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PhD Thesis

ON THE PRINCIPLE OF UNIVERSAL JURISDICTION
IN INTERNATIONAL LAW

AISLING O’SULLIVAN

SUPERVISOR
DR KATHLEEN CAVANAUGH

AUGUST 2013
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INTRODUCTION

The debate which envelopes the principle of universal jurisdiction draws out a “dark side” of the international criminal law project.¹ It is evident that the commitment by the international community to individual criminal accountability as “universal” has not produced its corollary—the ‘court of humanity’ that never adjourns.² As a principle, universal jurisdiction endeavours to fill a jurisdictional lacuna and therefore, is considered as an essential complementary mechanism for accountability.³ Here, universal jurisdiction appeals to the sensibility of a complete legal system or functional whole.⁴ At the same time, there is a significant emphasis on avoiding the principle’s ‘manipulation for political ends’ and the need for compliance with recognized rules of international law;⁵ this appeals to the sensibility of an anarchical world of competing state interests.⁶ Therefore, the debate on universal jurisdiction swings between the projects of ‘preventing impunity’ and of ‘avoiding

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¹ The notion of “dark sides” is drawn from D Kennedy The Dark Sides of Virtue: Reassessing International Humanitarianism (Princeton University Press Princeton 2005). See also M Koskenniemi From Apology to Utopia: The Structure of the International Legal Argument (Cambridge University Press Cambridge 2005) 570 (‘the law constructs its own field of application as it goes along through a normative language that highlights some aspects of the world while leaving other aspects in the dark’).
³ Report of the UN Secretary General Ban Ki-Moon ‘The scope and application of the principle of Universal Jurisdiction’ (29 July 2010) UN Doc A/65/181 para 9 (‘an essential jurisdictional instrument in the fight against impunity’).
⁵ Report of the UN Secretary General (n 3) para 9 (‘judicial independence and impartiality … [in order that principle] was not manipulated for political ends).
⁶ Koskenniemi (n 4) 199.
abuse’. In this way, this debate is bound within the inevitable tension between the ‘momentous and radical project’ and ‘the religion of sovereignty’. Luban describes international criminal law’s dilemma as one where the ‘gulf between the transcendent claims of sovereignty and its deflation in international criminal law’ presents a challenge in justifying prosecutions of nationals of states who object to their trial.

Disrupting the notion of international law as located within a fixed political culture underpins the approach this thesis will take when examining the struggle between competing visions of preventing impunity and avoiding abuse within the contemporary debate on the principle of universal jurisdiction. This approach to international law, recognizing its linguistic indeterminacy and its institutional bias, will serve as a framework through which the contemporary debate will be interrogated. Therein, international law is conceived of as a language that is the domain of lawyers, who engage in a practice underpinned by liberal ideas as the chosen political sensibility. Using Martti Koskenniemi’s work as a framework, this thesis aims to draw out, from within the legal

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7 Report of the UN Secretary General (n 3) para 5 (‘the goal of ending impunity did not in itself generate abuse’).
9 ibid.
judgments, the descending (more normative, less concrete) and
ascending (more concrete, less normative) patterns of argument. Here, a descending pattern is a project that characterizes international law as transforming ‘sovereign egoism into world unity’ while an ascending pattern is a project that sees international law as transforming ‘oppressive uniformity of global domination into self-determination and identity’. Each movement depicts universal jurisdiction in accordance with a particular political desire, whether world unity or self-determination, and emphasizes either the normative ideal (normativity) or social description (concreteness).

It follows that the endless oscillation of opposing patterns permits any position to be put forward and counter-argued by an opposing position. Therefore one critical issue to be tackled is the idea of the politics of international law, or what or whose law is being applied,

[The] meaning of legal language is derived from what point is being made by it in a particular context, in regard to what claim, towards what audience. What interests are being supported, what opposed by it?

In this way, international law ‘offers a defence for hegemonic and non-hegemonic practices equally’. This is the operation of the language of international law as a battleground or a site of politics in which participants struggle for hegemony over their opponents.

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13 Koskenniemi (n 1) 63.
14 ibid 571.
16 Jouannet (n 12) 7.
The result is a move to political choice between competing approaches, that is, the weighing of interests or applying the notion of reasonableness.\textsuperscript{18}

From this approach, it is apparent that the legal debate on universal jurisdiction is best read as a movement of hegemonic and counter-hegemonic positions within international law. Thus, this thesis sees the controversy over the principle of universal jurisdiction as a struggle for hegemony between these competing visions of preventing impunity and of avoiding abuse. This struggle between these competing visions is rooted in the \textit{Eichmann} judgments. Here, the trial and appeal judgments initiated the battle in the contemporary debate between these competing visions, which are characterized in this thesis as moralist and formalist approaches.\textsuperscript{19} The moralist approach challenges what it reads as the injustice of impunity, while the formalist approach challenges what it reads as the injustice of politically motivated or show trials. These contrasting approaches underpin the oppositions regarding the content of universal jurisdiction and its inter-dependency with immunity. For the moralist, the \textit{Eichmann} judgments provide a legal basis to support their approach; thus, the nature of the crimes justifies the application of universal jurisdiction, the inapplicability of immunity and lack of a violation of non-retroactivity. For the formalist, the \textit{Eichmann} case seems to be utopian; it fails to adequately reflect state behaviour because the observable evidence for universal jurisdiction and the removal of immunity can be called into question.

\begin{flushright}
\begin{footnotesize}
\textsuperscript{18} I Brownlie \textit{Principles of Public International Law} (7\textsuperscript{th} edn Oxford University Press Oxford 2008) 308.
\textsuperscript{19} AG \textit{v. Eichmann} (1968) 36 ILR 5.
\end{footnotesize}
\end{flushright}
It follows, then, that the moralist hegemony (until the Arrest Warrant case) was rooted in the dominance of the Eichmann judgment’s model, with the beginnings of a formalist counter-hegemony illustrated in Javor case and the dissents in Pinochet I and III cases (among others). However, in the context of the litany of criminal complaints after 2000, what had been the counter-hegemony moved into the hegemonic position after the Arrest Warrant judgment in 2002. It is evident that the formalist approach’s hegemony since the Arrest Warrant case has been sustained despite a moralist approach’s counter-hegemony in Guatemalan Generals case. Notwithstanding, the moralist approach has influenced the debate given the increasingly unquestioned acceptance by states that universal jurisdiction may be exercised over crimes against international law, even if they dispute over the principle’s parameters.

1. The Legal Context

The doctrine of jurisdiction is understood as a body of principles delimiting the competences of states in their mutual relations. It denotes the ‘authority to affect legal interests: to prescribe rules of law, to adjudicate legal questions and to enforce the judgments judicially made’. The fundamental maxim is that the

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21 Report of the UN Secretary General (n 3).
22 FA Mann ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 Recueil des Cours 9, 15.
state possesses and exercises absolute and exclusive rights within its own territory and any exception must derive from consent, either expressed or implied. Yet the extent of a state’s sovereignty is more complex than solely its territorial borders. In matters involving a foreign element, jurisdiction concerns the authority of the state ‘to regulate conduct in matters not exclusively of domestic concern’. Here, states may determine the scope of applicability of their substantive criminal law, including to acts committed extraterritorially, but must avoid arbitrarily interfering in the domestic jurisdiction of other states. Thus, ‘jurisdiction, which in principle belongs solely to the state, is limited by rules of international law’. The principles of jurisdiction “belong” to (and are determined by) the state yet equally international law determines what limits are imposed upon the state.

This paradox is reflective of an oft-discussed contentious dispute on the doctrine of jurisdiction. In the Lotus judgment, the majority’s obiter presupposed that the state had a wide measure of discretion to determine the extent of its jurisdiction, albeit within the limits imposed by international law. Conversely, the dissenting opinions considered that the exclusivity of territorial jurisdiction is only diminished when an exception emerges that recognizes the extraterritorial jurisdiction by law or a contrary conventional rule.

24 Schooner Exchange v McFaddon (1812) 7 Cranch 116, 136.
25 Mann (n 22), 14. See also Brownlie (n 18) 300.
27 Nationality Decrees in Tunis and Morocco Advisory Opinion (1923) PCIJ Rep Series B no 4, 24.
29 Case of the SS Lotus (France v Turkey) (1927) PCIJ Ser. A No 10, 18-19.
30 ibid 35 (Judge Loder).
Sidestepping this theoretical contradiction, many international lawyers see the principles of jurisdiction as reasonableness or an exercise in interest-balancing. The principle of universal jurisdiction is located within this legal framework and thus, there is a dispute over the origin of the principle and the advocacy for a move to reasonableness. The principle is generally described as the right of the state to exercise jurisdiction without a jurisdictional link to the offence, perpetrator or victim over certain ‘offences against the international community’, thus, the state acts as an “agent” of the international community. However, there is ‘no generally accepted definition’ either in customary international law or in multilateral treaties. Rather there are persistent disputes over the justification for and content of the principle, in particular the crimes to which it is subject and the meaning of presence of offender.

On the question of justification, one approach derives the origin of the principle from the nature of the offences per se, as a threat to fundamental interests or jus cogens norms. This claims to make an analogy to what is considered to be the justification for

31 For example, Brownlie (n 18) 308 and Section 403 of Restatement Third on Law of Foreign Relations of the United States Vol I (American Law Institute Washington 1986) 244.
universal jurisdiction over piracy committed on the high seas.\textsuperscript{38} It assumes that the validity is identified through a higher normative code. Conversely, an opposing position argues that there is limited evidence of states exercising jurisdiction without a prior refusal of an offer to extradite (representation principle).\textsuperscript{39} This assumes that the jurisdiction’s validity is determined based on what is identified through the voluntary will of states.\textsuperscript{40}

On the content of the principle, competing approaches contest the issues of offences and presence. On offences, the dominant approach is to consider universal jurisdiction over war crimes, crimes against humanity and genocide as accepted legal dogma.\textsuperscript{41} This assumes that when a crime is criminalized as a “universal offence”, a state may as a consequence claim to exercise universal jurisdiction. However, a contrasting view considers state behaviour as key. Thus, it is considered that the issue of jurisdiction as a distinct matter from the recognition of the crime as \textit{jus cogens}. Here, Guillaume and Rezek in their respective opinions in the \textit{Arrest Warrant} case reject the notion of universal jurisdiction over crimes other than piracy.\textsuperscript{42}

On presence of the offender as a precondition, this issue arose in response to the controversial claims of jurisdiction irrespective of

\textsuperscript{38} ibid 108 and Randall (n 36) 798.
\textsuperscript{40} AR Carnegie ‘Jurisdiction over Violations of the Laws of War’ (1963) 39 British Yearbook of International Law 402, 421.
\textsuperscript{41} For example, \textit{Case of the Arrest Warrant} (n 35) (Dissent of Van den Wyngaert) para 59-62 and (Joint Separate Opinion) para 19.
\textsuperscript{42} \textit{Case of the Arrest Warrant} (n 35) (Guillaume) para 9 and (Rezek) para 6.
the presence of the accused, that is, in absentia.\textsuperscript{43} Again, one approach justifies universal jurisdiction in absentia based on the nature of the offence. This approach is either underpinned by the Lotus judgment, that there is no evidence of a prohibition,\textsuperscript{44} or by an analogy to other principles of jurisdiction, that is, if there is a permission to exercise universal jurisdiction, then the ‘exercise of in absentia is logically permissible also’.\textsuperscript{45} In response, another approach rejects universal jurisdiction in absentia.\textsuperscript{46} Here, state behaviour does not demonstrate the acceptance of a legal right because treaty law is immaterial\textsuperscript{47} and national legislation is extremely limited.\textsuperscript{48} The increasingly dominant view is the latter;\textsuperscript{49} that in absentia is ‘unknown in international law’.\textsuperscript{50}

2. Background to Study

The contrasting approaches towards universal jurisdiction’s status in law presuppose that international law is politically neutral, in keeping with modern international law’s liberal assumptions. That

\textsuperscript{43} For example, Re Pinochet Tribunal de Premier Instance de Bruxelles (6 November 1998), para 3.2.1, Guatemalan Generals Case, Audiencia Nacional (13\textsuperscript{th} December 2000) and Chilean Investigation (5 November 1998) Audiencia Nacional.


\textsuperscript{45} O’Keefe (n 32) 748.


\textsuperscript{47} Case of the Arrest Warrant (n 35) (Guillaume) para 9 (an incorporation of aut dedere aut punire requiring presence of the accused). See in support R Rabinovitch ‘Universal Jurisdiction in absentia’ (2004-2005) 18 Fordham International Law Journal 500, 506-510.

\textsuperscript{48} ibid para 12.

\textsuperscript{49} For example, A Cassese ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) 1 Journal of International Criminal Justice 589, 591-2, Henzelin (n 39) 235, Reydams (n 39) 350 and Yee (n 46) 518, 523 and 530.

\textsuperscript{50} Case of the Arrest Warrant (n 35) (Guillaume) para 12.
said, the existence of persistent oppositions challenges the notion of an apolitical rule of law. Herein lies the rub, as legal scholarship reveals competing analyses that collapse into the theoretical oppositions, which can be described in terms of the naturalism-positivism dichotomy.\textsuperscript{51} These analyses justify or criticize universal jurisdiction using normative claims or descriptions of social behaviour; they then determine the content of the principle in accordance with those underlying theories. This leads to competing accounts, which, taken as a whole, serve to both justify and criticize the legal outcomes of national and international tribunals. In exploring the opposing analyses, scholarship reveals two polar opposites and a move to the middle ground. At one end, Randall embodies the normative approach (moral naturalism) and at the other, Reydams embodies the social description approach (competing interests), with Bassiouni as representative of an attempt to move to the middle ground.

Randall’s normative approach rests on a deductive study that is modelled on the \textit{Eichmann} judgments. Thus, universal jurisdiction was justified on the nature of the crime as a ‘grave offences’, which are an affront to humanity.\textsuperscript{52} This is known as ‘the piracy analogy’ because it assumes that jurisdiction over an offence can be treated similar to piracy if the former constitutes as an offence “against


\textsuperscript{52} Randall (n 36). See also \textit{AG v. Eichmann} (n 19) 25 and 300 and 304.
Randall’s normative approach used the method of analysis in *Eichmann* (historical origin and legal analogy) to conclude that post-WWII military trials and the modern international conventions have expanded the list of offences subject to universal jurisdiction. In this way, the crimes include war crimes and crimes against humanity (as defined under the London Charter), grave breaches under the 1949 Geneva Conventions and certain offences defined under international treaties. Here, Randall endorsed Carnegie’s analysis of certain *Council Control Law No. 10* proceedings that could only be explained under universal jurisdiction, the *Eichmann* judgments’ analysis on the Genocide Convention and used a combination of individual criminal responsibility, *jus cogens* and obligation *erga omnes* to argue that non-states parties to multilateral treaties possessed a legal right (as opposed obligation) to exercise universal jurisdiction.

In contrast, Reydams social description approach rests on an inductive study, where ‘deeds were what counted, not just words’. Therefore, he emphasizes the limited extent of legislation and criminal proceedings, as well as the varied approaches in terms of the application of sovereign immunity and the requirement of a linking interest (voluntary presence of the accused). His division of

54 Randall (n 36), 800-815. The case authorities are evidently based on Carnegie’s analysis of the Law Reports of the Trial of War Criminals in his 1963 paper, see Carnegie (n 40) 419-421.
55 Charter of the International Military Tribunal –Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945).
56 See Articles 49(2) of Geneva I, 50(2) of Geneva II, 129(2) of Geneva III, 146(2) of Geneva IV and article 85(1) of Additional Protocol I.
57 Randall (n 36) 789.
58 Reydams 2003 (n 39) 7-8.
the doctrinal history into distinct (albeit intersecting) categories helps expose the different concepts of universal jurisdiction, including the representation principle (or the vicarious administration of justice). Hence, the principle of universal jurisdiction is seen as a fragmented concept, which, apart from the representation principle, exists almost exclusively in the work of legal jurists. In terms of legal certainty then, the representation principle can qualify as a principle (or signpost) and treaty law incorporates Grotius’ concept of aut dedere aut punire, operating inter partes and having no significance in terms of customary international law. However, universal jurisdiction over crimes against international law (especially in absentia) is merely a political aspiration.

As an attempt at a middle ground, Bassiouni draws from Randall’s normative approach and premises his analysis upon the jus cogens status of the crimes under customary international law. This approach makes an analogy between the humanitarian values underlying jus cogens and universal jurisdiction, considering the two

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59 ibid 28. The categories are co-operative general universality principle, co-operative limited universality principle and unilateral specific universality principle. He emphasizes how his categorization cannot be concrete as the categories tend to be fluid.
60 ibid 28-42. He emphasizes the symbiotic connection between the principle of universal jurisdiction and extradition in the writing of jurists. Here, he traces the emergence of the idea of universal jurisdiction over delicta juris gentium as a concurrent legal right (as opposed to subsidiary to territorial jurisdiction) to Mikliszanski. ibid 38.
61 ibid 42. This is because it represents the only common grounds. Ibid.
62 Reydams 2003 (n 39).
63 ibid.
64 Bassiouni (n 37) 98. Because the crimes are jus cogens norms, the international community as a whole has a legal interest in their suppression. Ibid 96. See also Orakhelashvili (n 37) 288.
doctrines as compatible. Hence, universal jurisdiction is the legal consequence of the crime’s status as a *jus cogens* norm. However, unlike Randall, Bassiouni also draws on Reydams’ social description approach and concludes that state behaviour is limited and divergent. Similarly, Bassiouni interprets immunity of state officials as a limiting rule that avoids ‘disruptions in world order’. Nevertheless, unlike Reydams, Bassiouni validates universal jurisdiction over crimes against international law based on a cumulative weight of sources, that he claims, supports the principle and he maintains that this social description demonstrates an obligation to exercise *aut dedere aut judicare* over *jus cogens* crimes.

3. Disrupting the notion of International Law as a fixed political culture

In contrast to previous studies, this thesis adopts an approach to international law that challenges conventional approaches and thus, rejects the assumption that the rule of law is purely objective and capable of determining legal outcomes. This approach has a ‘dual insight’ that describes international law as both a language ‘characterized by a precise grammatical structure’ and a ‘site of

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65 MC Bassiouni ‘*Jus Cogens* and Obligations *Erga Omnes*’ (1996) 59 Law and Contemporary Problems 63, 66. See also Bassiouni (n 37) 104 and Randall (n 36) 829-830.
66 This assumes that the legal consequence to be drawn from the concept of *jus cogens* is the ‘comprehensive prohibition of all acts contrary to peremptory norms’. See Lauri Hannaiken *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki 1988) 6.
67 Bassiouni (n 37) 136. Regarding state behaviour, he lists legislation (what exists in most state legal systems, which would be representative of the major legal cultures) and international treaties. ibid, 105.
68 ibid 82 (avoid ‘use in a politically motivated manner’).
69 ibid 150. He combines the origin of universal jurisdiction in *jus cogens* with the implied recognition of universal jurisdiction within treaties proscribing *jus cogens* crimes, in addition to legislation asserting extraterritorial jurisdiction and the limited number of judicial proceedings.
politics’. The grammatical structure of the language is constructed on the paradox in liberal theory; this is exposed by the critique of liberalism that identifies the irreconcilable tension between individual freedom (as a justification for the legal order) and collective constraint (in order to protect freedom of all).

In this regard, modern international law must try to ‘balance’ the opposing ‘demands’ of individual autonomy and maintaining social order by contending that to ‘preserve freedom, order must be created to restrict it’. Therefore, each legal argument is both ‘concrete (linked to state voluntary will as reflected in behaviour) and normative (capable of impartial ascertainment and application)’; it is both reflective of (concreteness) and critical of (normativity) state policy regardless of which position is being argued. Thus, no legal argument can be superior to its counter-argument as both argument and counter-argument are structurally identical; each argument must use the same grammatical rules to adhere to ‘rigorous formalism’.

That said to be critical and reflective of states’ policy is obviously irreconcilable. Hence, each unified argument oscillates in a constant movement between normativity and concreteness,

70 Jouannet (n 12) 24.
71 Koskenniemi (n 1) xiii (‘international law reproduces the paradoxes and ambivalences of a liberal theory of politics’).
73 Koskenniemi (n 1) 71.
74 ibid.
75 ibid 19-20. See also D Kennedy International Legal Structures (Nomos Baden-Baden 1987) 31-31 (‘hard’ and ‘soft’ doctrines).
76 ibid 563.
incapable of remaining fixed or stable. We observed that such a movement suggests ‘two opposite projects that characterise international law’. One project moves from ‘oppressive uniformity of global domination into self-determination and identity’ (an ascending pattern, drawn from will and behaviour), whilst the other moves from ‘sovereign egoism into world unity’ (a descending pattern, drawn from higher normative code or natural morality). An ascending pattern privileges state power over objective binding norms; it emphasizes a non-normative position and assumes that the state liberty is superior to law. This presupposes that the objective (apolitical) rule of law can originate in state power. That said, to constrain state behaviour, the ascending pattern must turn to normativity in order to bind the State regardless of its consent (liberty). A descending pattern meanwhile privileges objective binding norms over state power; it emphasizes a normative position and assumes that the legal order is superior to state power. This presupposes that objective (apolitical) rule of law can originate in a higher normative code, preceding the state. Yet the descending pattern must turn to concreteness in order to bind the state by its consent.

It follows, then, that both patterns can be accused of being subjective by the opposite pattern. An ascending pattern can be read as subjective as it is too reflective of state power and, in doing so, diminishes law’s normative character and makes the law seem mere

78 Koskenniemi (n 4) 200.
79 ibid and Koskenniemi (n 1) 65-68.
80 Koskenniemi (n 1) 60.
apology for power.\textsuperscript{81} Equally, a descending pattern can be seen as subjective as it is too critical of state power and thus, arbitrarily constrains individual freedom and makes the law seem utopian, divorced from the realities of international affairs. Hence, projects of unity and identity ‘appear as surfaces on which political actors can reciprocally make and oppose hegemonic claims’ and the perception of superiority stems from each protagonist’s accusation of “subjectivity” against their opponent.\textsuperscript{82} We noted that if indeterminacy of rules accommodates competing positions within legal discourse,\textsuperscript{83} the legal rules of themselves fail to resolve the conflict. Rather, the legal outcome is a political choice between competing legal arguments, namely what is termed the politics of international law.\textsuperscript{84} Based on this observation, Koskenniemi contends that lawyers operate hegemonic and counter-hegemonic techniques, conscious of where the hegemony lies and pleading in accordance with the institutional culture.\textsuperscript{85}

These hegemonic and counter-hegemonic positions\textsuperscript{86} appeal to what Kennedy describes as moments of ‘stability’ or ‘reforming

\textsuperscript{81} Kennedy (n 75). Kennedy used the themes of ‘apology’ and ‘utopia’ as a way of describing the opposing patterns within the structure of argument. See also Koskenniemi (n 1) 69.

\textsuperscript{82} Koskenniemi (n 4) 201.


\textsuperscript{85} Koskenniemi (n 4) 202.

vision’ or what Koskenniemi classifies as movements towards self-determination or world unity. Neither picture of the social world avoids the apology and utopia charge as both positions are either less normative and more concrete or less concrete and more normative. It means that the ‘the rule of law thinly hides from sight the fact that social conflict must still be solved by political means’. Thus, in the Chapters that follow, the focus will be directed towards mapping a chronology of the hegemonic and counter-hegemonic positions and in turn, remarking upon the political decision-making within the debate.

4. Chapter Outlines

Chapter 1 explores the concept of the doctrine of jurisdiction within legal scholarship, which is the legal context for the principle of universal jurisdiction’s status in law. This chapter endeavours to explain the theoretical paradox whereby the state determines the extent of its jurisdiction while, at the same time, international law regulates the limits of the state’s jurisdiction. Thus, in section 1, the theoretical opposition in the *Lotus* judgment and the continued disagreement among scholars as to its accuracy and to its continued relevance will be examined. In section 2, the binary components of the doctrine of jurisdiction will be explored, namely to prescribe and to enforce. When turning to the question of jurisdiction to prescribe,

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89 Jouannet (n 12) 7-8.
90 Koskenniemi 1990 (n 77) 7.
section 2.1 discusses the principle of concurrency and reasonableness and sketches each of the five principles of jurisdiction, which are generally accepted as representative categories of state’s assertions of jurisdiction. Section 2.1.3 examines in greater detail the opposing views on contentious issues regarding the principle of universal jurisdiction. It divides the scholarship into competing approaches that are labelled normative and social description approaches and outlines how each approach addresses issues of justification for the principle and its content in terms of offences, presence of offender and treaty law. It then explains the attempts within scholarship to move to a middle ground. On jurisdiction to enforce, section 2.2 discusses the opposing approaches regarding the application of personal and functional immunity before foreign domestic courts in a similar framework to section 2.1.3 on universal jurisdiction.

Chapter 2 investigates the development of the *Eichmann* judgment’s portrayal of the principle of universal jurisdiction, which was drawn from contentious debates since the end of the 19th century. *Eichmann* is significant because various proceedings before national courts in the 1990s established what appeared to be the hegemony of the *Eichmann’s* legal opinion among judiciary and within legal scholarship until a shift in hegemony with the *Arrest Warrant* judgment. In order to make sense of how the *Eichmann* judgments’ portrayal emerged, this thesis categorizes the legal history into three interdependent periods, which it labels as an *embryonic* period (end of 19th century to 1918), an *incubation* period (1919 to 1949) and a *culmination* period (1960s). The aim is to identify how the courts and Defence counsels’ arguments connect to earlier opposing debates, creating a one-sided narrative of legal history and to highlight the naturalism-positivism dichotomy underpinning their
opposing approaches. In section 1, the *embryonic* period is divided into two threads of legal thought: the idea of a subsidiary jurisdiction over extraterritorial offences, where the state has custody of the accused, and the move to codification of the laws of war. On the latter, the Lieber Code’s piracy analogy is interrogated. In section 2, the *incubation* period explores three threads of legal thought that show how the piracy analogy entered the debates on criminalization of violations of laws of war on government order and the notion of crimes against international law. These are the debates on jurisdiction over submarine warfare against civilian shipping, the early 1930s debates over the scope of universal jurisdiction and the 1940s debates over individual criminal responsibility and the jurisdiction of the IMT Nuremberg and *Control Council Law* processes. The chapter ends with the culmination period, exploring the Courts and Defence counsel’s opposing positions in *Eichmann*.

Chapter 3 focuses on situating the observations of previous Chapters within a particular approach to international law that disrupts the notion of international law as located in a fixed political culture. Here, the work of Martti Koskenniemi is informative and this chapter will explore themes of indeterminacy and hegemony in Koskenniemi’s work, which will inform the investigation of the contemporary debate on universal jurisdiction over crimes against international law in Chapters 4 and 5. Section 1 will begin by exploring the competing conventional approaches to international law and section 2 will illustrate how Koskenniemi’s work departs from these conventional readings. Section 3 will then explore in greater depth the themes of indeterminacy in relation to sovereignty and jurisdiction. In particular, Koskenniemi’s critic of *Lotus* is useful in dissecting judgments, notably, the *Pinochet III* and the *Arrest*
Warrant cases. After noting how indeterminacy can explain how every legal outcome is a political choice between competing legal arguments, section 4 will discuss the inevitable move to political decision that accords with the international legal professions’ own biases or sensibilities. Thus, the themes of hegemonic and counter-hegemonic technique are constructive and are explored along with the move to specialisms or regimes.

Chapters 4 and 5 investigates the thesis’ key proposal—that the legal debate on the principle of universal jurisdiction over crimes against international law is best characterized as a sequence of hegemonic and counter-hegemonic positions that this thesis refers to as moralist and formalist approaches. A moralist approach is an appeal to a moral naturalism\(^1\) that views the social order as a complete system or functional whole and adopts a mind-set that assumes the rule of law is critical of (and distant from) State policy. In opposition, a formalist approach is an appeal to a social concept of law that views the social order as anarchical, composed of competing interests, and adopts a mind-set that assumes the rule of law is reflective of state policy. The key focus in chapter 4, then, is to explore the battle over the Eichmann judgments’ legal reasoning from the early 1990s to the litany of criminal complaints in national courts prior to the Arrest Warrant judgment. First it explores how Eichmann’s arguments were successfully adopted in the obiter of international criminal tribunals and in the ratio of certain national court judgments in the 1990s. It will then explore the Pinochet judgments in Belgium and Spain that appeared to be more normative

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than *Eichmann*. These judgments are at the margins of the *Eichmann* judgments, that is, jurisdiction irrespective of the voluntary presence of the accused in the territory of the prosecuting state. We then turn to *Pinochet III*, which appeared to be less normative and more concrete than *Eichmann*. Yet *Pinochet III*, in its attempt to steer a middle course, would appear on non-retroactivity as too concrete to the moralist approach and on the issue of immunity too normative to the formalist approach. In the end, *Pinochet III* was represented as a success story for the campaign to ‘end impunity’ and led to sea-change primarily in EU jurisdictions where the submission of civil party petitions increased considerably. However, within the dissent in *Pinochet III* was the counter-hegemony that underpinned the *Arrest Warrant* and this chapter will conclude at the height of the moralist approach’s hegemony, its “reforming vision”\(^{92}\) of accountability in national courts.

The key focus of Chapter 5 is the *Arrest Warrant* judgment and its aftermath, a sequence of events that led to the unravelling of the dominance of the moralist approach and a re-imagining of the debate. Given the inter-state disputes, it became the dominant view to read these developments as natural and inevitable and in turn, consider that a more reasonable notion or alternative vision of universal jurisdiction was necessary.\(^{93}\) Hence, this chapter discusses the formalist approach’s hegemony and begins with an analysis the *Arrest Warrant* case. On personal immunity, the Court’s judgment adopts a formalist approach with van den Wyngaert as the moralist counterweight and the Joint Separate Opinion as the attempt to

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\(^{92}\) Kennedy (n 87) 343.

reconcile the irreconcilable (the middle ground). On universal jurisdiction *in absentia*, van den Wyngaert adopted a moralist approach while Guillaume adopted a formalist approach and once more, the Joint Separate Opinion sought a middle ground. The dominance of the formalist approach in the *Arrest Warrant* judgment maintained its hegemonic position in the aftermath of the judgment because states began to retreat from the movement to world unity (reforming vision) of the pre-*Arrest Warrant* legal environment. This was demonstrated by the Belgian amendments to its universal jurisdiction laws in 2003, narrowing the competence of its courts, and the German courts dismissal of complaints based on universal jurisdiction *in absentia* because of the lack of anticipated presence of the accused.

Nevertheless, the moralist approach’s counter-hegemony surfaced in *Guatemalan Generals* case. However, even here, the formalist approach’s hegemony later asserted itself because Spain amended its legislation in 2009 to require presence of the accused in prospective universal jurisdiction proceedings. The chapter concludes with an analysis of the ICJ’s *Obligation to Prosecute and Extradite* case, which, similar to *Pinochet III*, adopted a moderate moralist approach. It sought to avoid being too normative by leaning towards a formalist approach on question of non-retroactivity. Yet in its attempt to steer a middle course it would appear on the interpretation of article 7 of the Torture Convention as too normative to the formalist approach and on non-retroactivity as too concrete to the moralist approach. It follows, then, that the following chapter investigates the opposing arguments within the doctrine of jurisdiction with particular focus on the principle of universal jurisdiction and the immunity of states officials.
CHAPTER 1

THE LEGAL CONTEXT

1. The Doctrine of Jurisdiction under International Law

The doctrine of jurisdiction is understood as a body of principles delimiting the competences of states in their mutual relations. It denotes the ‘authority to affect legal interests: to prescribe rules of law, to adjudicate legal questions and to enforce the judgments judicially made’. Etymologically, the term ‘jurisdiction’ combines *jus* (or *juris*) and *dicere* (or *diction*), which is translated as ‘the statement of the law or power to determine the right’, namely the state’s authority to determine the applicable law. Here, Mann conceives jurisdiction under international law as the right of the state to exercise ‘certain of its powers’ pertaining to the determination and enforcement of legal rules or ‘to affect the rights of persons’. This is a distinct legal concept from regulating the

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1 FA Mann ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 Recueil des Cours 9, 15.
4 Mann (n 1) 15 (the State’s ‘right of regulation… whether it is exercised by legislative, executive of judicial measures’).
5 Sucharitkul (n 3) 156.
6 J Beale ‘The Jurisdiction of a Sovereign State’ (1923) 36 Harvard Law Review 241 and D Harris *Cases and Materials in International Law* (7th edn Sweet&Maxwell London 2010) 264 (‘identify the persons and property within the permissible range of a state’s law and its procedures for enforcing that law’).
jurisdiction of courts and administrative bodies within municipal law;\textsuperscript{7} rather, jurisdiction under international law is considered the sum of external competences of the state deriving from sovereignty.\textsuperscript{8} Thus, jurisdiction has been consistently ‘equated with “imperium” or sovereignty’;\textsuperscript{9} it is ‘an aspect or an ingredient or a consequence of sovereignty’.\textsuperscript{10}

It follows then that the content of jurisdiction (or sum of competences) is premised upon the maxim \textit{par in parem non habet imperium} so that ‘while a state is supreme internally….it must not intervene in the domestic affairs of another nation’.\textsuperscript{11} Therefore, the state possesses and exercises absolute and exclusive rights within its own territory and any exception (to its internal supremacy) must

\textsuperscript{7} Henzelin (n 3) 15 (where the state demarcates the sphere of application of its laws within its domain and the competence of its courts). See also P Malanczuk \textit{Akehurst’s International Law} (7th edn Routledge London 1997) 109 (‘...jurisdiction has a large number of different meanings’) and Sucharitkul (n 3) 156.
\textsuperscript{8} ibid 15 (‘la somme des compétence étatiques extérieures tirées directement de la souveraineté des Etats’). Although Henzelin cautions that it is difficult to always use the phrases principles of jurisdiction and principles of competence with precision. ibid.
\textsuperscript{9} I Brownlie \textit{Principles of Public International Law} (7th edn Oxford University Press Oxford 2008) 299 (an aspect of ‘the general legal competence of states’). See also A Aust \textit{Handbook of International Law} (2nd ed Cambridge University Press Cambridge 2010) 42 (international law’s permission to a State to exercise its domestic jurisdiction over matters, which is an aspect of state sovereignty), MN Shaw, \textit{International Law} (6th ed Cambridge University Press Cambridge 2008), 645 (jurisdiction is ‘a vital and central feature of state sovereignty’) and C Ryngaert \textit{Jurisdiction in International Law} (Oxford University Press Oxford 2008) 5 (deriving the State’s right to ‘shape’ its sovereignty from the sovereign equality of States).
\textsuperscript{10} Mann (n 1) 20. See also Sucharitkul (n 3) 156, DW Bowett ‘Jurisdiction: Changing Patterns of Authority Over Activities and Resources’ in RStJ Macdonald and D Johnston (eds) \textit{Structure and Process of International Law} (M Nijhoff The Hague 1983) 555 (‘manifestation of state sovereignty’) and G Schwarzenberger \textit{International Law Volume I} (3rd edn Stevens and Sons London 1957) 184 (‘state sovereignty and state jurisdiction are complementary terms...’).
\textsuperscript{11} Shaw (n 9) 647. See T Mertens ‘Memory, Politics and Law –The Eichmann Trial: Hannah Arendt’s View on the Jerusalem Court’s Competence’ (2005) 6(2) German Law Journal 407 (‘the ordinary criminal law is not applicable where the mutual conduct of states is concerned’).
derive from either express or implied consent. In this spirit, article 2(1) of the UN Charter recognizes the ‘sovereign equality’ of its member states, who are correspondingly obliged to refrain from acting against ‘the territorial integrity or political independence of any state […] in any manner inconsistent with the purposes of the UN’. It follows, then, that the state is ‘free to legislate [as] a matter of internal law’ but as an attribute of sovereignty, ‘this liberty is subject to the overriding question of entitlement’. In this way, if the state assumes jurisdiction ‘outside the limits of its sovereignty’, it conflicts with the sovereignty of other states. Thus, the extent of a state’s sovereignty is more complex than solely its geographical limits. As Mann argues, the issue of right of regulation appears ‘fundamentally different from the physical extent of territorial rights or the range of…rights over persons’. Therefore, in matters

12 Schooner Exchange v McFaddon (1812) 7 Cranch 116, 136. See also Glass v Betsy, 3 US 2 Dall. 6 (1794). See Island of Palmas Arbitration Award, (1928) Vol XI Reports of International Arbitral Awards (RIAA) 839 (sovereignty was described as independence; the ‘right [in regard to a portion of the globe] to exercise, to the exclusion of any other state, the functions of a state’). See Austro-German Customs Regime (Advisory Opinion) (1928) PCIJ Ser A/B No 41, 55-57 (Anzilotti). (‘the state has over it no other authority than that of international law’). 13 Article 2(1) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16. See also article 2(3) peaceful settlement of disputes and article 2(4) (non-threat or use of force). See also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA Res 2625 (24 October 1970) 122 (duty ‘not to intervene in matters within the domestic jurisdiction of any state’). Within the UN Charter, Akehurst cautions that the phrase ‘domestic jurisdiction’ has a particular meaning. See Malanczuk (n 7) 109. 14 Mann (n 1). 15 ibid 30. 16 ibid 16-17 (if two concepts are conflated, they would lose their ‘inherent unlikeness’). See reference to this debate in Brierly and De Visscher, Annex Report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International law, (1926) 20 American Journal of International Law Special Supplement 252, 256.
involving a foreign element, the doctrine of jurisdiction concerns the ‘extent to which a state may apply its domestic law to events and persons outside of its territory in circumstances affecting the interests of the other states’. Thus, the state may determine the scope of its criminal law (including to acts committed extraterritorially) yet this determination should not arbitrarily interfere with the rights of other states.

In this way, ‘jurisdiction, which in principle belongs solely to the state, is limited by rules of international law’. Hence, the extent of a state’s jurisdiction is correspondingly a ‘relative concept’ and while the state’s act of delimitation is ‘a unilateral act’ within its domestic law, ‘the validity of the delimitation’ depends upon international law. Therefore, Mann considers the relationship as

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17 Feller described ‘foreign element’ as ‘a circumstance characterizing the commission of an offence’, which is generally a ‘circumstantial factor and not...essential to the very existence of the offence’. This may be status or nationality of the alleged perpetrator (nationality jurisdiction) or the ‘interest endangered by its commission’ (passive personality, protective and universal jurisdiction). See SZ Feller ‘Jurisdiction over offences with a foreign element’ in MC Bassiouni and VF Nanda (eds), A Treatise on International Criminal Law (Charles C Thomas United States 1973) 5-6.

18 O Schachter International law in Theory and Practice (M Nijhoff Dordrecht 1991) 250. See also I Cameron The Protective Principle of International Criminal Law (Aldershot Dartmouth 1994) 6, Mann (n 1) 14 and Brownlie (n 9) 300.

19 Gardocki noted that in criminal matters, there is a ‘strict inseparability of the applicability of substantive criminal law and the [range of] jurisdiction of courts’ within the State; criminal courts ‘do not apply foreign criminal law’. Since the criminal courts only apply domestic law, the jurisdiction determines the scope of the criminal law at the same time. L Gardocki ‘The Principle of Universality’ in N Jareborg Double Criminality: Studies in International Criminal Law (Almqvist Wiksell International Sweden 1989) 57. Compare Bowett (n 10) 556.

20 Nationality Decrees in Tunis and Morocco Advisory Opinion (1923) PCIJ Rep Series B no 4, 24 (‘the right of the State to use its discretion [when not regulated by international law and within its exclusive domain] is nevertheless restricted by obligations which it may have undertaken towards other States’).

21 Anglo-Norwegian Fisheries Case (1951) ICJ Rep 116. See also LH Woolsey, ‘Extraterritorial Crime’, (1926) 20 American Journal of International Law 726, 758 (the State decides ‘what exceptions to territorial jurisdiction it supports’, yet this decision must accord with ‘the interests of other States’), Beale (n 6) 243 (‘the sovereign cannot confer jurisdiction on his courts or his legislature when he has no
one of a higher law, determining the existence of a power, and a subordinate law, where the state gives effect to the power allowed to it. These twin components of state internal supremacy and international law’s limitations explain the descriptions of jurisdiction in criminal matters as ‘the international aspect of domestic criminal procedure’ or the municipal law description of the ‘ambit or spatial scope’ of the state’s criminal laws (temporal, material and geographical). With these points in mind, there is no specific convention, which defines and delimits jurisdiction with respect to crime, although certain regional treaties on jurisdiction in civil and commercial matters have been concluded. Thus, that the relevant legal context is primarily a matter of customary international law, in such jurisdiction, according to the principles of international law’) and JL Brierly, ‘Matters of Domestic Jurisdiction’, (1925) 6 British Yearbook of International Law 8, 10 (‘whenever that law recognises it as having authority to decide any particular matter’).

22 Mann (n 1) 16.
23 Cameron (n 18) 11.
24 Schwarzenberger (n 10) 255 (although Schwarzenberger rejected the existence of international criminal law ‘in any true sense’). See also G Williams ‘Venue and Ambit of Criminal law’ (1965) 81 Law Quarterly Review 276-88 (‘ambit’).
addition to multilateral treaties governing specific international offences, which authorize or oblige states to establish criminal jurisdiction within their domestic laws.27

1.1 The Case of the SS Lotus

The discussion has so far aimed at elucidating the general thesis that international law regulates the delimitation of jurisdiction between states. Yet the origin of the doctrine of jurisdiction remains a controversial point and in turn, any determination, as to whether the state’s claim to jurisdiction is permitted or prohibited, can be contentious. In the SS Lotus case, the parties disagreed whether a state must ‘point to some title to jurisdiction’ or alternatively, jurisdiction is permitted if it ‘does not come into conflict with a principle of international law’.28 In its judgment, the Permanent Court of International Justice (PCIJ)29 concluded that international law consisted of a general liberty of states, where ‘rules of law binding upon states…emanate from their own free will as expressed in


28 Case of the SS Lotus (France v Turkey) (1927) PCIJ Ser. A No 10, 18 and 42 (Dissent of Judge Weiss) and 59 (Judge Nyholm). Here, the Turkish courts had prosecuted a French national (after the French vessel docked in a Turkish port) in regards to a collision between French and Turkish vessels in the high seas, which led to the deaths of Turkish nationals. Ordinarily, jurisdiction over vessels in the high seas rests with the flag state or state of registration of the vessel. ibid 25. See also J Fawcett The Law of Nations (Penguin Press London 1968) 86 and article 92 of the Law of the Sea Convention (noting certain exceptions of piracy, slave trade and hot pursuit), Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

29 ibid 32. The opinions were equally divided on the issue of whether Turkey had acted contrary to the principles of international law so the judgment was secured by the President’s casting vote. ibid.
conventions or by usages...’ The function of the rule of law then is ‘to regulate relations between these co-existing independent communities or with a view to the achievement of common aims’. Thus, ‘restrictions on the independence of States cannot be presumed’, instead, this presumption is only rebutted by certain limitations imposed by international law and states are bound to remain within those limits when exercising their inherent independence. According to the court, one of the foremost of these limitations is the prohibition against exercising jurisdiction (or acts of sovereign authority) on the territory of another state without the latter’s consent.

It follows, then, that international law requires criminal proceedings to be undertaken within the legislating state’s own courts if the state has lawful custody of the accused. Nevertheless, the PCIJ did not consider that the limitation on jurisdiction to enforce necessarily limited the state from exercising jurisdiction ‘in its own territory…which relates to acts which have taken place abroad’. Here, the Court was unable to conclude that international law comprised of a ‘general prohibition’ against extending the scope of laws to persons, property and acts outside the State’s territory, unless there are specific exceptions to the general prohibition. Rather the Court concluded from its analysis of the behaviour of states that the ‘great variety of rules which [states] have been able to adopt without objections or complaints’ demonstrated the ‘wide measure of

30 ibid.
31 ibid.
32 ibid.
33 ibid.
34 ibid 19.
35 ibid.
36 ibid.
discretion’ left to states by international law ‘which is only limited in certain cases by prohibitive rules’. Outside of those limitations, ‘every state remains free to adopt the principles, which it regards as best and most suitable’. Thus, laws applying to acts committed extraterritorially are validly within the state’s discretion deriving from its sovereignty, unless there is a limitation under international law, and as long as the enforcement of such proscriptions would be conducted on the prosecuting state’s own territory. However, the majority in the PCIJ were uncertain if criminal jurisdiction necessitated a different approach because the territorial character of criminal law is fundamental. Even so, the Court argued that even where a permissive rule must be established, the Court is required to determine whether there is a rule of international law restricting the discretion of states to adopt principles regarding criminal jurisdiction. This is because the Court noted that states extended their laws to acts committed outside their territory and do so in ways that ‘vary from state to state’. Consequently, it was evident from state behaviour that the ‘territorial character of criminal law is not absolute’.

37 ibid.
38 ibid.
39 ibid 19.
40 ibid 20.
41 ibid.
42 ibid 21. Brierly and De Visscher (n 16) 255 (‘territorial basis of jurisdiction is not mere dogma; it is justified normally because it is convenient that crimes should be dealt by the State whose social order they affect most closely and this in general is the State on whose territory they are committed’).
That said Judge Loder\(^\text{43}\) disagreed with the Court’s assumption that international law comprised of rules of law where ‘everything which is not prohibited is permitted’ or ‘every door is open unless it is closed by treaty or established custom’.\(^\text{44}\) Loder’s view stressed the need for a ‘general consensus of opinion’ in the development of rules rather than being abrogated or changed by the municipal law of a minority of states.\(^\text{45}\) He disagreed that a consensus could be demonstrated by the ‘absence of international disputes or diplomatic difficulties’ in response to municipal laws ‘which are at variance with generally accepted ideas’.\(^\text{46}\) Instead, Judge Loder interpreted the consequence of the independence of states (that no law could apply or have binding effect outside the national territory) as signifying how the criminal law could apply only to all persons within the state’s territory.\(^\text{47}\) However, extending the law to acts committed by foreigners abroad would infringe the sovereign rights of the foreign state as the prosecuting state had no right to exercise jurisdiction within the former State.\(^\text{48}\) This general postulate on the exclusivity of territorial jurisdiction was considered to be overruled

\(^{43}\) Judge Loder, a Dutch lawyer, was the first President of the Permanent Court of International Justice. He was also a member of the Commission for the Progressive Codification of International Law. See *Annual Report of the Permanent Court of International Justice*, Series E, No.1 (1\(^{\text{st}}\) January 1922-15\(^{\text{th}}\) June 1925), 13.

\(^{44}\) *Case of the S.S. “Lotus”* (n 28) 34 (Judge Loder) and 52 (Lord Finlay) (to determine whether Turkey was authorized under international law and not that France must demonstrate a prohibitive rule). See support, Brierly (n 21) 155 and R Higgins, *Problems and Processes: International Law and How we use it*, (Oxford University Press Oxford 1994) 77.

\(^{45}\) ibid 34 (Judge Loder), 44 (Judge Weiss) (international law is where ‘all nations…are in agreement as regards the acceptance…of a specific rule of conduct’) and 60 (Judge Nyholm) (‘must be acts of State accomplished in the domain of international relations…municipal laws are insufficient’).

\(^{46}\) ibid.

\(^{47}\) ibid and 44-45 (Judge Weiss). However, he contended that a State may extend its territorial jurisdiction to offences committed abroad by nationals ‘since such nationals are subject to the law of their own country’.

\(^{48}\) ibid 35 (Judge Loder).
only by an exception recognized by law or a contrary conventional rule, permitting jurisdiction.\footnote{ibid 35 (Judge Loder).} Similarly, Judge Nyholm argued that this ‘actual infringement of the principle of territoriality’ could not be validated by ‘mere tacit acceptance’; there must be express consent that demonstrated the recognition of the jurisdiction as authorized by international law.\footnote{ibid 60 (Judge Nyholm) (‘the necessity of some action…on the part of States’).} He contended that the majority’s reasoning appeared to argue that without a rule of law, relations between states were governed by an ‘absolute freedom’.\footnote{ibid 61 (Judge Nyholm).}

It follows then that the obiter in the Lotus judgment appeared to presuppose that state liberty precedes the rule of law (the state has a wide measure of discretion).\footnote{ibid 18-19.} Conversely, the dissenting opinions appeared to assume that the legal order preceded the state (territorial jurisdiction was exclusive unless permitted).\footnote{ibid 35 (Judge Loder) and 44-45 (Judge Weiss).} These assumptions regarding the origin of law remain unresolved in legal scholarship. One approach accepts the Lotus majority’s presumption against restrictions and requires evidence of a prohibition.\footnote{See AG v Eichmann (1968) 36 ILR 5, Prosecutor v. Furundzija, IT-95-17/1-T (10 December 1998) para 156, Aust (n 9) 42, A Orakhelashvili Peremptory Norms in International Law (Oxford University Press Oxford 2006) 288 and Gardocki (n 19) 59.} For example, the Joint Separate Opinion in the Arrest Warrant case considered this presumption to be ‘a high water mark of laissez-faire in international relations, and of an era that has been significantly overtaken by other tendencies’.\footnote{Case of the Arrest Warrant of 11 April 2000 (2002) ICJ Rep 121 (Joint Separate Opinion) para 51.} Notwithstanding, they concluded that this presumption (despite certain ‘attendant dangers’) has a continuing
potential ‘in the context of jurisdiction over international crimes’. Another approach accepts Lotus’ dissenting opinions and requires evidence of a permission. Here, Judge Guillaume noted that the PCIJ in the Lotus case did not determine whether the general principle in its obiter applied to the specific case of criminal jurisdiction and he considered the court’s caution justified given the ‘sparse treaty law at that time’. However, the combination of the UN Charter’s recognition of sovereign equality and the ‘impressive legal corpus’ of international criminal law indicates a different situation; thus, it must be necessary for the state to demonstrate that it is authorized by international law.

In parallel, rather than advocate for one of the opposing positions, certain scholars either limit Lotus’ significance to the recognition of certain key concepts or attempt to reconcile the

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56 ibid para 50. On requisite state behaviour, Oehler concluded that states introduce principles of jurisdiction in their domestic law without searching for an authorization by international law. D Oehler Internationales Strafrecht (Heyman 1973) 124 as cited in Gardocki (n 19) 61. That said, Oehler prefers evidence of an authorization in treaty or customary international law. Ibid. See also GW Berge ‘The Case of the SS Lotus’ (1928) 26(4) Michigan Law Review 361, 375.


58 Case of the Arrest Warrant (n 55) (Separate Opinion of Judge Guillaume) para 14.

59 ibid para 15.

60 ibid para 15-16. In contrast to Oehler, Jennings interprets state behaviour as illustrating that, rather than an unlimited discretion, states base their assertions on existing principles of jurisdiction. Jennings (n 57) 150. See also Mann (n 1) 35 (‘can be confidently asserted that [a most unfortunate and retrograde theory] have been condemned by the majority of the immense number of writers that have discussed them’) and JL Brierly ‘The Lotus Case’ (1928) 44 Law Quarterly Review 154.

61 Similarly, Brownlie drew on McNair in the Fisheries case and the Nottebohm judgment and concluded that these authorities demonstrate how the International Court of Justice identified a legal connection rather than one based on state discretion. See Brownlie (n 9) 303. See also Fisheries case (n 21) 180 (implication of McNair’s conclusions) and Nottebohm case (Liechtenstein v. Germany) (1955) ICJ Reports 4. See also Ryngaert (n 9) 23-24 and Higgins (n 44) 77 (shouldn't rely on the Lotus case given the numerous dissents and its controversy in scholarship).
oppositions. Reydams narrowly extrapolates certain notions as fundamental assumptions, that is, concurrence of jurisdictions and the emphasis within *Lotus* on limitations under international law.\(^{62}\) Meanwhile, O’Keefe proposes a reconciliation of positions, given the practice of only tolerating exercises of jurisdiction if they come within the accepted categories. He contends that the principles can be conceived of as ‘pockets of residual presumptive permission in the interstices of specific prohibitions’.\(^{63}\) Notwithstanding the theoretical opposition, it is accepted in contemporary scholarship that ‘in certain circumstances (permission) and within certain limits (prohibition), it is consistent with international law for a state to exercise criminal jurisdiction in respect of the conduct of aliens abroad’ (AOS).\(^{64}\)

2. The Binary components of Jurisdiction: The Rights to Prescribe and Enforce

It follows, then, that the relevant framework is the principles of jurisdiction as limited by the duty of non-intervention,\(^{65}\) in accordance with reasonableness, mutuality and proportionality.\(^{66}\) The twin elements of domestic jurisdiction and non-intervention

\(^{62}\) Reydams (n 25) 15-16.


\(^{64}\) RY Jennings and A Watts *Oppenheims International Law* (9th edn London Longmans 1992) 468.

\(^{65}\) This includes the doctrine of sovereign immunity; see generally H Fox *The Law of State Immunity* (2 edn Oxford University Press Oxford 2008) and R van Alebeek *Immunity of States and their Officials in International Human Rights Law and International Criminal Law* (Oxford University Press Oxford 2008).

\(^{66}\) Brownlie (n 9) 308, *Case of the Arrest Warrant* (n 55) (Joint Separate Opinion) para 59, Reydams (n 25) 24, Section 403 of *Restatement Third* (n 2) 244, C Pappas *Stellvertretende Strafrechtspflege* (Max Planck Institut fuer auslaendisches und internationals Strafrecht Freiburg 1996) 86-87.
mean that jurisdiction is ‘not a unitary concept’;67 instead, there are
binary components of jurisdiction to prescribe and to enforce.68 As
the terminology of prescription and enforcement is open-ended,
some commentators question whether these descriptions are
misleading categories; rather, they should be categorized according
to the organs of state exercising the power (legislative, adjudicative
or executive).69 Cameron explains that the phrase ‘adjudicative
jurisdiction’ is primarily used to explain jurisdictional issues arising
‘in the context of conflict of laws, that is, disputes over the
application of foreign laws’.70 This is where states may apply foreign
case to disputes in private law involving a foreign element but this is
not strictly enforcement rather declaratory of private rights.71
However, Cameron contends that the prescriptive and enforcement
terminology is more appropriate in criminal matters. Here,
prescriptive jurisdiction can be exercised by an executive body, that
is, ‘a regulatory agency or a court’;72 conversely, enforcement
jurisdiction may be exercised by institutions other than executive
bodies; ‘a court order or judgment can be an act of enforcement
jurisdiction’.73 In other words, ‘judicial competence cannot be
separated from legislative competence’, to which it is subordinate to,
and the issue of choice of law, the key element in conflict of laws, does not arise in criminal cases.\textsuperscript{74}

It follows, then, that when the state does not have legislative competence (the act is not made criminal under the municipal law), its courts will not apply foreign law to prosecute an individual for the particular conduct.\textsuperscript{75} Thus, the state’s jurisdiction extends only to crimes ‘with the state’s jurisdiction to prescribe’,\textsuperscript{76} that is, over the subject matter, the temporal moment and geographic location of the offence.\textsuperscript{77} It is generally acknowledged that even though crimes against international law are criminalized under customary international law, there must be a legislative act by the state to criminalize the act within its domestic legal order; ‘only a truly monistic approach…would dispense with the requirement of any national prescriptive act’.\textsuperscript{78} In other words, without jurisdiction to prescribe, there can be no exercise of jurisdiction to enforce and without exercising jurisdiction to enforce, the proscriptive remains ineffectual.\textsuperscript{79} The issue here is whether the domestic statute is in conformity with international law even though constitutionally the domestic statute would prevail within the domestic order.\textsuperscript{80}

\textsuperscript{74} ibid 7. See also Jennings (n 57) and Cameron (n 18) 8.
\textsuperscript{75} ibid 7. Cameron argues that many international lawyers believe that the same rules apply to criminal and civil jurisdiction, citing how the exercise of civil jurisdiction can be backed by criminal sanctions such as the power to order disclosure to the other party or the Court. ibid.
\textsuperscript{76} Section 423 of Restatement Third (n 2).
\textsuperscript{77} Brownlie (n 9) 311. If the legislative jurisdiction is beyond lawful limits, the enforcement is unlawful. Therefore, the distinction between bases and limits (between legislative and enforcement) is not essential different; ‘the one is the function of the other’. ibid.
\textsuperscript{79} Bowett (n 10) 555. This is so where the accused is outside the territory of the prescribing State and extradition is not possible. ibid.
\textsuperscript{80} Jennings and Watts (n 64) 457. See also AG v Eichmann (n 54).
Ultimately, the paramount rule is that if the state’s prescriptive or legislative jurisdiction goes beyond the lawful limitations imposed by international law, then any exercise of enforcement jurisdiction within its territory is equally unlawful.\textsuperscript{81} Hence, the offence must not be too remote or lead to ‘nonsensical or grossly unjust results’.\textsuperscript{82} If a ‘meaningful point of contact’ does not arise, the exercise of jurisdiction is excessive and an abuse of power.\textsuperscript{83} In such an instance, the state may diplomatically protest against the assertion of jurisdiction\textsuperscript{84} or alternatively, mount civil proceedings claiming a violation of sovereign rights.\textsuperscript{85} In other words, the aforementioned paramount rule is underpinned by the ‘absence of abuse of rights or arbitrariness’\textsuperscript{86} and engages state responsibility ‘even in the absence of an intention to harm another state’.\textsuperscript{87} For example, in the \textit{Arrest Warrant} case, the International Court of Justice ruled that Belgium, in circulating the arrest warrant, violated an obligation owed to DRC, namely to respect the immunity of the latter’s Minister for Foreign Affairs.\textsuperscript{88} Another example is how the principle against non-retroactivity has been tested in cases where states have applied universal jurisdiction even where the relevant domestic legal provision asserting universal jurisdiction was absent

\begin{footnotes}
\item Brownlie (n 9) 308.
\item ibid.
\item ibid.
\item Akehurst (n 57) 176.
\item In the criminal sphere, famous examples are the \textit{Case of the SS Lotus} (n 28), \textit{Case of the Arrest Warrant} (n 55), \textit{Certain Criminal Proceedings (Republic of Congo v France)}, Order of 16 November 2010, ICJ Rep 635 (discontinued by agreement of the parties) and \textit{Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)} ICJ Rep 177(2008).
\item Mann (n 1) 47. See also I Bantekas \textit{International Criminal Law} (Hart Publishing Oxford 2010) 331.
\item Brownlie (n 9) 316.
\item \textit{Case of the Arrest Warrant} (n 55).
\end{footnotes}
at the time the offense was committed.\textsuperscript{89} This principle prevents a state from prosecuting an accused for an offence, which is not criminalized in law at the time of the offence.\textsuperscript{90} O’Keefe considers this jurisdiction as ‘a form of \textit{ex post facto} criminalization and therefore, repugnant in that a substantive national criminal prohibition and its attendant punishment become applicable to the accused only after the performance of the impugned conduct’.\textsuperscript{91} In effect, the accused is ‘not prohibited by the law of that state from performing the relevant act’.\textsuperscript{92} He claims that the point of time should be when jurisdiction is asserted over the offence in domestic law rather than when it is attempted to apply the law to a particular set of facts.\textsuperscript{93} His view expressly accords with Judge Loder’s dissent in the \textit{Lotus} case,

[The] guilty act has not been committed within the area subject to the jurisdiction of that State and the subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the State.\textsuperscript{94}

The ICJ in the \textit{Obligation to Prosecute and Extradite} case accords with O’Keefe’s position in terms of treaty interpretation. The Court interpreted the scope of state parties’ obligations under the Torture Convention as not extending to crimes prior to the Convention’s

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\textsuperscript{89} O’Keefe (n 63) 742.  \\
\textsuperscript{90} ibid. But he distinguished prescription by way of a judicial ruling, which may happen where a judicial ruling issues a broad interpretation of an ambiguous criminal statute so while the prescription appears to be at the time of the ruling (exercised), the formal idea is that the statute always had the jurisdictional scope; in other words, recourse can be had to the common law fiction that a judicial ruling ‘merely “discovers” what the common law has always been’. However, he argues that with such prescription, serious questions of retroactivity arise, ‘although the prohibition itself might have existed at the time of the accused’s conduct the application of the prohibition to the accused might not have been ascertainable’. ibid.  \\
\textsuperscript{91} ibid 743.  \\
\textsuperscript{92} ibid.  \\
\textsuperscript{93} ibid.  \\
\textsuperscript{94} Case of the \textit{SS Lotus} (n 28) 35 (Dissent of Judge Loder).
\end{flushright}
entry into force. This is in spite of the thesis that torture committed as a crime against humanity has been criminalized under customary international law prior to the Torture Convention. However, the Israeli courts in the Eichmann case and the Spanish courts in Chile/Argentina and Guatemalan Generals cases considered their claim to jurisdiction over offences prior to domestic procedural law as legally justified because the alleged offences were crimes against international law and thus, criminal under international law at the time of commission. As Mann argues, any attempt to identify an abuse of power may be challenging because the circumstances for applying non-intervention are ‘not always clear’; thus, he considers that the judgment will be based on ‘good faith and reasonableness’, that is, the need for discretion. As will be evident, in determining whether the States has exceeded its legal rights, the bases of jurisdiction and limits imposed by law are essentially the same – ‘the one is the function of the other’.

2.1. Jurisdiction to Prescribe

We observed that jurisdiction to prescribe is generally understood as the right to create and apply laws, that is, ‘whether

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95 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (2012) ICJ Rep. 144, para 99.
96 AG v. Eichmann (n 54) 42-44 (District Court) and 281-283 (Supreme Court), Chilean Investigation (5 November 1998) Audiencia Nacional, para 3 and Guatemalan Generals case, Judgment No. 15/2000 (13 December 2000).
97 Mann (n 1) 47.
98 ibid 48.
99 Brownlie (n 9) 311.
100 Mann (n 1) 14, Bowett (n 10) 555 and Akehurst (n 57). See also Legal Status of Eastern Greenland (1933) PCIJ Rep Series A/B No. 53, 48 (legislation as ‘one of the most obvious forms of the exercise of sovereign power’).
and in what circumstances a state has the right of regulation’.\(^{101}\) It is clear that unlike jurisdiction to enforce, jurisdiction to prescribe is not territorially restricted and therefore, the state can claim the right to apply its criminal law to particular conduct but without custody of the accused ‘cannot [claim] to enforce it’.\(^{102}\) It is also clear that the lawfulness of enforcement on the state’s own territory does not automatically imply the lawfulness of its exercise of jurisdiction to prescribe; in other words, the state may not have the authority to arrest a national or foreign national in its own territory because the accused may have committed an act which is lawful in the state of location of the offence, even though it is criminalized under the arresting state’s laws.\(^{103}\) However, although jurisdiction to prescribe is not territorially limited, the validity of jurisdiction to prescribe must be determined by certain principles, independent of the state’s own determination.\(^{104}\)

It follows, then, that scholars undertook an inductive approach of state behaviour in order to deduce a ‘universal assent or consensus of the majority’ (‘all or most states’) to certain principles of jurisdiction.\(^{105}\) The Harvard Research on International law referred to its categorization, which has been consistently adopted, as reflecting

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\(^{101}\) ibid 16.

\(^{102}\) O’Keefe (n 63) 740.

\(^{103}\) Mann (n 1) 90.

\(^{104}\) Of note, an arrest on the territory of the enforcing state would not breach jurisdiction to enforce but if the act was lawful in the state of location of the offence, it raises an issue of the lawfulness of jurisdiction to prescribe. O’Keefe (n 63) 741.

\(^{105}\) G Schwarzenberger The Inductive Approach to International Law (Stevens and Sons London 1965) 18-19. See also WE Beckett, ‘The Exercise of Criminal Jurisdiction over Foreigners’, (1925) 6 British Yearbook of International Law 44, 50 (determination by international law is based on ‘general consent of all members of the family of nations’).
the ‘greatest common denominator of national law and practice’. This means that the principles are ‘generalizations’ from ‘a mass of national provisions which by and large do not directly reflect categories of jurisdiction in the same way’. Bantekas remarks how each principle represents ‘manifestations inherent in statehood’ that could only be attributable to the state and thus, are distinct from the jurisdiction of international criminal tribunals. However, for the most part, jurisdiction to prescribe is concurrent because international law has not developed a rule of exclusivity. While Mann considers this a ‘matter for regret’, most international lawyers favour (or at the very least do not disprove of) concurrency. As notable exceptions, De Vabres and Bassiouni reject concurrency and establish a hierarchy of jurisdictions with the territorial jurisdiction at the apex. In fact, there are rare examples in treaty law of explicitly referring to conflicts of jurisdiction.

106 Harvard Research ‘Draft Convention on jurisdiction’ (n 25) 445
107 Brownlie (n 9) 308.
108 Bantekas (n 86) 331.
109 Brownlie (n 9) 308 (‘jurisdiction is not based upon a principle of exclusiveness: the same acts may be within the lawful ambit of one of more jurisdictions’), Mann (n 1) 10 (various circumstances where ‘more than one state has a right to regulate’) and Feller (n 17) 8.
110 Mann (n 1) 10.
113 Article 31(d) (ex article K3(d)) of the 1998 Amsterdam Treaty Amending the Treaty on the European Union, (1998) 37 ILM 56, 74 (EU States must prevent conflicts of jurisdiction in their common action on judicial cooperation in criminal matters) and article 7(5) of the UN Convention for the Suppression of Financing Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (must ‘coordinate their actions appropriately’ when more than one State party claims jurisdiction over the offences).
It is evident that the application of principles of jurisdiction requires ‘further balancing of interests of the states involved and the requirements of justice’,\(^{114}\) as Pappas contends the principles have a normative meaning in international law because of their origin and function.\(^{115}\) Therefore, if Pappas’ analysis is accepted, the issue is whether the jurisdiction asserted is a ‘proper exercise of jurisdiction’ as opposed to whether it is illegal, which amounts to a ‘delicate’ balancing between sovereignty (state interests) and non-intervention (justice).\(^{116}\) In this way, the principles provide ‘no clear answer’ or delimit a strict boundary line as to the extent of a state’s jurisdiction;\(^{117}\) in fact, they have ‘strong similarities’ and ‘often interweave in practice’.

Rather the principles may be ‘only evidence of the reasonableness of the exercise of jurisdiction’ or more appropriately formulated as genuine or meaningful link.\(^{118}\)

It follows, then, that, in general, international lawyers discuss the principles of jurisdiction in terms of identifying a ‘substantial and

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\(^{114}\) Reydams (n 25) 24.

\(^{115}\) Pappas (n 66) 86-7.

\(^{116}\) Reydams (n 25) 24. See also Pappas (n 66) 87.

\(^{117}\) JG Merrills, *Anatomy of International Law: a study of the role of international law in the contemporary world*, 2nd ed. (Sweet and Maxwell London 1981) 51. See also Henkin (n 68) 232 (discussing the principles as not ‘black letter law’ rather that ‘realities have refined the traditional categories, made them less rigid, less conclusive’).

\(^{118}\) Brownlie (n 9) 308 (for example, the principles of objective territoriality (place where the crime is completed) and the passive personality (nationality of the victim) may overlap). See also A Cassese ‘When may Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case’ (2002) European Journal of International Law 853, 859 (justifies universal jurisdiction by making an analogy to the acceptance of protective principle).

\(^{119}\) Brownlie (n 9) 308 and 311 (‘substantial and bona fide connection between subject matter and source of the jurisdiction). See also Ryngaert (n 9) 145-150. Henzelin (n 3) 19-20 (linking point is an element of the offence whereas competence (or jurisdictional principles) can be based on more than one link to the offence). He notes that not all possible linking criteria can be principles of jurisdiction and that some linking points by States are not necessarily used by other States, for example, residency.
genuine connection between the subject matter and territorial base', 120 ‘meaningful point of relation’, 121 ‘meaningful link’ 122 or ‘legitimizing link’ 123 between the State claiming jurisdiction and the offence, offender or victim. This concept of meaningful link looks at the significance of the state’s “legitimate interest” and whether it can “outweigh” the interests of other states. 124 According to Dahm, criminal jurisdiction ‘requires a ‘linking point’ (Anknüpfungspunkte), a legal connection that links the punisher with the punished’. 125 This is the ‘search for the state or states whose contact with the facts is such as to make the allocation of legislative competence just and reasonable’. 126 The task should be ‘to identify the relevant points of contact, to localise the legal relationships’. 127 Here, the state must have ‘a close, rather than the closest, connection with the facts, a genuine link, a sufficiently strong interest’. 128 Invariably, this is judged by the objective standards of international

120 Brownlie (n 9) 299 and Jennings and Watts (n 64) 46.
122 Pappas (n 66) 85.
124 Mann (n 1) 46 citing Watson v Employers Liability Assurance Co., 348 US 66 (1952), 73.
125 Dahm Zur Problematik des Voelkerstrafrechts (1956) as cited in AG v. Eichmann (n 54) 50 (‘persons and acts which concern it more than they concern other States …’).
126 See also Pappas (n 66) 85-7.
127 Mann (n 1) 44.
128 ibid 45. His conclusion is oft-cited: ‘if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of interdependence’)’. ibid 49. See also Harris (n 6) 291.
law rather than those of the prosecuting state.\textsuperscript{129} Although Mann draws an analogy to the constitutional law of federal states, where the determination involves a ‘flexible and largely discretionary notion based upon the degree of connection’.\textsuperscript{130} Nevertheless, Ryngaert criticizes determinations based on harm to the prosecuting state’s interests, given the inevitable subjectivity involved.\textsuperscript{131} In fact, Brownlie concedes that the genuine link method could not necessarily resolve issues involving nationality and territorial jurisdictions.\textsuperscript{132} On universal jurisdiction, he argues that the genuine link cannot be applied at all and therefore must be regulated by other principles. Hence, the court must determine whether there has been excessiveness or arbitrariness in the claim of jurisdiction based on context or the aggregate of factors.

2.1.1. Jurisdiction over Offences committed within the State’s territory

Territorial jurisdiction or the right of the state to exercise jurisdiction over its territory is considered to originate in its sovereignty\textsuperscript{133} and is undoubtedly accepted.\textsuperscript{134} Nevertheless, the extent of the principle remains a matter of dispute.\textsuperscript{135} For Huber, laws

\textsuperscript{129} ibid. Brownlie compares Mann’s approach to a ‘proper law’ approach in private international law; the accused can plead forum conveniens or the appropriateness of litigating in the place of commission of the offence. See Brownlie (n 9) 308.
\textsuperscript{130} ibid.
\textsuperscript{131} Ryngaert (n 9) 32-35.
\textsuperscript{132} Brownlie (n 9) 308.
\textsuperscript{133} Island of Palmas (n 12) 839. See also W Berge ‘Criminal Jurisdiction and the Territorial Principle’ (1931-32) 30 Michigan Law Review 238, 240.
\textsuperscript{135} See Mann (n 1) 37-38.
only have force within the boundaries of the state ‘but not beyond’\textsuperscript{136} while Story argued that ‘the laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens’.\textsuperscript{137} However, it is recalled that ‘the territoriality of criminal law is not an absolute principle of international law’ because nearly all legal systems extend their laws to extraterritorial offences ‘in ways which vary from state to state’.\textsuperscript{138} Here, \textit{Lotus} is considered to reject the ‘strict territoriality of criminal jurisdiction’ (of Huber-Story maxims) adopting a flexible rule.\textsuperscript{139}

Nevertheless Cryer argues that extraterritorial jurisdiction is justified in terms of crimes against international law because of the threats of either ‘excessive willingness to convict’ or ‘excessive lenience or willingness to acquit’.\textsuperscript{140} First, certain \textit{in absentia}

\textsuperscript{136} See English translation of U Huber \textit{De Conflictu Legum diversarum in diversis imperis} (1684) in DJ Llewelyn Davis (1937) 18 British Yearbook of International Law 49, 64-65 (Section 1 of Annex).
\textsuperscript{137} \textit{The Apollon} (1824) USSC 32, 22 US 362, 9 Wheaton 362 (17 March 1824) (‘[laws] can have no force to control the sovereignty or rights of any other national within its own jurisdiction’).
\textsuperscript{138} \textit{Case of the S.S. “Lotus”} (n 28) 18 (‘the constituent elements of the offence or more especially its effects’ are located on the prosecuting State’s territory). Here, \textit{Lotus} observed in particular the following exceptions: In the Cutting Case report, Moore divided territorial jurisdiction into subjective and objective bases; the subjective principle involves an offence committed ‘by persons on the territory, except diplomatic officers’ while the objective principle is where ‘an offence [is] committed within the territory by persons outside’. See Moore (n 134) 22. On the history of territorial jurisdiction in common law states, see Berge (n 133) 239.

Another facet is jurisdiction over offences committed on ships registered to the state (or Flag State jurisdiction). See also the ‘effects’ doctrine in US anti-trust legislation has been particularly controversial, see Jennings (n 57) 146.
\textsuperscript{139} Mann (n 1) 36. For a discussion of the European Court of Human Rights jurisprudence, see S Besson ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights depend on Jurisdiction and What jurisdiction amounts to’ (2012) 25(4) Leiden Journal of International Law 857. In its case law, the court has found state parties to be subject to the Convention in areas outside the territory of that state party, albeit over which they exercise jurisdiction. See for example, \textit{Al-Saadoon v UK}, Judgment of 2 March 2010 (Appl. No. 61498/08) and \textit{Al Skeini v UK}, Judgment of 7 July 2011 (Appl. No. 55721/07).
\textsuperscript{140} R Cryer \textit{Selectivity in International Criminal Law} (Cambridge University Press Cambridge 2005) 75 and JS Fawcett ‘The Eichmann Case’ (1962) 38 British
convictions are considered to have been based on a manifest desire for convictions, such as Pol Pot and Leng Sary in 1979. Second, national courts emphasized the leniency or lack of prosecution in other courts despite *prima facie* evidence against the accused, such as the failure of Chilean courts to overrule the amnesty law prior to Pinochet’s arrest. Against this backdrop, though the Rome Statute recognizes the primacy of territorial jurisdiction vis-à-vis the ICC, the latter’s jurisdiction is engaged where there is a failure to genuinely prosecute. Therefore, the dominant approach speaks of the preference for the territorial and nationality jurisdictions within the broader context of a complementary system of international and national jurisdictions.

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143 Preamble and article 1 of the Rome Statute of the International Criminal Court (‘the ICC...shall be complementary to national criminal jurisdictions’).

144 *Case of the Arrest Warrant* (n 55)(Joint Separate Opinion) para 51 (‘a flexible strategy in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play’).
2.1.2 Jurisdiction over Extraterritorial Offences (Nationality, Protective, Passive Personality)

Nationality jurisdiction is the right to exercise jurisdiction over offences committed abroad by nationals given the protections afforded by nationality abroad or because of the non-extradition of nationals by the requisite state. Nevertheless, dispute remains over the meaning of the term ‘national’, that is, what is a ‘close connection’ between the individual and state. Within this issue, states will claim nationality jurisdiction over citizens who at the time of the commission of the offence were nationals of another State. Cases involving participation in crimes committed during WWII or the Rwandan conflict are justified by the state based on acquired

145 Brownlie (n 9) 303-304 and Mann (n 1) 88-89. However, state legislation is diverse. See Harvard Research ‘Draft Convention on jurisdiction’ (n 25) 527 and Jennings and Watts (n 64) 463 (jurisdiction can involve few or all offences, or can impose certain conditions such as double criminality or that the offence was committed against fellow nationals).
146 Henkin (n 68) 238 (national ‘enjoys the benefits of nationality abroad’).
148 Deen-Racsmany (n 147) 606; see also his discussion on dual nationality, ibid, 611. See also Harvard Research ‘Draft Convention on jurisdiction’ (n 25) 475.
149 Nottebohm case (n 61) 23 (the state determines whether nationality is acquired or revoked but rules of international law determine whether there is an ‘inadequate connection’, that is, genuine connection of existence, interests and sentiments’ with the State). See generally Ruth Donner The Regulation of Nationality in International Law (2nd edn 1994), 121-167.
150 The Harvard Research’s draft Convention included nationality at the time of trial, although this was justified by the lack of a prohibitive rule, that is, the Lotus presumption. See Harvard ‘Draft Convention on jurisdiction’ (n 25) 440. See also article 8 of the Resolution of the Warsaw International Conference for the Unification of Penal Law (November 5, 1927) cited as Appendix 6 in the Harvard Research.
151 Polyukhovich v. The Commonwealth of Australia and Another (1991) 172 CLR 501. The War Crimes Amendment Act 1988 (No. 3 of 1989) provided that the individual need only be an Australian citizen or resident at the time of prosecution [section 11]. ibid, para 21. See also R v Finta (1994) 1 SCR 701.
152 Reuters Africa ‘Sweden Indicts Man over Rwandan Genocide’ (Swedish citizen of Rwandan origin).
citizenship but this seems to overlap with universal jurisdiction. Equally, states have included permanent residence\(^\text{153}\) or refugee status in national laws\(^\text{154}\) and international conventions have included ‘stateless persons with habitual residence’ either without specifying which principle of jurisdiction applies\(^\text{155}\) or in the same category as nationality jurisdiction.\(^\text{156}\) In response, there is a dispute whether this assertion of nationality jurisdiction over non-nationals at the time of the commission of the offence is satisfactory. O’Keefe rejects these claims as ‘a form of \textit{ex post facto} criminalization\(^\text{157}\) while Deen-Racsmány considers nationality ‘at time of prosecution or at the time of commission’ as sufficient.\(^\text{158}\)

That said, like territorial jurisdiction, nationality jurisdiction can be accused of ‘unwarranted leniency or unjustified acquittals’ because of the ‘affinity between the courts and the accused, or

\(^{153}\text{Article 6(1) bis of the Belgian Code of Criminal Procedure: Preliminary Title. This was inserted into the CCP by the Loi relative aux violations graves du droit international humanitaire in Moniteur Belge (7 August 2003).}\)

\(^{154}\text{The Belgian Cour d’Arbitage considered that persons granted refugee status must have the same legal rights as Belgian nationals, which may submit a civil party complaint to an investigating magistrate irrespective of the location of the offence. In 2006, the Belgian legislature amended subparagraph 2 of article 10(1) bis and article 12bis of the Code of Criminal Procedure (Preliminary Title) to accord with the Court’s judgment. See Judgment No. 62/2005 (23 March 2005) (Cour d’Arbitrage)}\)

\(^{155}\text{For example, article 7(2)(d) of the Financing Terrorism Convention (n 124) and article 9(2)(c) of the International Convention for the Suppression of Acts of Nuclear Terrorism (adopted on 13 April 2005, entered into force on 7 July 2007) 2445 UNTS 89. Here, the State ‘may’ assert jurisdiction on this basis, it is not mandatory to do so.}\)


\(^{157}\text{O’Keefe (n 63) 743. See also L. Sarkar ‘The Proper Law of Crime in International Law’ (1962) 11 International and Comparative Law Quarterly 446, 459.}\)

\(^{158}\text{Deen-Racsmány (n 147) 615.}\)
political interference in the process on behalf of the accused’. In the Leipzig Trials, there were 6 acquittals out of 12 trials and the German Courts were accused of giving those convicted lenient sentences. In the My Lai military court-martials, Captain Medina was acquitted on all charges. However, Lieutenant Calley was convicted of war crimes; this was upheld on appeal although his sentence was slightly reduced by the Army Court of Military Review. In the Kahan Commission of Inquiry, the Minister for Defence was held to have failed to order ‘appropriate measures for preventing or reducing the danger of massacre’ and Defence Forces Chief of Staff was guilty of a dereliction of duty. Nevertheless, there were no subsequent criminal or military trials. In the Indonesian domestic trials for offences committed in East Timor, 12 of the 18 defendants were acquitted. Of the six convicted, only one was sentenced to a term greater than the legal minimum and on appeal, all were released.

159 Cryer (n 140) 77.
161 Medina was charged with murder of a civilian, involuntary manslaughter of a group of civilians and the failure to intervene when gained knowledge of the killing of civilians; however, the jury were instructed that Medina had to have actual or constructive knowledge that criminal acts were being committed. See KA Howard ‘Command Responsibility for War Crimes’ (1972) 21 Journal of Public Law 7, 8-11. See also United States v Calley (US Court of Military Appeals 1973) reprinted in (1974) 8 International Lawyer 523. See also J Paust ‘My Lai and Vietnam: Norms, Myths and Leader Responsibility’ (1972) 57 Military Law Review 99, 125.
163 HD Bowman ‘Letting the Big Fish Get Away: The UN Justice Effort in East Timor’ (2004) 18 Emory International Law Review 371, 394 (‘most if not all of the trials were characterized by the abject failure of the prosecution to press its case against the accused and by the blatant and often shocking efforts of the military to intimidate the judges on the Special Panel’). See also Cryer (n 140) 78.
The protective and the passive personality principles have rarely been invoked regarding crimes against international law\textsuperscript{164} and when invoked, it is usually simultaneously. The protective principle is a right to exercise jurisdiction over acts committed abroad which affect the vital or fundamental interests of the state.\textsuperscript{165} The passive personality principle is the right to exercise jurisdiction over offences committed abroad where the victim is a national. That said the protective principle raises challenges in terms of the definition of ‘vital interests’ or ‘national security’\textsuperscript{166} and the passive personality has always been a matter of controversy.\textsuperscript{167} Here, the \textit{Eichmann} case is particularly illustrative;\textsuperscript{168} the Israeli district court contended that Israel could assert jurisdiction based on how ‘the crime very deeply concerns the “vital interests” of Israel’ and given the ‘special connection’ between Israel and the Nazi atrocities, the latter of which was ‘one of the major causes for the establishment of the state of the

\textsuperscript{164} Cryer argues that it is ‘possible to conceptualize some, although not all, international crimes as being justifiable’ under protective principle, in particular the crime of aggression. Cryer (n 140) 77.

\textsuperscript{165} See generally Cameron (n 18) 79-82 (overlap with universal jurisdiction). See also Shaw (n 9), Brownlie (n 9) 304, Jennings and Watts (n 64), Council of Europe ‘Report on Extraterritorial Jurisdiction’ (Strasbourg 1990) 13-14, Bowett (n 10) 560, Akehurst (n 57) 157-159.

\textsuperscript{166} Cameron contends that the protective principle permits criminalizing conduct ‘damaging to national security or other central state interests’ based on a combination of the Harvard Research Draft Convention and the US Restatement Third. See Cameron (n 18) 2. See also Articles 7 and 8 of the Harvard Research ‘Draft Convention on Jurisdiction’ (n 25) 543-562 and section 402(3) of Restatement Third (n 2). The former refers to crimes against security, territorial integrity or political independence of the State, counterfeiting of seals, currency, instruments of credit etc.

\textsuperscript{167} Moore (n 134). The case involved an alleged libel of a Mexican national resident in Mexico, which was published and circulated in the US by a US national. It was rejected as a sound basis of jurisdiction by the Harvard Research, see Harvard Research ‘Draft Convention on jurisdiction’ (n 25) 578-579 and by Judge Moore in his dissent in the \textit{Lotus case, Case of the SS Lotus} (n 28) 92 (Dissent of Judge Moore). For a more recent concurring view, see Brownlie (n 9) 304.

\textsuperscript{168} AG v. \textit{Eichmann} (n 54). See also Rohrig, Brunner and Heinze (1950) 17 ILR 393, 396
survivors’.\textsuperscript{169} This position was rebuked within scholarship based on the Defence counsel’s observation that that Israel was not a state at the time of commission of the offences.\textsuperscript{170} More recently, the passive personality has been invoked in certain contexts.\textsuperscript{171} The U.S. has invoked passive personality over domestically prescribed terrorist offences\textsuperscript{172} and the 2003 Amendment to the Belgian code of criminal procedure included legal residents and persons with refugee status under nationality of the victim.\textsuperscript{173}

2.1.3 The Principle of Universal Jurisdiction

The discussion has so far concentrated on the arguments that international lawyers use to justify territorial and extraterritorial jurisdiction in circumstances where an element of the offence is considered to engage an interest of the prosecuting state. In this section, the discussion turns to the arguments over the justification for the principle of universal jurisdiction over crimes against international law. Here, the element of the offence does not possess a direct link or interest to the state as an entity, that is, the elements of territory or people.\textsuperscript{174} Rather the prosecuting state claims to exercise

\begin{footnotes}
\textsuperscript{169} ibid 49, 53-54 and 306.
\textsuperscript{170} Fawcett (n 140) 190, D Lasok ‘Eichmann Trial’ (1962) 11 International and Comparative Law Quarterly 355, 368 and Cryer (n 140).
\textsuperscript{171} Some writers consider that belligerent jurisdiction over offences by enemy forces against their nationals (armed forces and civilians) is passive personality. See Akehurst (n 57) 160 and Cryer (n 140) 77 (albeit arguing that this overlaps with universal jurisdiction).
\textsuperscript{173} Loi relative aux violations graves du droit international humanitaire in Moniteur Belge (7 August 2003).
\textsuperscript{174} See MC Bassiouni ‘Theories of Jurisdiction and their application in Extradition Law and Practice’ (1974) 5(1) California Western International Law Journal 3, 50-51. According to Reydams, the positive definition is ‘when [the State] seeks to
jurisdiction over offences committed extraterritorially by foreign nationals against foreign nationals.175 Thus, this principle justifies jurisdiction without the claim of a jurisdictional link or legal nexus to the location of the offence (including the constituent element of the offence), nationalities of the perpetrator or victim or the state’s security/vital interests176 or ‘any other ground of jurisdiction’.177

When international lawyers justify universal jurisdiction over crimes against international law, this lack of a jurisdictional link is combined with the idea that the state has a legal right to extend the scope of its criminal law to certain ‘offences against the international community’,178 that are ‘offensive to the international community as a

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175 This can be described as the right of ‘any’ or ‘every’ State. Shaw (n 9) 652 and 668, O’Keefe (n 63) 740 and Reydams (n 25) 3-6. See also Akehurst (n 57) 160, Harvard Research ‘Draft Convention on Jurisdiction’ (n 25) 445 and 563-592.


177 Institute of International Law ‘Resolution on Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes’ (Krakow 2005) Principle 1. Kress interprets this latter reference as intended to exclude the protective principle, the effects doctrine and may exclude the principle of representation or vicarious administration of justice. See Kress (n 78) 566.

178 Higgins (n 44) 56-7, Cryer (n 140) 84, Section 404 of Restatement Third (n 2) 232 (‘certain offenses recognized by the community of nations as of universal
whole’\textsuperscript{179} or that ‘offend the whole of mankind and shock the conscience of nations’.\textsuperscript{180}

That said it remains a matter of contention among international lawyers whether a principle of universal jurisdiction over crimes against international law exists in law and if affirmed, what is its exact parameter or content. When justifying the validity of the principle of universal jurisdiction, the approach, that is adopted, derives the principle from the nature of the offence,\textsuperscript{181} either through an analogy to piracy as an offence against the law of nations\textsuperscript{182} or as a legal consequence of the offences constituting \textit{jus cogens} norms.\textsuperscript{183} In this way, universal jurisdiction is conceived of as a vertical notion as distinct from the horizontal notion depicted in \textit{Lotus};\textsuperscript{184} that is, the


\textsuperscript{180} See \textit{AG v. Eichmann} (n 54), 24, \textit{In re Rauter} (1949) 114 LRTWC 89, 109, Demjanjuk \textit{v Petrovsky}, 776 F.2d 571, 583 (6th Cir. 1985) and \textit{Prosecutor v. Dusko Tadic aka “Dule” (Decision on the Defence Motion on Jurisdiction)}, IT-94-1 (10 August 1995) para 42. See also \textit{Case of the Arrest Warrant} (n 55) (Van den Wyngaert) para 86-87.

\textsuperscript{181} Higgins (n 44) 56-7, Randall (n 176) 788.


\textsuperscript{183} Orakhelashvili (n 54) 288, Bassiouni (n 182) 104, Bassiouni ‘International \textit{jus cogens} and Obligations \textit{Erga Omnes}’ (1996) 59(4) Law and Contemporary Problems 63, 65 and Randall (n 176) 829-830. See also \textit{Prosecutor v Furundzija} (n 54) para 156 and \textit{R v. Bow Street Magistrate, ex parte Pinochet Ugarte} (No.3) (1999) 2 WLR 827 (Lord Millet).

\textsuperscript{184} \textit{Case of the Arrest Warrant} (n 55) para 51.
state acts as an ‘agent’ of the international community.\(^{185}\) Henzelin identifies these arguments as deriving from an ‘absolute’ theory that is in opposition to a ‘delegated’ theory which we return to later.\(^{186}\) Under the absolute theory, the state derives a right from a transcendent duty, divine or natural law or need for ‘human justice’\(^{187}\) and, in this way, the state acts as part of a \textit{civitas maxima}.\(^{188}\) This is a vertical perspective where the state secures the common interest in repressing crime, assuming a ‘genuine moral community comprising all humanity’.\(^{189}\) Henzelin argues that this absolute theory sub-divides into arguments\(^{190}\) drawn from the philosophical order (moral) and from the structure of the international society.\(^{191}\) Under the philosophical order, the legal right is independent of voluntary practice and pre-exists the state; its ideal of justice stems


\(^{187}\) ibid 821.


\(^{189}\) Bassiouni and Wise 1995 (n 27) 22.

\(^{190}\) Likewise, Bassiouni characterizes this approach and describes the competing positions as the ‘idealistic universalist’ and the ‘pragmatic policy-oriented position’. See Bassiouni (n 182) 97.

\(^{191}\) Henzelin (n 186) 821-822.
from natural laws’, a universal morality.\textsuperscript{192} Under the structure of
the international society, it presupposes an entity of the international
community (a civil society) independent of the will of states and
within this ‘constitutional world’ legal rules are applied to states
against their will.\textsuperscript{193}

As illustrative of this approach that emphasizes the normative
proscription (normative approach), Randall derives the principle of
universal jurisdiction from the nature of the offence, in conjunction
with his empirical analysis of state behaviour in treaty and national
practice.\textsuperscript{194} In this case, Randall adopts \textit{Eichmann’s} narrative of the
historical origin of the principle and its method of legal analogy,
treating certain offences as similar in character to the offence of
piracy.\textsuperscript{195} Here, \textit{Eichmann} justified universal jurisdiction on the nature
of the crimes as ‘grave offences’, which are an affront to mankind\textsuperscript{196}

\textsuperscript{192} ibid. Similarly, Bassiouni considers the idealistic-universalist position as
originating in the early period’s transcendental ideas of ‘universal wrongs’
(Christian notions of a natural law). See Bassiouni (n 182) 97.

\textsuperscript{193} ibid 822. He sources this to the American school of international criminal law,
influenced by Glaser, See S Glaser \textit{Droit International Penal} (Bruylant Brussels 1954),
Randall (n 176) and Bassiouni (n 182). Similarly, Bassiouni traces the pragmatic
policy-oriented position to the classical period, particularly Grotius, where jurists
conceived of ‘certain commonly shared interests of the international community…’
See Bassiouni (n 182) 98.

\textsuperscript{194} Randall (n 176) 785, Benavides (n 185) 58 and Higgins (n 44) 56-7. See also KC
Perspectives’ (2004) 98 American Journal of International law 627, 628 (explaining
that while it appears that Reydams equated Randall’s work with the US position,
his paper focused on civil litigation and ‘did not necessarily advocate for criminal
jurisdiction \textit{in absentia}’). However, Randall’s approach was drawn upon in a
context of criminal jurisdiction, see for example M Bassiouni \textit{Crimes against
Humanity in International Criminal Law} (Kluwer Law International The Hague 1999)
227-240 and M Scharf ‘The ICC’s jurisdiction over Nationals of Non-Party States: A

\textsuperscript{195} ibid 794. Hence, he implicitly endorses \textit{Eichmann’s} use of the \textit{Lotus} majority’s
presumption against limitations on freedom of States. He also prefers to justify
jurisdiction over piracy upon the ‘heinous and wicked acts of violence or
depredation committed indiscriminately against vessels and nationals of various
States’.

\textsuperscript{196} \textit{AG v. Eichmann} (n 54) 25 and 300 and 304.
and where the alleged perpetrators are enemies of all humanity.\textsuperscript{197} Thus, Randall considers piracy and slave-trading as the ‘prototypal offences’ because pirates and slave-traders were ‘enemies of mankind’.\textsuperscript{198} On these premises, Randall concludes that post-WWII military trials\textsuperscript{199} and the modern international conventions expand the list of offences subject to universal jurisdiction to include war crimes and crimes against humanity (as defined under the London Charter),\textsuperscript{200} grave breaches under the 1949 Geneva Conventions\textsuperscript{201} and certain offences defined under international treaties.\textsuperscript{202} Likewise, in her dissenting opinion in the \textit{Arrest Warrant}, Van den Wyngaert assumes that universal jurisdiction derives from the ‘international reprobation for certain very serious crimes such as war crimes and crimes against humanity’.\textsuperscript{203} Universal jurisdiction’s ‘raison d’etre is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries’.\textsuperscript{204} Similar to Randall, she implicitly approves the \textit{Lotus} majority’s opinion as she searches for a prohibitive rule to determine whether the principle violated a limit imposed by international law.\textsuperscript{205} She also contends that universal

\begin{footnotesize}
\begin{enumerate}
  \item Randall (n 176) 789.
  \item ibid 789.
  \item ibid 800-815. The case authorities are evidently based on Carnegie’s analysis, see AR Carnegie ‘Jurisdiction over Violations of the Laws and Customs of War’ (1963) 39 British Yearbook of International Law 402, 419-421.
  \item Charter of the International Military Tribunal –Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945).
  \item See Articles 49(2) of Geneva I, 50(2) of Geneva II, 129(2) of Geneva III, 146(2) of Geneva IV and article 85(1) of Additional Protocol I.
  \item Randall (n 176) 789.
  \item \textit{Case of the Arrest Warrant} (n 55) (van den Wyngaert) para 46.
  \item ibid.
  \item ibid para 51.
\end{enumerate}
\end{footnotesize}
jurisdiction over crimes against international law can be established in state behaviour, that is, there is a recognized permissive rule. It is apparent that Randall’s approach uses legal analogy while van den Wyngaert presupposes a hierarchy of norms. Nevertheless, their concrete analysis draws on treaty law and pronouncements of international and national tribunals in order to further justify the existence of the principle and as a means to ascertain its content. Hence, their analysis would be classified as modern custom or the modern positivist perspective. According to Roberts, modern custom results from a deductive process that begins with general statements of rules rather than particular instances of practice. [It] emphasizes opinio juris rather than state practice because it relies primarily on statements rather than actions.

Thus, invariably, Randall’s and van den Wyngaert’s concrete analysis may be criticized by an opposing traditional approach to custom as either too limited in actual instances of state action (criminal laws and proceedings) or irrelevant in supporting a customary norm (treaty provisions), which we will return to later.

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206 ibid.
207 AE Roberts ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 American Journal of International Law 757. See also H Chodosh ‘Neither Treaty nor Custom: The Emergence of Declarative International Law’ (1991) 26 Texas Journal of International Law 88, 89 (claiming that there is a third type of law called declarative rules which ‘lack one of the two elements of customary rules of international law. Declarative rules are those that are declared as law by a majority of States but not actually enforced by them or rules that are both practiced and accepted as law, but only by a minority of states’).
208 B Simma and A Paulus ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View’ (1999) 93 American Journal of International Law 302. This widens the evidence of state; ‘custom and general principles cannot simply be reduced to instances of state will. So-called soft law is an important device ... Moral and political considerations are not alien to law but part of it’. ibid 308.
209 Roberts (n 207) 758.
While the condition for proving the jurisdictional right for each crime may be preferred, Kress argues that criminalization must be viewed ‘as a strong indication in favour of a customary state competence to exercise universal jurisdiction’.\(^{210}\) Notwithstanding, the following exploration will outline the arguments from the normative approach that are used to justify the claim that universal jurisdiction may be exercised over war crimes, crimes against humanity and genocide. In the case of war crimes, the common articles obliging repression of grave breaches in international armed conflict of the 1949 Geneva Conventions\(^ {211}\) and article 85(1) of Additional Protocol I\(^ {212}\) are interpreted by certain writers as establishing universal jurisdiction.\(^ {213}\) Here, the normative approach has three distinct arguments. First, the grave breaches regime can be discussed in normative terms whereby universal jurisdiction is established based on the nature of the offence. Therefore, if war

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\(^{210}\) Kress (n 78) 575. The issue of whether national courts are according with the definition of crimes against international law will not be addressed. For a critic and proposal for ensuring national courts remain within treaty definitions, see A Colangelo ‘The Legal Limits of Universal Jurisdiction’ (2006-2007) 47 Virginia Journal of International Law 149.

\(^{211}\) This states: ‘each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. 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’. See Geneva Conventions (n 201).

\(^{212}\) Article 85(1) of the Additional Protocol Relating to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

crimes exist as crimes under customary international law, its criminalization gives rise to a right to exercise universal jurisdiction under customary international law.\footnote{Case of the Arrest Warrant (n 55) (Joint Separate Opinion) para 61 (stressed the national incorporation of war crimes in line with obligations towards ICTY, ICTR and ICC). See also Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), para 62 (‘universal jurisdiction being nowadays acknowledged in the case of international crimes’, although this paragraph is in reference to an international judicial body). Similarly, note Prosecutor v. Tadic (n 180) para 41 (exclusive jurisdiction of place of commission is not established). See also Prosecutor v Furundzija (n 54) para 156 (specifically in regards to torture as war crime).} Second, O’Keefe conducts a textual analysis and argues that ‘irrespective of nationality’ must imply irrespective of place of commission\footnote{His justification is based on the fundamental principle that State may prosecute foreign nationals for crimes committed on their territory. Therefore, the Geneva Conventions must be assumed to refer to extraterritorial jurisdiction. See R O’Keefe ‘The Grave Breaches Regime and Universal Jurisdiction’ (2009) 7 Journal of International Criminal Justice 811, 813.} and, similar to van Elst, considers that ‘each High contracting party’ must include all state parties, not merely belligerents to an international armed conflict.\footnote{O’Keefe (n 215) 814. This is to respond to Röling’s contention that the common repression obligation does not bind neutrals within the text even though the travaux signify an intention to bind neutrals. BAV Roeling, ‘Aspects of the Criminal Responsibility for Violations of the Laws of War’, in A Cassese ed., The New Humanitarian Law of Armed Conflict (Editoriale Scientifica Italy 1979) 202.} He cites treaty incorporation,\footnote{ibid 814 (fn 9).} the drafting history of the Conventions\footnote{See Final Record of the Diplomatic Conference of Geneva of 1949, vol II, section B, 116. See a detailed discussion in R van Elst (n 213) 822.} and legal opinion\footnote{Pictet (n 213) and JM Henckaerts and L Doswald-Beck Customary International Humanitarian Law: Vol I: Rules (Cambridge University Press Cambridge 2005) 606.} in support of his textual deduction.\footnote{O’Keefe (n 215) 817. He considers the obligation aut dedere aut judicare as distinct from the mandatory universal jurisdiction, which interprets the obligation to prosecute (as mandatory universal jurisdiction) supplemented by an obligation to surrender if the State does not prosecute (as aut dedere aut judicare). ibid.} O’Keefe observes that under the law of treaties, the Conventions are only binding between state parties and therefore...
only against nationals of other states parties. However, he argues that the rule is not violated if a state exercises jurisdiction over a non-state party national under one of the bases of jurisdiction recognized under customary international law in respect of an analogous domestic offence.

Third, other legal commentators offer empirical analysis. They invoke national proceedings under the *Council Control Law No.10* as concrete sources for universal jurisdiction over war crimes. Their argument is that while certain tribunal reports make express reference to universal jurisdiction, other proceedings involved factual particulars indicative of universal jurisdiction, that is, the prosecution of non-nationals in custody without any other nexus to the offence or offender. Carnegie and Sponsler argue that the validity of these proceedings is upheld by universal jurisdiction, even if unarticulated by the courts. On internal armed conflicts, the

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221 Article 34 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (‘a treaty does not create either obligations or rights for a third State without its consent’).
222 See O’Keefe (n 63) 812. See also R van Elst (n 213) 821.
224 Randall (n 176) 800, Schachter (n 18) 268 and Cowles (n 213). Cowles argues a longer pedigree for universal jurisdiction over war crimes by deducing an analogy between the features of war crimes and those of brigandage. ibid.
225 *Re List* (n 223).
227 Carnegie (n 199) 422-423 and TH Sponsler ‘The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen’ (1968) 15 Loyola Law Review 43, 49-50. Carnegie considers that universal jurisdiction must be the basis of jurisdiction for certain trials if the arguments regarding Allied sovereignty over Germany and Japan or passive personality are rejected.
normative approach emphasizes the criminal proscription. Here, Meron argues that a right to exercise universal jurisdiction over violations in internal armed conflicts can be asserted, despite the lack of a treaty law basis. He contends that the nature of the conflict should have no bearing on the question of universal jurisdiction; rather, it should be determined by the gravity of the offence. In an earlier paper, Meron combined the Conventions’ obligation to ensure respect, with the duty to suppress all violations and the justification for universal jurisdiction based on the nature of the offence in order to justify universal jurisdiction over violations in internal armed conflicts.

Regarding crimes against humanity, the issue of universal jurisdiction rests entirely on customary international law, in the absence of a specific convention. From a normative approach (as above), it is considered that the right derives from the criminalization

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229 ibid 569-570.

230 If one accepts that universal jurisdiction may be established by treaty, then the Torture and Apartheid Conventions provide a treaty-basis for those offences committed as part of a widespread or systematic attack, with the latter making an explicit reference to apartheid as constituting a crime against humanity. For an analysis of the legal development of crimes against humanity, see MC Bassiouni *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press Cambridge 2011). See also Article 6(c) of the Charter of the International Military Tribunal –Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945), Principle VI(c) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission Vol II* (1950) 374, 377 and article 18 of the Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/CONF.4/L.532 (1996) and article 7 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
of crimes against humanity under customary international law\textsuperscript{231} or, relatedly, as a legal consequence of \textit{jus cogens}.\textsuperscript{232} In \textit{Eichmann}, the Israeli Trial Court noted the recognition of the criminalization of crimes against humanity by article 6(c) of the Nuremberg Charter and for ‘offences against the law of nations’, ‘the jurisdiction to try...is universal’.\textsuperscript{233} In the \textit{Guterres} case, the Indonesian Ad Hoc Human Rights Court for East Timor implicitly endorsed this position by arguing that ‘the international community has included the international crime within the universal jurisdiction’, eliminating the possibility of safe havens.\textsuperscript{234} The \textit{Eichmann} position is replicated in the \textit{Pinochet} and \textit{Guatemalan Generals} cases pertaining to torture as a crime against humanity.\textsuperscript{235}

In relation to genocide, article VI of the Genocide Convention obliges states parties solely to exercise territorial jurisdiction\textsuperscript{236} and consequently, the debate revolves around the possibility of a legal right under customary international law. In \textit{Eichmann}, the Israeli Trial Court put forward a novel argument in response to the \textit{travaux préparatoires} of the Draft Statute of the International Court of Justice.\textsuperscript{237}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{231} C Tomuchat in \textit{Preliminary Exposition and Report on the ‘Resolution on Universal Jurisdiction over War Crimes, Genocide and Crimes against Humanity’}, Yearbook of the Institute of International Law, para 26. He combined the absence of protest against proceedings undertaken, the system envisaged in Rome statute, the endorsement in the \textit{Restatement Third} and heinousness of crime.
\item \textsuperscript{232} See generally Orakhelashvili (n 54).
\item \textsuperscript{233} \textit{AG v Eichmann} (n 54) 24 and 31 (District Court) and 299 and 304 (Supreme Court).
\item \textsuperscript{235} \textit{Pinochet III} (n 183) and \textit{Guatemalan Generals} (n 96).
\item \textsuperscript{236} In the alternative, alleged perpetrators may be tried by an international penal tribunal ‘as may have jurisdiction with respect to those Contracting parties which shall have accepted its jurisdiction’. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
\end{itemize}
\end{footnotesize}
of the Convention, which had rejected the inclusion of universal jurisdiction in article VI.\(^{237}\) The Court inferred from the travaux that states parties did not intend to make the territorial jurisdiction exclusive and thereby, the obligation to exercise territorial jurisdiction under article VI must be read as a ‘compulsory minimum’.\(^{238}\) The Court concluded that as universal jurisdiction derived from the ‘nature of the crime as a crime of utmost gravity’, the Convention merely affirmed the ‘international nature of the crime’ rather than restrict state parties’ jurisdiction.\(^{239}\) Likewise, in the *Bosnia v Serbia (Provisional Measures [III])* case, Lauterpacht argued that the confirmation of genocide as a crime under international law under article I of the Convention gave rise to a right of states to assume universal jurisdiction within the state’s domestic law.\(^{240}\) This analysis was followed by the Spanish High Court in its *Chile/Argentina* cases\(^ {241}\) and by the ECHR in *Jorgic v Germany*.\(^{242}\) In the latter, it was claimed that the concurrent jurisdictions of international and national courts in article 9 of the ICTY Statute demonstrated this

\(^{237}\) See generally Schabas (n 140) 410-416 and WA Schabas ‘Judicial Activism and the Crime of Genocide’ in S Darcy and J Powderly *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press Oxford 2010) 64. This will discussed below.

\(^{238}\) *AG v Eichmann* (n 54) 38. This interpretation was justified in light of the express recognition of extraterritorial jurisdiction in the explanatory report (nationality jurisdiction) and a consensus that the failure to include universal jurisdiction was a ‘grave defect’ in the Convention. ibid.

\(^{239}\) ibid 38. See also Draft Code of Crimes (n 230) 29 (para 8 to commentary on article 8).


\(^{241}\) *Chilean Investigation* (n 96) para 2.

\(^{242}\) *Jorgic v Germany* (Application No. 74613/01) (12 July 2007) para 20. To interpret the Genocide Convention as prohibiting States’ exercising extraterritorial jurisdiction under customary international law ‘would not be reconcilable with the *erga omnes* obligation undertaken by the Contracting States in Article I…to prevent and punish genocide’. Ibid.
recognition among states.\textsuperscript{243} The notion that universal jurisdiction over genocide is established under customary international law has been repeatedly asserted.\textsuperscript{244} It has also been re-formulated, deriving the legal right from \textit{jus cogens}\textsuperscript{245} and obligations \textit{erga omnes}.\textsuperscript{246} As empirical evidence, the Rule 11bis (A) transferrals,\textsuperscript{247} increasing number of national laws\textsuperscript{248} and certain national proceedings are cited.\textsuperscript{249} Based on this evidence, Schabas concludes that there is ‘simply too much state practice and judicial authority to support a credible challenge’ to universal jurisdiction over genocide.\textsuperscript{250}

In parallel, certain treaties have been interpreted within national and international decisions as a legal basis for establishing jurisdiction over crimes against international law, that is, when the treaty crime is committed on a widespread or systematic basis. For this reason, the arguments over the character of these treaty

\textsuperscript{243} ibid para 69. Article 9(1) (concurrent jurisdiction) and 9(2) (primacy over national courts) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, UN SC Res 827, Annex (25 May 1993).

\textsuperscript{244} ‘Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780’ (1992) UN Doc. S/1994/674, annex, 13 (para 42), article 8 of the Draft Code of Crimes (n 230), 15 (‘irrespective of where or by whom those crimes were committed’). See also \textit{Case of the Arrest Warrant} (n 55)(Koroma) para 9 and (Dissenting Opinion of van den Wyngaert) para 59 and Meron (n 228) 570.

\textsuperscript{245} Orakhelashvili (n 54) 288, Randall (n 176) 829-830 and \textit{Prosecutor v Furundzija} (n 54), para 156.

\textsuperscript{246} \textit{Case of the Arrest Warrant} (n 55) (van den Wyngaert) para 59.

\textsuperscript{247} For example, \textit{Prosecutor v Bagaragaza} (Decision on Rule 11bis Appeal), ICTR-05-86AR11bis (30 August 2006), \textit{Prosecutor v Bagaragaza} (Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands), ICTR-2005-86-R11bis (13 April 2007) and \textit{Prosecutor v Bucyibaruta} (Decision on Prosecutor’s Request for Referral of Laurent Bucyibaruta’s Indictment to France), ICTR-2005-85-I (20 November 2007) and \textit{Prosecutor v Munyeshyaka}, ICTR-2005-87-I (20 November 2007).

\textsuperscript{248} For detailed compilation of national legislation, see Amnesty International ‘Universal Jurisdiction: A Preliminary Survey of Legislation Around the World’ (AI Publications London 2011).


\textsuperscript{250} Schabas (n 140) 435. Similarly Bassiouni bases the conclusion on academic and judicial recognition, see Bassiouni (n 182) 120-121.
provisions are of note. From a normative approach, Randall argues that the provisions in treaty law, such as article 5(2) of the Convention against Torture, are universal jurisdiction. These provisions oblige the state to exercise jurisdiction over an alleged perpetrator, who ‘is present in any territory under its jurisdiction and it does not extradite...’ by submitting the case to its competent authorities. Randall argues that the treaty represents either a codification of a norm of customary international law or, where there is no pre-existing rule of customary international law, the possibility of an agreement between the parties to refrain from objecting to any state party’s exercise of jurisdiction over an accused. Consequently, Randall contends that non-state parties have a right (as opposed to a duty) to exercise universal jurisdiction based on a combination of rules of principles, notably individual criminal responsibility and *jus cogens*. Scharf is another advocate of this view, who considers these treaties as precedent for the ICC to exercise jurisdiction over

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252 Randall (n 176) 820. This means that the State parties can agree without reference to universal jurisdiction; instead, the basis of jurisdiction derives from the parties consent. Although, he notes that treaty drafting history has references to universal jurisdiction by State representatives. ibid. See also Institute of International law, Resolution on ‘The Extraterritorial Jurisdiction of States’ (Milan 1993).

253 ibid 825-831. He presupposes that individual criminal responsibility implies a right of all States to prosecute, making an analogy to jurisdiction over piracy committed on the High Seas. He bolsters this presupposition with *jus cogens* status of the crimes, over which States have an *erga omnes* obligation. He considers the combined principles to form an ‘evolving hierarchy of norms as fundamental to the world community’, which imply a right of every State to prosecute. ibid 829.
nationals of non-states parties.\textsuperscript{254} O’Keefe concludes, similarly, but provides a different reasoning; he argues that the ‘any’ or ‘every’ state component of the generic definition is not to be applied literally and therefore, it is not required that all states have to be treaty parties. Hence, universal jurisdiction is simply a basis of jurisdiction without any other accepted nexus.\textsuperscript{255}

One of the most controversial elements of the discussion has been whether custody of the alleged offender is a prerequisite. Such an issue arose from the political controversy over certain proceedings before Belgian and Spanish courts,\textsuperscript{256} where the relevant legislation was interpreted as not requiring presence of the accused at time of initiation of the criminal investigation.\textsuperscript{257} This involved situations where the prosecuting state would secure custody through either voluntary presence of the accused prior to the trial stage\textsuperscript{258} or

\textsuperscript{255} O’Keefe (n 63) 746-47 and O’Keefe (n 215) 812.
\textsuperscript{256} Re Pinochet, Tribunal de Premier Instance de Bruxelles (6 November 1998), para 3.2.1, Re Yerodia Ndombasi, Tribunal de Premier Instance de Bruxelles (11 April 2000), para 3.4, Re Sharon et al, (2002) 126 ILR 110, Guatemalan Generals case (n 96), Cavallo (2003) 42 ILM 888, Scilingo Audencia Nacional (4\textsuperscript{th} November 1998) and Peruvian Genocide Case (n 249).
\textsuperscript{257} Law Relative to the Repression of Grave Violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977, No. 877/1 (25 January 1993) and Act Concerning Grave Breaches of International Humanitarian Law (1999) 38 ILM 918. See also A Andries et al, ‘Commentaire de loi due 16 Juin 1993 relative à la répression des infractions graves au droit international humanitaire’, (1994) 74 Revue de Droit Penal et de Criminologie 1114 (particularly 1132-33, 1169 and 1173-74). Article 23(4)(a) states that Spanish jurisdiction is also competent to take cognizance of crimes committed by a Spaniard or foreign national outside of the national territory when constituting, under Spanish penal law, as the following acts: (a) genocide…’. For copy of OLJP, see URL: http://www.poderjudicial.es.
\textsuperscript{258} C Tomuschat ‘Issues of Universal Jurisdiction in the Scilingo Case’ (2005) 3 Journal of International Criminal Justice 1074, 1075. See also AG v. Eichmann is an example of involuntary presence outside of formal extradition procedures.
extradition sought from a third state in which the accused is found. Notionally, these situations have been referred to as *in absentia* or ‘pure’ universal jurisdiction as distinguished from conditional.

When analysing from the normative approach, the *Lotus* majority’s presumption against limitations is adopted. Here, they conclude that state practice is unable to evidence a prohibition against exercising universal jurisdiction *in absentia* in regards to crimes against international law. When turning to an analysis of state behaviour, scholars present certain interpretations of treaty law provisions and of national legislation and proceedings. On the treaty provisions, van den Wyngaert interpreted the 1949 Geneva Conventions’ repression regime schematically and concluded that presence of the suspect is not necessarily required. She also interprets the final sub-paragraph in most treaty provisions as not prohibiting a broader jurisdiction than provided in the treaty. Similarly, El Zeidy contends that the term ‘search’ in the Geneva Conventions may be interpreted widely and that the silence in the Conventions regarding how to apply the doctrine of universal

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259 Examples include Cavallo, Pinochet, Guatemalan Generals aforementioned. See also Denjanzik (n 180).
261 *Case of the Arrest Warrant* (n 55) (van den Wyngaert) para 51, Kress (n 78) 577, Poels (n 260) 76-8 and El Zeidy (n 260) 852. See also Cowles (n 213) (using *Lotus* presumption to argue for existence of universal jurisdiction over violations of the laws of war).
262 Ibid para 54.
263 Ibid para 61. Generally, sub-paragraph 3 states that the treaty does not ‘exclude any criminal jurisdiction exercised in accordance with national law’. 
jurisdiction can support a broader interpretation.\textsuperscript{264} On national legislation and proceedings, van den Wnygaert perceives national practice as varied and therefore, inconclusive.\textsuperscript{265} According to her analysis, national practice could only become a legal prohibition if there is a ‘conscious decision’ of states giving rise to a prohibitive rule.\textsuperscript{266}

[If] the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction…there is no rule of international (and certainly not the aut dedere principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.\textsuperscript{267}

Likewise, the Joint Separate Opinion questions the usefulness of existing state behaviour; here, though national laws can be ‘illuminating’, they cannot be conclusive as to the legality of universal jurisdiction in absentia under international law.\textsuperscript{268} Nevertheless, O’Keefe criticizes all the existing approaches within the literature as flawed because, he contends, lawyers conflate jurisdiction to prescribe their criminal law with jurisdiction to

\textsuperscript{264} El Zeidy (n 260) 852-854. This means the narrower notion in Pictet’s Commentary is not necessary, see Pictet (n 213).
\textsuperscript{265} Case of the Arrest Warrant (n 55) (van den Wyngaert) para 55. See also El Zeidy (n 260) 841-843. He also discusses early trials, such as the Hadamar, the Almelo, the Zyklon B and the Eisentrager Trials undertaken by domestic Allied military tribunals pursuant to the Council Control Law No. 10 (discussed in greater detail in Chapter 1). He argues that the reference in the Hadamar, Almelo and Zyklon B judgements to custody of the suspect does not specify when such custody must be secured. ibid, 841.
\textsuperscript{266} ibid para 56.
\textsuperscript{267} Case of the Arrest Warrant (n 55)(Joint Separate Opinion) para 58. Although the Judges proceeded to outline a series of safeguards, including respect for immunities under customary international law and a prior offer to the State of nationality of the accused to investigate. ibid para 59. For policy justifications for investigation in absentia, see Kress (n 78) 578.
\textsuperscript{268} ibid para 45. A state is not required ‘to legislate up to the full scope of the jurisdiction allowed by international law’; they concluded that State practice is ‘neutral’. Ibid.
enforce and ‘an inattention to crucial temporal considerations’.\textsuperscript{269} Instead, he argues that if there is a permission to exercise universal jurisdiction, then the ‘exercise of \textit{in absentia} is logically permissible also’.\textsuperscript{270} In this regard, he sees the decision of jurists to investigate universal jurisdiction \textit{in absentia}, as if \textit{in absentia} is a distinct category whose lawfulness must be established, as problematic and unwarranted.\textsuperscript{271}

As noted above, when criticizing the validity of the principle of universal jurisdiction over crimes against international law, the opposing approach turns to state behaviour; thus, the above justifications for the principle fail to reflect the actual behaviour of states. Here, Henzelin classifies such arguments as deriving from a delegated theory. Under the delegated theory, the state can only derive a legal right from the voluntary contract of legal subjects.\textsuperscript{272} In support, Beccaria’s opposed the notion that,

[H]e who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in

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\textsuperscript{269} O’Keefe (n 215) 735-36. He disagrees with the division of the doctrine into distinctions, for example universal jurisdiction proper vs. conditional universal jurisdiction or unilateral limited universality principle vs. co-operative limited universality principle. ibid 747. See Cassese (n 260) 589 and Reydams (n 25) Chapter 2.
\textsuperscript{270} ibid 748. See also Kress (n 78) 578 (if valid basis of prescriptive jurisdiction, then presumption that adjudicative is valid).
\textsuperscript{271} ibid 748.
\textsuperscript{272} Henzelin (n 186) 836. See also C Beccaria-Bonesana \textit{An Essay on Crimes and Punishments} (R Bellamy and R Davies ed Cambridge University Press Cambridge 1995) Chapter 2, 10. Beccaria assumed that the right to punish derived from the necessity of the sovereign to defend ‘the public well-being from usurpations of individuals’. Each individual surrendered to the public repository no more than the ‘smallest possible portion consistent with persuading others to defend him’ and the sum of these ‘smallest possible portions constitutes the right to punish; everything more than that is no longer justice but an abuse’. Anything beyond the need to preserve the public well-being from individual hegemony is ‘unjust by its very nature’. By justice ‘I mean nothing other than the restraint necessary to hold particular interests together, without which they would collapse into the old state of unsociability’. ibid, chapter 2, 11.
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general, rather than guardians of particular conventions between men.\textsuperscript{273}

As illustrative of the approach that emphasizes social description (social description approach), Reydams argues that there is limited evidence of states exercising jurisdiction without a prior refusal of an offer to extradite.\textsuperscript{274} He conducts an inductive study of state behaviour where ‘deeds were what counted, not just words’.\textsuperscript{275} On this premise, he observes the numerous examples of national legislation since the 19\textsuperscript{th} century that provided for jurisdiction over certain offences committed extraterritorially, albeit on a subsidiary basis. This observation is contrasted with the limited number of national laws proscribing for jurisdiction over crimes against international law and even more limited instances of criminal proceedings pursuant to such laws.\textsuperscript{276} Therefore, he emphasizes the limited extent of legislation and criminal proceedings, as well as the varied approaches in terms of the application of sovereign immunity, the requirement of a linking interest or voluntary presence of the

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\item Bellamy and Davies (n 272). Wise explains that the Italian original says literally ‘avengers of the sensibilities of mankind’ as opposed to ‘knights errant of human nature’, which is derived from the translator. See Bassiouni and Wise 1995 (n 27) 27.
\item Henzelin (n 3) 235 and Reydams (n 25), 28 and 42. In this respect, he refers to his first category (co-operative general universality principle) as the only version of the doctrine to qualify as a principle according to Pappas’ conception of the principles of jurisdiction, discussed above. ibid, 42. See also L Reydams ‘The Rise and Fall of Universal Jurisdiction’ in WA Schabas and N Bernaz (eds), Routledge Handbook of International Criminal Law (Routledge New York 2011).
\item Reydams (n 25) 7-8. Reydams considered his approach as representative of Simma and Paulus’ modern positivism. However, it may be more in tune with traditional approaches to custom where legislation and judicial proceedings are stressed; the origin of the principles of jurisdiction derives only from ‘domestic law and the practice of states’. ibid 21. See Simma and Paulus (n 208) 303 and Roberts (n 207) 757.
\item ibid 42. Case of the Arrest Warrant (n 55)( Guillaume) para 9 and (Separate Opinion of Rezek) para 6 (both reject the notion that the right derives from the ‘gravity of the offence’).
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accused. His division of the doctrinal history into distinct (albeit intersecting) categories helps expose the different concepts of universal jurisdiction, including the representation principle (or the vicarious administration of justice). Hence, the principle of universal jurisdiction is seen as a fragmented concept, which is near exclusively grounded in the work of legal jurists. It follows that universal jurisdiction over crimes against international law (as especially in absentia) is merely a political aspiration.

Similarly, Henzelin social description approach divides his study into different categories of universal jurisdiction, namely unilateral, delegated and absolute theories. Henzelin conducts a detailed study of the historical sources for each form; he traces the unilateral form to Hobbes and his followers’ concept of sovereignty, the delegated form to Italian and German legal traditions and the absolute form to natural law philosophy within Greek, Christian and

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277 ibid 28. The categories are co-operative general universality principle, co-operative limited universality principle and unilateral specific universality principle. Co-operative and Unilateral describe the relationship between the different States (i.e. a subsidiary basis and a primary discretion to decide whether to prosecute) while general and limited refer to the types of offences (i.e. serious domestic offences and crimes under international law). He emphasizes how his categorization cannot be concrete as the categories tend to be fluid.

278 ibid 28-42. His doctrinal history depicts a symbiotic connection between the principle of universal jurisdiction and extradition. He argues that the idea of universal jurisdiction over delicta juris gentium as a concurrent legal right (with discretion to prosecute resting with the State with custody of the accused) is traceable to Mikliszanski. ibid, 38.

279 Reydams 2011 (n 274).

280 The unilateral form (irrespective of any link) divides into “profit” and “absolute sovereignty”. Profit is where the state exploits for political purpose while absolute sovereignty is based on the absolute rights of the sovereign. The delegated form (custodial state) is effectively a waiver in advance (usually in the form of a multilateral treaty or by tacit or express consent in custom) permitting the custodial State to proceed. The absolute form is based on transcendental duties or divine or natural rights. See Henzelin (n 3) 63, 64-65 and 66-69 (unilateral), 71 (delegated) and 81 (absolute) respectively.
the classical traditions. Like Reydams, Henzelin concludes that the idea of universal jurisdiction without any legal link is difficult to reconcile with the function of public international law. As Henzelin argues, what he terms the absolute theory (universal jurisdiction over crimes against international law) is evidenced by certain trials under the Control Council Law No.10, Eichmann, Demjanjuk and 1990s trials including Pinochet. However, the jurisdiction may be based on other competences (such as passive personality) or may have been delegated by the other state under treaty law, that is, absence of evidence of a customary rule. In the end, Henzelin concludes that the unilateral form must be rejected, that the absolute is not supported by the consent of states and that the delegated constitutes the only reasonable concept of universal jurisdiction.

In parallel, Benavides and Higgins refute the arguments that universal jurisdiction can derive from jus cogens or erga omnes obligations based on the lack of clarity on the legal consequences of jus cogens and an interpretation of the ICJ’s reference to erga omnes in the Barcelona Traction case respectively. It is submitted that these analyses appear to follow the ‘traditional approach’ to customary international law, which focuses ‘primarily on state practice in the

281 Henzelin (n 3) 66-67, 72-78 and 81-110 respectively.
282 ibid 448. In effect, he argues that it raises the philosophical question, discussed through the centuries, on the nature of the social order.
283 ibid 423.
284 ibid 447-8.
285 Benavides (n 185) 29. Benavides points to the difficulty to define what effects jus cogens produces. Yet he justifies universal jurisdiction on the basis of securing fundamental values and interests, which poses the same difficulty.
286 Higgins (n 44) 57-58. As the ICJ discussed erga omnes in terms of diplomatic protection, erga omnes could only support the right of any State to invoke another State before an international tribunal. She considers the list of obligations erga omnes cited by the ICJ equally problematic, including the right to self-determination, which, Higgins contends, could not be considered a fundamental interest giving rise to universal jurisdiction. In approval, see Reydams (n 25) 39-40 and Benavides (n 185) 30.
form of interstate interaction and acquiescence'. 287 Thus, the jurisdiction’s validity is determined based on what is perceived as the voluntary will of states. 288

In keeping with the earlier discussion on the normative approach, the following exploration will sketch the arguments from the social description approach, which criticizes the claim that universal jurisdiction may be exercised over war crimes, crimes against humanity and genocide. In relation to war crimes, some international lawyers continue to dispute the existence of universal jurisdiction under the 1949 Geneva Conventions because the grave breaches regime does not govern the jurisdiction of national courts 289 or, alternatively, does not impose a positive obligation to establish jurisdiction. 290 Still others consider that the jurisdictional obligations under the Conventions are distinct from state jurisdiction over acts criminalised under domestic law. Here, it is argued that, as the 1949 Geneva Conventions criminalize acts for which there is individual criminal responsibility under international law, there is a crucial conceptual distinction. 291 Others conceive the common articles of the Geneva Conventions as incorporating Grotius’ notion of aut dedere

287 Roberts (n 207) 758. According to Roberts’ classification, ‘opinio juris is a secondary consideration invoked to distinguish between legal and non-legal obligations’; it is identified through ‘an inductive process in which a general custom is derived from specific instances of state practice’, that is ‘state action and acquiescence’. ibid.
288 Carnegie (n 199) 421. Thus, recognition of universal jurisdiction must be evident in state behaviour and not merely recognition of the act as criminal. See similarly Princeton Project on Universal Jurisdiction (n 179) 42-43.
289 Case of the Arrest Warrant (n 55) (Guillaume) para 6 (‘no provision governing jurisdiction’) and (Ranjeva) para 7 (‘no provision concerning the jurisdiction of national courts’).
291 Brownlie (n 9) 306.
aut punire and therefore are unable to support the notion that states may exercise jurisdiction regardless of any jurisdictional link. In particular, this argument relates to the notion discussed earlier that states may exercise universal jurisdiction irrespective of presence on the prosecuting state’s territory. Similarly, on the issue of internal armed conflict, there is caution. Boelaert-Suominen considers that state behaviour is too inconsistent to conclude that a ‘uniform set of rules applying to all conflicts’ is recognized by states as law. Instead, treaty law and the interpretation of international institutions indicate a ‘resistance’ to this move and where states have claimed universal jurisdiction over violations in internal armed conflicts, they have done so ‘cautiously and selectively’, ‘limited to a series of fairly elementary prohibitions’.

On crimes against humanity, Yee stresses how the ‘data on state conduct’ is insufficient and in this way, accords with Guillaume’s conclusion that universal jurisdiction under customary international law applies only to piracy. Yee notes that the declarations in support may appear to be opinio juris ‘taken at face value’ but nonetheless state behaviour does not ‘reveal sufficient

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292 Case of the Arrest Warrant (n 55) (Guillaume) para 6. Guillaume treats the treaty regimes post 1970 Hague Conventions as the system designed by Grotius, albeit established by treaty. He concludes that the only crime subject to universal jurisdiction is piracy committed on the high seas. ibid 9.

293 For example, Reydams considers it improbable that the negotiators of the Conventions would adopt universal jurisdiction when the principle was rejected in the Genocide Convention. He contends that the UN War Crimes Commission’s draft convention on extradition from neutral countries is significant. See Reydams 2011 (n 274) 344-345. See also History of the UN War Crimes Commission and the Development of the Laws of War (HMSO London 1948).

294 Boelaert-Suominen (n 228) 101.

295 ibid 102. Here, she refers to the ‘two-box’ regulation that was adopted by the ICTY Appeals Chamber in Tadic and the resistance to the move for a uniform regulation in the Rome Statute of the International Criminal Court. ibid.

296 Yee (n 260) 520.
evidence’. Regarding genocide, international lawyers emphasize the significance of the rejection of universal jurisdiction in the travaux. In the Bosnia v Serbia (Provisional Measures [III]), Judge Kreca stated that the Convention does not contain universal jurisdiction as the territorial principle was ‘firmly opted for’ in the Convention’s drafting history. This refers to the decisive move away from universal jurisdiction, which had been included in the draft General Assembly Resolution 96(1) on Genocide. The only

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297 ibid 519.
298 Reydams (n 25) 52, Reydams 2011 (n 274) 343-344 and Schabas (n 140) 367. For a comprehensive exploration of the drafting history, see Schabas (n 140) 411-415. The following analysis draws from this exploration.
300 Originally, Lemkin had equated genocide with offences delicta juris gentium and this position was approved in the first draft of General Assembly Resolution 96(1) and in article 4 of the draft Genocide Convention proposed by Saudi Arabia. However, the final draft of Resolution 96(1) adopted by the General Assembly, offered only a modest idea. Thereafter, the re-emergence of the idea of universal jurisdiction in the Secretariat draft met with strong resistance in the Ad Hoc Committee. The Secretariat’s draft article VII was rejected by four votes (in favour) to two (against), with one abstention. Earlier in the comments by Governments, the US, Soviet Union and Netherlands were against extraterritorial jurisdiction without consent of the territorial state. Only Siam was in support. In the General Assembly, an Iranian amendment sought to include universal jurisdiction, albeit dependent on a prior failure of a request for extradition. States response was overwhelming opposition. The amendment was defeated by 29 votes (against) to 6 (in favour) with 10 abstentions. Reasons included the location of the offence as significant for piracy (India), the impossibility of determining the place of commission for treaty offences like trafficking (Soviet Union), ‘dangerous and unacceptable [principle]’ (United States), its criminal law based on territorial jurisdiction (United Kingdom), revolutionary idea (Greece). See R Lemkin Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government Proposals for Redress (Carnegie Endowment for World Peace Washington 1944) 93-4, ‘Draft General Assembly Resolution’, UN Doc A/BUR/50 (‘punishment of the very serious crime of genocide...lies within the exclusive territorial jurisdiction of the judiciary of every State concerned...’), Saudi Arabia ‘Draft Genocide Convention’, UN Doc. A/C.6/86 (‘shall be prosecuted and punished by any State regardless of the place of commission of the offence or of the nationality of the offender, in conformity with the laws of the country prosecuting’), ‘Genocide Resolution’, UN GA Res 96(1), Secretariat Draft Convention, UN Doc. E/447, 5-13 (‘pledge...to punish any offender...within any territory under their jurisdiction, irrespective of the nationality of the offender or the place where the offence has been committed’), Work of the Ad hoc Committee: UN Doc. E/AC.25/7 (Soviet Union), UN Doc.
exception, which may be deduced from the travaux, is the possibility of exercising nationality jurisdiction.\textsuperscript{301} Here, with reference to the territorial jurisdiction under article VI, the travaux states that ‘in particular, it does not affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state’.\textsuperscript{302} It is inferred that this probably responded to the non-extradition of nationals by certain states; thus, there would have been ‘a terrible oversight’ if states parties had not agreed to recognize nationality jurisdiction as a legal right, alongside article VI obligation.\textsuperscript{303} The right of states to exercise nationality jurisdiction has recently been affirmed by the ICJ in \textit{Bosnia v Serbia}.\textsuperscript{304}

Returning to the issue of the nature of treaty law provisions, international lawyers, adopting a social description approach, classify these provisions as \textit{aut dedere aut judicare} rather than

\textsuperscript{301} UN Doc. A/C.6/SR.130. An Indian amendment attempt to have recognition in the text that States may exercise extraterritorial jurisdiction but it was agreed that the explanatory report would cite how nationality jurisdiction was not excluded. UN Doc. A/C.6/SR.129 and UN Doc. A/C.6/SR.131 respectively. The Swedish proposal to include nationality of the victim in the explanatory report was opposed by the US, UK and Belgium as it was not a generally accepted basis of jurisdiction. See UN Doc. A/C.6/SR.131 and UN Doc. A/C.6/SR.132.

\textsuperscript{302} UN Doc. A/C.6/SR.132. Schabas argues that the phrase ‘in particular’ left the issue of passive personality unresolved, in an evident compromise, see Schabas (n 202) 416. See also UN GA Res 3074 ‘Principles of International Cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity’ (3 December 1973) para 2 (‘every State has the right to try its own nationals for war crimes or crimes against humanity’).

\textsuperscript{303} Schabas (n 140) 425.

universal jurisdiction. Here, Clark views the treaty law provisions that are similar to article 4 of the 1970 Hague Convention,\(^{305}\) as a modified version of Grotius’ idea of *aut dedere aut punire* in light of the development of law of extradition.\(^{306}\) Here, Grotius contended that ‘when appealed to [the sovereign] should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal’.\(^{307}\) He considered certain offences to establish the right of states, other than the injured state, to punish\(^{308}\) and in such cases, the state of refuge is liable for impeding punishment if it does not surrender or punish.\(^{309}\) This right to surrender or punish is conditional on the prior conviction of the fugitive offender by the injured state (‘he who has been found guilty’).\(^{310}\) Another argument is that it is theoretically difficult to accommodate treaty law within the notion of universal jurisdiction.

Kress argues that treaty obligations can only apply *inter partes* which

\(^{305}\) Higgins (n 44) 63-65, Cameron (n 18) 80 and Cassese (n 260) 594. The model jurisdictional clause for numerous multi-lateral treaties is article 4(2) of the Hague Convention on the Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105.

\(^{306}\) Clark (n 27) 97. Here, Clark refers to the practice of States in the 19th century whereby most States refused to extradite in the absence of an extradition treaty and how the history of the law of extradition illustrates that States do not consider themselves bound to prosecute an accused if they decide not to extradite. See also Reydams 2011 (n 274) 347.

\(^{307}\) See H Grotius *De Jure Belli Ac Pacis Libri Tres* Book II, Chapter XX (FW Kelsey tr Clarendon Press Oxford 1925) 527. This is justified as States ‘as a matter of fact’ do not permit other States to ‘cross their borders…to exact punishment’.

\(^{308}\) As exceptions to the right of the injured State, crimes affecting ‘human society’ or injure another State in ‘a special sense’ give rise to the right of other States or the injured State to exact punishment (crimes that affect the public weal (welfare) or that manifest extraordinary wickedness’). See Grotius (n 307) 526 and 533.

\(^{309}\) ibid 528.

\(^{310}\) ibid 527. However, Wise notes crucial differences between Grotius’ *aut dedere aut punire* and the modern treaty provisions. Grotius’ notion is based on the prior conviction of the fugitive offender and applies to any offence. This is different to the treaty provisions which require only submission for prosecution and apply to specific treaty defined crimes. Bassioumi and Wise (n 27) 39-40.
frustrates the idea of a ‘universal’ notion.\textsuperscript{311} Here, it is theoretically difficult to accommodate offences in multilateral conventions, which have provisions on custody of the offender, under the rubric of offences ‘offensive to the international community’.\textsuperscript{312} As Akande submits, the treaty provisions are better explained as ‘a delegation of jurisdiction by the states of primary jurisdiction to the state of custody’.\textsuperscript{313} If we apply this approach, the state would have to illustrate that its assertion over a national of a non-state party was lawful under customary international law; otherwise, it would be unlawful.\textsuperscript{314}

On the controversial issue of custody of the offender, the social description approach interprets state behaviour as failing to demonstrate the acceptance of a legal right.\textsuperscript{315} Here, it is considered that treaty law is immaterial\textsuperscript{316} and national legislation is extremely

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\item \textsuperscript{311} Kress (n 78) 567. See also Benavides (n 185) 60 and Case of the Arrest Warrant (n 55) (Joint Separate Opinion) para 41 (referring to the treaties as ‘obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere’). For a critic of the JSO, O’Keefe (n 63) 755.
\item \textsuperscript{312} Kress (n 78) 567. Kress exempts the 1949 Geneva Conventions from this argument. Similarly, Henzelin argued that the treaties did not demonstrate a general principle of international law nor apply to non-States parties. However, they do imply the acceptance of universal jurisdiction as an ingredient of the treaty. See Henzelin (n 3) 376.
\item \textsuperscript{313} D Akande ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 Journal of International Criminal Justice 618, 623. Henkin similarly regards the treaties as ‘pooling the jurisdiction of different states and supplementing them by extended co-operation in extradition’. See Henkin (n 68) 248.
\item \textsuperscript{314} O’Keefe (n 63) 813, Cassese (n 260) 594, Akande (n 313) 623 and R Cryer et al An Introduction to International Criminal Law and Procedure (Cambridge University Press Cambridge 2007), 40, 46 and 283.
\item \textsuperscript{315} Reydams (n 25) 15 and 25-26. See also Case of the Arrest Warrant (n 55) (Guillaume) para 12 and Yee (n 260) 519.
\item \textsuperscript{316} Case of the Arrest Warrant (n 55) (Guillaume) para 9 (an incorporation of aut dedere aut punire requiring presence of the accused). See in support Rabinovitch (n 260) 506-510.
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limited.\textsuperscript{317} As Reydams argues, the notion of \textit{in absentia} cannot be traced to Grotius because such an interpretation is ‘textually and contextually indefensible’; it ignores the evident relationship between the state of custody and the aggrieved state in the text as well as the character of the social order envisaged by Grotius based upon reciprocal rights and duties.\textsuperscript{318} His analysis of domestic case law leads to the conclusion that most states require an objective link to the offence and offender.\textsuperscript{319} It belongs ‘to the realm of cosmopolitanism’, an attempt to reconcile ‘a Kantian idea with the Grotian international legal order’.\textsuperscript{320} Similarly, Henzelin contends that the unilateral form may be deemed valid under the \textit{Lotus} majority’s presumption against limitations. However, he notes that \textit{Lotus} would negate law and that the ICJ’s jurisprudence may be interpreted as requiring the evidence of legal competence, that is, the permission to exercise jurisdiction.\textsuperscript{321} Hence, Henzelin views the unilateral form in the context of limiting rules and concludes that it is illegal.\textsuperscript{322}

It is evident that the polar opposites of the normative approach and the social description approach are not the end of the discussion. There is also an attempt to draw from both approaches and move to a middle ground. In keeping with the normative

\textsuperscript{317} ibid para 12 (the only precedent is the \textit{Israeli Nazi and Nazi Collaborators Act} 1950). Note the discussion of ICC incorporation statutes as requiring custody and interpreted as indicative of a trend against \textit{in absentia}, see Zahar and Sluiter (n 186) 500.

\textsuperscript{318} Reydams 2011 (n 274) 341. See also Feller (n 17) 33.

\textsuperscript{319} ibid 347-349. See also Bassiouni (n 182) 139-148.

\textsuperscript{320} ibid 350. For policy reasons against \textit{in absentia}, see GP Fletcher ‘Against Universal Jurisdiction’ (2003) 1 Journal of International Criminal Justice 580 et seq (rights of accused, particularly problem of double jeopardy) and Rabinovitch (n 260) 519-523 (politically motivated trials and potential of parallel proceedings).

\textsuperscript{321} Henzelin (n 3) 149-161.

\textsuperscript{322} ibid 235.
approach, there is an acceptance that universal jurisdiction may be exercised over war crimes, crimes against humanity and genocide; in parallel, some scholars will lessen the significance of state behaviour or dismiss it as neutral and unhelpful. However, in keeping with the social description approach, some scholars consider immunity as a limiting rule while others dispute the validity of universal jurisdiction in absentia and the classification of treaty law provisions as universal jurisdiction. It follows then that Benavides, Bassiouni and Cassese conclude that universal jurisdiction may be exercise over war crimes, crimes against humanity and genocide yet they reach this conclusion in different ways.\textsuperscript{323}

Benavides assumes that universal jurisdiction derives from the substantive effect inflicted by the crimes on the international community as a whole.\textsuperscript{324} Hence, the nature of the crimes as crimes against international law indicates that they are subject to universal jurisdiction.\textsuperscript{325} He views this as a double opinio juris, namely the recognition of the criminalization of the act and its subject to universal jurisdiction, and this double opinio juris becomes his lens for analysing state behaviour, that is, certain normative standards to determine whether the opinio juris has been met.\textsuperscript{326} This lessens the

\textsuperscript{323} Benavides (n 185) 52-53 (war crimes), 56 (crimes against humanity) and 58 (genocide) and Bassiouni (n 182).

\textsuperscript{324} ibid 26 (nature of the crimes, which are universally condemned and represent fundamental rights of the international community). Benavides amalgamates three schools of thought into a ‘middle ground’ approach; thus, universal jurisdiction is an exceptional basis (no other nexus) applied to crimes against international law and exercised on a subsidiary basis (although not subject to a prior refusal of an offer to extradite). See Benavides (n 185) 30-32.

\textsuperscript{325} ibid 38. As noted earlier, Benavides rejects the jus cogens argument based on the difficulty in defining the legal effects produced by jus cogens. ibid 29.

\textsuperscript{326} ibid 40. He establishes a list of normative criteria, including ‘the criminal act should damage the most valued interests of international society’. ibid.
significance of the social description approach’s criticism based on limited state laws and proceedings.

In a related vein, Bassiouni conceives the doctrine of universal jurisdiction as jurisdiction exercised on behalf of the international community similar to *actio popularis*.\(^{327}\) He identifies two distinct positions justifying universal jurisdiction\(^{328}\) and develops an independent theory from the underpinning thread of both positions.\(^{329}\) In his approach, the concept of core values or interests of the international community gives rise to universal jurisdiction, justified on the status of the crimes as ‘*jus cogens* crimes’.\(^{330}\) However, Bassiouni does acknowledge the limited divergent practice;\(^{331}\) yet he uses the *Nicaragua* case with its emphasis on *opinio juris*\(^ {332}\) and maintains that a cumulative weight of legal sources supports the principle.\(^{333}\) Cassese’s opinion in particular was in keeping with the normative approach. He considered that customary international law made ‘an exception’ for certain crimes that ‘constitute attacks on the whole international community’ and ‘infringe values shared by all

\(^{327}\) Bassiouni (n 182) 88. On *actio popularis*, see *South-West Africa* (1966) ICJ Rep. 6.

\(^{328}\) Ibid 97-98.

\(^{329}\) Ibid. His argument claims that these two positions result in distinctions regarding the nature of the values, the concept of the international community and in turn the nature of the legal rights. Ibid.

\(^{330}\) Ibid 98.

\(^{331}\) Ibid 136. Regarding state behaviour, he lists legislation (what exists in most state legal systems, which would be representative of the major legal cultures) and international treaties. Ibid 105.

\(^{332}\) *Military and Paramilitary Activities (Nicaragua v. U.S.)* (1986) ICJ Rep. 14, 98. There does not have to be ‘absolutely rigorous conformity’ with the rule in practice but that ‘in general’ practice is consistent with the rule, with instances of non-conformity to be deemed as breaches of the rule rather than the emergence of a new rule. Ibid.

\(^{333}\) Bassiouni controversially argues that this combination produces a weightier argument for a duty to exercise *aut dedere aut judiciare* over *jus cogens* crimes (with an exercise of universal jurisdiction in regards to the *judiciare* element) than any one source of itself. See Bassiouni (n 182) 117, 120, 121 and 150. Contrast Wise’s position, see Bassiouni and Wise 1995 (n 27) 49 and 55-56 and Wise 1993 (n 27) 268.
members of that community’.334 Where he departed from the normative approach was on the issue of jurisdiction in absentia discussed below.

That said as observed earlier, these scholars draw conclusions on treaty law, jurisdiction in absentia and limiting rules that demonstrates the influence of the competing approach, which emphasizes social description. Here, Benavides disagrees with the conclusions on Randall and Scharf of the nature of the treaty law provisions; he contends that those treaties can only be inter-partes.335 This is concurred by Cassese.336 Likewise, in the Arrest Warrant, the Joint Separate Opinion deems treaty law as immaterial as they establish obligations rather than legal rights under customary international law.337 On in absentia, Cassese argued that it would be ‘contrary to the logic of current state relations’ to permit any state to prosecute any foreign national; rather the proposal of in absentia must be seen as lex ferenda to be adopted when relations are better suited to ‘realization of universal values’.338

On immunity, Bassiouni views immunity of state officials as context for universal jurisdiction to avoid ‘disruptions in world order…when [universal jurisdiction is] used in a politically

334 Cassese (n 260) 591. Here he cited a limited list of national and international decisions buttressed by the accord with ‘the general rationale behind the assertion of universal jurisdiction over international crimes’. ibid, 592.
335 Benavides (n 185) 59. This has significance for his interpretation of the common penal repression provisions of the 1949 Geneva Conventions, which he does not consider universal jurisdiction. See also Kress (n 78) 567 (albeit exempts 1949 Geneva Conventions from his argument).
336 Cassese (n 260) 594 (although he claims an exemption for crimes that are ‘indisputably’ subject to individual criminal responsibility).
337 Case of the Arrest Warrant (n 55) (Joint Separate Opinion) para 44. They describe the treaty provisions as ‘sensible realities’ ibid, para 57. On the 1949 Geneva Conventions, without evidence from the ‘modest’ case law, the Judges did not determine which interpretation should be valid. ibid para 32.
338 Cassese (n 260) 593 (considering universal jurisdiction as subsidiary or a substitute; thus, other states would have primary interests).
motivated manner …’ (AOS). Writing post-Arrest Warrant, Cassese
is more direct. He adopted what he referred to as the ‘balance
approach’ of the Joint Separate Opinion in the Arrest Warrant; thus, a
serving senior official is immune from jurisdiction during office but
once they leave office, they may be tried before foreign tribunals.
He advocates the same ‘safeguards’ that are outlined in the joint
opinion, such as first offer to the states with primary interest the
priority in prosecuting the crime. Thus, his concept of universal
jurisdiction is a ‘moderate conception’ of ‘default jurisdiction’
(custody), only triggered when the territorial or national state fails to
act and where the custodial state has an ‘acceptable link’ to the
offence. Overall, it is suggested that this move to a middle ground
would appear unsatisfactory to either the normative or social
description approach because the middle ground fails to adhere fully
to one or the other approach.

2.2 Jurisdiction to enforce laws

When turning to jurisdiction to enforce, it is generally defined
as the enforcement of laws by the constitutionally competent organ
of the state (usually referred to as the executive arm) using
administrative measures permitted by law. In the field of criminal
justice, this includes the seizure of property and arrest or detention

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339 Bassiouni (n 182) 82. In contrast, Benavides disagrees that non-intervention
should be a limiting-point based on the nature of the crimes (as they affect the
total international community), see Benavides (n 185) 87.
340 Cassese (n 260) 594.
341 ibid 594.
342 ibid 595.
of persons. As discussed in section 1.2, the PCIJ in Lotus, in an oft-
cited passage, observed how,

[...] 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...  

Hence, in the Lotus case, it was argued that enforcement jurisdiction
is ‘certainly territorial’ and consequently, no state can exercise its
competence outside its territory, unless permitted by a rule of
customary international law or by convention between respective
states. Without consent, there is a breach of the prohibition against
undertaking enforcement measures in another state even if the
jurisdiction to prescribe is valid; thus, it would constitute excessive
jurisdiction by the enforcing state. For example, a state’s police
force may not conduct investigations or arrest suspects on the
territory of another state unless it has obtained the other state’s
consent. Consequently, co-operation mechanisms between states
are required in order to facilitate the prosecution of certain domestic,
transnational and international offences.

343 O’Keefe (n 63) 740.
344 Case of the SS “Lotus” (n 28) 18-19. For a sample of literature and case law
referencing such a restriction, see Beckett (n 105), Mann (n 1) 14, A Chase ‘Aspects
of Extraterritorial Criminal Jurisdiction in Anglo-American Practice’ (1977) 11(3)
International Lawyer 555, 556, Merrills (n 117) 50, Henkin (n 68) 230, Reydams (n
25) 12, O’Keefe (n 63) 736.
345 ibid 14. Although Heads of State may be permitted to perform their functions
abroad. Akehurst (n 57) 146-150.
346 O’Keefe (n 63) 741. As Virally argued, the state could not justify any
enforcement procedures, such as instigating judicial inquiry or judicial or
administration injunctions, without consent. See M Virally ‘Panorama du Droit
347 Virally (n 346) 91.
348 O’Keefe (n 63) 740. See Akehurst (n 57) 146 (‘acts illegal by nature’ according to
Akehurst’s analysis), Virally (n 346) 90 and Merrills (n 117) 50.
349 See Articles 40, 41(1) and 41(3) of the Convention Implementing the Schengen
Agreement of 14 June 1985 […] on the gradual abolition of checks at their common
2.2.1. Arrest, Extradition and Investigating measures

One contentious issue that arises from certain state’s assertion of universal jurisdiction has been the decision by magistrates to issue an arrest warrant for a suspect, who resides in the state of nationality or the state of location of the offence at the time of the issuing of the warrant. As noted above, executing an arrest warrant is obviously an aspect of enforcement jurisdiction and therefore the Lotus principle against exercising any enforcement measures on the territory of another state without consent would apply. Hence, where the suspect is voluntarily present in the state claiming universal jurisdiction over the alleged offence, there is no need for co-operative mechanisms because the arrest takes place in the territory of the prosecuting state. Though the state of nationality may protest against the arrest of its national, there is no breach of enforcement jurisdiction; the issue would turn to the validity of the jurisdiction to prescribe. It follows that in the contentious cases of issuing arrest warrants against suspects that are not present in the enforcing state’s territory, the enforcing state is attempting to secure custody through extradition from the territorial jurisdiction or third states.

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350 However, the issuing of a witness summons to a visiting Head of State without a threat of legal action (as an ordinary witness) did not violate the State’s sovereignty. Based on the Arrest Warrant case, the relevant legal test is whether the act is a ‘constraining act of authority’. See Certain Questions of Mutual Assistance (Djibouti v France) (2008) IC Rep 177, para 171.

351 For example, Chilean investigation (n 96), Re Pinochet (n 256) and Re Yerodia Ndombasi (n 256), Guatemalan Generals case (n 96) and Cavallo (n 256).
Extradition is a procedure of ‘request and consent’;\textsuperscript{352} it is a form of judicial assistance that operates on the basis of reciprocity through extradition treaties.\textsuperscript{353} Here, extradition and mutual legal assistance evolved from the twin desires of facilitating domestic prosecution of fugitive offenders and overcoming distrust of foreign jurisdictions.\textsuperscript{354} Of brief note, there has been dispute within scholarship as to whether extradition treaties are required in the situation of crimes against international law. Brownlie argues that there is an exception to the general rule whereby the accused may be surrendered as of right in the absence of an extradition treaty.\textsuperscript{355} In opposition, Green focuses on inadequacy of the empirical data offered in support of an exception; for instance, he notes how General Assembly resolutions on the surrender of war criminals are recommendatory only and can in no way be interpreted as obligatory or directive.\textsuperscript{356}


\textsuperscript{353} Harvard Research in International Law, Part I: Extradition, (1935) 29 American Journal of International Law Supplement 1, 32. See Shearer (n 147) and G Gilbert \textit{Transnational Fugitive Offenders in International law: Extradition and Other Measures} (M Nijhoff Dordrecht 1998).

\textsuperscript{354} Shearer (n 147) 5. On the historical development, see also P O’Higgins ‘The History of Extradition in British practice’ (1964) 13 Indian Yearbook of International Affairs 78. In the 20th century, it became more common to consider that no duty to extradite existed in the absence of a treaty. See JA Scott ‘The Law of Interstate Rendition, Erroneously referred to as Interstate extradition’ (1918) 18(3) Columbia Law Review 288.

\textsuperscript{355} Brownlie (n 9) 308. Brownlie’s opinion suggests an assumption that an exception developed from the General Assembly resolutions, which encouraged the surrender of war criminals in the 1940s and 1950s, combined with the ‘grave breaches’ regime in the 1949 Geneva Conventions.

\textsuperscript{356} LC Green ‘Political Offences’ (1962) 11 International and Comparative Law Quarterly 348-349.
Though treaties provide for the rendition, national courts determine under domestic law whether to surrender the fugitive in accordance with the extradition treaty and domestic laws differ in regards to various issues, including the role of executive and judiciary and the extradition of nationals. Of note here is the move away from a strict rule of non-inquiry and to investigate whether human rights guarantees in constitutional law or international human rights law treaties would be complied with by the requesting state. Previously, in certain common law states, national courts had operated under a rule of non-inquiry, albeit this was not absolute. Under this rule, the courts would refuse to enquire upon the ‘standards of criminal justice to which the fugitive is likely to be subjected’ because such an enquiry was an executive matter. Meanwhile civil law jurisdictions had adopted the position that defendants could raise the issue of human rights standards and bilateral extradition treaties had reciprocal clauses where extradition is refused if the death penalty could be applied to the fugitive.

That said the most dramatic developments have emerged within human rights law treaty interpretation. Both the European Convention on Human Rights and the Covenant on Civil and Political Rights have been interpreted as obliging state parties to determine whether, as a foreseeable consequence of the extradition, the accused would be subjected to torture or inhuman or degrading treatment in the requesting state and if so, not to accede to the

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358 ibid 188.
359 ibid 189.
360 ibid 190. For a common law jurisdiction, see the Irish courts’ position, Magee v O’Derr (1994) 1 IR 500, 510-513.
request for surrender. Similarly, certain regional treaties contain provisions preventing state parties from surrendering a fugitive when there are ‘substantial grounds for believing’ that the request is ‘for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion…’.

Two further matters are of relevance to the universal jurisdiction cases discussed in Chapters 4 and 5. First, national courts have extracted ‘general principles of international law’ that are common to treaties and domestic legislation wherein the rule of double criminality and the principle of specialty are paramount. Here, double criminality is of particular note. Its function is to ensure respect for the principle of *nullum crimen sine lege*; it requires that the act is criminal under the laws of the requesting and requested states. As a condition to extradition, double criminality requires the court of the requested state to judge whether the act is criminal under its laws; the assessment is in the reverse when judging double criminality as a condition for jurisdiction. Second, at the trial stage,

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361 *Soering v. United Kingdom* (1989) 161 EHHR (ser A) para 91. The European Court of Human Rights found that there was a real risk that Soering would be subjected to inhuman or degrading treatment as result of the death row phenomenon, where convicted offenders remain for a prolonged period on death row. For similar reasoning regarding article 7 of the Covenant on Civil and Political Rights, see *Ng v Canada*, UN Doc CCPR/C/49/D/469/1991. See also article 3(1) of the Torture Convention (n 212).
362 See also article 11 of the European Convention on Extradition (1957) ETS 24, article 4(5) of Inter-American Convention on Extradition (1981) 20 ILM 733 and article 33 Convention Relating to the Status of Refugees (1951) 189 UNTS 150 (dealing with deportation or return).
363 Brownlie (n 9) 317.
364 Briefly, the principle of specialty ensures that the accused is tried and punished solely for the offences for which extradition has been sought. See Brownlie (n 9) 317.
365 Dugard and van den Wyngaert (n 357) 188.
366 Brownlie (n 9) 317.
367 C van den Wyngaert ‘Double Criminality as a Requirement to Jurisdiction’ in N Jareborg *Double Criminality: Studies in International Criminal Law* (Almqvist Wiksell International Sweden 1989) 50. See also *Pinochet III* (n 183). As a condition to
the criminal courts of a state may not conduct their proceedings in
the territory of another state unless by agreement.\(^{368}\) This restriction
naturally extends to the subpoena witnesses and persons of interests
as well as other forms of evidence.\(^{369}\) In civil legal systems, where the
investigative and trial stages are conducted by investigative
magistrates, it means that the latter cannot engage their judicial
police in investigative measures and the arrest of suspects.\(^{370}\) Instead,
as conducted in universal jurisdiction cases, the investigating State
must secure consent of the State where the witnesses and/or evidence
is located, to have access to witness testimony and other evidence,
usually by letters rogatory.\(^{371}\)

2.2.2. Immunity of State Officials from the jurisdiction of foreign
courts

As detailed in section 1.2, the state’s ability to enforce its laws
within the physical extent of its own territory may be limited by
international law. This limitation arises when the state does not
possess jurisdiction over the subject matter of the dispute even if the
alleged transgression was performed on its territory or the alleged

\(^{368}\) See in the Lockabie case, Agreement between the Government of the Kingdom of
the Netherlands and the Government of the United Kingdom of Great Britain and
Northern Ireland concerning a Scottish Trial in the Netherlands (1999) 38 ILM 926.
\(^{369}\) O’Keefe (n 63) 740.
\(^{370}\) ibid.
\(^{371}\) For example, in certain criminal proceedings under universal jurisdiction,
investigating magistrates have conducted rogatory missions to interview
witnesses, with the consent of the territorial jurisdiction. Case of the Butare 4 (n 249),
636. Note Guatemalan Generals case, Response to Guatemalan Constitutional Court
decision of 12 December 2007 (complaint by Spanish investigating judge regarding
lack of cooperation by Guatemalan authorities).
offender is found within its territory and the state would ordinarily have jurisdiction. The key limitation here is the rule of immunity of the state and its officials from the jurisdiction of foreign national courts. This is a procedural plea that acts as ‘a bar against one state from sitting in judgment on another state’. Its function is to prevent private parties from seeking to ‘enlist assistance of the courts of one state to determine the claim against another state’ and thus, it avoids a ‘stand-off’ between states over the appropriateness of forum. 

*Schooner Exchange v McFaddon* acknowledged the cardinal rule that no sovereign could be amendable to another and pronounced that states remain bound ‘not to degrade the dignity’ of other states through adjudicating the latter’s legal rights. This rule was justified in the ‘common interest…mutual intercourse and an interchange of good offices…’

Of particular relevance to this thesis are the personal and functional immunities of state officials, which developed as distinct regimes from the immunity of the state. Personal immunity derives historically from the personal immunities of the monarch or sovereign while functional immunity developed historically from the immunity of foreign ambassadors. Notwithstanding their development as distinct regimes, they are ‘are conferred by the state who alone may waive it’. However, rather than a broad discussion regarding immunity of state officials and crimes against international

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372 Fox (n 65) 5 and Brownlie (n 9) 324.
373 ibid 1.
374 Schooner Exchange v McFaddon (n 12) 137.
375 ibid.
376 Fox (n 65) 667. See also Brownlie (n 9) 327 (referring to the historical link between diplomatic immunity and state immunity).
377 ibid.
378 ibid.
379 ibid. See also *Case of the Arrest Warrant* (n 55) para 52.
law, this section’s key focus is on its contradistinction with the jurisdiction of foreign tribunals asserting universal jurisdiction over crimes against international law. Fox contends that developments in the law of immunities have led to two perspectives (or lenses), through which this question is approached, that is, the classic structure of international law and the recognition of the individual as perpetrator or as victim.\textsuperscript{380} It is evident from the contrasting positions that they are underpinned by either one of these two perspectives.

A brief overview of the distinction between the two types of immunity is constructive. First, personal immunity (or immunity \textit{ratione personae}) relates to status;\textsuperscript{381} it attaches to the office in light of international law’s recognition of the office as ‘an attribute of statehood’ that requires the respect of other states.\textsuperscript{382} Like other forms of immunity, its function is generally considered as ‘the smooth conduct of international relations …’ including ‘the unimpeded operation of other states’ organs in conducting its public functions’.\textsuperscript{383} Personal immunity is possessed by the office-holder for the duration of their term\textsuperscript{384} and exempts the office-holder from the civil and criminal jurisdiction of foreign courts irrespective of whether the alleged acts were committed in an official or private capacity.\textsuperscript{385} As a

\begin{footnotesize}
\begin{enumerate}
\item ibid 141.
\item ibid.
\item ibid 682. Likewise, there has been debate as to whether the immunities attach to the person or are an aspect of State or diplomatic immunity. Note the discussions on article 2(b)(iv) of the UN Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004, not yet in force) UN Doc. A/59/508.
\item Zahar and Sluiter (n 186) 504. In the \textit{Arrest Warrant}, the ICJ adopted the description in the Vienna Convention on Diplomatic Relations, that is, ‘the efficient performance of the functions of diplomatic missions’. \textit{Case of the Arrest Warrant} (n 55) para 52.
\item \textit{Case of the Arrest Warrant} (n 55) para 55. Historically, Heads of State have been immune from civil and criminal process within their own domestic order. See also
\end{enumerate}
\end{footnotesize}
‘full immunity, it precludes the instigation of criminal proceedings for official and private acts performed during office or such acts performed before assuming office. In light of this, it is conferred only on ‘officials with primary responsibility for the conduct of the international relations of the state’. Hence, it attaches to a limited group of senior state officials and applies to diplomatic staff on mission and other officials on special mission in foreign states.

Second, functional immunity (immunity ratione materiae) attaches to the act conducted in an official capacity, as opposed to the status of the office. It exempts the state official from criminal or civil jurisdiction regarding acts performed in an official capacity. As the immunity attaches to the act as opposed to the office of state, it applies to both serving and former state officials. However, the plea only bars jurisdiction from acts performed while in office and is not

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Fox (n 65) 673 and Article 2 of the Institute of International ‘Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law’ (Vancouver 2001)(immunity from jurisdiction [regarding] any crime ‘regardless of its gravity’.)

386 Case of the Arrest Warrant (n 55) para 56.

387 Akande (n 384) 409 and Fox (n 65) 673.

388 ibid. In light of the Arrest Warrant judgment, personal immunity extends to Heads of Government (Prime Minister) and Minister for Foreign Affairs by analogy in terms of functions. However, this analogy (without correspondingly state behaviour) has been heavily criticized; in particular the ICl’s normative argument, along with the phrase ‘certain holders of high-ranking Office’ could apply to other portfolios within central government. See Fox (n 65) 671 and Akande (n 384) 412. See also Families and Relatives of Persons affected by Military operations conducted by the IDF in the Occupied Palestinian Territories v General Mofaz (2004) ILDC 97 and Re Bo Xilai (2005) 128 ILR 713 (analogy between foreign affairs and defence in terms of overseas representation).

389 Article 29 (personal inviolability of diplomatic agent), article 30 (inviolability of private residence etc) and article 31 (immunity from civil and criminal jurisdiction of the receiving State) of the Vienna Convention on Diplomatic Relations (adopted April 18 1961, entered into force 24 April 1964) 500 UNTS 95. Hereinafter Diplomatic Relations Convention.

390 Article 21 (privileges and immunities of Heads of State, Government and Ministers for Foreign Affairs) and article 29 (inviolability of representatives of the sending State in the special mission and diplomatic staff) of the Convention on Special Missions (adopted on 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231. Hereinafter Special Missions Convention.
the “full immunity” covering official and private acts.\textsuperscript{391} Of note, Van Alebeek identified two concepts of act of state within the doctrinal history, which she considers to influence the confusion regarding function immunity. The first is that the official is immune from suit when ordinarily the state would have been immune, if it had been sued in place of the official, that is, ‘act of state as public act’. The second is that the official is immune when the subject matter of the dispute is an act attributable to the state.\textsuperscript{392}

When turning to the focus of this section, it is submitted that there are competing approaches and a move to the middle ground, similar to that which we observed in the discussion on the principle of universal jurisdiction. It is important to note that international lawyers have distinguished the removal of defence plea of immunity from the procedural plea. The former is a defence against liability for the substantive charges (no liability) while the latter is a procedural plea against the appropriateness of the tribunal’s jurisdiction (no jurisdiction).\textsuperscript{393} The undisputed acceptance of individual criminal responsibility for crimes against international law means that the defence against liability is no longer valid.\textsuperscript{394} However, the issue of the appropriateness of the tribunal as a forum for the dispute remains a contentious matter.

From a normative approach, personal and functional immunity is inapplicable in the context of crimes against international law. There are four variants. First, the acts cannot be functions of the State because the conduct is outlawed by \textit{jus cogens}

\begin{itemize}
\item \textsuperscript{391} Akande (n 384) 412.
\item \textsuperscript{392} Van Alebeek (n 65) 222.
\item \textsuperscript{393} ibid 265.
\end{itemize}
prohibitions, which possess a hierarchically superior status. In this way, a violation of a *jus cogens* norm cannot be a sovereign act and thus, immunity of a state official does not arise.\(^\text{395}\) Second and relatedly, the crimes cannot be ordinary state functions that a state alone can perform; here, it is argued that there is recognition ‘that State related motives are not the proper test for determining what constitutes public State acts’.\(^\text{396}\) Third, as the crimes are *jus cogens*, criminal liability overrides the procedural plea of immunity; in other words, rules of *jus cogens* invalidate any conflicting rules of international law.\(^\text{397}\) As Al-Khasawneh argues, ‘when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail’.\(^\text{398}\) In van den Wyngaert’s view, the issue was the conflict between individual and state responsibility, where the former must prevail in event of crimes against international law.\(^\text{399}\) Finally, there was Belgium’s claim that the recognition of individual criminal responsibility combined with certain national proceedings against former state officials for criminal offences demonstrated the acceptance of an exception to immunity in the context of crimes against international law.\(^\text{400}\)

From a social description approach, personal and functional immunity is applicable as a bar to criminal jurisdiction regardless of the context including crimes against international law. In the *Arrest*

\(^{395}\) Orakhelashvili (n 54) 325.

\(^{396}\) See also *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Pinochet I)* (1998) 4 All ER 897, 939- 940 (Nicholls) and 944 (Steyn).

\(^{397}\) *Case of the Arrest Warrant* (n 55) (Joint Separate Opinion) para 85. They argued that state behaviour is gradually recognizing this idea, citing the *Eichmann* judgment. See also Orakhelashvili (n 54) 325.

\(^{398}\) ibid (Al-Khasawneh) para 7.

\(^{399}\) ibid (van den Wyngaert) para 30-35 (citing Draft Code of Crimes (n 230)).

Warrant case, the ICJ implicitly rejected the *jus cogens* argument\(^{401}\) and explicitly dismissed as insufficient the evidence of an exception in the state behaviour,\(^{402}\) including the dismissal of treaty law obligations as capable of affecting immunities.\(^{403}\) It justified personal immunity on functional necessity, irrespective of the context of the alleged crimes.\(^{404}\) However, regarding functional immunity, the judgment’s *obiter* is open to interpretation; it considered that once the Minister for Foreign Affairs has left office and personal immunity is no longer applicable, the former Minister may be prosecuted before foreign tribunals ‘for acts committed before and subsequent to assuming office and during office in a private capacity’.\(^{405}\) Fox interprets this criteria as treating a serving and former Minister for the purposes of immunity as analogous; thus, the change of status from personal to functional does not admit a different framework rather both immunities remain applicable before national courts. She contends that the *Arrest Warrant* signifies how ‘there are strong arguments for retaining the classical view’ in regards to functional immunity because the immunities belong to the state and thus, the change in status from serving to former state official is not relevant. If functional immunity is removed, it could arguably impinge arbitrarily upon state officials in the exercise of their functions

\(^{401}\) ibid para 58.

\(^{402}\) Ibid. See also *Pinochet I* (n 396) 913. Lord Slynn ruled that there is insufficient evidence of an exception to the application of functional immunity before foreign tribunals; he considered the decisions of national courts as ‘aspirational’. However, he considered that there was evidence of a trend to remove functional immunity before international criminal tribunals.

\(^{403}\) ibid para 59

\(^{404}\) Van Alebeek (n 65) 267.

\(^{405}\) *Case of the Arrest Warrant* (n 55) para 61. The list also included prosecution under territorial jurisdiction, before a foreign court arising from a waiver of immunity by the territorial jurisdiction and before an international tribunal with jurisdiction. On this, the Court was not unanimous; Judges Oda, Al-Khasawneh and van den Wyngaert dissented.
during office. It would also render the entire internal administration of a state to the jurisdiction of foreign tribunals.  

In parallel, Fox adopts a social description approach but differs from the Arrest Warrant in her conclusion on functional immunity. She rejects the jus cogens argument because the procedural bar does not possess a substantive content to which a jus cogens norm could bite. Thus, personal immunity cannot be overruled because there is no hierarchically superior norm; this is distinguishable from the defence against liability as here the jus cogens prohibition is hierarchically superior and prevails. However, unlike the Arrest Warrant, she makes a distinction between functional immunity of a former Head of State (and Minister for Foreign Affairs) and that of military and lower-ranking officials. Thus, state behaviour indicates that functional immunity is removed for lower-ranking officials in regards to crimes under international conventions where there is an obligation to establish jurisdiction and prosecute.

As noted above, there is also an attempt to draw from both approaches and move to a middle ground between the two polar opposites. These middle ground approaches accord with the conclusions of the social description approach regarding personal immunity yet at the same time, they accord with the conclusions of the normative approach regarding functional immunity. The legal

\[\text{406 Fox (n 65) 697.}\]
\[\text{407 ibid 151-152. This argument was reiterated by Lord Hoffmann and Lord Bingham in Jones v Saudi Arabia. See Jones v Saudi Arabia (2006) UKHL 26, para 45 and para 24 (Lord Bingham).}\]
\[\text{408 ibid 699. According to Fox, in combination with jus cogens status, individual criminal responsibility and the obligation to prosecute, there is state behaviour demonstrating that functional immunity is removed before national courts regarding lower-ranking state officials in the context of crimes against international law. She advocates making an analogy to former Heads of State in order to ensure consistency. ibid 695.}\]
outcome here would be that senior state officials afforded personal immunity would be exempt during office. However, on ceasing office, they would be amenable to prosecution similar to all lower level officials as functional immunity could not be invoked before foreign jurisdictions. These middle ground approaches seem to be the dominant position;\textsuperscript{409} here, two strategies will be explored.

First, van Alebeek stresses the distinction that she identifies between personal and functional immunity; here, the former’s lack of personal responsibility is based on status rather than on the act. Therefore, even if the individual may be held personally responsible for the act, this does not remove immunity based on status. In her view, the balancing of interests should be by policy decision of states and any change, determined by the courts, must be through an inductive study of state practice.\textsuperscript{410} Thus, she rejects the normative arguments; she considers van den Wyngaert’s argument as a balancing act where ‘preventing immunity outweigh[s] the interests protected by the rule of personal immunity’.\textsuperscript{411} Nevertheless, she distinguishes functional immunity because the acceptance of individual criminal responsibility demonstrates the requisite policy decision of states, that is, that immunity should be inapplicable. Because individual criminal responsibility for crimes against international law holds the state official responsible in their personal capacity, it means that the state is not the factual defendant in the

\textsuperscript{409} Princeton Project on Universal Jurisdiction (n 179) 51, article 13(2) of the Resolution on the Immunities from Jurisdiction (n 385). However, the House of Lords Pinochet III decision pertained to the particular case of an allegation of systematic practice of torture under the Torture Convention. See Pinochet III (n 183). Compare Lord Browne-Wilkinson’s dissent to the Princeton Principles (n 179) 49 (disagreeing with universal jurisdiction where there is no prior consent in treaty).

\textsuperscript{410} Van Alebeek (n 65) 273.

\textsuperscript{411} ibid 272.
The underlying rationale and purpose for the rule of immunity of state officials does not arise. This is of course contrasted with the situation of personal immunity, where the immunity attaches to the office and hence, the state is the factual defendant. Second, Akande and Shah reject the *jus cogens* and the ‘not official acts’ arguments in a similar vein to the social description approach. However, like van Alebeek, they similarly view individual criminal responsibility as a significant development that challenges the classical view (as discussed in *Arrest Warrant*). Here, they contend that the recognition of extraterritorial jurisdiction over the alleged crime is crucial and it demonstrated state assent to the jurisdictional rule overruling a prior rule of immunity where these rules are co-extensive, that is, applying to the same set of facts.

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412 Ibid 104-107. Van Alebeek devises a different concept of act of state immunity than the ‘act as public acts’ and ‘acts attributable to the state’ concepts. She concludes that many functional immunity cases ‘offer support for the assertion that the law of state immunity only applies if the foreign state is the nominal or factual defendant in the proceedings’. Thus, functional immunity precedes state immunity; the individual lacks personal liability for acts committed ‘as an arm or as a mouthpiece of the home State’. Therefore, the state official cannot be held personally responsible in [their] personal capacity because the proceedings against the official would involve ‘impleading the foreign sovereign’. This then can be distinguished from individual criminal responsibility because the individual is held responsible in their personal capacity. ibid. See also Akande (n 384) 415.

413 Ibid 223.

414 D Akande and S Shah ‘Immunities of State Officials, International Crimes and Foreign Domestic Courts’ (2010) 21(4) European Journal of International Law 815, 833-834. Here, they stress that the content of *jus cogens* in terms of international crimes is not entirely certain, though certain crimes are clearly *jus cogens* status. In a similar vein to Fox, they contend that for a conflict to exist, there must be an obligation on third States to prosecute, which must itself be of *jus cogens* status. Alternatively, the claim that the right to exercise universal jurisdiction is *jus cogens* as it derives from a *jus cogens* norm (criminal proscription), ‘read[s] too much into *jus cogens* prohibitions (AOS)’. ibid, 834.

415 Ibid 830. Here, the official character of the act does not depend on the legality of the act under international law but whether it is ‘intrinsically governmental’. This depends on the nature and context of act; in the case of international crimes, they are conducted under state policy, using the state apparatuses. ibid.

416 Ibid 840.

417 Ibid 841.
3 Conclusion

This Chapter observes that the legal context for the debate on the principle of universal jurisdiction is the binary opposition of prescribe and enforce, which reflect liberal assumptions of freedom (state liberty) and equality (order). In turn, the paradox at the core of these liberal assumptions underpins the endless theoretical debate over the origin of the doctrine of jurisdiction. The competing positions in this debate trace the origin of law to either an anterior state liberty or a prior legal order. In the *Lotus* judgments, it was assumed that states possess a wide measure of discretion to exercise jurisdiction within limits imposed by international law. Thus, state liberty precedes and constitutes the legal order. However, the dissenting opinions disagreed; the state must demonstrate a permissive rule and an exception to the exclusivity of territorial jurisdiction must emerge within state behaviour. In other words, the legal order precedes and therefore, constitutes liberty. The latter position appears to be the dominant approach in scholarship yet as we will observe in Chapter 3, this debate is irreconcilable and instead, legal argument moves back and forth between liberty and higher order. Similarly, when addressing each principle of jurisdiction, it is apparent that they are not fixed or stable. Thus, the dominant approach is to apply a principle of reasonableness and interests-balancing; yet this is a move to discretion, a determination as to whether the jurisdiction is reasonable in the circumstances.

With these observations in mind, we explored how the debate on the principle of universal jurisdiction reveals opposing approaches on the principle’s justification for and content. In parallel, the doctrine of immunity of state officials that is in
contradistinction to universal jurisdiction reveals similar competing approaches. These approaches have been addressed as normative, social description and a middle ground approaches. The normative approach appeals to a higher order and emphasizes the normative ideal of universal accountability. The social description approach appeals to state liberty and emphasizes the respect for voluntary will and prohibition against arbitrary interference. The move to the middle ground attempts to navigate some reconciliation between the competing approaches. Yet each approach will appear to a competing approach as subjective and political, failing to accord with liberal assumptions on the rule of law. To the normative approach, the social description approach appears to cement the status-quo and offer justifications for shielding state officials from accountability when the territorial jurisdiction fails to act. To the social description approach, the normative approach appears to be a fanciful utopia and offers justifications for the intervention by ‘humanity’, which can only result in arbitrary rule by the powerful. The middle ground suffers from being unacceptable to the competing approaches. By moving back and forth between normative ideal and state behaviour, it can appear inconsistent and arbitrary.

It follows that the competing approaches appear to be based on opposing theoretical assumptions. We will observe in chapter 2 how the historical debates on the principle of universal jurisdiction appear to demonstrate the same endless opposition and are challenging to disentangle. It will be evident that both the Eichmann judgments’ and the Defence counsel’s portrayals interwove threads of legal thought from opposing debates since the 19th century and as such, both established a one-sided representation of legal history.
CHAPTER 2

THE GESTATION PHASES FOR
THE 1990s DEBATE ON UNIVERSAL JURISDICTION

Having explored the legal context for and debates on the principle of universal jurisdiction, this chapter now turns to the development of the *Eichmann* judgments’ portrayal. This portrayal was employed by national courts in various proceedings in the 1990s and these events established the hegemony of the *Eichmann* judgments portrayal until a shift in hegemony with the *Arrest Warrant* judgment. It is noteworthy how the approach of the Israeli Courts delved into earlier threads of legal argument to construct their particular representation of legal concepts.¹ In this way, the current debate on the principle of universal jurisdiction is rooted in a repetition of opposing legal arguments. Therefore, in order to make sense of how the *Eichmann* judgments’ portrayal emerged, we begin at the end of the 19th century, a period considered by critical legal scholars as instrumental in shaping the modern international legal profession.² It was during this period from the end of the 19th century to the 1960s when the concept of ‘universality’ or ‘universal

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¹ This observation was identified and strongly emphasized by Reydams and Henzelin in their respective studies. However, their underlying theoretical presupposition was the liberal assumption that international law constituted a coherent, objective legal order. In contrast, as indicated in the Introduction, this thesis disrupts the notion of international law as deriving from a fixed political culture. See L Reydams *Universal Jurisdiction: International and Municipal Perspectives* (Oxford University Press Oxford 2003) and M Henzelin *Le Principe de l’universalité en droit penal international* (Helbing & Lichtenhahn Bruylant 2000).

jurisdiction’ was explicitly or implicitly referenced by international lawyers in key debates, which were a breeding ground for the opposing arguments of the Israeli trial court and defence counsel in *Eichmann*. This thesis categorizes this legal history into three interdependent periods, labelled as an embryonic period (end of 19th century to 1918), an incubation period (1919 to 1949) and a culmination period (1960s). In the culmination period, the *Eichmann* judgments constructed a one-sided representation of these opposing debates. Here, the courts justified universal jurisdiction over crimes against international law committed by state officials on government orders using the Lieber Code’s piracy analogy, drawing on debates in the incubation period, and determined the principle’s content to involve the subsidiary basis of jurisdiction and Grotian notion of aut dedere aut judicare, drawing on debates in the embryonic period. We will observe how the naturalism-positivism dichotomy threads through each opposing debate and thus, *Eichmann* is viewed as a battle between legal positivists and “moralists”.

1. End of 19th century to the WWI: an embryonic period

The embryonic period is divided into two threads of legal thought that were of significance for the *Eichmann* judgment’s portrayal: the idea of a subsidiary jurisdiction over extraterritorial

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3 Note that this exploration will refer to the description used by the particulars writers (to remain in keeping with their writing) and therefore ‘universality’ will be referred to, particularly the 19th century to 1930s writing. In those instances, the writers were describing a jurisdiction over foreign nationals for offences committed abroad irrespective of any other nexus –what is now termed ‘universal jurisdiction’.

4 *AG v Eichmann* (1968) 36 ILR 5, 26 and 299.

offences, where the state has custody of the accused, and the move to codification of the laws of war. First, section 1.1 will discuss the subsidiary basis of jurisdiction that justified the practice of European states in asserting jurisdiction over offences committed abroad by non-nationals where extradition is frustrated or refused. This subsidiary jurisdiction was considered the format of the principle of universal jurisdiction in *Eichmann*. Second, section 1.2 will explore the Lieber Code’s piracy analogy and its influence prior to WWI. This analogy equated the jurisdiction of belligerents over enemy irregulars to pirates and brigands. It was adopted in the *Eichmann* judgments in order to justify the extension of universal jurisdiction over crimes against international law.

1.1 A subsidiary jurisdiction over extraterritorial offences

The Institute of International Law addressed the question of extraterritorial penal jurisdiction in its 1883 Munich session.\(^6\) Article 10 of its Resolution provided that every “Christian state” may try and punish an offender held in its custody when, notwithstanding *prima facie* evidence of a serious crime and culpability, the location of the crime cannot be identified or the extradition of the offender is not granted or deemed dangerous.\(^7\) Therefore, the jurisdiction of the

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\(^6\) Institute of International Law *Règles relatives aux conflits des lois pénales en matière de compétence* (1883-5) *Annaire de l’Institut de droit international* (Munich Session 1883). The resolution was a recommendation to facilitate gradual progressive legal development. The rapporteurs did not advocate that the resolution be adopted by states nor should a treaty be concluded. ibid 143.

\(^7\) ibid. Translation of author from the French original: ‘Chaque Etat chrétien (ou reconnaissant les principes du droit des pays chrétiens), ayant sous sa main le coupable, pourra juger et punir ce dernier, lorsque, nonobstant des preuves certaines de prime abord d’un crime grave et de la culpabilité, le lieu de l’activité ne peut pas être constaté ou que l’extradition du coupable, même à sa justice nationale, n’est pas admise ou est réputée dangereuse’.
state with custody of the offender is dependent upon the inability to extradite or to determine the actual location of the offence.\textsuperscript{8} Given these preconditions, the dominant approach is to interpret this jurisdiction as complimentary or subsidiary.\textsuperscript{9} The Harvard Research on International Law considered the earliest incorporation of the

\textsuperscript{8} As an historical context for the Institute’s Resolution (and the opposition of de Bar and Brusa), it is worthwhile to draw from Reydams’ and De Vabres’ doctrinal histories. Reydams contends that the sixteenth century jurist Covarruvias is the earliest theorist to advocate a concept of extradite or try, which is the theoretical precursor for the modern concept, discussed by the Institute’s 1883 session. Here, Covarruvias modified the legal claim by the Lombard League, a regional collective of city States in Northern Italy in the 12\textsuperscript{th} and 13\textsuperscript{th} centuries. The League permitted the place of arrest to exercise jurisdiction over certain offenders. Ordinarily, the city States recognized the jurisdiction of the place of commission (lex loci delicti) and the place of domicile (or residency) of the offender. However, \textit{vagabundi} (vagabonds) had no permanent domicile. Consequently, the place of commission would be the sole competent tribunal. Therefore, in order to avoid a jurisdictional lacuna (in the event the accused fled the jurisdiction of the place of commission), the Lombard League granted competence upon the place of arrest of the accused (\textit{locus deprehensionis}). De Vabres traced this concept of \textit{judex deprehensionis} (judge of the place of arrest) to the \textit{Codex Justinianus}; the Code validated the competence of both the tribunal of the place of commission and of arrest. The Lombard League also established this competence over \textit{assassini} (murderers), \textit{banniti} (exiles), and \textit{latrones} (thieves or robbers) because they deemed these offenders as similar to \textit{vagabundi}. It is suggested that the League justified the exceptional jurisdiction of the judge of the place of arrest on the character of the offender. However, in Covarruvias’ adapted version, he derived the jurisdiction of the \textit{judex deprehensionis} (or the place of arrest) from natural law common to and binding on all sovereigns, rather than the character of the offender. Therefore, he could conclude that a natural law obligation to extradite or punish extended to all dangerous fugitive offenders in order to prevent arbitrariness. Therefore, jurisdiction could extend to all common offences allegedly committed by perpetrators with no fixed abode. This translated as ‘\textit{judex requisitus vel remittere tenetur, vel delinquentem ipsum punire},’ which, Reydams argues, is the basis for the principle of ‘extradite or try’, as opposed to the later writings of Hugo Grotius. See Reydams (n 1) 29 and D de Vabres \textit{Les Principes Modernes du Droit Pénal International} (Sirey Paris 1928) 135. Contrast MC Bassiouni and EM Wise \textit{Aut dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law} (Martinus Nijhoff Dordrecht 1995) 26 (tracing \textit{aut dedere aut punire} to Bodin’s contention that a sovereign had the duty to submit the alleged offender for trial where an appeal for surrender had been made and the State of refuge did not surrender to the demanding State). See also J Bodin \textit{On sovereignty: four Chapters from the Six Booke of a Commonweale} (JH Franklin tr Cambridge University Press Cambridge 1992), G Raccagni \textit{The Lombard League 1167-1225} (Oxford University Press Oxford 2010) and F Andrews ‘Book Review’ (2012) CXXVII (525) English Historical Review 417.

\textsuperscript{9} de Vabres (n 8) 136-7.
(subsidiary) principle of “universality” in modern legislation as in all likelihood, the Austrian Penal Code of 1803. However, its subsequent amendment, the Austrian Penal Code of 1852, was quoted as the exemplary example of national provisions, from among the later comparative provisions in other European nations. In the inter-war period, comparable provisions were incorporated into the penal codes of numerous European states, including newly formed European states. De Vabres contended that numerous national codes illustrated how most states asserted this jurisdiction of the \textit{judex deprehensionis} (place of the judge).

That said the national codes were varied as to which offences were subject to this jurisdiction and what preconditions to exercising jurisdiction were involved. Therefore, the Institute of International law made an assumption that despite the diversity of criminal laws, there was evidence of ‘a kind of solidarity among civilized states, on

\begin{itemize}
  \item \textsuperscript{11} ibid 574. Article 39 states that ‘if a foreigner has committed abroad an offence…, he shall always be arrested upon entering the country; arrangement shall be made forthwith for his extradition to the state where the offence was committed’ but article 40 qualifies that ‘Should the foreign state refuse to receive him, the foreign offender will generally be prosecuted in accordance with the provisions of the present code’ (emphasis of author). ibid.
  \item \textsuperscript{12} ibid 575-6. For example, the commentary cited article 5 of Argentinean Penal Code of 1885, article 9 of the Hungarian Penal Code 1878 and article 6 of the Norwegian Penal Code of 1902 (the latter provision excluded the offer of surrender and asserted jurisdiction over numerous common domestic offences), ibid.
  \item \textsuperscript{13} ibid. Among the many codes referenced by the commentary, see section 9 of Chapter 1 of Swedish Penal Code (1923), article 37 of the Cuban Penal Code (1926), section 7 of the Czechoslovakian Penal Code (1926), article 6 of Turkish Penal Code (1926). Compare section 7 of the German Penal Code 1927 (requiring double criminality, arrest on the state’s territory and a decision not to extradite even though an extradition crime) and article 8 of the Romanian Penal Code (over offences proscribed by various international treaties, such as counterfeiting currency and trafficking in women and children).
  \item \textsuperscript{14} de Vabres (n 8) 156.
\end{itemize}
the repression of serious offences that threaten human society’.\(^{15}\) Here, the state with custody of the accused must exercise jurisdiction, ’[o]therwise there would be absolute impunity for these scoundrels…’\(^{16}\) Thus, article 10 appeared to recognize both a moral order (Christian morality) and a collective will (evidence of solidarity or unity among Christian states). The Session’s Report also stressed the need to avoid abuses (of the administration of justice), such as ill-founded complaints and arbitrary arrests.\(^{17}\) Therefore, the extraordinary jurisdiction should be narrowly conceived – the crime must be serious and there must be \textit{prima facie} evidence of the accused’s guilt.\(^{18}\) In this way, the Institute’s commentary pointed to recurring assumptions and themes in later debates, that is, the naturalism-positivism dichotomy and the impunity-avoiding abuse opposition.

This division into naturalism-positivism is evident in the contrasting justifications posited by de Bar and Brusa. De Bar justified universality on the basis of a universal justice and solidarity among nations (the Christian moral order).\(^{19}\) Brusa, on the other hand, justified universality as the right of every state to defend its public order. Here, he argued that ‘the culpable act travels with the

\(^{15}\) Institute of International Law (n 6) 141-2. Original text: ‘… qu’il y a une sorte de solidarité entre les Etats civilises, quant a la repression des delits graves qui menacent la société humaine’. This was considered to reflect the domestic laws of Christian states and a rule of international law; see de Bar’s rejection of Neuman’s amendment). ibid 148.

\(^{16}\) ibid 142. Here, either the accused could not be extradited (cannot determine the location of the offence or nationality of the offender) or extradition is frustrated because the offender belongs to an uncivilized nation (nation non civilise) where she would be subject barbaric justice (l’exposer a une justice barbare) or alternatively, there were revolutionary movements where extradition would be deemed dangerous. ibid.

\(^{17}\) ibid 143.

\(^{18}\) ibid.

\(^{19}\) A Mercier ‘Le conflit des lois pénales en matière de compétence’ (1931) Annuaire de l’Institut de Droit International 87, 134 as cited in Reydams (n 1) 30-31.
offender and the presence of the unpunished criminal threatens the domestic moral and legal order and justifies a ‘territorial jurisdiction’. These contrasting arguments of universal justice and public order reappeared in later scholarship between de Vabres and Travers. De Vabres remained the closest to the 1883 Report, combining de Bar and Brusa. He justified the custodial state’s ‘universal right to punish’ on the threat to the state’s social order because of the presence of the offender on the state’s territory. This jurisdiction was justified as the custodial state acts in the ‘interests of humanity’ in order to prevent a scandalous impunity, citing historical justification from Lombard League’s exercise of jurisdiction over certain categories of dangerous fugitives. In opposition, Travers remained closest to Brusa’s interpretation, rejecting outright the ‘interests of humanity’ concept. In his view, this concept did not accord with criminal law theory, which must be premised on the protection of the state’s own interests; the state could not act on behalf of humanity. Thus, the concept could only be derived from natural law or morality yet such laws could only exist if all states were identical in their ‘degree of civilization’. Instead, he justified

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20 ibid.
21 de Vabres (n 8) 135. This subsidiary basis of jurisdiction was considered to be the negation of asylum. ibid 137.
22 ibid 135-136 (‘the presence, on the territory, of the unpunished criminal, being a cause of trouble, gives the city [state] the cognizance over the crime’). See also AG v. Eichmann (n 4) 25.
23 ibid 135 (it intervenes, in default of all other states, to prevent in the interests of humanity, a scandalous impunity’). His historical narrative turned to the Lombard League’s exercise jurisdiction over certain character of criminals in Italy in the Middle Ages. This narrative was drawn upon in the Eichmann judgments.
24 ibid 136.
25 M Travers Le droit penal international et sa mise en œuvre en temps de paix et en temps de guerre Vol. 1 (Recueil Sirey Paris 1920) 75-76. Travers describes the goal of criminal theory as being the protection of the group and only the group and this theory is at odds with universality.
26 ibid.
the subsidiary basis of jurisdiction on the interests of security of the custodial state, that is, the threat to public order.27

Similarly, the reference to state behaviour and morality within the Institute’s commentary to its 1883 Resolution underpinned the division between the studies by League of Nations and the Harvard Research on International Law. In the League of Nations study,28 Brierly and de Visscher detailed state behaviour as drawn from national legislation and noted the contrasting positions among states.29 Here, they were particularly in debt to Beckett’s analysis of national codes.30 However, unlike the Institute’s 1883 Report, Brierly

27 ibid. In effect, if the fugitive were permitted to escape justice, it would encourage criminality in the State with custody of the accused as well as attract other fugitives seeking to escape justice. The alternatives to prosecution of extradition and expulsion were not always feasible or desirable respectively. See also K Mikliszanski ‘Le système de l’universalité du droit de punir et le droit penal subsidiare’ (1936) Revue de science criminelle et de droit pénal comparé 331 (preventing a common criminal from being shielded from punishment was a purely practical devise to prevent offenders from fleeing justice).

28 JL Brierly and C De Visscher ‘Annex Report on ‘Criminal Competence of States in Respect of Offences Committed Outside Their Territory’ of the Sub-Committee of the Committee of Experts for the Progressive Codification of International law’ (1926) 20 American Journal of International Law Special Supp 252. Here, the League of Nations established a Committee of Experts for the Progressive Codification of International Law, whose members were appointed by the Council of the League of Nations. In this study on criminal competence, the committee narrowed its mandate to exclude both nationality jurisdiction (as it was so well-established and unnecessary to codify) and exclude offences committed outside the territory of any State because the rapporteurs felt that the legal regimes regarding various offences committed on the high seas were too distinct. See also Assembly Resolution of September 22nd 1924 as cited in ‘Work of the Committee of Experts for the Codification of International Law During its First Session’ (1925) 6 League of Nations Official Journal 783, 842.

29 ibid 254. This emphasis on “practice” is indicative of Brierly’s international law writing. Note Landauer criticism of the narrative of Brierly’s Law of Nations (1928) as a failed attempt to modernize international law by according to reality and complexity. Landauer emphasizes the observations of Brierly’s reviewers; that Brierly gave significant weight to “facts”. See C Landauer ‘JL Brierly and the Modernization of International Law’ (1992-93) 25 Vanderbilt Journal of Transnational Law 881, 886. See also H Lauterpacht ‘Brierly’s Contribution to International Law’ (1955) 56 British Yearbook of International Law 1.

30 WE Beckett ‘The Exercise of Criminal Jurisdiction over Foreigners’ (1925) 6 British Yearbook of International Law 44. See also JL Brierly ‘Matters of Domestic
and de Visscher concluded that the ‘far from uniform’ laws made it difficult to determine whether each assertion of jurisdiction was considered to be a legal right by the particular state.\textsuperscript{31} They rejected the idea that international law left an absolute discretion to the state to determine its jurisdiction;\textsuperscript{32} thus, they found that state practice lacked an evident consensus as to what exceptions to territorial jurisdiction were permitted.\textsuperscript{33} It follows that their recommendation was a compromise solution, that is, the adoption of objective territorial jurisdiction, which was the least questionable basis of extraterritorial jurisdiction among states.\textsuperscript{34}

In the Harvard Research on International Law study,\textsuperscript{35} its commentary followed the Institute’s 1883 Report in justifying the subsidiary jurisdiction on preventing an otherwise gross impunity and, unlike the League of Nations study, concluded that there was sufficient consensus within state behaviour.\textsuperscript{36} Here, article 10 on universality over other crimes was distinct from article 9 on universality over piracy. Unlike jurisdiction over piracy, article 10

\begin{footnotes}
\item[31] Brierly and De Visscher (n 28) 254.
\item[32] ibid 255.
\item[33] ibid. As explained in Chapter 1, the majority in \textit{Lotus} concluded that Turkey’s jurisdiction was valid under the objective territorial principle, as one of the constituent elements of the offence of manslaughter was committed on the Turkish ship. \textit{Case of the SS Lotus (France v Turkey)} (1927) PCIJ Ser. A No 10, 18-19.
\item[34] ibid 255.
\item[35] Harvard Research ‘Draft Convention on jurisdiction’ (n 10) 439-442. The purpose of the Harvard Research study was to produce a general convention on criminal jurisdiction that would be acceptable to states. (a compromise text)
\item[36] ibid 574.
\end{footnotes}
did not provide for ‘original or primary competence’ based solely on
the presence of the accused.\textsuperscript{37} Though the subject matter of
jurisdiction of article 10 was broad (‘any offence committed outside
its territory by an alien’\textsuperscript{38}), its application is procedurally
preconditioned upon the refusal of an offer to extradite by the state
with the primary interest.\textsuperscript{39} The commentary advocated these
preconditions in order to avoid ‘jurisdictional cosmopolitanism’;
instead, article 10 of the draft Convention was ‘conservative
statement of a subsidiary competence, available in case there can be
no surrender…’ \textsuperscript{40} that would be rarely invoked in practice but may
serve ‘useful purpose in exceptional circumstance’.\textsuperscript{41}

1.2 Laws of war and the Lieber Code: the Pirate enters …. 

In 1863, the General Orders No.100 (Lieber Code) was issued
to the United States Federal army by President Abraham Lincoln.\textsuperscript{42}
At the time it was issued, the Lieber Code was considered a
codification of the customary international law of war;\textsuperscript{43} as

\begin{itemize}
  \item \textsuperscript{37} ibid 583.
  \item \textsuperscript{38} Article 10 of the Draft Convention applied to offences other than security of the State (article 7), counterfeiting currency (article 8) and piracy committed on the high seas (article 9). In this way the Draft Convention offered a proposal in regards to delicta juris gentium.
  \item \textsuperscript{39} ibid 573-4. It justified this broad subject matter on the idea that a crime remaining unpunished is intolerable. It also considered that State legislation asserting jurisdiction over offences against its nationals may be accommodated within this general competence, avoiding the challenge of rationalizing the validity of passive personality jurisdiction. Article 10 provided a series of subparagraphs that covered the various distinct ways that states had asserted this subsidiary basis of jurisdiction.
  \item \textsuperscript{40} ibid 577.
  \item \textsuperscript{41} ibid 584.
  \item \textsuperscript{42} Instructions for the Government of the Armies of the United States in the Field (24 August 1863). Hereinafter the Lieber Code.
  \item \textsuperscript{43} Q Wright ‘Editorial Comment: Retribution for War Crimes’ (1943) 37 American Journal of International Law 81.
\end{itemize}
Kalshoven and Zegfeld note, prior to the prohibition of these practices by declarations or treaties in the late 19th century, military leaders had occasionally ordered their troops not to execute prisoners of war or civilians of the opposing belligerent and to exchange prisoners on cessation of hostilities.\(^{44}\) In the Lieber Code there was a distinction made between enemy soldiers who commit acts within the soldiers privilege, and enemy irregulars, who commit such acts ‘without any commission, without being part and portion of the organized army and without sharing continuously in the war’.\(^{45}\) Enemy soldiers are afforded prisoner of war status on capture for commission of lawful acts of war during hostilities;\(^{46}\) they were public enemies ‘armed or attached to the hostile army for active aid, who have fallen into the hands of the captor’.\(^{47}\) However,

[Men], or squads of men, who commit hostilities...without commission, without being part and portion of the organized army and without sharing continuously in the war... are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoner of war, but shall be treated summarily as highway robbers and pirates.\(^{48}\)

Therefore, the enemy irregular was deemed an ‘outlaw’ rather than a ‘public enemy’, and, as such, was beyond the protections of the laws


\(^{45}\) Article 82 of the Lieber Code (n 42). Rubin notes the irony that the Lieber Code was issued in a conflict where the Federal army did not recognize the Confederate forces as ‘entitled to the status implied by the application of that body of law’. See AP Rubin *The Law of Piracy* (Honolulu University of Hawaii 2006) 293.

\(^{46}\) Renault explained that ‘[w]hat deprives such acts of the element of criminality is their conformity to the rules of international law’. See L Renault ‘De l’Application du droit penal aux faits de guerre’ (1918) 25 Revue Général de Droit International Public 5, 10.

\(^{47}\) Lieber Code (n 42) (article 49).

\(^{48}\) ibid (article 82). Here, violations of the law of war by enemy irregulars is assimilated to ordinary crimes because the *actus reus* of most acts of war possess all of the elements of criminal acts. See JW Garner ‘Punishment of Offenders against the Laws and Customs of War’ (1920) 14 AJIL 70, 73 and Renault (n 46) 10.
of war, namely prisoner of war status on capture.\textsuperscript{49} They were denied this status by belligerents in a conflict because they were not acting on behalf of any state. In effect, they were, in legal terms, private individuals engaged in acts of war and subject to the ordinary criminal law.\textsuperscript{50} As such, enemy irregulars were within the jurisdiction of the capturing state\textsuperscript{51} and by its analogy to piracy, the Lieber Code sought to deny them any status under laws of war (as \textit{hostes}) and to invoke an exceptional jurisdiction allowing any State to punish the offender irrespective of nationality.\textsuperscript{52} This exceptional jurisdiction was the claim that the Federal Armed forces had the right to punish enemy irregulars for offences committed outside state territory (whether or not in active hostilities) irrespective of any legal nexus to the offence and offender. The Lieber Code’s piracy analogy implicitly claimed that certain characteristics were comparable, that is, the lack of state commission validating the act and the concept of the common enemy.

\textsuperscript{49} Rubin (n 45) 295. See also D Heller-Roazen \textit{The Enemy of All: Piracy and the Law of Nations} (Zone Books New York 2009) 103-118. Both Gentili and Grotius considered pirate communities as lacking sovereignty, whose object was indiscriminate warfare, or plundering and pillage regardless of place. According to Grotius, pirates and brigands were comparable because their communities as a body were not ‘a state’. According to Gentili, ‘pirates are the common enemies of all mankind and therefore, Cicero says that the laws of war cannot apply to them’. Sovereigns could not be in a ‘state of war’ with pirates and robbers because ‘that law (of war) is derived from the law of nations and malefactors [and pirates] do not enjoy the privileges of a law to which they are foes’. See H Grotius \textit{De Jure Belli Ac Pacis Libri Tres} (FW Kelsey tr, Clarendon Press Oxford 1925) 631-632 and A Gentili \textit{De Iure Belli Libri Tres} (JC Rolfe tr, Clarendon Press Oxford 1933) 22.

\textsuperscript{50} H Kelsen ‘Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law’ (1947) 1 International Law Quarterly 153, 160.

\textsuperscript{51} Exploring the writings of Belli, Gentili and Grotius, Cowles observed that the rules on safe-passage, title to captured property and lawful conduct of hostilities did not apply to brigands. See WB Cowles ‘Universal Jurisdiction over Violations of the Laws of War’ (1945) 33(2) California Law Review 177, 189.

Nevertheless, Rubin criticized the writings of the late 19th century because statesmen and legal scholars increasingly used what he referred to as a ‘vague pejorative’ of the word piracy. He argued that this usage did not accord with the technical word that reflected the actual historical jurisdiction of the British Admiralty courts in the 17th and 18th centuries. This vague pejorative was the application of the word piracy to ‘any acts of foreigners against whom some forcible political action was directed’. Here, British policymakers and naval officers applied British 19th century legislation to any act of robbery or murder on the high seas and to acts of murder in the territory of non-European states (as opposed to the high seas) where British imperial interests were threatened. Thus, late 19th century scholarship included uses of the word piracy ‘to refer generally to illegality under international law’. However, based on his historical analysis, Rubin discounted this late 19th century use of the word piracy as ‘naturalist’ rhetoric because this use did not accord with the ‘actual treatment’ by governments in the 17th and 18th centuries of non-Europeans, unrecognized rebel military forces and communities such as the Barbary States. In this way, he argued that the vague

53 Rubin (n 45) 292.
54 ibid.
55 For example, see Rubin’s discussion of Lushington’s interpretation of the British Bounty Act 1850 in regards to the Segredo, an English vessel that had been seized by Chilean insurgents, recaptured by British navy and on return voyage to England, floundered and sold in Portugal. In regards to the labelling of insurgents as pirates, Lushington claimed that the dictum that a state cannot be piratical is not a ‘universal proposition’. He argued that parliamentary intention was that the Bounty Acts applied to acts of robbery and murder on the high seas committed by ‘subjects of a barbarous state or by insurgents’ as well as private individuals or groups without a State commission. As Rubin pointed out, this failed to distinguish between those acting for private ends and those with political motives. See The Magellan Pirates, 1 Spink Ecc.&Ad. 81 (1853), 3 BILC 796 as cited in Rubin (n 45) 232-235.
56 Rubin (n 45) 292.
57 ibid.
pejorative was not a rule of law within a positivist international legal order.

In light of this controversy and in order to give context for the later opposing positions in the 1920s and 1930s, the controversies over the definition of piracy committed on the high seas and on the opposing legal arguments that justified universal jurisdiction, merit review. Regarding the definition, jurists historically sought to untangle what was agreed to be piracy under the law of nations from definitions under municipal statutes.\textsuperscript{58} Of particular interest here is the debate in the 18\textsuperscript{th} and 19\textsuperscript{th} centuries on the importance of the ‘private ends’ or \textit{animus furandi} element.\textsuperscript{59} As indicated in the Lieber Code, the punishment of piracy had a normative justification; it made an analogy to the ‘outlaw’, the common enemy who acted ‘without commission’ or ‘without state authority’.\textsuperscript{60} Regarding universal jurisdiction, there was opposition among lawyers from the 19\textsuperscript{th} century onwards as to whether piracy was an offence against the law of nations, for which there was direct liability of an individual

\textsuperscript{58} In repressing piracy committed on the high seas, States prosecuted the acts based on statute law definitions and their unique interpretations led to controversies over the general definition under customary international law. See Harvard Research on International Law ‘Draft Convention on Piracy’ (1932) 26 American Journal of International Law Supplement 739, 750-751 and 769-785. See also W Blackstone \textit{Commentaries on the Laws of England} Vol 4 (1\textsuperscript{st} edn Clarendon Press Oxford 1765-1769) 71-73 (for an analysis of the confusion raised by use of ‘pirate’ for various felonies under English statutes). Contrast Rubin’s criticism of the Harvard Research’s method generally (although in agreement regarding their conclusion on piracy’s definition), Rubin (n 45) 315-6.

\textsuperscript{59} Rubin (n 45) 82 (\textit{Animus furandi} referred to the motive for robbery at sea, namely for private gain, rather than state licenced robbery).

\textsuperscript{60} We noted that the ‘common enemy’ treated pirates (and brigands) as outlaws and thus, denied them the protections afforded to the enemy or \textit{hostes} under the laws of war. For an insightful examination of the notion of “hostes” (and its various definitions), see Heller-Roazen (n 49) 99-102. See also Rubin (n 45) 11 (discussing the use of the word “hostes” by Roman jurists). On brigandage, see BS Jackson ‘Some Comparative Legal History: Robbery and Brigandage’ (1970) 1 Georgian Journal of International and Comparative Law 45 and 78 et passim (concept of brigandage in Roman criminal law) and Cowles (n 51) 181 and 184.
under international law, or it was a municipal law offence that by common accord gave rise to an exception to the exclusive jurisdiction of the Flag State. This in turn would lead to the opposition between those who justified the jurisdiction on the nature of the offence and those who justified the jurisdiction on the threat to the common interest of States in their maritime commerce. Within this opposition, the *Eichmann* judgment’s piracy analogy emerged, which was the claim that an analogy could be made between comparable features or characteristics of piracy and other offences.

1.2.1 The definition of piracy committed on the high seas

Jurists used the *animus furandi* element to distinguish the practices of piracy from a comparable practice of privateering. Privateering was ‘privately financed, governmentally authorized means of commercial warfare conducted for profit and supervised only after-the-fact’. Hence, though piracy and privateering were conducted for commercial gain, jurists emphasized that state sponsorship was the significant distinction between the two practices.

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61 Privateering was a state licenced practice of sea robbery that although it secured military objectives, it was neither under the protections of the laws of war nor was punishable under municipal criminal law. Kontorovich likened privateering to piracy because he considered the commercial gain objective (‘private ends’) and modus operandi as comparable. He focused on the fact that privateering was independently financed by the private ship-owners. The latter’s purpose was to secure good title to the proceeds of the sale of seized property and on this premise, he concluded that the practice was more commercial than military. Thus, he argues that the different legal framework arose from the failure by pirate ships to conform to the formalities of the licencing system rather than the nature of the acts. See E Kontorovich ‘The Piracy Fallacy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45(1) Harvard International Law Journal 183, 211 and 217. See similarly CK Marshall ‘Putting Privateers In Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars’ (1997) 64 University of Chicago Law Review 953, 960-63.

62 Marshall (n 61) 958. The licences, ‘letters of marque and reprisal’, authorized private ships to seize foreign merchant vessels on the high seas. ibid, 954.
for the purposes of determining property rights to the plunder and whether the crew should be subject to criminal punishment.\textsuperscript{63} This meant that privateering was lawful solely because there was state authorization. However, as the formality of the state licence (letters of marque) became less significant over time, any defects in the licence could be overcome by demonstrating ‘political motive’ and hence, identifying piracy through evidence of ‘private ends’ became fundamental.\textsuperscript{64} Thus, the dominant view characterized piracy under the law of nations as the absence of lawful authority (or state commission). As a useful example, Hall declared that:

 [...] If a commissioned vessel of war indulges in illegal acts, recourse can be had to its government for redress... the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state (emphasis of author).\textsuperscript{65}

Invariably (and as reflected in the Lieber Code), the normative and factual justifications narrowed the application of the rule to non-state actors.\textsuperscript{66} However, within the historical record, there are inconsistencies. Certain states described acts of violence on the high seas as piracy, even though those acts were committed as part of an

\textsuperscript{63} This licensing was for the purposes of interfering with recognized or unrecognized belligerents and judicially administered (post-seizure) in the State’s prize courts where the courts determined the validity of the licence. Without a letter of marque, the private vessel would be accused of piracy, lose title to the seized vessel and its cargo and be sentenced to death. See Marshall (n 61) 959.

\textsuperscript{64} See WE Hall International Law (8\textsuperscript{th} edn Clarendon Press Oxford 1924) 310-11 and Beckett (n 30) 45.

\textsuperscript{65} J Brierly The Law of Nations (6\textsuperscript{th} edn Oxford University Press Oxford 1963) 312. The two Conventions of 1958 and 1982 resolved the issue over whether unrecognized insurgents (not afforded status of lawful belligerents) could be considered as pirates by defining piracy as ‘for private ends’; this excludes acts solely involving ‘political motives’ from being addressed as piracy.
insurgency by non-nationals; that is, acts having a political motive.\(^67\) In this way, the ‘private ends’ element was challenged because the insurgents were described as pirates despite the evident lack of *animus furandi*. Based on his historical analysis,\(^68\) Rubin argues, forcefully, that most jurists’ rejection of insurgency (or political motive) as “piracy” is justified empirically.\(^69\) He rejected the English assertion because there was no *animus furandi* involved and such assertions were an attempt to further British imperial interests.\(^70\) Hence, Rubin describes the Privy Council’s *Piracy Jure Gentium* as ‘similarly exaggerated’ “naturalist” rhetoric.\(^71\) His positivist analysis narrowed the evidence of a sense of legal obligation to those historical examples where states acted in ‘deference to better-based jurisdiction’, that is, acting against their own interest.\(^72\) However, even though the dominant view maintained the ‘private ends’ element, the inconsistencies generated by the British practices led to

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\(^67\) For example, see *The Magellan Pirates*, 1 Spink Ecc.&Ad. 81 (1853), 3 BILC 796 as cited in Rubin (n 45) 232-235.

\(^68\) Rubin’s treatise meticulously dissects the English and American practice but it is beyond the scope of this examination to recount its discussion of key incidents.

\(^69\) Rubin (n 45) 309. In his view, the opposing positions stem from a ‘jurisprudential split’ between “naturalists”, who view the law of nations as ‘a legal order directly applicable to individuals’ with moral underpinnings and “positivists”, who view the law of nations as between sovereign States only and search for implied or express consent. Rubin adopts the “positivist” position. His view is that a sense of legal obligation (giving rise to a rule of customary international law) could only be demonstrated from instances where States act against their own interests. ibid 310.

\(^70\) ibid. This Anglo-American position was resurrected in the debates prior to the 1958 Geneva Convention on the High Seas where the Western Powers advocated a broader definition of piracy that would include public vessels. He noted that in contrast, the Soviet Union emphasized the ‘private ends’ element. See DHN Johnson ‘Piracy in Modern International Law’ (1957) 43 Transactions of the Grotius Society 63, 64.

\(^71\) AP Rubin ‘Revising the Law of Piracy’ (1990-1991) 21 California Western International Law Journal 129, 132. The Privy Council stated that the pirate ‘is no longer a national, but “hostis humani generis”, as such he is justiciable by any State anywhere’, citing Grotius’s Law of War and Peace. The court also cited Molloy’s reference to ‘hostis humani generis’ with approval. See *In re Piracy Jure Gentium* (1934) AC 586, 589.

\(^72\) Rubin (n 45) 310.
conflicting interpretations of the definition of piracy by Schmitt and Lauterpacht in the 1930s; a debate which had implications for the nascent international criminal law.

1.2.2 The debates over the justification for universal jurisdiction over piracy

The Lieber Code’s analogy to piracy (and robbery) sought to deny prisoner of war status and justify the punishment of alleged perpetrators under the ordinary criminal law. The ‘common enemy’, ‘outlaw’ or ‘public enemy’ was not addressed under the laws of war; rather the ‘outlaw’ was a concept that permitted anyone to kill, even those without the soldier’s privilege. In the work of De Vattel and Grotius, the crimes of the ‘outlaw’ permitted the sovereign, in whose territory the offender had fled, to exact punishment, unless the

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73 Public enemies were declared outlaws by the Pope or Holy Roman Emperor and as such, could be killed by any person even without soldier’s privilege to kill. Rubin (n 45) 18-19. Rubin identified Belli’s and Ayala’s work in the 16th century as the beginning of the inconsistencies in interpretations of Plutarch, Livy and Cicero, which led ultimately to the pirate’s loss of [his] law of war status - an interpretation that adopted from Gentili onwards. Here, Ayala interpreted reference to ‘brigands’ and the rules on capacity and property rights in the Justinian Digest as if these were equally applicable to pirates. As a consequence, he was the first jurist to deny pirates (as well as rebels) any status under laws of war in disregard of ancient writings. He justified this denial based on their lack of recognized statehood, therefore, the ‘pirate is not included in the list of state enemies but is the common enemy of all’. For this reason, brigands and pirates are not denoted by the word “hostes” and the requirements of good faith and oath did not apply. ibid, 19. See B Ayala On the Law of War and On the Duties Connected with War and on Military Discipline: Volume II (JP Bate tr, Carnegie Endowment for International Peace Washington 1912) 59.

74 De Vattel contended that in general the sovereign’s right to punish must be confined to territory. He justified this natural right to punish on defence and security; the sovereign punished the offender who had committed an injury against the sovereign. Both Gentili and Grotius originated the sovereign right to punish captured pirates) from ‘ancient Roman law dealing with the extension of Roman criminal jurisdiction over acts of foreigners (latrones) within the Empire, including the seas’. E de Vattel Law of Nations or the Principles of Natural Law Book I, Chapter XIX (CG Fenwick tr, Carnegie Institution Washington 1916) para 232 and

place of the commission of the crime sought the offender’s return.\textsuperscript{75} For De Vattel, this exception to the rule of territorial jurisdiction was justified against offenders who ‘by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race’ (emphasis added).\textsuperscript{76} For Grotius, this exceptional jurisdiction or \textit{aut dedere aut punire} was a natural right of the sovereign that arose when the state had custody of the fugitive and an appeal was made by the injured state to exact punishment.\textsuperscript{77} This duty arose only if the offender had been convicted of the offence in the place of commission.\textsuperscript{78}

In the 18\textsuperscript{th} and 19\textsuperscript{th} centuries, these notions of an ‘enemy of mankind’\textsuperscript{79} ‘interest of all’\textsuperscript{80} or ‘common danger (of mankind)’\textsuperscript{81} were

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\end{itemize}

\textsuperscript{233} This jurisdiction over \textit{latrones} was the same theory that used by the Lombard League to justify jurisdiction over \textit{vagabundi} and others, which is explored by Reydams, see Reydams (n 1) and Rubin (n 45) 66.

\textsuperscript{75} Grotius (n 49) 526. In the case of the injury to the State (who punish ‘for the sake of the dignity or security of the State’), any State, in which the offender resides, must not interfere with the exercise of the injured State’s right. ibid.

\textsuperscript{76} De Vattel listed ‘poisoners, assassins or incendiaries’ (by profession) and ‘pirates’ as falling within the exception and thus, may be summarily executed, unless the injured State (place of commission) sought their surrender: ‘…for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety’. De Vattel (n 74) para 232 and 233.

\textsuperscript{77} We noted in section 2.1.3 of chapter 1 that Grotius considered the sovereign to have a natural right to exercise \textit{aut dedere aut judicare} if the crimes affect ‘human society’ or injured another State in ‘a special sense’. Grotius (n 49) 526 and 533.

\textsuperscript{78} Grotius (n 49) 527.

\textsuperscript{79} Blackstone (n 58) 71 (piracy as the declaration of war ‘against all mankind’, giving rise to a right of every community to inflict punishment as an act of self-defence (otherwise entitled within a state of nature)) and Hall (n 64) 311 (‘in the strong language of judges and writers….he is reputed to be the enemy of the whole human race’).

\textsuperscript{80} T Twiss The Law of Nations Considered as Political Communities–On the Rights and Duties of States in Time of Peace (2 edn Clarendon Press Oxford 1884) 290-1. Twiss argued that the aim of the Common law of nations was the ‘maintenance of peace of the Sea’; therefore, any offence against the peace of the Sea is an offence against the law of nations, which all nations may take cognizance. He described the high seas as ‘a common highway…subject to Common law of Nations’. Moore contended that as the pirate was \textit{hostis humani generis}, ‘any nation may, in the interest of all, capture and punish’. See \textit{Case of the SS Lotus} (n 33) 70 (Dissent of Moore).
invoked in order to represent the pirate as an ‘outlaw’, which all states had the right to punish irrespective of the place of commission or nationality of the offender. This presupposed that piracy was an offence against the law of nations, giving rise to this natural right of the sovereign. As such, all individuals were bound under the universal moral order and, if in breach, must be held directly individually responsible. As Hall argued, the acts of piracy ‘are done under conditions which render it impossible or unfair to hold any state responsible for their commission’. In a similar vein, Lorimer contended that ‘when the law of nations exercises criminal jurisdiction directly, it deals with persons whom it claims as its own citizens’. In this instance, international law punishes ‘cosmopolitan criminals, whom it regards as having ceased to be state citizens altogether in consequence of their having broken the laws of humanity as a whole, and become enemies of the human race’. According to this perspective, states would be ‘members of a veritable legal community, all subjects to the authority of a definite legal order’.

[Some] speak of a citizenship of private individuals in this world community, and of international law as the law of a super-society. Some maintain that there are international law crimes ...[and] that there should be an international tribunal of justice before which private individuals might prosecute their claims against states and private individuals might be prosecuted for crimes against the international community.

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81 Case of the SS Lotus (n 33) 95 (Dissent of Altamira).
82 Hall (n 65) 310.
83 J Lorimer The Institutes of the law of nations: a treatise of the jural relations of separate political communities Vol II (Blackwood & sons London 1883-1884) 132.
84 ibid.
86 ibid.
These ideas shared affinity with Molloy’s naturalism within the debate among English jurists in the 16th century. Molloy contended that under the law of nature, English courts had jurisdiction over pirate vessels of English nationality, foreign vessel attacking English vessels or where victim and perpetrator were present in English territory and the victim’s state did not proceed.\(^7\)

That said we noted earlier that based on his positivist approach, Rubin conducted an historical analysis of state behaviour and concluded that universal jurisdiction over piracy was,

[…](at best a rule of international law only for a limited period of time and under political circumstances that no longer apply; at worst it was merely a British attribution to the international legal order of substantive rules forbidding ‘piracy’ and authorizing all nations to apply their laws against it on the high seas, based on a model of imperial Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England alone.\(^8\)

Rather than adopt Rubin’s particular positivist position, the Harvard Research’s commentary on its Draft Convention on the Law of Piracy presented what appeared to be the more dominant view. It contended that piracy was not an offence against the law of nations rather piracy was a municipal offence that gave rise to an exception

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\(^7\) Beyond this jurisdiction under natural law, there was the right of self-help over acts committed on the high seas, that is, private punishment outside the jurisdiction of English courts. See discussion in Rubin (n 45) 86-87.

\(^8\) Rubin (n 45) 343. He contended whether either view was correct or it was a view between two extremes was the debate but he considered that for naturalist jurists, the problem was that piracy in ancient Rome was a ‘form of belligerency and not criminal behaviour’. Ibd 344. See also G Schwarzenberger ‘The Problem of an International Criminal Law’ (1950) 3 Current Legal Problems 263 (piracy is punished by municipal law and not before an international tribunal and thus, it is not an international crime \textit{stricto sensu}) and I Brownlie \textit{Principles of Public International Law} (7th edn Oxford University Press Oxford 2008) (universal jurisdiction is a right to punish acts which international law does not declare criminal).
to the exclusivity of territorial jurisdiction. Hence, piracy was an offence under municipal law and states may establish jurisdiction in their national law even though the crime was committed outside the territory of the state. This exceptional jurisdiction was justified based on the collective interest in maintaining the safety of commerce on the high seas. This view follows Jenkins’ approach in which he argued that English municipal law jurisdiction could extend to acts of foreigners who were not in English vessels and the acts did not affect English vessels. According to Jenkins, this extension of jurisdiction was justified on the right to preserve public peace and security of navigation and the supposition that there was a jurisdictional lacuna in the normal jurisdictional rules.

However, the commentary does not give the same weight to the limited actual cases of universal jurisdiction and the actual content of national law provisions. Here, the commentary’s writers were forced to concede that many municipal laws assert jurisdiction on the basis of some nexus to the offender or offence, that is, nationality or passive personality. Likewise, there was difficulty in finding actual cases ‘which could not be supported on one or more of the ordinary grounds’. Instead, the commentary dismissed the significance of these facts based on common accord or consensus (the

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89 See M Korowicz ‘International Personality of Individuals’ (1956) 50 American Journal of International Law 533, 545. Korowicz rejected the claim that piracy (and other offences such as white slave trade) is an example of individual’s possessing rights and duties. Instead, ‘individuals appear in these cases as subjects of prosecution and punishment by the interested State’. ibid.

90 Harvard Research ‘Draft Convention on Piracy’ (n 58) 760.

91 ibid 566.

92 Rubin (n 45) 88. According to Jenkins, the law of the place of crime determined jurisdiction but because pirates were not subject to the jurisdictional limits as fixed by European sovereigns in their mutual practice, the pirate can be tried ‘in whatever port they are taken’. ibid, 89.

93 Harvard Research ‘Draft Convention on Piracy’ (n 58) 760.

94 Ibid.
special jurisdiction was ‘generally supported…at least all seafaring states’\(^{95}\) and, drawing on Stiel’s legal analysis, on normative grounds (the necessity of ‘sea policing’).\(^{96}\)

1.3 Brussels Declaration to the Hague Regulations: the Pirate leaves…

Though the Lieber Code was significant in its contribution to the 1874 Brussels Conference on the rules of warfare,\(^{97}\) its reference to enemy irregulars and the analogy to piracy was not influential because the outcome document (the Brussels Declaration) did not include any provisions on penal sanctions despite a French proposal during the negotiations. In the French proposal, treaty parties were obliged to establish criminal jurisdiction over ‘any act of violence perpetrated by members of armed forces in neutral or enemy territory contrary to the provisions of the proposed treaty’.\(^{98}\) Unlike the Lieber Code’s distinction between enemy forces and enemy irregulars, this proposal suggested nationality jurisdiction (of members of the treaty parties’ armed forces) over offences committed extraterritorially, whether occupied or neutral territory.

\(^{95}\) Ibid.

\(^{96}\) Ibid 761. This is one of Rubin’s major criticisms of the Harvard Research, that it relied heavily on Paul Stiel for its conclusion that universal jurisdiction existed. However, Rubin argued that Paul Stiel work relied on secondary sources regarding key historical cases. Rubin (n 45) 307.

\(^{97}\) The 1874 Brussels Conference developed a draft convention regulating the conduct of hostilities on land, building on the provisions of the Lieber Code. The Declaration was not accepted by all 15 Governments at the Conference and consequently was never ratified. It significance lies in the groundwork prepared for later treaties. The Declaration established rules on ‘measures for injuring the enemy’, ‘bombardments’, ‘treatment of prisoners of war’ and the exercise of military authority in hostile territory. See Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874.

Nevertheless, the Institute of International law’s 1880 *Manual of the Laws of War* did address penal sanctions.99 Article 84 of the *Manual of the Laws of War* provided that ‘offenders against the laws of war are liable to the punishments specified in the penal law’.100 The Manual’s commentary described this right of the belligerents as the right to prosecute an alleged perpetrator (‘after a judicial hearing’) under the criminal law of the belligerent ‘into whose hands they are’.101 Garner’s argument, that belligerents had jurisdiction over violations of the laws of war committed on the belligerent’s own territory102 suggests then that their own and enemy forces could be prosecuted based on territorial jurisdiction. However, the question of jurisdiction over offences committed during military occupation was contentious;103 similarly, lawyers in the French legal tradition

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99 Institute of International Law ‘Manual of the Laws of War on Land’ (Oxford 1881-1882), Part 2 (I) [Hostilities], Part 2(II) [Occupied Territory], Part 2(III) [Prisoners of War].

100 ibid. The 1880 Manual was envisaged as a model for national legislation as opposed to proposal for codification by international treaty.

101 ibid Part III: Penal Sanctions. See Garner (n 48) 73-75 (citing American, British, French and German Military Manuals). See also Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report presented to the Preliminary Peace Conference (1920) 14 American Journal of International Law 95, 121.

102 See Garner (n 48) 75.

103 ibid. Here, Garner argued that the State could exercise jurisdiction over offences committed by enemy forces on its territory while under military occupation ‘in the interests of justice’ and on the fact that the belligerent’s sovereignty was not extinguished by the occupation of the enemy rather it was temporarily displaced. Cowles claimed that the offences need not take place in active hostilities. Belligerents have jurisdiction over offences ‘outside of particular territorial commands or national boundaries’. However, Renault argued that there was a distinction between the zone of active hostilities and outside this zone. Therefore, the State could have jurisdiction over offences committed (against States nationals) within the zone of hostilities of the State’s army, but it did not have jurisdiction over offences that occurred outside of this zone. See WB Cowles ‘Trial of War Criminals by Military Tribunals’ (1944) 30 American Bar Association Journal 330, 331 and Renault (n 46) 28.
disputed whether jurisdiction over offences committed against nationals in enemy territory could be justified.\textsuperscript{104}

Ultimately, the significance of the 1880 Manual’s criminal provision was its influence on state’s own military regulations because the Great Powers did not include repression provisions in the Hague Regulations.\textsuperscript{105} Instead, the Hague Regulations focus on State liability for acts of its armed forces,\textsuperscript{106} which ‘if the case demands’ must be compensated.\textsuperscript{107} Yet subsequent military manuals provided that violations of the laws of war were to be treated and prosecuted as analogous to domestic crime.\textsuperscript{108} However, they left open-ended the question of the extent of their jurisdiction over enemy nationals for offences committed outside of the injured belligerent’s territory. The US Rules on Land Warfare (1914) established military jurisdiction over US armed forces and enemy nationals captured after having committed an offence. The British Military manual claimed jurisdiction over acts of British nationals and those of enemy forces, except (as discussed further below) subordinates in enemy forces could not be prosecuted for acts ordered by their commanders. The French Code of Military Justice

\textsuperscript{104} This was adopted in the Treaty of Versailles (June 28 1919), Part VII, Article 228. Here, Clunet argued that jurisdiction over ‘attacks against the safety of the state’ could justify the belligerent exercising jurisdiction over crimes against its nationals committed extraterritorially. Merignhac contended that such jurisdiction would only be reasonable in time of war; but could not justify jurisdiction in time of peace. See Clunet cited in Garner (n 48) 78 and A Meringhac ‘De la sanction des infractions au droit des gens commises, au cours de la guerre eurpeenne, par les Empires du Centre’ (1917) 24 Revue Générale de Droit International Public 5, 45.
\textsuperscript{105} Wright (n 43) 82. In terms of the substantive law, the influence of the Hague treaties was such that the codes or manuals of the Great Powers were considered to ‘conform substantially to the Hague Regulations’. ibid.
\textsuperscript{106} Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations respecting the Laws and Customs of War on Land, The Hague (18 October 1907).
\textsuperscript{107} Ibid.
\textsuperscript{108} Garner (n 48) 73-75. See also Commission on the Responsibility of the Authors of the War (n 101) 121.
provided jurisdiction over ‘every individual’, which could be interpreted broadly to include enemy nationals.\textsuperscript{109}

Nonetheless the military manuals provided that if members of the armed forces committed violations of the laws of war pursuant to an order by their Government or their commanders, the capturing belligerent had no right to prosecute the subordinate.\textsuperscript{110} The right to punish only arose if the commander fell into the belligerent’s hands; failing capture, the only resort was through lawful reprisals.\textsuperscript{111} In light of this defence of superior orders, it meant that belligerents could only exercise their criminal jurisdiction over enemy irregulars (private persons) or enemy commanders if they fell into the belligerent’s hands.\textsuperscript{112}

That said as a chapter in the nascent international criminal law, the Allied powers made a ‘formal attempt’ in the peace treaties not only to hold enemy commanders and their subordinates

\begin{itemize}
\item \textsuperscript{109} See article 181 of the US Rules of Land Warfare, article 443 of the British Military Manual and article 249 of the French Code of Military Justice as cited in Garner (n 48) 73.
\item \textsuperscript{110} Article 443 of the British Military Manual and article 336 of the US Rules of Land Warfare both provided for the defence of superior orders and the prosecution of military commanders, who gave the orders, only if the latter fall into the hands of the enemy. See The Peleus Trial (1945) 1 Law Reports of the Trial of War Criminals 1, 18.
\item \textsuperscript{111} G Bower ‘The Laws of War: Prisoners of War and Reprisals’ (1915) 1 Transactions of the Grotius Society 23, 28.
\item \textsuperscript{112} This defence of superior orders attempted to grapple with two competing duties, one arising from military discipline and the other from the laws of war, that is, the duty to obey orders and the duty to comply with the rules of warfare. However, an absolute defence of superior orders would frustrate criminal prosecutions. It would impose on prosecutors the burden of proving that no order was issued, when most military orders are issued verbally. Unsurprisingly, Garner’s assessment of international law scholarship led him to conclude that Oppenheim was the only writer to approve the defence. See Garner (n 48) 85. Phillipson and Smith explicitly rejected the defence while Hall and Holland did not refer to the defence at all. Finch depicts this legal debate as an opposition between Phillipson and Oppenheim, see GA Finch ‘Superior Orders and War Crimes’ (1921) 15 American Journal of International Law 440, 441-442 (emphasizes that the defence was not in any previous edition of the military manuals).
\end{itemize}
criminally liable for violations of the laws of war but to hold Kaiser Wilhelm responsible for offences against international morality. On the former, article 228 recognized the right of the Allied Powers to prosecute those accused of violating the laws and customs of war before its own military tribunals (irrespective of proceedings brought within German (and Associated Powers) courts). On the latter, article 227 sought to indict the former German Emperor before a special international tribunal for the ‘supreme offence against international morality and the sanctity of treaties’. However the US members of the Commission dissented; they argued that any proceedings against a sovereign would be contrary to sovereign immunity as discussed in Schooner Exchange v. McFadden. Instead, the only law to which a Head of State is responsible ‘is the law of his own country’. However, this rule ‘does not apply for one ‘who has abdicated or has been repudiated by his people’. In the end, the

113 Commission on the Responsibility of the Authors of the War (n 101) 117. The 1919 Commission advocated the establishment of a high tribunal to exercise jurisdiction over four categories of offences (i) outrages against civilians and Allied soldiers committed in prisoner of war camps; (ii) conduct, which affected several Allies armies (as opposed to one area of battlefield); (iii) high ranking officials who failed to prevent violations of laws and customs of war; (iv) where the character of offence renders it advisable to prosecute under a high tribunal. Ibid, 121-122. See also Wright (n 43) 82 and MC Bassiouni ‘World War I: “The War To End All Wars” and the Birth of a Handicapped International Criminal Justice System’ (2001-2002) 30 Denver Journal of International Law and Policy 224.
114 Article 228 of the Treaty of Versailles (n 104). It states that ‘the German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies’. ibid.
115 Ibid article 227.
116 Commission on the Responsibility of the Authors of the War (n 101) 135. For criticism of the rejection of crimes against the ‘laws of humanity’, see Wright (n 43) 82.
117 ibid 136.
118 ibid.
Kaiser’s political asylum in the Netherlands thwarted any possibility of bringing the Kaiser before the ‘high tribunal’ and the Allies ultimately agreed to the Weimar Republic’s proposal to prosecute German officers before the Leipzig Supreme Court. However, the trials were controversial, with some suggesting there were cases of miscarriages of justice. The Commission of Allied Jurists publicly accused the German courts of giving those convicted lenient sentences.

2 Inter-War Period to WWII: an incubation period

The incubation period delves into three debates that illustrate the increasing influence of the piracy analogy within legal thought and the shift within the legal debate to apply the analogy to violations of the laws and customs of war committed by state officials acting on government order. Thus, section 2.1 will explore the debate over this analogy as applied to submarine warfare against civilian shipping. It will view this debate primarily through the

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119 The Supreme Council of the Peace Conference made an official demand for the Kaiser’s surrender in January 1920 and the Netherlands’ refusal was accepted by the Allies in March 1920; no further attempt to secure surrender was made. See GG Battle ‘The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes’ (1921-1922) 8 Virginia Law Review 1, 4. See also Wright (n 43) 82.

120 Battle (n 119) 4-5. The original list prepared by England, France and Belgium numbered 890, including senior commanders in the German armed forces. However, 46 were investigated and 11 brought to trial.

121 See CC Hyde ‘Punishment of War Criminals’ (1943) 37 American Society of International Law Proceedings 39, 41 and Wright (n 43) 87. For more recent commentary, see R Teitel Transitional Justice (Oxford University Press Oxford 2000) 31.

122 See generally Battle (n 119) 9-12.

123 See Bassiouni (n 113) 282. In the end, there were five acquittals: Karl Neumann (torpedo of hospital ship), Maz Randohr (imprisoning and mistreatment of civilians), General Stenger (killing of wounded in the field), van Schack and von Krushe (intentionally or negligently causing epidemic of typhoid fever in prisoners of war camp).
opposing positions of Carl Schmitt and Hersch Lauterpacht. In parallel, the idea of a principle of universality over offences defined by international treaties became a matter of interest. Section 2.2 will outline these debates in the 1930s within legal institutes and scholarship, which centred on the validity of jurisdiction asserted in certain national codes, as discussed in section 1.1. Finally, the International Military Tribunal at Nuremberg process and the Control Council Law No. 10 proceedings established the opposing arguments on individual criminal responsibility and here, section 2.3 ends with a discussion on how these tribunals used a combination of Kelsen, Lauterpacht and Cowles to justify their jurisdiction over non-nationals, that is, territorial sovereignty, belligerent jurisdiction and universal jurisdiction.

2.1 Codifying Submarine Warfare: the Pirate returns…

International lawyers returned to the notion of treating violations of the laws of war ‘as if’ they were acts of piracy within the debate on regulation of submarine warfare against civilian shipping in the 1920s and 30s. Under the Manual of the Laws of Naval Warfare, belligerents must issue a warning shot when stopping non-military public or private vessels. \(^\text{124}\) It is only if met with resistance that the use of force is permitted and here, all persons on board an enemy vessel must be ‘placed in safety’ before the vessel may be destroyed.\(^\text{125}\) However, the strategic relevance of submarine warfare was the capacity to destroy enemy trade by attacking civilian

\[^{124}\text{Manual of the Laws of Naval War (Oxford 9 August 1913) (article 32).}\]
\[^{125}\text{Ibid (article 104). The ability to destroy enemy vessels is restricted to ‘exceptional necessity’ when ‘the safety of the captor ship or the success of war operations demands it’. Ibid.}\]
shipping by surprise.\textsuperscript{126} During the war, the British Government refused to afford prisoner of war status to captured German submarine crews because their attacks on British shipping were ‘offences against the Law of Nations and contrary to common humanity’.\textsuperscript{127} This refusal to recognize prisoner of war status posed the question of whether the British policy was legally justified.\textsuperscript{128} As illustrative of the opposing approaches, Rech discusses the disagreement between Holland and Harrison in 1915.\textsuperscript{129} Holland disagreed outright that submarine warfare could be defined as piracy. Rather piracy ‘is committed under no recognized authority’ (‘private ends’ element),\textsuperscript{130} even if ‘certain countries, for their own purposes, have by treaty or legislation, given a wider meaning to the term…’\textsuperscript{131} Therefore, Holland advocated ‘careful consideration’ on the issue of penal sanctions. Instead, he turned to the ‘general rule’ that all activity under Government order must be exempt. Nevertheless, it is suggested that his reference to espionage indicated his recognition that exceptions may emerge in state behaviour and this would be the preferred avenue forward.\textsuperscript{132} In contrast, Harrison

\textsuperscript{126} W Rech (n 52) 239.

\textsuperscript{127} Bower (n 111) 26. Bower questioned the legality of imprisoning the German soldiers because jurisdiction over enemy nationals was restricted in national law to espionage, war treason and war crimes (violations of rules of warfare, illegitimate hostilities committed by individuals not members of the armed forces, espionage and war treason and marauding). However, he illustrated how the sinking of a merchant vessel (including neutrals) does not fit the definitions (in the British Military Manual) for any of those crimes. ibid.

\textsuperscript{128} The British Prime Minister Asquith declared German submarine warfare as a ‘campaign of piracy and pillage’ (given its indiscriminate character) and this theme became popular within the British press. See Anon ‘Reply of the Allies: Mr Asquith’s Speech’ The Times (2 March 1915) 9. Reporting on Speech in the House of Commons and Bower (n 111) 30.

\textsuperscript{129} W Rech (n 52) 240.

\textsuperscript{130} TE Holland ‘Letter to the Editor: Submarine Crews’ The Times (23 March 1915) 11.

\textsuperscript{131} TE Holland ‘Letter to the Editor: “The Pirates” The Times (15 March 1915) 9.

\textsuperscript{132} Holland (n 130) 11.
argued that the killing of civilians and the sinking of ships without notice were offences for which no defence of superior orders may be raised. While its depiction as piracy ‘in the strictness of law may be open to argument’, he advocated that the crimes should be prosecuted under municipal law. In other words, acts committed pursuant to government order should be subject to the ordinary criminal law of the capturing state, in a similar vein to the Lieber Code’s treatment of enemy irregulars.\textsuperscript{133}

This Harrison-Holland opposition was reflected (somewhat similarly) in the debates over the 1922 Washington Treaty and here, Schmitt and Lauterpacht are illustrative of the opposing approaches. The 1922 Washington Treaty declared that the general rule regarding protection of civilian shipping applied to belligerent submarines.\textsuperscript{134} It imposed liability on ‘any person in the service of any Power’, including those acting ‘under orders of a governmental superior’;\textsuperscript{135} thus, it removed the defence of superior orders. In parallel, the treaty adopted the Lieber Code’s piracy analogy. Article 3 provided that such persons deemed to have violated the laws of war,

\[\ldots\] shall be liable \ldots as if for an act of piracy\ldots before the civil or military authorities of any Power within the jurisdiction of which he may be found.\textsuperscript{136}

\textsuperscript{133} F Harrison ‘Letter to the Editor’ \textit{The Times} (16 March 1915) 7. Rech considers that Harrison states that German forces should be tried as ‘pirates and murders’ but Harrison seems to leave open the exact charge to be laid against the captured Germans; the focus is on justifying the prosecution in civilian courts as opposed to refusing POW status and detaining Germans without charge. Rech (n 52) 240.

\textsuperscript{134} Article 1(2) of the Treaty Relating to the Use of Submarines and Noxious Gases in Wartime (Washington 6 February 1922). This established that the merchant vessel ‘must be ordered to submit to visit and search’, ‘must not be attacked unless it refuses to submit to visit and search after warning\ldots’ and ‘must not be destroyed unless the crew and passengers have been first placed in safety’. ibid.

\textsuperscript{135} ibid. However, Rubin observes that the 1922 treaty was never applied to a submariner in fact. See Rubin (n 45) 295.

\textsuperscript{136} ibid. Rubin criticizes that article 3 seems to prohibit treaty parties from issuing State licences (privateering). See Rubin (n 45) 295. However, article 12 of the
Next, the 1930 Treaty for the Limitation and Reduction of Naval Armaments makes no analogy to piracy in its suppression provisions, even though it adopted the same substantive obligations, regarding warning and protection of civilians as outlined in article 1 of the 1922 Treaty.\footnote{Rubin (n 45) 347.} However, the piracy analogy returns in the preamble of the Nyon Agreement of 1937, albeit not in the operative text of the treaty. The Preamble states that the attacks (arising out of the Spanish Civil War) constitute ‘acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy’. Therefore, the treaty parties agreed ‘upon certain special collective measures against piratical acts by submarines…’\footnote{The Nyon Agreement (14 September 1937) URL: http://www.icrc.org/ihl.nsf/FULL/3107OpenDocument.} In the operative part, the treaty parties agreed to permit Great Britain and France to enforce the criminal sanctions on the high seas rather than a right of all treaty parties to exercise universal jurisdiction. Rubin contends that

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\ldots\text{ it seems to reflect a conception of special military or political rights to impose order on the high seas in the interests of general commerce and to confine rebellion to national borders of a single State to the profit of third country merchants.}\footnote{Rubin (n 45) 297.}
\]

\footnote{Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (The Hague 1907) prohibited privateering. Therefore, privateering would have been prohibited in any case for those treaty parties who were also signatories of the Hague Conventions. Article 22(1) of the Treaty for the Limitation and Reduction of Naval Armaments (22 April 1930). Also the Procés Verbal relating to the Rules of Submarine Warfare (6 November 1936) simply extended the number of States subject to the rule on submarine warfare outlined in article 22 of the 1930 Treaty. By the end of 1938, there were 48 parties including all the major powers of the world. See Rubin (n 45) 347.}
Rubin compared the 1937 Treaty to British and American attempts in 19th century to apply the notion of ‘pirate’ to attacks on commercial shipping committed on the high seas without private ends in order to place the acts under legal category of common crime yet enforcement would be left to Britain and US ‘as a matter of immediate political and military action to the exclusion of the courts’.140

Like the British policy during WWI, the 1922 Treaty and the Nyon Agreement prompted debate over the validity of the enforcement schemes. Genet and Schmitt dismissed the piracy analogy because it failed to accord to the classic definition of piracy.141 Genet discussed the classic definition, emphasizing the ‘private ends’ element.142 He argued that the treaty unjustifiably moved from municipal law to international law when it classified the rebel as a pirate and imposed sanctions.143 The rebel can be ‘subject only to punishment by the authority against whom he rebels…’ but the ‘pirate [is] an outcast from mankind, an international criminal…’144

140 ibid.
141 Meanwhile others argued that the non-acceptance and abandonment of article 3 of the 1922 Treaty demonstrated the ‘prevailing view’ that an officer acting under order of a State could not be classified as a pirate. See Anon ‘The Nyon Arrangements: Piracy by Treaty?’ (1938) 19 British Yearbook of International Law 198, 202.
143 An anonymous contribution to the British Yearbook of International law defined piracy as either (i) piracy jure gentium, an offence ‘done by a person in defiance of the laws of all States for which no state can be held responsible’ or (ii) various acts assimilated to piracy jure gentium under municipal law or by treaty between States. As neither of these definitions included submarine warfare, article 3 was ‘new legislation’. Anon (n 141).
144 Genet (n 142) 254.
Schmitt proffered the same legal arguments as Genet. Here, he endorsed Paul Stiel’s definition; ‘an undertaking that pursues political aims is not piracy’ rather the pirate was denationalized and citizenship-less. While Schmitt observed the confused entanglement of ‘ancient, medieval and modern conceptual elements’ in the theory on piracy, he likewise sought conceptual “clarity” by emphasizing the private ends motive. Rather than an offence against international law, piracy was merely an expanded competence of the state because of the pirate’s citizenship-less. However, Schmitt went further than Genet because he recognized that the ‘golden age of jus publicum Europaeum had gone’. He opposed the ‘new and authentic inter-State European order’ which certain developments are designed to bring into being, that is, the attempt to replace war with collective measures or in creating ‘some power capable of acting “in the name of humanity”. In the midst of the rise of the “total state”, the “empty space” for the non-political had become smaller and less significant and Schmitt feared that the use of the concept of the pirate was a means to impose a ‘moralizing global politics’.

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145 C Schmitt ‘The Concept of Piracy (1937)’ (2011) 2(1) Humanity An International Journal of Human Rights, Humanitarianism and Development 27. The ‘empty space in which the State was completely absent’ was piracy’s ‘stage’. The pirate was denationalized ‘as a precondition or consequence of his act’. The attack ‘was not directed against a specific state but must (at least hypothetically) be directed against all States, the goal being private enrichment…’. ibid.

146 Again here it is reminded that Rubin’s major criticisms of the Harvard Research was that it relied heavily on Paul Stiel because Paul Stiel’s work relied on secondary sources regarding key historical cases as opposed to a detailed analysis of the actual historical record. Rubin (n 45) 307.

147 ibid 28.

148 Rech (n 52) 238.

149 Heller-Roazen (n 49) 144.

150 Schmitt (n 145) 28.

151 Rech (n 52) 248.
Schmitt’s concept of the political assumed that only the state can be political; the state could never act in substantive terms like the ‘outlaw’.\textsuperscript{152} Thus, according to Schmitt, the ‘enemy of mankind’ was an ‘un-political entity’, out of which one can construct the idea of humanity to be defended.\textsuperscript{153} However, ‘humanity’ must be itself an un-political construct as it depends upon the un-political pirate. In the end, the 1922 and 1937 treaties located submarine warfare in a space where the state must be absent,\textsuperscript{154} despite the evident political motive. Schmitt’s ultimate call was to avoid adopting the ‘English concept of piracy’ or continental policing and using ‘interim concepts’, permitting the move into grey areas between war and peace.\textsuperscript{155} Though Schmitt’s concept of the political can be criticized,\textsuperscript{156} both Rech and Roazen observe Schmitt’s contemporary insight into how ‘the legal status of warfare had undergone an irreversible change, where state vessels were no longer impervious to charges of criminality’.\textsuperscript{157} This altered the landscape from inter-state warfare, pitting political enemies against one another, to ‘one collective against its lesser, infamous opponents, setting the representatives of a universal code of law against the stateless criminals who sought to transgress it’.\textsuperscript{158} If one raised ‘humanity’, then it opened to door to arguments justifying the use of criminal justice methods against the enemy.\textsuperscript{159}

\textsuperscript{152} ibid 249 and 251.
\textsuperscript{153} Schmitt (n 145) 28.
\textsuperscript{154} ibid.
\textsuperscript{155} ibid 29.
\textsuperscript{156} Rech (n 52) 249 and 251. As Rech argues, Schmitt also assumed that there can be some space for the non-political pirate, which is inconsistent with his observations on the dominance of the ‘total state’. ibid.
\textsuperscript{157} Heller-Roazen (n 49) 145.
\textsuperscript{158} ibid.
\textsuperscript{159} ibid.
In stark contrast, Lauterpacht sought to provide the legal justification for this new development. Koskenniemi observes that Lauterpacht’s early writing sought to demonstrate how international law could be addressed as a complete system, rather than the fragmented collection of treaty rules, and that international questions could be resolved by precedent or analogy from domestic law.\textsuperscript{160} In 1937, Lauterpacht had argued that the principle of immunity was ‘an anarchical principle of legal and moral irresponsibility’\textsuperscript{161} the only solution was to adopt the principle of individual criminal responsibility.\textsuperscript{162} Therefore, in the 1939 paper, Lauterpacht contended that submarine warfare against commercial shipping could rightly be termed acts of piracy as they were ‘acts which no government was prepared to take responsibility for’ and were ‘contrary to the most elementary rules of humanity’.\textsuperscript{163}

That said, Lauterpacht had to play down (or overrule) the significance of the private ends element of piracy because submarine warfare was solely politically motivated and incompatible with Schmitt’s “classic” definition. Therefore, unlike Schmitt, Lauterpacht turned to the controversial practice of the British and American Governments in the 19\textsuperscript{th} century where rebel groups were declared to be pirates. He considered that this ‘trend’ in practice demonstrated the division among jurists and made it doubtful whether the private ends element was fundamental.\textsuperscript{164} Taking the conflicting practice as a

\textsuperscript{162} ibid.  
\textsuperscript{163} H Lauterpacht ‘Insurrection et Piraterie’ (1939) 46 Revue générale de droit international public 513.  
\textsuperscript{164} ibid 523.
basis, he could then define piracy as an act of violence committed on the high seas with the legal consequences of universal jurisdiction.\textsuperscript{165} Hence, piracy was characterized by the agreement of states to address the particular conduct with universal jurisdiction rather than distinguished by types of violence and their motive. This definition meant he could avoid the limitation imposed by private ends and at the same time, avoid the debate on assimilating other offences to piracy.\textsuperscript{166} Rech concludes that Lauterpacht ‘took what he needed from municipal law’, that is, for his definition of piracy, and considered the distinction between piracy and privateering as a fiction, given that the acts were in substance analogous.\textsuperscript{167} The label ‘universal enemy’ was once powerful, 

... to unite an otherwise anarchical international society and to legitimize collective security actions that conventional law had not managed to protect.\textsuperscript{168}

As Rech argues, Lauterpacht wanted to use piracy as ‘the most relevant historical precedent for the nascent international criminal law’; he was only interested in how piracy could operate to suppress international crimes as opposed to piracy itself.\textsuperscript{169}

\textsuperscript{165} ibid 525.
\textsuperscript{166} ibid 528. Lauterpacht’s justification for the destruction of submarines engaged in submarine warfare against commercial shipping by Britain and France will not be discussed here. His argument hinged on the notion that the fair trial rights available under municipal law (as was the increasing trend) did not affect the lesser protections under the law of nations, that is, the right of States to summarily execute those engaged in piracy. ibid.
\textsuperscript{167} W Rech (n 52) 259.
\textsuperscript{168} ibid.
\textsuperscript{169} ibid 258.
2.2 Universality over delicta juris gentium?

Rech describes developments, such as the Versailles Treaty’s ‘formal attempt’ to criminalize atrocities in wartime, the 1922 Washington Treaty and the debate over an international criminal court, as radicalizing ‘the trend towards moralizing warfare and discriminating against the public enemy’.¹⁷⁰ Thus, the use of the ‘enemies of mankind’ analogy shifted lawyer’s arguments to ‘justifying war in humanity’s name’ that in turn broke the taboo of non-discrimination against the public enemy.¹⁷¹ Against this backdrop, there were discussions in the 1930s on whether the principle of universality¹⁷² could extend to offences other than the crime of piracy. This debate took the Lieber Code’s nascent notion of a piracy analogy beyond the confines of the laws of war and sought to broaden the concept of the international “outlaw”. It also responded to certain national codes that asserted extraterritorial jurisdiction over offences that had been defined in specific treaties in the instances where the state had custody of the alleged offender.¹⁷³ These treaties involved offences taking place across borders and provided that states parties could establish jurisdiction over the offence under various heads of jurisdiction.¹⁷⁴ In the 1930s debate, the Institute of International Law, the International Association of Penal

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¹⁷⁰ ibid 236.
¹⁷¹ ibid 237.
¹⁷² Or ‘universal right to punish’, see Mikliszanski (n 27) 331.
¹⁷³ These codes were outlined in the Harvard Research Draft Convention on Jurisdiction with respect to crime and were referred to in section 1.1 because those national codes were classified by the Harvard Research as evidence of the subsidiary jurisdiction.
¹⁷⁴ For example: article 2 of the White Slave Traffic Convention states ‘…shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries’. See International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20.
law and the Harvard Research on International law came to competing conclusions.

Under article 5 of the Institute of International Law’s Resolution on Conflict of Penal Laws with respect to Competence,175 every state had the right to punish acts committed abroad by a foreigner, found on its territory, where the acts constituted an offence against the general interests protected by international law.176 This interwove the subsidiary jurisdiction of the Institute’s 1883 Resolution177 with jurisdiction over piracy (based on custody). The ‘general interests’ reference could connect to De Vabres’ ‘interests of humanity’ and possess a natural law credo.178 In the Third International Congress of Penal law, there was debate over what offences should be subject to universal jurisdiction. De Vabres maintained that there was a difficulty in establishing a category of delicta juris gentium. Therefore, he advocated that forum deprehensionis (judge of the place of arrest) should apply to all offences (whether or not deemed international offences) and as a protection, there should be a hierarchy of jurisdiction where the forum deprehensionis is the final resort.179 In the end, the Third Congress’s Resolution advocated the revision of

176 Institute of International Law ‘Resolution on the Conflict of Penal Laws with respect to Competence’ (Cambridge 1931). It listed the crimes of piracy, slavery, facilitating the spread of contagious diseases, damage to submarine cables, counterfeiting currency or credit instruments etc. ibid.
177 ibid. Thus, the jurisdiction was subject to the condition that extradition of the accused had not been demanded or was refused by the territorial or nationality jurisdiction.
178 Arguably, this could invoke the ‘general interests’ of States in protection against threats to their security and domestic order, that is, dignity and independence. This would invoke Traver’s hypothesis discussed in section 1.1.
179 D de Vabres ‘Pour quels delits convient-il d’admettre la competence universelle’ (1932) 9 Revue International de Droit Penal 315.
existing treaties or negotiation of new treaties to ‘ensure the universal repression of all offences which the states would agree to consider as harming their interests or as dangerous to international relations’. In default of this harmonization of laws, it recognized that extradition was preferable to universality, although universality was highly desirable in the case of offences against ‘the Common Law’. Nevertheless, the Third Congress discerned a ‘tendency towards a universal repression of certain of these offences…which endanger the common interests of States…’ This has a De Vabres’ natural law credo, albeit determined by common accord of states.

In Mikliszanski study of a ‘universal right to punish’ delicta juris gentium, he contended that it derives theoretically from the nature of the penal norm as an international crime. Unlike the Institute of International Law, Mikliszanski marked a clear distinct line between the subsidiary basis of jurisdiction and jurisdiction over piracy as an offence against the law of nations. He argued that as the penal norm constituted an ‘expression of human justice’, the ‘universal right to punish’ must be a primary right of the custodial

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180 Section 1, para 1 of the Resolution of the Third International Congress of Penal Law, reprinted by International Association of Penal Law, URL: [http://www.penal.org/IMG/RICPL.pdf](http://www.penal.org/IMG/RICPL.pdf). The Preamble listed numerous treaty proscribed offences as ‘harmful to the interests common to all States’, for example, piracy, slave-trading, traffic in women and children, drugs and obscene publications, damage to submarine cables.

181 ibid section 2, para 1 and 2. See also section 1, para 2(i) and (ii) (the exercise of jurisdiction by the State with custody of the accused is subject to the harmonization of the laws of treaty parties and the establishment of ‘rules of cooperation between States designed to assure the exchange of evidence for and against the guilt of the accused’).

182 ibid (preamble).

183 Mikliszanski (n 27) 331. Reydams identifies the distinction between the work of Travers and Mikliszanski as the historical point where writers diverged between universal jurisdiction as exercisable only where an offer to extradite had been refused and universal jurisdiction as permitting a right to punish crimes under international law. See Reydams (n 1) 32.
state and not subsidiary to the territorial jurisdiction.\textsuperscript{184} This was justified on the ground that the national courts represented justice and not their own interests. In effect, the commission of \textit{delicta juris gentium} as international crimes triggered the jurisdiction of all courts.\textsuperscript{185} However, like the Third International Congress of Penal law, his thesis was not entirely natural law in tone as he considered \textit{delicta juris gentium} as the offences defined in treaties agreed by states.\textsuperscript{186}

That said, in the Harvard Research in International Law study, it rejected the claim that \textit{delicta juris gentium} should be assimilated to piracy for the purposes of jurisdiction. Like De Vabres, the commentary emphasized the disparity of national statutes\textsuperscript{187} and international resolutions, which rendered it impossible to draw ‘common agreement as to which offences should fall into a class of \textit{delicta juris gentium’}.\textsuperscript{188} It further rejected the claim that universality should extend to all crimes proscribed in treaty law based on the

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\textsuperscript{184} ibid 338.\\
\textsuperscript{185} ibid 339.\\
\textsuperscript{186} This was clearly not purely positivist as it assumed that the ‘universal right to punish’ could be imposed on treaty parties irrespective of their consent; most of the relevant treaties neither established a right nor imposed an obligation to exercise universal jurisdiction. The 1922 Washington Treaty was an exception. For this reason, the Third Congress of the International Association of Penal Law recommended the amendment or re-negotiation of the existing treaties to afford a right to exercise universal jurisdiction. See Third Congress (n 180).\\
\textsuperscript{187} Compare section 6 of the German Penal Code (asserted jurisdiction over two treaty offences, counterfeiting and traffic in women and children) and article 9 of the Polish Penal Code (asserted jurisdiction over piracy, counterfeiting, slavery, traffic in women and children, traffic in obscene publications, traffic in narcotics and any other offence pursuant to an international treaty binding on Poland). Harvard Research ‘Draft Convention on Jurisdiction’ (n 10) 569.\\
\textsuperscript{188} Harvard Research ‘Draft Convention on jurisdiction’ (n 10) 569. However, the divergent practice on the subsidiary basis of jurisdiction did not influence the commentary’s conclusion on its article 10, explored in section 1.1. This is despite the earlier criticism of the divergent practice of States regarding extraterritorial jurisdiction by the 1926 Committee of Experts in the Report on Extraterritorial Jurisdiction.
\end{flushright}
implicit or explicit acceptance of international cooperation for the repression of treaty offences.\textsuperscript{189} Thus, the commentary did not conclude that a principle of international law had crystallized; rather it cited the conclusion of the Third International Congress of Penal Law that further unification of national legislation was required along with better co-operation in matters of criminal proceedings.\textsuperscript{190} Hence, until these developments, extradition would be preferable in situations of such offences.\textsuperscript{191} Therefore, according to the text of the Commentary, if states sought to assert jurisdiction over ‘international crimes’ committed extraterritorially, it could use article 10 (other crimes) of the draft Convention (although a state is not obliged to assert such jurisdiction) or alternatively, conclude an international treaty providing for universal jurisdiction over specific offences.\textsuperscript{192}

2.3 The 1940s debate over the justifications for the jurisdiction of the IMT Nuremberg and the tribunals acting under \textit{Council Control Law No. 10}

The Allied post-war trials of enemy forces accused of war crimes was described as ‘on a scale quite without precedent in recorded history’.\textsuperscript{193} The Allied Declarations\textsuperscript{194} and the work of the

\textsuperscript{189} ibid.
\textsuperscript{190} ibid 571.
\textsuperscript{191} ibid. The study in this paragraph used the phrase ‘universal jurisdiction’ as opposed to ‘universality’. ibid.
\textsuperscript{192} ibid 572.
\textsuperscript{194} See Inter-Allied Declaration ‘Punishment for War Crimes’, St James’s Palace London (January 13 1942) and Official Documents ‘Tripartite Conference in Moscow: Anglo-Soviet-American Communiqué’ (1944) 38 American Journal of International Law Supplement 3, 8. At the 1943 Moscow Conference, the ‘Declaration on German Atrocities in Occupied Europe’ announced that any
UN War Crimes Commission\textsuperscript{195} moved international lawyers back into the space opened up by the codification of the laws of war since the 19\textsuperscript{th} century and the 1919 Versailles settlement. It re-engaged the international legal community on issues of criminal liability for aggressive war and war crimes under international law,\textsuperscript{196} the subordinate’s defence of superior orders,\textsuperscript{197} immunity of military and civilian commanders for acts of State and jurisdiction of belligerents and neutrals over enemy forces.\textsuperscript{198}

2.3.1 Individual criminal responsibility

As it informed the debate on jurisdiction, this section will briefly explore the 1940s debate on individual criminal responsibility for violations of the laws of war and the (controversial) offences of

\begin{footnotesize}
\textsuperscript{195} The Inter-Allied Conference was followed by the establishment of the United Nations War Crimes Commission (UNWCC), which involved 17 nations and met initially in October 1943. The UNWCC received and indexed charges filed by the member States and published lists of war crimes suspects and other relevant information. See T Taylor (n 193) 246.


\textsuperscript{197} Kelsen ‘Collective and Individual Responsibility in International Law with particular regard to the Punishment of War Criminals’ (1942-43) 31 California Law Review 530.

\textsuperscript{198} Given the wealth of material on the substantive legal issues arising from the Nuremberg trials and Council Control Law No. 10 trials (particularly criminal liability for aggressive war/crimes against humanity and defence of superior orders), this section will focus primarily on the issues of jurisdiction that are of immediate relevance to this historical exploration.
\end{footnotesize}
crimes against peace and crimes against humanity. The debate hinged on the compatibility of ‘criminal responsibility [for acts of state] with the idea of national sovereignty (AOS) and here, Kelsen and Lauterpacht are a good representation of the opposing approaches.

Kelsen emphasized how legal orders reflected sovereign will and consent. Thus, he contended that an official acting in service of the state cannot be criminally liable for violations of international law unless responsibility arises under treaty binding on the individuals’ home State. In terms of customary practice (as depicted in the Lieber Code), Kelsen contended that military tribunals could only punish violations of the laws of war perpetrated by private persons, whether the State’s own nationals or nationals of the opposing belligerent (or “enemy irregulars”) if they fall into their hands. However, violations of the laws of war that are acts of state

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199 This discussion does not contend with the wider debate that Arendt addressed in her work on the Eichmann Trial. On culpability, she considered that the trials only demonstrated the ‘inadequacy of the prevailing legal system and of current juridical concepts’ to deal with administrative atrocities. The crimes cannot be separated from the collective guilt of the State yet the political responsibility of the government could not be the subject matter of a criminal trial pronouncing individual guilt. See H Arendt Eichmann in Jerusalem: Report on the Banality of Evil (Penguin Books New York 2006) 294 and 298. See also M Koskenniemi ‘Between Impunity and Show Trials’ (2002) 6 Max Planck Yearbook for United Nations Law 1.


201 This following exploration will cite any relevant references to ‘piracy’ in regards to individual liability under international law. However, it is not envisaged to explore references to ‘piracy’ as a construct for ‘conspiracy’ as a mode of liability.

202 Kelsen (n 50) 160. Acts prohibited by the Hague Regulations could be committed by those acting on behalf of the State and by private persons acting on their own initiative, that is, without commission.

203 ibid. See also Kelsen (n 197) 537. See also Manner’s discussion which focuses on the treaty provisions of the core texts of the laws of war, which, he concluded, accorded with the orthodox principle that individuals could not be subjects of the law of nations. He argued that all relevant treaties refer to the obligation of every
can only give rise to collective responsibility of states and acts under order are not punishable under the defence of superior orders.\textsuperscript{204}

Similarly, Manner argued that the existing provisions on the laws of war only provided for civil responsibility of states for breaches of the laws and customs of war committed ‘by them or by their members acting in their behalf’.\textsuperscript{205} ‘Neither individual nor state can incur criminal liability under international law of war’; he supported this conclusion by highlighting the lack of an international executive authority that meant the only possibilities were the discretion to states to exact punishment (Hague) or obligation on states to impose sanctions (Geneva).\textsuperscript{206} According to Kelsen, the individual cannot be made liable without the consent of his/her own state and thus,

\begin{quote}
...using the fiction that [the] violation of the norms of the Treaty of Washington are to be considered as piracy, for which general international law establishes individual responsibility, is vain, since a violation of the Treaty of Washington is not piracy.\textsuperscript{207}
\end{quote}

He distinguished the White Slave traffic convention because the state has consented to the obligation to punish individuals for commission of offences.\textsuperscript{208} Outside of explicit state consent by treaty, general international law only establishes collective responsibility. Finally, Kelsen considered that the application of sovereign immunity over

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\textsuperscript{204} ibid 161. He cited the 1940 US Rules of Land Warfare in support of the rule on defence of superior orders. On collective responsibility and crimes against peace, see Kelsen (n 50).
\textsuperscript{205} Manner (n 98) 409.
\textsuperscript{206} ibid. This is a reference to the Hague IV and to the Geneva Convention on Prisoners of War (1929).
\textsuperscript{207} Kelsen (n 197) 537. See also Schick (n 196) 789.
\textsuperscript{208} ibid 538. He concurred with Lauterpacht that treaty offences were breaches of international law rather than merely breaches of municipal law. ibid.
\end{footnotesize}
\end{flushright}
acts of state officials applied as a general rule. He acknowledged certain exceptions, such as espionage even if authorized by the opposing belligerent. However, he argued that any exception to the general rule of immunity ‘must be established by special rules of customary or contractual international law’. Kelsen also supported Oppenheim’s endorsement of the defence of superior orders, which he argued arose from the general principle that the State does not sit in judgment of another State (par in parem non habet).

In contrast, Lauterpacht presented a series of radical (or seminal) arguments to justify prosecutions under the Nuremberg Charter that had their infancy in the 1919 Commission’s Report. We observed in section 2.1 that Lauterpacht had established in his scholarship a critic of sovereignty, a concept of treating international law as a complete legal system and a desire to transform the discipline of international law into an established legal profession. Naturally then, his 1944 paper accored with these assumptions and preferences. Thus, Lauterpacht considered violations of the laws of war

209 Kelsen (n 50) 159. Schick similarly rejected the claim that immunity of State officials was inapplicable. He argued that individual criminal responsibility should be incorporated in future international law when there is agreement ‘by statesmen and jurists acting on behalf of their respective nations’ as to what is justice in this instance. He discredited arguments based on the notion that the act of state doctrine in the context of state crimes is “bad” law; rather at the present time, there was no agreement as to what is good or bad law and in absence of agreement in international law, immunity must prevail. He emphasized how there was no evidence of an agreement in State practice at the time (citing the failure to include individual criminal responsibility and the removal of immunity in the UN Charter). See Schick (n 196) 790 and 792.


211 Commission on the Responsibility of Authors for the War (n 101).

212 See generally Koskenniemi (n 160). Lauterpacht was one of the foremost proponents of re-engaging the ‘theoretical connection between international law and remnants of natural law’. He was a student of Kelsen but had moved away from the latter’s ideas given his moral agnosticism. See I Venzke How Interpretation Makes International Law: On Semantic Change and Normative Twists (Oxford University Press Oxford 2012), 204.
as violations of international law and not merely offences under national law. The belligerent could treat the violations committed by enemy forces as criminal under municipal law ‘only if there is no justification for them in international law’.\textsuperscript{213} War criminals ‘are punished, fundamentally, for breaches of international law’\textsuperscript{214} and thus, Lauterpacht contended that,

[The] rules of warfare, like any other rules of international law, are binding not upon impersonal entities, but upon human beings. ...The immediate subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal character.\textsuperscript{215}

This implicitly invoked the naturalism of Lorimer’s ‘cosmopolitan criminals’, the vision of the international social world as universal order, in the guise of a \textit{civitas maxima} or natural law order.

Lauterpacht considered espionage as the requisite precedent for the ‘direct criminal liability of individuals’ for violations of the laws of war,\textsuperscript{216} particularly the US Supreme Court’s judgment in \textit{Ex parte Quirin}.\textsuperscript{217} In effect, Lauterpacht advocated that this exception, which would impose personal responsibility for acts of state on state officials, should become the general rule. Therefore, all state officials that violated the laws of war would be personally responsible, in a similar way to those accused of espionage. Though Holland in 1915 advocated the development of an exception in state behaviour, Lauterpacht made an analogy to espionage based on normative

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\item \textsuperscript{213} Lauterpacht (n 196) 64. Lauterpacht argued that the entitlement of the belligerent to punish enemy forces that fall into his hands is traceable in legal theory to Vitoria, Grotius and Wolff. ibid 61.
\item \textsuperscript{214} ibid (emphasis added).
\item \textsuperscript{215} ibid.
\item \textsuperscript{216} ibid.
\item \textsuperscript{217} Case of the German Saboteurs (\textit{ex parte Quirin et al}) (1943) 37 American Journal of International 152.
\end{itemize}
\end{footnotesize}
grounds rather than establishing whether an exception existed in actual fact. Thus, Lauterpacht claimed his position was supported ‘emphatically’ because the lack of personal responsibility for war crimes was so manifestly inconsistent.\footnote{Lauterpacht (n 196) 64.}

On the defence of superior orders, Lauterpacht rejected the absolute impenetrability of the defence of superior orders because its application would result in near complete impunity as only the Head of State, particularly in a dictatorial regime, could be liable.\footnote{History of the UN War Crimes Commission and the Development of the Laws of War (1948) 276.} This mirrored Garner’s discussion in his 1920 paper;\footnote{Lauterpacht made the same points as Garner in a draft of his 1944 paper that was submitted to the Committee on Crimes against the International Public Order in July 1942. Like Garner, he focused on the inconsistency that the Military Manuals endorsed the defence of superior orders yet at the same time, the duty to obey orders was qualified by the obedience to lawful orders. E Lauterpacht ‘Introduction’ in Lauterpacht (n 161). The Committee was headed by McNair, Lauterpacht’s mentor at LSE. See also Koskenniemi (n 160) 819 and Henzelin (n 1) 383.} however, while Garner was supportive of the French legal traditions’ exclusion of the defence, Lauterpacht went further and presented national practice as if it was uniform.\footnote{Lauterpacht argued that national practice demonstrated that the soldier was relieved of liability if ‘on the fact of it’ the order would not be illegal. Therefore, where the soldier knew with certainty that the order involved the commission of a crime, the latter would be liable. See UN War Crimes Commission (n 219) 277. Lauterpacht’s view was generally approved by the War Crimes Commission and by various Governments. ibid.} In Lauterpacht’s opinion, members of the armed forces would not automatically be excused if ‘in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity’.\footnote{Here, Lauterpacht extended the mens rea element to both knowledge and constructive knowledge and in effect, saw the courts’ determination as a contextual choice that reconciled the tension between the duty of obedience to orders and a duty to obey the law. The court would analyse whether the subordinate should and could have acted against the commander’s orders. Note the change in para 443 of the British Military Manual in April 1944 to accord with Lauterpacht’s}
provide the counter-weight to Kelsen’s opinion on immunity, Wright adopted the position of the US representatives in the 1919 Commission Report. Wright distinguished times of war and peace; during peacetime, immunity must be absolute but in wartime an exception may be made. He also distinguished the rules applicable to an incumbent and former Head of State. Hence, there was ‘no impropriety’ in criminal proceedings against a former Head of State where the act ‘is not an act of State’ or where the proceedings did not derive ‘authority from the state but from the international community’, that is, an international tribunal by treaty. However, in the case of incumbent Head of State, s/he had ‘symbolic significance’ and thus, would be ‘difficult to distinguish an action against him from an action against the State’.


223 As noted in section 1.2, the US dissenting opinion stated that the immunity applicable to a head of state ‘actually in office and engaged in the performance of his duties’ does not apply for one ‘who has abdicated or has been repudiated by his people’. Commission on the Responsibility of the Authors of the War (n 101) 136.

224 Q Wright ‘War Criminals’ (1945) 39 American Journal of International Law 257, 269.

225 Ibid. Wright pointed to ‘increasing acceptance’ of the principle that the state can be held liable for acts ‘not within its governmental capacity’; though this principle has not been recognized in regards to civil responsibility, ‘in respect to criminal liability it commands some support’ (citations omitted). Ibid.

226 This adopted the concept of immunity that the official is immune from suit when ordinarily the State would have been immune if it had been sued in place of the official (‘act of state as public act’). On this premise, acts in violation of international law could not be regarded as acts of State. See R van Alebeek The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (Oxford University Press Oxford 2008) 222.

227 Wright (n 224) 269.
Naturally, the Allied Powers endorsed the concept of individual criminal responsibility for acts committed by state officials and those acting on behalf of the state in the Charter of the Nuremberg Tribunal, annexed to the London Agreement of 8th August 1945. In turn, the indictment of the Allied prosecutors accused the defendants of being ‘individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy’. In doing so, the Prosecuting authorities drew heavily on Lauterpacht’s use of piracy as an appropriate precedent. In Jackson’s opening address, he referenced piracy and brigandage as acts ‘long recognized as crimes punishable under international law’. He contended that the principle of individual responsibility for those offences was ‘old and well-established’.

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228 Charter of the International Military Tribunal –Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945).
229 Count 1 of the Indictment accused the defendants of participation as ‘leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy to commit or which involved the commission of crimes against peace, war crimes and crimes against humanity, as defined in the Charter of the Tribunal’.
230 It is worth noting that recent scholarship has shed light on Lauterpacht’s profoundly influential role in advising Justice Robert Jackson, the Chief Prosecutor for the United States and his British counterpart, Sir Hartley Shawcross at Nuremberg. In Jackson’s Report to Truman, Jackson’s opening address and Shawcross’ closing address, Lauterpacht’s critic of sovereignty was palpable and there was a clear nod to the notion of the pirate as directly liable under international law that, the Prosecutors claimed, could act as a valid precedent. For example, see Closing Speech Part 1 reprinted in H Lauterpacht ‘Draft Nuremberg Speeches’ (2012) 1(1) Cambridge Journal of International and Comparative Law 72, 93 and 82 (‘the State could be a pirate’, according with his 1939 paper on submarine warfare). For explorations of Lauterpacht’s contributions, see Koskenniemi (n 160), P Sands ‘Twin Peaks: The Hersch Lauterpacht Draft Nuremberg Speeches’ (2012) 1(1) Cambridge Journal of International and Comparative Law 37 and E Lauterpa (n 222) 266 et passim (in particular 270-274) and Henzelin (n 1).
231 RH Jackson ‘Opening Address for the United States: Chapter V’ (1946) 1 Office of the US Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression 114, 167. See also Shawcross (n 200) 92 (referring to the crimes of piracy, breach of naval blockade and espionage as examples of ‘duties being
[That] is what illegal warfare is. This principle of personal liability is a necessary as well as logical one if International law is to render real help to the maintenance of peace. [...] While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity. 233

On the removal of the act of state defence, Shawcross argued that the principle, whereby one sovereign does not sit in judgment on another, is a matter of comity234 (or discretion).235 Therefore, it was not ‘any sacrosanctity of foreign sovereignty except in so far as the recognition of sovereignty in itself promotes international relations’,236 that is, exceptions arose where a state acted beyond its competence (as determined by international law). If the state ‘sets out to destroy that very comity on which the rules of international law depends’, it cannot shelter behind ‘the metaphysical entity which [agents of the state] create and control’.237 Shawcross concluded that the act of state defence argument was merely ‘an attempt to clothe crime with impunity because the motive was political rather than imposed by international law directly upon individuals’ and that there is always a single case that acts as a precedent).

232 ibid. See also Shawcross (n 200) 93 (‘war Crimes have always been recognized as bringing individuals within the scope of international law).

233 ibid.

234 Maier defined comity as ‘legal policies that energize the rules of conflict of laws and to considerations of high international politics concerned with maintaining amicable and workable relationships between nations’. See HG Maier ‘Interest Balancing and Extraterritorial Jurisdiction’ (1983) 31 American Journal of Comparative Law 579, 589.

235 Shawcross (n 200) 93. Shawcross rejected the ‘absolute sovereignty’ as a ‘thing of the past’ because it is inconsistent with the binding force of rules by common consent or treaty. Here, though lacking a ‘super sovereign body’, international law is a body of law obligatory on members of the international community and the rules ‘are the laws of that community’.

236 ibid 91.

237 ibid. Schick interpreted the use of ‘comity’ as being only a reference to times of peace and therefore, according to Schick, Shawcross was arguing that immunity did not apply in times of war. See Schick (n 196) 789.
personal’. 238 Such argument is solely an ‘arbitrary political doctrine(s) more appropriate to the sphere of power politics than to that in which the rule of law prevails’. 239

In its judgment, the International Military Tribunal Nuremberg concurred with the Prosecutor. Implicitly, the often-cited pronouncement was underpinned by the Prosecutor’s representation of piracy under the law of nations, along with an explicit reference to the US case law on espionage. The judgment invoked the moral naturalism of the Prosecutors’ arguments; it considered that individuals have international duties transcending their duties to the state, which had ‘long been recognized’, 240 and as such can be enforced by those acting in the interests of securing international law,

(...) the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law (emphasis of author). 241

238 Shawcross (n 200) 93-94.
239 ibid.
240 1 International Military Tribunal, The Trial of German Major War Criminals by the International Military Tribunal sitting at Nuremberg Germany (1946), reprinted in (1947) 41 American Journal of International Law 172, 220-221.
241 ibid. Based on the same premise, the Flick Trial contended that individual criminal responsibility applied to private citizens (as opposed to only State officials). The trial involved the trial of German industrialists whose companies provided the heavy industries to support the Nazi war effort. The Trial of Flick & Five Others (1949) 9 Law Reports of the Trials of War Criminals (US Military Tribunal 22 December 1947) I, 17-18.
2.3.2 Jurisdictional Basis of IMT and the Allied trials under *Council Control Law No. 10*?

In the 1945 London Agreement, the phrase ‘no particular geographical location’ has remnants of the subsidiary jurisdiction endorsed by the 1883 Institute of International Law (and successive writers) as well as the notion of piracy as outside the jurisdiction of any State.\(^{242}\) Thus, the Allied powers sought to justify jurisdiction over offences committed outside the territorial and nationality jurisdiction of the prosecuting states by foreign nationals (against foreign nationals in certain cases). Invariably, the International Military Tribunal in its judgment stressed that it was bound by its Charter yet this argument, of itself, could not answer whether the states acted lawfully in conferring jurisdiction on the Tribunal.\(^{243}\)

Therefore, the Tribunal attempted to justify the Charter as lawful exercise of authority by referencing the ‘unconditional surrender’ of Nazi Germany\(^{244}\) and the capacity of states to act jointly in

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\(^{242}\) Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (1945) 13 US Department of State Bulletin 222. This is in keeping with the 1943 Declaration on German Atrocities in Occupied Europe. However, article 1 of the Charter of the IMT focused on the accused: ‘the major war criminals of the European Axis powers’. The following section is not going to address the jurisdiction of the Tokyo Tribunal as writers didn’t address any question of universal jurisdiction as a possible justification. Instead, it is suggested that in general writers approved the IMTFE’s position that the basis of jurisdiction was the Potsdam Declaration where Japanese Government agreed to formal Instrument of Surrender; this was interpreted as consent by the existing Japanese government to Allied exercise of jurisdiction in contrast to the German ‘unconditional surrender’ by representatives who replaced the Nazi leadership. See AR Carnegie ‘Jurisdiction over Violations of the Laws of War’ (1963) 39 British Yearbook of International Law 402, 415 and G Schwarzenberger ‘The Judgment at Nuremberg’ (1946-47) 21 Tulane Law Review 329, 339 (‘all acts…of the occupying powers in Japan which go beyond limits of Hague Convention IV of 1907 derive their validity from consent on the part of the defeated enemy…’).

\(^{243}\) Carnegie (n 242) 415.

\(^{244}\) International Military Tribunal judgment (n 240) 216-217. The IMT judgment stated as follows: ‘the exercise of the sovereign legislative power by the countries
establishing ‘special courts’. These two justifications were particularly ambiguous and could accommodate the different arguments of Kelsen and Lauterpacht (‘unconditional surrender’) and Cowles and Wright (‘act jointly’).

The ‘unconditional surrender’ argument focused on the legal consequences of the *debellatio* of Germany. In scholarship, Kelsen and Lauterpacht offer variants on the theme and in their view, the ‘unconditional surrender’ entitled the Allied powers to exercise powers normally appropriate to the territorial sovereign. First, Kelsen rejected that belligerent occupation could describe the legal status of Germany and even if it could, he disagreed that this would legally justify the jurisdiction of Allied tribunals. The Hague to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world’. ibid.

245 ibid. ‘In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law…’ ibid.

246 Schwarzenberger argued that this phrase demonstrated that the IMT was a joint military tribunal under municipal law, see Schwarzenberger (n 242) 334 and Carnegie (242) 415.

247 Kelsen described this as where the German territory along with its population is placed under the sovereignty of the occupant powers. See H Kelsen ‘The Legal Status of the Unconditional Surrender’ (1945) 39 American Journal of International Law 518, 520. See also Q Wright ‘The Law of the Nuremberg Trial’ (1947) 41 American Journal of International Law 38, 50.

248 Kelsen (n 247) 518. According to Kelsen, belligerent occupation presupposed a continuing state of war between the occupying State and the State whose territory is under belligerent occupation. This would require Germany as a state to continue to exist in a state of war with the Allied forces and even if this was the legal situation, it would not confer any sovereignty over territory to the occupying State. Rather belligerent occupation meant that the legitimate government was incapable of exercising its authority and was only substituted for the period of occupation by the occupying State. However, in the case of Nazi Germany, the legitimate government ceased to exist either because the surrender treaty indirectly recognised the transfer of sovereignty to the Allies or because the last central government was legally abolished by the surrender treaty.

249 Ibid. Of note, recall Kelsen’s rejection of individual criminal responsibility of agents acting on government order as discussed in section 2.1.3. See Kelsen (n 50) 160.
Regulations prohibit an occupying State from making any changes to fundamental institutions in occupied territory, that is, the establishment of new executive, legislative and judicial institutions. With the same force, Kelsen rejected annexation as the legal status; instead, the Berlin Declaration explicitly stated that the Allied powers did not affect an annexation and there was no evidence of intention to remain in permanent control of the territory.\textsuperscript{250} However, he considered that intention to permanently control should not be the only form of intention to acquire sovereignty.\textsuperscript{251} Here, he argued that if the government was abolished, as in the case of Nazi Germany, the belligerent must establish its own sovereignty over the territory.\textsuperscript{252}

It follows, then, that territorial sovereignty could be explained by the concept of \textit{condominium}, that is, the joint sovereignty over Germany.\textsuperscript{253} As territorial sovereigns, the occupying states possessed ‘unrestricted legislative competence’\textsuperscript{254} and could establish a military tribunal for the purposes of prosecution of crimes committed prior to their “supreme authority”. As general international law obligated states to prosecute their own armed forces for violations of the laws of war, the Control Council can fulfil this obligation in its capacity as

\textsuperscript{250} ibid 520. Kelsen acknowledged how the existing law seemed to require annexation by the belligerent for an enemy’s State to cease to exist but he was adamant that Germany had ceased to exist as a State and sought to demonstrate that the Allied Powers have territorial sovereignty over Germany.

\textsuperscript{251} ibid 521. He considered that the difference between intention to permanent control (annexation) and a lesser intention was ‘a political [rather] than a legal one’. ibid.

\textsuperscript{252} ibid.

\textsuperscript{253} ibid 523. Kelsen cited certain precedents such as Austria and Prussia over Schleswig-Holstein (1864-1866) and Great Britain and Egypt over Sudan (1898). ibid.

\textsuperscript{254} ibid 525.
German government’s successor. Kelsen considered the Leipzig Trials as a requisite precedent. However, this territorial sovereignty could only extend to the acts of German nationals, that is, allegiance by virtue of nationality. Kelsen argued that jurisdiction over non-nationals could only be justified by agreement of the state of nationality under treaty. This would raise doubts over the validity of jurisdiction over non-nationals prosecuted under the Council Control Law No.10. Radin added an argument which was adopted in the Eichmann judgments. Though German courts ordinarily would have jurisdiction to try German nationals for extraterritorial offences, the unconditional surrender resulted in the complete absence of German courts, except for the local and newly constituted courts of limited jurisdiction by the Allied powers. He also turned back to the Leipzig Trials precedent and assumed that even if there were German courts and the accused were tried, it would be improbable that punishment would follow.

Second, Lauterpacht discussed Allied authority in terms of the rights of belligerents. Rather than questioning whether the Allied

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255 ibid 519.
256 ibid 525.
257 Schwarzenberger described the IMT as being international in the formal sense (being based on an international agreement) and a joint military tribunal under municipal law in substance. He concluded that the Nuremberg Charter had binding effect on the Allied powers and the 19 signatory states, as well as binding any court in Germany as Allied-decreed municipal law. See Schwarzenberger (n 242) 339-340. He doesn't appear to narrow the condominium to jurisdiction over German nationals as Kelsen does.
258 M Radin ‘Justice at Nuremberg’ (1945-46) 24 Foreign Affairs 369, 372. He dismissed the need to turn to jurisdiction over piracy (even if a ‘proper enough designation for those Nazis who have openly and defiantly denied any obligation to their fellow men’). Ibid.
259 This is similar to Garner’s argument, which he justified on ‘the interests of justice’. See Garner (n 48) 76. See also Memorandum for the Topic Formulation of the Nuernberg Principles submitted by the Secretary General ‘The Charter and Judgment of the Nuernberg Tribunal: History and Analysis’ UN Doc A/CN.4/5, 80. ‘The Law of Nations is the ultimate source of the authority to establish military
authority post-surrender was belligerent occupation (as Kelsen had), Lauterpacht viewed Nazi Germany’s occupation of Europe and North Africa during hostilities as the usurpation of the Allied belligerents’ authority over their own territory.\(^{260}\) At the end of hostilities, the sovereignty over Allied territory was restored to the Allied powers and therefore, the latter possessed the legal authority to prosecute war crimes committed on their territory.\(^{261}\) On this basis, the Allied powers could assert territorial jurisdiction over the crimes committed in Europe and North Africa against nationals of the State under occupation and against nationals of other States, including those of the occupying power, that is, ‘Jewish nationals of Germany’, and stateless persons.\(^{262}\) He added a combination of jurisdiction over extraterritorial offences against safety of state or its nationals and the capacity of belligerents to punish war criminals ‘as may fall into [their] hands’.\(^{263}\) On the former, he contended that the right of belligerents to exercise jurisdiction over crimes wherever committed against the safety of the state and its nationals was ‘claimed by some states and not denied by international law’ (emphasis of author).\(^{264}\) However, Lauterpacht did not elaborate as to whether the ‘safety of the state’ was the protective principle or was the subsidiary

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\(^{260}\) Lauterpacht (n 196) 62. He pointed out how in the case of belligerent occupation (in this instance Nazi occupation), the principle of territorial jurisdiction

\(^{261}\) ibid. He noted the principle of immunity of armed forces on foreign soil but he argued that this principle only applied to armed forces present ‘with permission of the lawful sovereign’. He also noted exceptions in peacetime for acts of foreign armed forces against the State and in wartime for acts of an ally that may be subject to local jurisdiction. He finally argued that the ‘very notion of the punishment of war crimes’ implied an exception to the principle of immunity. ibid.

\(^{262}\) ibid 63.

\(^{263}\) ibid.

\(^{264}\) ibid.
jurisdiction based on Travers’ threat to the security of the state. The implication from Lauterpacht’s stress on the belligerents’ right on capture would suggest that he sought to imply the latter.

The capacity of states to act jointly (‘done together what any one of them might have done singly’) was interpreted as a reference to universal jurisdiction or protective principle of jurisdiction.265 Here, Cowles and Wright offered variants on this theme. Though both investigations had specific remits,266 they compare in terms of their premise and conclusion. Thus, they explicitly premised their analysis on the *Lotus* judgment whereby ‘international law imposes few limitations …’ 267 Nevertheless; they turned to demonstrate why jurisdiction could be claimed, albeit offering distinct grounds. Cowles used legal analogy. Like the Lieber Code, he considered brigandage and war crimes as analogous in terms of substantive acts and he extensively detailed the legal history of US courts exercising extraterritorial jurisdiction over the former; he contended that the legal history demonstrated neither a sense of obligation to desist from exercising jurisdiction nor any protest by the State with primary interest.268 In other words, US courts did not consider that international law prohibited them from exercising jurisdiction and there was no evidence that such prohibition emerged through objections by other States. He argued that the US courts exercised jurisdiction ‘where ordinary law enforcement is difficult or

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265 Memorandum (n 259) 79 (considering piracy as the appropriate parallel, as well as the protective principle and parallel to counterfeiting currency). See also Carnegie (n 242) 415.

266 Wright’s analysis is directly related as it specifically dealt with the jurisdiction of the IMT while Cowles’ investigation pertains to national courts exercising jurisdiction over foreign nationals accused of committing violations of the laws of war irrespective of any legal nexus.

267 Wright (n 247) 49. See also Cowles (n 51) 180.

268 Cowles (n 51) 216.
suspended’ to ensure the offence was prosecuted\textsuperscript{269} or De Vabres’ “scandalous impunity”. Cowles transposed his analogy to war crimes, which, he considered, was empirically supported, as a ‘matter of general interest and concern’, that is, in the interests of justice.\textsuperscript{270}

In a different vein, Wright interwove universality over piracy with the threat to security of the State.\textsuperscript{271} Hence, Wright’s view combined the content of article 10 of the Harvard Research’s \textit{Draft Convention on Jurisdiction}, which could include offences against the law of nations, and justification for universality posited by Travers, which was based on the threat to the security or public order of the state. In an earlier paper, Wright had contended that the crimes under article 6 of the Nuremberg Charter were ‘offences against the universal law’.\textsuperscript{272} They were committed not in a ‘state of war’ but rather have the ‘character of conspiracy, rebellion or aggression against the world community’.\textsuperscript{273} Therefore, all acts in pursuance of conspiracy (or illegal war) are recognized as criminal in the law of civilized nations and are offences against the universal law.\textsuperscript{274} Wrights’ conclusion on jurisdiction had been particularly open-ended; ‘such crimes may be prosecuted by a tribunal with the authority of the international community’.\textsuperscript{275}

Alongside the International Military Tribunal proceedings, the Allied Powers established domestic military tribunals to prosecute

\textsuperscript{269} ibid.
\textsuperscript{270} ibid 217.
\textsuperscript{271} Wright also did not qualify the State (‘any State) as the belligerent party to a conflict and therefore could be interpreted more broadly as permitting neutrals to prosecute.
\textsuperscript{272} Wright (n 224) 282.
\textsuperscript{273} ibid.
\textsuperscript{274} ibid 284.
\textsuperscript{275} ibid 282.
enemy forces for crimes committed during the war, based on the Control Council Law No. 10. Article III empowered each occupying authority to arrest and if there is a *prima facie* case, to prosecute all persons before their military tribunals in their respective zones of occupation. However, certain trials involved the prosecution of enemy nationals for crimes that did not fall within the unquestionable jurisdiction of belligerent parties, namely committed within the belligerent’s own territory or against its own forces (nationality of the victim). Carnegie argued that the ‘unconditional surrender’ argument could not explain the validity of certain proceedings, which involved extraterritorial jurisdiction over non-nationals for crimes against non-nationals; here, universal jurisdiction becomes the only legitimate basis for proceedings. Likewise, the introduction to the *Law Reports* argued that

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276 The military commanders of the four zones of occupation, comprising the provisional legislative organ for the whole of Germany, enacted Control Council Law No. 10. The purpose of the enactment was to establish ‘a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal’. Article II (1)(c) of the Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes Against Humanity (20 December 1945), reprinted in Appendix D, T Taylor ‘Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10 (Washington 1949) 250. Taylor criticized how the British zone conducted trials under a Royal Warrant which only provided a legal basis for war crimes prosecutions. ibid, 8. See also *Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offences and Trial of German Offenders* (8 July 1945).

277 Article III of the Control Council Law No.10 (n 276) 250. The (article II) definitions of the crimes were drawn from two sources, Jackson’s Interim Report to the President and from the London Charter. However, for crime against humanity, the Control Council Law only adopted Jackson’s definition, which did not include the requirement of being committed ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal’ (as was the case in article 6(c) of Nuremberg Charter). Taylor argued that as the Nuremberg Charter had been enacted four months earlier, the difference in the Control Council Law was manifest and must have been deliberately adopted, ‘intending the differences to be meaningful’. ibid.

international law permits ‘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’.\textsuperscript{279} It endorsed the ‘exhaustive treatment’ by Cowles and was ‘generally accepted as sound’ in principle.\textsuperscript{280}

It follows then that the \textit{Control Council Law No.10} proceedings adopted either the same “ambiguous” stance as the International Military Tribunal or the dual reasoning as presented by Kelsen’s joint sovereignty\textsuperscript{281} and Cowles’ universal jurisdiction.\textsuperscript{282} \textit{Re List} is an example of the International Military Tribunal’s (\textit{Hostages}) “ambiguous” stance.\textsuperscript{283} The US tribunal stressed the character of the crimes as those ‘universally recognized as criminal, which [are] considered a grave matter of international concern’;\textsuperscript{284} ‘the inherent nature of a war crime is...itself sufficient justification’ for the jurisdiction of the capturing State.\textsuperscript{285} This characteristic of ‘international crimes’ established a ‘valid reason’ against exclusive jurisdiction of the place of commission, combined with the invariably

\textsuperscript{279} \textit{Law Reports of the Trial of War Criminals} (n 241) 26.
\textsuperscript{280} ibid.
\textsuperscript{281} Kelsen (n 247) 518.
\textsuperscript{282} Cowles (n 51) 177.
\textsuperscript{283} \textit{List and Others (Hostages Trial)} (1949) 8 \textit{Law Reports of the Trial of War Criminals} 34, 55 (US Military Tribunal, Nuremberg, 19 February 1948). The Defence argued that an occupying force had no jurisdiction over offences committed prior to the occupation. It cited article 63 of the Geneva Convention of 1929, where the criminal proceedings by an occupying force apply ‘only to crimes and offences committed while occupying,...and confers no jurisdiction over a violation of international law committed prior to the time of becoming such’.
\textsuperscript{284} ibid. The trial involved the prosecution of German officers for the reprisal killings of civilians or destruction of property not justified by military necessary in Greece, Yugoslavia and Albania. Therefore, the trial could not be based on territoriarity, passive personality, or on jurisdiction of the occupying force (as the offences occurred before occupation and outside zone of US occupation).
\textsuperscript{285} ibid.
‘political upheavals’ of post-war environment that may leave crimes unpunished.\footnote{Ibid.}

Meanwhile the \textit{Hadamar},\footnote{\textit{Klein and Six Others (Hadamåarn Trial)} (1947) 1 Law Reports of the Trial of War Criminals 46, 52. The \textit{Hadamåarn} case involved the war crimes trial before a US tribunal of the German staff of a small sanatorium in Hadamar, where staff deliberately killed 400 Polish and Soviet nationals by injecting the victims with poisonous drugs. Therefore, the offences were committed by non-US nationals, outside US territory and against non-US nationals. The tribunal’s jurisdiction was provided under various federal statutes, primarily ‘Articles of War’; it had jurisdiction over enemy combatants and civilians against non-enemy nationals and against own forces.} \textit{Almelo}\footnote{\textit{Sandrock and Three Others (Almelo Case)} (1947) 1 Law Reports of the Trial of War Criminals 35, 41. The \textit{Almelo} case involved the war crimes trial of German soldiers by a British tribunal for the murder of a British prisoner of war and a Dutch civilian in the Netherlands. The tribunal could claim jurisdiction over the killing of one of its armed forces but the jurisdiction over an offence against a non-national civilian was different.} and \textit{Zylon B}\footnote{\textit{Tesch and Two Others (Zyklon B case)}(1947) 1 Law Reports of the Trials of War Criminals 93, 103. In the \textit{Zylon B case}, the British tribunal tried German industrialists responsible for producing the gas used in the death camps, although it could not be proved whether there were British nationals among the victims.} cases are demonstrative of the adoption of the dual reasoning. The US court’s judgment in \textit{Hadamåarn} captures the underpinnings of the previous judgments when the court argued that jurisdiction was based on three avenues: ‘universality of jurisdiction over war crimes’, the ‘common struggle against a common enemy’ and the ‘assumption of supreme authority’. On universality, it cited the support for the doctrine by the UN War Crimes Commission and described ‘universality’ as:

‘…jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.’\footnote{\textit{Klein case} (n 287) 53. See also \textit{Sandrock Case} (n 288) 42.}
On the ‘common enemy’, it claimed that the US could exercise jurisdiction over offences where the victims are ‘nationals of allies engaged in a common struggle against a common enemy’. This is indicative of the ‘common enemy’ notion within the literature on the law of piracy and brigandage. Finally, the unconditional surrender and assumption of full authority permitted US tribunals to assume jurisdiction based on territoriality and nationality of the accused.

It is apparent from the antecedent debates that the piracy analogy in the International Military Tribunal Prosecutors speeches, the *Law Reports* and scholarship delved into chaotic and entangled history where each debate had its competing approaches. Nevertheless, these references allowed for the concept of universal jurisdiction over crimes against international law to become an acceptable idea in the 1940s. Yet, at the same time, the “dangers” of arbitrary interference re-entered the debates; here, Schmitt’s provocative attack is tempered down considerably and the approach, that was adopted, showed an affinity with the views of the International Association of Penal law and Travers, in which the need for harmonization of laws (or similar ‘degrees of civilization’) was stressed. Hence, at the end of the decade when two landmark humanitarian treaties were being drafted, the idea of universal jurisdiction over crimes against international law found its way into the debates. First, the 1948 Genocide Convention famously excluded universal jurisdiction from article VI;

291 ibid 53. See also Sandrock Case (n 288) 42.
292 ibid.
293 Article VI states: ‘Persons charged with genocide or any of the other acts enumerated in Article 3 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’. See *Convention on the Prevention and Punishment of the*
provided for ‘universal enforcement’, it was set aside by a majority of the Ad Hoc Committee on Genocide, which stressed how universal repression might lead to ‘dangerous international tension’ and ‘biased and arbitrary authority over foreigners’.

Second, the 1949 Geneva Conventions obliged State parties to search for and punish persons accused of grave breaches. In Pictet’s 1952 Commentary, he described the common repression regime as ‘universality of jurisdiction’. Pictet’s interpretation is approved by van Elst, who observes the descriptions of two earlier proposals within the negotiations as demonstrating recognition of universal jurisdiction. The first proposal (1947) would oblige States parties to punish ‘wherever [the accused] was found’. The second proposal (1948) was described by its commentary as ‘the principle of

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295 Official Records of the Seventh Session of ECOSOC, Supplement No.6, Report of the Ad Hoc Committee on Genocide, 12. It was rejected by the Committee by four votes (among which France, the United States of America and the Union of Soviet Socialist Republics) against two with one abstention. (Eighth meeting, Tuesday, 13 April 1948). Ibid.
296 The British delegation argued that implicit in an obligation to search for and punish was the requirement to establish jurisdiction. See R van Elst ‘Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions’ (2000) 13 Leiden Journal of International Law 815, 820.
297 JS Pictet The Geneva Convention of 12 August 1949: Commentary Vol. 1 (Geneva 1952) 339. Pictet also refers to this jurisdiction as based on aut dedere aut punire. Ibid, 338. See Article 49 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 50 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), Article 129 of the Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949) and Article 146 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).
298 van Elst (n 296) 820-21.
universality of jurisdiction’. Yet there were also dissenters; Bowett and Röling contended that the penal provisions could not be binding on neutrals, but rather only bound treaty-party belligerents.

3. The culmination of opposing debates: AG v. Eichmann

The dramatic covert abduction of Eichmann and his trial before the Israeli Courts was a cause célèbre in international affairs in 1961. The Eichmann trial forced a return to debates over the validity of universal jurisdiction over crimes against international law. In turn, the Trial judgment and Defence Counsel mounted the same battle-lines between Prosecutor and Defence as adopted in the post-WWII trials. The Eichmann judgments used the series of interweaving

299 ibid 821 (the proposal was dropped because of controversy of the obedience to superior orders and the reference to an international criminal court).
300 D Bowett ‘Jurisdiction: Changing Patterns of Authority Over Activities and Resources’ (1982) British Yearbook of International Law 1, 12 and Roeling ‘Aspects of the Criminal Responsibility for Violations of the Laws of War’ in A Cassese (ed) The New Humanitarian Law of Armed Conflict (1979) 202. However, note that this latter interpretation has been challenged by Van Elst who observed that the Italian delegates’ proposal to restrict the obligation to ‘parties to the conflict’ was rejected by the Netherlands and in the end, the Italian motion was withdrawn. The Netherlands delegate stated that the obligation applied to neutrals in a conflict. Van Elst (n 296) 820.
301 Here, this discussion of Eichmann does not delve into Arendt’s challenges in her work on the Eichmann trial, except her comments on the issue of nullem crimen sine lege (or non-retroactivity of law). Along with her challenge to the idea of individual culpability in regards to crimes that involve collective guilt, she criticized the instrumental use of the trial for didactic purposes and controversially described Eichmann as the ‘banality of evil’, as opposed to the monster (radical evil) depiction of the Israeli Prosecutor. Likewise, she contended that crimes against humanity were new crimes that were without precedent because they occurred within the context of totalitarianism, which was a modern phenomenon. See Arendt (n 199) 9-10, 25-26, 54 and 254. For critic of Arendt’s arguments on the trial, see T Mertens ‘The Eichmann Trial: Hannah Arendt’s View on the Jerusalem Court’s Competence’ (2005) 6 German Law Journal 407.
302 This discussion will discuss only the arguments on the validity of universal jurisdiction as a legal principle, the form of the principle as subsidiary and the claims against the violation of non-retroactivity of law and of immunity. However, the discussion of the validity of universal jurisdiction over war crimes, crimes against humanity and genocide will be interrogated in Chapter 4, section 2.1.
threads of legal thought that had emerged in the *embryonic* and *incubation* periods and although the trial judgment was heavily influenced by the 1940s arguments, it also has threads of earlier material. Likewise, the defence counsel interwove the opposing side of the debates during both developmental periods, which had been drawn upon by the Defence counsel during the International Military Tribunal process.

The Defence counsel argued that universal jurisdiction only arose where there was no competent territorial jurisdiction and an international tribunal with jurisdiction had not been established.\(^{303}\) This implied that territorial jurisdiction was exclusive unless exceptional circumstances were involved and in this way, it invoked the *Lotus* dissenting opinion which posited that extraterritorial jurisdiction must develop as a recognized exception.\(^{304}\) Jurisdiction over piracy was considered to be justified based on the absence of sovereignty over the high seas,\(^{305}\) which delved back to Jenkins’ positivist justification for a broad jurisdiction over piracy. As noted section 1.2.2, Jenkins located the right to exercise jurisdiction in territorial jurisdiction that could be extended to the area of the high seas to secure public peace in the situation of a jurisdictional lacuna within the normal jurisdictional rules.\(^{306}\) Similarly the Harvard Research’s commentary on its Draft Convention on Piracy argued

\(^{303}\) *Written Pleadings submitted by Counsel for the Appellant Adolf Eichmann*, para 2 (a). This connected with the claim that the legislation was invalid because it provided for prosecution of acts committed before the establishment of the State of Israel against non-nationals. It was also not internationally sanctioned (treaty-based) unlike the Nuremberg process and as such, was ‘a unilateral measure’. See D Lasok ‘The Eichmann Trial’ (1962) *11 International and Comparative Law Quarterly* 355, 361.

\(^{304}\) *AG v Eichmann* (n 4) 286.

\(^{305}\) *Written Pleadings* (n 303) para 2 (b).

\(^{306}\) Rubin (n 45) 88. See also Harvard Research ‘Draft Convention on Piracy’ (n 58).
that piracy was not an offence against the law of nations rather piracy was a municipal offence that gave rise to an exception to the exclusivity of territorial jurisdiction.307 On the content of jurisdiction, the Defence counsel contended that the principle operated according to aut dedere aut punire; this notion required that there must be a refusal of an offer to extradite to the state of location of the offence.308 Finally, the Defence adopted Kelsen’s critic of individual criminal responsibility; an act imputable to a foreign State cannot be the subject of criminal jurisdiction in a foreign court. The acts could only be possible ‘by means of an act of State’ and thus, the individual ‘is not capable of committing them’; this cannot be denied ‘by characterizing the state as a “criminal gang”’.309

In opposition, the Eichmann judgments drew on the Lotus majority’s presumption against limitations, which demonstrates the influence of Lauterpacht, Cowles and Wright. The trial court simply stated that ‘far from…negating or limiting the jurisdiction of countries with respect to such crimes’, international law required all States to exercise jurisdiction in order to repress these offences, particular in the absence of an international criminal court.310 However, the appeals court went into greater detail. It

307 See also Korowicz (n 89) 545 (challenging the notion that individuals possess legal personality as well as States).

308 Written Pleadings (n 303) para 2 (b). This invoked the form of the subsidiary basis of jurisdiction as explored in section 1.1. However, this section noted how the legislation of European States was varied as to whether the state asserted jurisdiction over domestic and/or treaty offences. Interestingly, the Harvard Research separated universality over piracy and universality over other crimes (including treaty-defined crimes), a distinction which it justified based on the lack of demonstrable practice that jurisdiction over piracy could extend to other international crimes.

309 ibid para 2(b). The Defence emphasized the political character of the acts and stressed how individual punishment for political acts had not ‘generally been applied’. ibid.

310 AG v Eichmann (n 4) 26.
acknowledged the conflict between majority and minority in *Lotus*\(^{311}\)
but rather than adopt a particular view, it emphasized the evident lack of agreement or consensus on matters of extraterritorial jurisdiction. This accords with Lauterpacht’s 1939 article on the 1937 Nyon Agreement; there, he refuted the significance of the private ends element of piracy given competing trends in state behaviour. However, though the appeals court claimed to be against adopting a particular view, the court evidently preferred the discretion left to States rather than the exclusivity of the territorial jurisdiction. In further support, the court weighed the significance of the Israeli statute, the *Nazi and Nazi Collaborators (Punishment) Law 1950*. It was viewed as proof that the territorial jurisdiction in this instance was not exclusive. However, invariably, the statute could also be viewed as a unilateral and excessive assertion of jurisdiction.

In a similar method to Cowles and Wright, both courts moved to demonstrate that the Israeli statute was based on recognized principles of jurisdiction under international law even though they had endorsed the *Lotus*’ presumption against limitations. This method moves from the *Lotus* judgment to its dissenting opinions and in effect, accords with the Defence’s position, that is, a permissive rule must be established.\(^{312}\) Of relevance to this thesis is the courts’ discussion of the principle of universal jurisdiction; \(^{313}\)

\(^{311}\) ibid 283-285. It divided the interpretations of the majority judgment into the following: it could only relate to the specific facts (validity of Turkish jurisdiction based on objective territorial jurisdiction), it was authority for the presumption against limitations on jurisdiction over extraterritorial offences (discretion), it must be rejected because of a general rule prohibiting extraterritorial jurisdiction unless a specific basis exists in customary international law (minority dissents in *Lotus*).

\(^{312}\) *Case of the S.S. “Lotus”* (n 33) 34-35.

\(^{313}\) As noted in Chapter 1, section 2.1.2, the Israeli district court contended that the State of Israel could assert jurisdiction based on how ‘the crime very deeply concerns the “vital interests” of the State of Israel and given the ‘special connection’ between the State of Israel and the Nazi atrocities, the latter of which
here, we will focus on the narrative that it constructed in order to justify the principle and how it represented the principle’s content. First, both courts premised their justifications for universal jurisdiction on the gravity of the crimes; they interwove the common enemy or outlaw with the offences against the law of nations or ‘universal offences’ and as such, appealed to an international community in the guise of a *civitas maxima*. The trial court referred to ‘abhorrent crimes’, which ‘shock the conscience of nations’. Similarly, the appeal court referred to the ‘universal moral values and humanitarian principles, which are at the root of the system of criminal law adopted by civilized nations’. In other words, the Israeli courts singled out the approach in earlier debates that justified jurisdiction over piracy on the nature of the offence and applied this approach to crimes involving political motive, thereby ignoring Schmitt’s critic that considered the private ends element as the crucial feature in the definition of the crime.

The trial judgment used De Vabres’ legal history and presented this history as if it had developed in a linear, uninterrupted fashion and that the concept of universal jurisdiction was unchanged from that advocated by the courts, that is, universal jurisdiction over crimes against international law. It referred to was ‘one of the major causes for the establishment of the State of the survivors’. Yet this was challenged by scholars because Israel was not a State at the time of commission of the offences. See *AG v. Eichmann* (n 4) 49, 53-54 and 306. See also JES Fawcett ‘The Eichmann Case’ (1962) 38 British Yearbook of International Law 181, 190 and Lasok (n 303) 368.

314 *AG v Eichmann* (n 4) 26.
jurists who endorsed this version of universal jurisdiction, such as Glaser and Cowles, after referencing the work of Grotius and De Vattel. These citations were designed to impress that universal jurisdiction was a long-standing principle of international law, which was well-recognized within legal scholarship. However, in terms of actual historical proceedings, the trial judgments’ only empirical support for universal jurisdiction over crimes against international law was the Allied trials under the Control Council Law.

In the Appeal judgment, the Court observed the division among scholars as to whether universal jurisdiction solely exists over piracy or alternatively, other offences may be treated as if acts of piracy in the interests of justice. It set aside these divisions and argued that among the views, there was sufficient justification for universal jurisdiction over crimes against international law. It adopted Kelsen and Glueck’s notion that states in prosecuting piracy acted as ‘the organ and agent of the international community’; thus, it contended that this justification ‘applies with even greater force’ to crimes against international law as ‘a vital interest common to all civilized states and of universal scope’. The court

317 AG v Eichmann (n 4) 27-29.
318 ibid 29.
319 ibid 299. The courts referred to Judge Moore’s dissent in the Lotus case (UJ over piracy is sui generis), the Harvard Research’s Draft Convention on Jurisdiction with respect to crime (subsidiary jurisdiction), Wheaton’s International Law (assimilate other offences to piracy) and Lauterpacht (interests of justice) -all of which are cited above in sections 1.1 and 2.1.
320 ibid.
321 ibid.
322 ibid. This is because of the ‘unprecedented extent of their injurious and murderous effects’ and how the international character of ‘crimes against humanity’ is ‘no longer in doubt’.
323 ibid. The description of the ‘vital interest’ was ‘the interest to prevent bodily and material harm to those who sail the seas and to persons engaged in trade between nations’, that is, Jenkins’ contention within the 16th century debates of English jurists, as discussed in section 1.2. Jenkins attempted to square his thesis on piracy.
viewed this extension of universal jurisdiction as a development that had been evolving since the post-WWII war crimes trials.\textsuperscript{324}

Second, the appeal judgment adopted the notion of a subsidiary jurisdiction as reflective of the content of the principle. It agreed with the Defence counsel that there was a precondition of a refusal of an offer to extradite and assumed that this constituted \textit{aut dedere aut punire}, which was the description of universal jurisdiction.\textsuperscript{325} However, it disputed the Defence counsel’s interpretation of the facts because West Germany had not sought Eichmann’s extradition.\textsuperscript{326} In this way, the court sidestepped whether this subsidiary jurisdiction was preconditioned upon voluntary (as opposed to involuntary) presence;\textsuperscript{327} here, the state’s right to exercise jurisdiction over piracy in the high seas included the capacity to secure custody through forcible capture. The courts also rejected the

with his positivist position on the international order; he considered universal jurisdiction to be an extension of territorial jurisdiction as opposed to a rule of law descended from natural law principles.

\textsuperscript{324} ibid 300 (citing Cowles on historical US court practice and Baxter on post-WWII trials). Nevertheless, on the particular question of genocide, the Israeli 1950 Act classified acts of genocide as ‘crimes against the Jewish people’, which Lippmann’s criticized as improper because it was ‘used to prosecute Eichmann for crimes against a particular race (as opposed to a crime against the human race)’. See M Lippmann ‘The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law’ (1982-83) 5 Houston Journal of International Law 1, 31.

\textsuperscript{325} ibid 302.

\textsuperscript{326} ibid. Here, the Defence counsel argued that as Israel had not offered to extradite Eichmann to Germany, the courts were effectively barred from exercising jurisdiction.

\textsuperscript{327} HW Baade ‘The Eichmann Trial: Some Legal Aspects’ (1961) Duke Law Journal 400, 417. Baade agreed with what he called Israeli ‘enforcement by proxy’. He considered this enforcement as necessary to avoid the ‘harbouring of fugitives’ when extradition is ‘cumbersome’. He conceived universal jurisdiction as a subsidiary jurisdiction, whereby States may act where extradition is frustrated, that is, the modern representation principle. He compared the factual situation in Eichmann to his concept of universal jurisdiction (the frustration in Eichmann’s extradition to Germany). There was no extradition treaty between Israel and Germany and Germany evidently refused to seek extradition which can be interpreted as tacit consent to Israeli jurisdiction. ibid.
claim that the Israeli statute violated non-retroactivity of criminal laws; instead, following the International Military Tribunal, the courts emphasized the interests of justice as warranting an exception. It submitted that the Nazi atrocities ‘must be considered an extraordinary instance where non-retroactivity should not be strictly applied’ and thus, the 1950 Act does not ‘conflict…with rules of natural justice […] on the contrary, it enforces the dictates of elementary justice’. Finally, the courts approved the IMT judgment’s justification for individual liability under international law and the corresponding non-application of the immunity of state officials for acts executed on government order. If accepted as an absolute rule, functional immunity would negate international criminal law. Thus, the courts submitted two inter-related avenues. In the face of Nazi crimes, this principle of justice loses its moral value and undermines a sense of justice; here, the social circumstances that have been addressed in immunity case law ‘do

328 As noted in Chapter 1, the principle against non-retroactivity prohibits criminal prosecution of an individual for an act which was not criminal at the time of its commission. R O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 Journal of International Criminal Justice 735, 742.
329 Blackstone (n 58) 46 (there was an exception for ‘occasions and circumstances involving the safety of the State or the conduct of individual(s)...’).
330 AG v. Eichmann (n 4) 12.
331 ibid 12. Arendt also turned to ‘interests of justice’ because she considered genocide a new crime, violating non-retroactivity in the formal and material sense; she argued that ‘the demand for justice cannot be ignored out of deference for considerations of temporality and retroactivity’. However, controversially, see considered the courts’ jurisdiction to be based on the territorial principle (the ‘territorial dispersion of the Jews’ as fundamental to the ‘international’ nature of the crime) and thus, the Eichmann Trial was the same as the Control Council Law proceedings. Mertens criticizes Arendt’s territorial jurisdiction thesis because territory becomes something that may be constructed from a ‘people’ which crystallizes when the people have a territory secured. Mertens notes that ‘this concept refers not so much to a strip of land as to the ‘space’ between the members of a group of people, united by a common language, heritage, religion, history, and by common customs and laws.’ See Arendt (n 199) 254 and 259 respectively and Mertens (n 301) 418-419.
not fit the realities of Nazi Germany’. In this way, the requirement for consent of the state to the tribunal’s jurisdiction was negated when the acts are criminal under international law.

In the end, Pavrikko argues that the *Eichmann* case was a battle between legal positivists and moralists. The legal positivists advocated that the ‘existing legal order be respected’ and thus, jurisdiction should not be based on ‘external justification’, that is, extra-legal ideas. On this premise, the *Eichmann* case must constitute as an exercise of jurisdiction under international law.

Thus, legal positivists would not go as far as suggesting that the trial was unlawful and concur with the Defence counsel’s arguments. As Lasok argued, the exclusivity of territorial jurisdiction ‘can hardly be sustained’ because International Military Tribunal process ‘confirmed’ that states could prosecute war crimes ‘if perpetrators fall into their hands’. It was presumed that this right arose for all crimes subject to universal jurisdiction, including piracy and ‘probably crimes against humanity’. Yet legal positivists did not advocate a repeat of *Eichmann*, which was an extraordinary case that should not become a legal precedent; it was ‘a product of judicial distillation clothed in erudite form of the judgment’ that ‘may

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332 ibid 46 and 309-310.
333 Parvikko (n 5) 243.
334 ibid. As Lasok put it, the trial would ‘go down in history as a trial without precedent not only because of the enormity of the charges but mainly because it is likely to perpetuate and deepen the controversy provoked by the Nuremberg War Crimes Tribunal’. See Lasok (n 303) 355.
335 Lasok (n 303) 364. Here Lasok referred to Lotus majority’s presumption against limitations and though the application of universal jurisdiction to such crimes ‘appears to be of recent origin’, he noted the 1949 Geneva Conventions. ibid 365.
336 ibid 364. See also Fawcett (n 313) 208 (if not yet sufficient in practice to be rule of international law, recent state behaviour demonstrated that in case of international crimes ‘the general territorial limitation upon the exercise of criminal jurisdiction does not operate…as a rule which would have prohibited’ Israeli jurisdiction).
encourage imitation in less meritorious cases’.\textsuperscript{337} Rather they considered a change of policy was necessary, namely the establishment of an international criminal court.\textsuperscript{338}

Conversely, the moralists justified the jurisdiction on an “external justification” because ‘Eichmann’s evil was something extraordinary’.\textsuperscript{339} Moralists viewed the \textit{Eichmann} trial as an ‘extreme and unprecedented’ situation that would justify the ‘search for moral justification outside the realm of positive law’.\textsuperscript{340} This must assume that there is an ‘indisputable superhuman authority above human made-laws and norms’ which could ‘provide law with firm moral justifications’,\textsuperscript{341} that is, a higher normative code or standard of justice akin to a natural legal order. As Silving argued, this was an exceptional situation where positivism would undermine justice and hence, positive law should cede to natural law ‘in order to avoid flagrant injustice’,

[This] implies a “minimum measure of natural law” which might, in the case of conflict with “positive law”, override the latter.\textsuperscript{342}

This would require an attempt to devise threshold criteria in order to judge when natural law would prevail.\textsuperscript{343} However, even if an agreed

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{337}] ibid 373 (‘a very dangerous precedent….all formal barriers separating arbitrariness from administration of justice appear to be broken’).
\item [\textsuperscript{338}] ibid 374.
\item [\textsuperscript{339}] Parvikko (n 5) 243.
\item [\textsuperscript{340}] ibid.
\item [\textsuperscript{341}] ibid. She explained that the moralists saw the Nazi atrocities as such that they could not be treated as ‘normal criminal law’, rather the ‘evil was extraordinary and superhuman’. Thus, Eichmann’s case was ‘ethical rather than criminal’ and here, ‘fundamental principles of natural law were needed’ in order to deal with the case.
\item [\textsuperscript{342}] H Silving ‘In re Eichmann: A Dilemma of Law and Morality’ (1961) 55 American Journal of International law 307, 309.
\item [\textsuperscript{343}] ibid. Here, the Eichmann trial combined a (i) conflict between positive law (territorial integrity) and natural law interests, (ii) the human interest that was
\end{enumerate}
\end{footnotesize}
threshold could be established, this approach assumed ‘commonly shared ethical authorities for the international community’ and assumed that natural law should always prevail in event of a conflict.\textsuperscript{344}

\section*{4 Conclusion}

We have observed the persistent opposing arguments that have resurfaced within the debates since the end of the 19th century and it is apparent that, in each historical debate, there were dominant voices that succeeded in securing the hegemony over an opposing approach. It is noteworthy how these persistent contestations appear to be divided along the naturalism-positivism divide or between justice-consent-based arguments; either the jurist appeals to a moral value or solidarity among nations or appeals to the State’s interests in securing its protection from internal and external threats. In this way, this Chapter illustrates how the Israeli courts in the \textit{Eichmann} case could delve back into earlier debates, isolate their preferences and conjure up a compelling legal portrayal. The \textit{Eichmann} judgments then were an adherence to the 1940s dominant position (that justified the Allied powers’ behaviour), albeit modified to suit its own particular context. Thus, the courts’ reasoning was an extract from one side of these earlier opposing debates within the \textit{incubation} period, combined with the subsidiary concept from the \textit{embryonic} period. Invariably, \textit{Eichmann}’s use of the piracy analogy (Lauterpacht/Cowles model), its rejection of the act of State defence (Wright model) and the contextual question on the defence of

\footnotesize{unanimously recognized by all nations and (iii) ‘disproportion’ between the value-loss of the positive law interest and the value-loss of natural law interest. ibid, 311.\textsuperscript{344} Parvikko (n 5) 239.}
superior orders (Lauterpacht model) were all contestable and unsurprisingly, the Defence counsel’s approach drew on the opposite claims within the earlier legal debates, as explored in sections 1 and 2.

Notwithstanding these inconsistencies, the *Eichmann* judgments’ portrayal became the model argument for an approach, that emphasized moral value, and was used to explain (and justify) the exercise of jurisdiction by European States over crimes committed in the Former Yugoslavia, Rwanda, Chile and Argentina in the 1990s. Invariably, in light of the inconsistencies in the *Eichmann* judgments’ portrayal, certain national judgments (such as *Javor*) could draw upon Eichmann Defence counsel’s approach, part of which became the model argument for the approach that emphasized independence and dignity of the State and was used to criticize the principle of universal jurisdiction over crimes against international law. It follows, then, that Koskenniemi’s thought is informative because the recurring oppositions, which appear to be grounded in the naturalism-positivism dichotomy, can be shown to be mere surface oppositions and the legal outcomes (and dominant approaches) can be understood as a hegemonic claim at the particular historical moment. Thus, the following chapter will explore the themes of indeterminacy and hegemonic technique, which frame the analysis of the contemporary debate in Chapters 4 and 5.
CHAPTER 3

INTERNATIONAL LAW AS A LANGUAGE
AND A SITE OF POLITICS

It is all too apparent that the contemporary legal debate is captured by opposing approaches on the principle of universal jurisdiction’s origin and content and, when disentangling historical debates, similar opposing approaches are obvious. It is evident that each debate appears to divide along the naturalism-positivism dichotomy and that historically one approach has dominated and appears more persuasive than its competing approach. Therefore, the work of Martti Koskenniemi is informative and this chapter explores the themes of indeterminacy and hegemony in Koskenniemi’s work that informs the investigation of the contemporary debate in subsequent Chapters. This Chapter begins by briefly exploring the competing conventional approaches to international law and illustrates how Koskenniemi’s work departs from these conventional readings. It then explores in greater depth the theme of indeterminacy in relation to sovereignty and jurisdiction. In particular, Koskenniemi’s critic of Lotus is useful in dissecting judgments in subsequent Chapters, notably, the Pinochet III and the Arrest Warrant cases. As noted in chapter 1, the Lotus case encapsulates the persistent disagreement on the origin of the rule of law, whether derived from state liberty or a legal order, pre-existing the state. Given the liberal core paradox of freedom and order, the doctrine of jurisdiction creates endless oppositions and these same irreconcilable oppositions arise with the principle of universal jurisdiction. Thus, faced with a dispute over a state’s exercise of
jurisdiction, no legal argument can be preferred over another and thus, legal decision-makers turn to ideas of reasonableness and interest-balancing. It follows that indeterminacy can explain this move to equitable principle and how decision-making is ultimately based on extra-legal factors. Nevertheless, it is apparent that the exercise of discretion is not irrational but accords with certain biases or sensibilities. This observation, then, suggests that scholars must investigate institutional biases at landmark historical moments. When applying this to the debate on universal jurisdiction, the themes of hegemonic and counter-hegemonic technique are constructive. These themes help to illustrate how key legal outcomes have accorded with certain biases from the 1990s to the present.

1 Conventional Approaches to International Law and the Critical Project

We noted that Koskenniemi challenges the competing conventional approaches to law. Here, each approach has a social conception of law. Thus, law is a “social fact”; it emerges from

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1 When referring to the “Critical Project”, this writer is attempting to describe the body of work by international legal scholars that critiqued the conventional approaches to international law since the 1980s. This is an attempt to refer to the 1980s literature as well as the continuing critical scholarship, which is no longer referred to as “New Stream” or “New Approaches to International Law”. The latter was the descriptions in the 1990s by Kennedy and others. See D Kennedy ‘A New Stream of International Law Scholarship’ (1988-89) 7 Wisconsin International Law Journal 1, T Skouteris ‘Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship’ (1997) 10 Leiden Journal of International Law 415 and DZ Cass ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ (1996) 65 Nordic Journal of International Law 341.

2 This rejects the possibility that the origin of international law derives from a higher normative order (naturalist school). Bodin and Hobbes conceived their voluntary law of nations as founded on individual self-preservation rather than a natural order based on ‘unverifiable speculations’ as to God’s will and moral truth. Instead of law originating from theories of justice, law is verified by social events.
within a society towards a particular social purpose. An adequate concept of law is ‘one which accurately describes those facts’. This assumes that the law’s content ‘can be verified in a reliable and consistent fashion’ by measuring experience (observable facts). Nevertheless, Realism and Formalism diverge on the question of what is the role (or social purpose) of international law. According to the realist school, the role of international law is merely to achieve desired goals of policy-makers. Realism imagines the political world as the distribution of power between States and hence, it is best described in terms of ‘power’ and ‘social tension’ that focuses on “authentic” experience in state behaviour. In this view, legal rules


3 M Koskenniemi (n 2) 106-108. The positivistic method in law emphasizes observable facts; it assumes that rules are objective in some way that ideas or values are not. Values have no ‘reality in their own right’, only experience is considered to be a fact capable of being externally examined. Thus, values are unobservable by scientific means; they exist only ‘in the minds of individual’ actors. Scientific enquiry must be ‘value-free’ by not making value judgments about what it observes and not inquiring about the meaning of the values held by those it observes. See R Cotterell The Sociology of Law: An Introduction (2nd edn Butterworths London 1992), 9.

4 Skouteris (n 1) 418.

5 This is instrumentalism; law as an instrument which decision-makers can choose to apply or ignore depending on whether the ‘rule’ enables them to realize their interests. See M Koskenniemi, ‘The Place of Law in Collective Security’, (1996) 17 Michigan Journal of International law 455, 488. Here, relations between states are instrumental activities and thus, obligations only arise within states. States cannot demand obligations that would bind other states. See for example R Jackson Classical and Modern Thought on International Relations (Palgrave Macmillian New York 2005) 102.

6 Realism views the international political world as anarchical, as opposed to constituting a legal order of independent States. State power is the ‘most important
are unable to restrain state behaviour;\textsuperscript{7} instead, a legal right or duty can only arise in those specific instances where state power seeks to enforce.\textsuperscript{8} This reduces the role of international law to merely a reflection of state power, one of a number of means for policy makers to secure desired goals or “values”. Thus, realism prioritizes politics over law \textsuperscript{9} rather than the latter constraining States in how they can behave.\textsuperscript{10}

A realist view of universal jurisdiction stresses the probable effects on the desired goals of policy-makers when criminal prosecutions could ‘unravel national efforts to move beyond periods of repression and civil war’.\textsuperscript{11} Invariably, a foreign court would pass judgment on the democratic legitimacy of another state and bring into disrepute the decisions of policy makers on the appropriate method of national reconciliation.\textsuperscript{12} Here, the disagreements among

\textsuperscript{7} M Koskenniemi ‘International Law in a Post-Realist Era’ (1995) 16 Australian Year Book of International Law 1, 10.
\textsuperscript{8} Krasner (n 6) 265.
\textsuperscript{9} Therefore, the existence of a legal rule is judged by the ‘unfavourable reaction’ or ‘sanction’ against a violator. Where a probable reaction is absent, it cannot be considered a valid rule. See Morgenthau (n 6) 277.
\textsuperscript{10} ED Williamson ‘Realism versus Legalism in International Relations’ (2002) 96 American Society of International Law Proceedings 260, 262 and EH Carr \textit{The Twenty Years’ Crisis} 1919-1939: An Introduction to the Study of International Relations (Palgrave Macmillian Basingstoke 2001) (power is fundamental; morality only has a limited place). See A Paulus ‘Realism and International Law: Two Optics in Need of Each Other’ (2002) 96 American Society of International Law Proceedings 260, 269.
\textsuperscript{12} Krasner refers to Chilean amnesties for the military junta, the South African Truth and Reconciliation Commission and the removal of autocratic leaders who lived in exile, such as Udi Amin. Krasner (n 11) 65.
international lawyers regarding the substantive law of international
criminal law and the jurisdiction of national courts would be viewed
as significant.\textsuperscript{13} This indeterminacy renders the law’s ability to
determine the legitimacy of national practices acutely challenging.

That said Realism can stand accused of being subjective and
political because it assumes that a stable and determined set of
“interests” and “values” exists,\textsuperscript{14} which are agreed by all
international actors. Yet the lawyer knows that values and interests
(such as “peace” or “justice”) are as open to interpretation as rules;\textsuperscript{15}
they do not possess fixed and determined meanings. Rather the
meaning of any normative term may be contested between different
actors\textsuperscript{16} because each actor, invoking those normative terms in a
particular context, is seeking to secure their own political
preferences.\textsuperscript{17} Therefore, because of the indeterminacy of normative
terms, Realism has to refer back to ‘more general systematic theories,
assumptions…that provide the implicit matrix that makes

\begin{itemize}
\item \textsuperscript{13} Krasner argues that the resolution of these disagreements are ‘not based on
doctrine and law’ rather the ‘political beliefs, ambitions and ideology of
prosecutors and judges play a large role’. ‘Accusations of bias and unfairness are
inevitable’. Krasner (n 11) 64.
\item \textsuperscript{14} In fact, when Realism invokes normative ideas, such “fundamental rights”, it
turns back to formal law. Fundamental rights must bind the State regardless of
whether the rule accords with state’s interests but this does not accord with
Realism’s premise that binding rules do not exist in the international sphere. See
Koskenniemi (n 2) 233.
\item \textsuperscript{15} Koskenniemi (n 7) 10. In other words, there is no single descriptive box in which
reality, value or policy can fit and there is no method available that could allow the
realist to determine the “universal” interest without being ideological or being
within a normative (legal) framework. This means that a realist account has to
make a prior conceptual choice as to what value and policy should be, before
analysing the ‘observable data’ of State behaviour. ibid 7.
\item \textsuperscript{16} It also observes how the “sovereign” is constructed from political theory rather
than observed. Koskenniemi (n 7) 10.
\item \textsuperscript{17} M Koskenniemi ‘Global Governance and International Law’ (2004) 37(3)
Kritische Justiz 241, 253-54.
\end{itemize}
description possible’. This involves choosing particular desired goals (presenting those goals as “universal”) and hence, Realism cannot prevent the domination of the powerful few. In the case of universal jurisdiction, the realist criticism assumes that the universal value to be secured is the freedom of policy makers to determine national reconciliation approaches unhindered by arguments that individual criminal responsibility is a fundamental interest of the international community. Equally, the claim that the international lawyer’s role is a mere façade or decoration is problematic. It ignores how lawyers self-identify as well as how others see the purpose of their engagement.

In contrast to Realism, Formalism assumes that international law regulates and controls the behaviour of states. Formal law assumes that the rule of law is a neutral regulator of competing individual desires of legal subjects and this presupposes a strict separation of law from politics. It assumes that the rule of law is the

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18 Koskenniemi (n 5) 468. See generally Koskenniemi (n 7) 10 and Koskenniemi (n 2) 221.
19 For example of justifications for US exceptionalism, see M Koskenniemi ‘Perceptions of Justice: Walls and Bridges between Europe and the United States’ (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 305.
20 Koskenniemi (n 7) 1.
21 Koskenniemi (n 5) 476. Realism cannot explain why the State will invoke rules of international law to justify its behaviour, as opposed to speak merely in terms of its interests, or explain why States may limit their behaviour by invoking international law, that is, act against their own interests.
22 Koskenniemi (n 2) 590.
23 Koskenniemi (n 17) 246 (the focus of international lawyers in the 1920s and 1930s on institutions, ‘reimagining diplomacy…as the administration of a world society’).
24 This expectation (the separation of law and politics) gives rise to legal positivism’s internal dispute over international law’s character as ‘law’, such as the Austin v Hart debate in British positivism. See J Austin The Province of Jurisprudence determined (WE Rumble ed, Cambridge University Press Cambridge 1993) 164-171 and 183 and HLA Hart The Concept of Law (2nd ed. Clarendon Oxford 1994) 116 and 230. See also JA Becket ‘The Hartian Tradition of International Law’ (2008) Journal
‘sole thinkable principle of organization’, capable of being applied to
the ‘organization of international society just as [liberal principles
and the rule of law] had been used in the domestic one’, 25

[The] fight for an international Rule of Law is a fight against
politics, understood as a matter of furthering subjective
desires and leading into an international anarchy. Though
some measure of politics is inevitable, it should be constrained
by non-political rules... 26

In the case of universal jurisdiction, formal law considers the
principle to be a legal right to extend the scope of its criminal law to
certain ‘offences against the international community’. 27 However,
the legal debate on the origin and content of the principle reveals
opposing approaches and an attempt to steer a middle ground. These
disagreements undermine the notion that the rule of law can provide
an agreed and fixed answer to any international problem and in turn,
‘escape politics’. 28 Instead, international lawyers continue to debate
the “exact” parameters of the principle and its relationship to other
relevant principles, most notably the doctrine of immunity. 29 In this

of Jurisprudence 51, 56 and 60 and S Lee ‘A puzzle of Sovereignty’ (1996-1997) 27
California Western International Law Journal 241.
International 4. See also Kennedy (n 1) 8 (the idea that law is ‘both above, removed,
or neutral with respect to political life’).
26 ibid 4 (citation omitted).
27 For example, R Higgins Problems and Process: International Law and How we use it
(Clarendon Press Oxford 1994) 56-7, R Cryer Selectivity in International Criminal Law
(Cambridge University Press Cambridge 2005) 84 and K Randall ‘Universal
28 Koskenniemi (n 25) 6.
29 Contrast Randall (n 27) and L Reydams Universal Jurisdiction: International and
municipal perspectives (Oxford University Press Oxford 2003). See also Report of the
UN Secretary General Ban Ki Moon ‘The scope and application of the principle of
Universal Jurisdiction’ (29 July 2010) UN Doc A/65/181, para 10 and 12 and ‘The
scope and application of the principle of universal jurisdiction’ UNGA Res 66/103
(13 January 2012), UN Doc. A/RES/66/103.
way, formal law is a failure because it is manifestly indeterminant;\textsuperscript{30} the \textit{Arrest Warrant} case is illustrative of how international law has been used by disputing states to both justify and criticize state behaviour.\textsuperscript{31} Thus, Formalism is also vulnerable to the criticism of being subjective and political.\textsuperscript{32} To the realist, formal law is evidently indeterminant because legal arguments accommodate completely competing agendas; there is no black-white scenario to which law provides definitive solutions to international problems. Likewise, formal law is unable to guide state behaviour. Here, the realist can highlight the instances where the principle of universal jurisdiction has been disregarded by states in practice.\textsuperscript{33}

Faced with an attack on two fronts from Realism and British positivism, international lawyers either adopted an instrumentalist view of international law or remained committed to legal Formalism

\textsuperscript{30} Positivists from the Hartian tradition submit the idea of ‘relative indeterminacy’, which accepts the existence of discretion by jurists but assumes this discretion can be constrained ‘within the existing law’. Thus, ‘gaps’ are resolved by ‘rationality’, a series of logical arguments that leads to a resolution, which is persuasive. In effect, the courts make ‘vague standards’ determinate, resolve inconsistencies in statute law and ‘develop’ or qualify’ rules which have been broadly defined. See Hart (n 24) 132.

\textsuperscript{31} In the \textit{Arrest Warrant} case, the DRC claimed a violation of its sovereignty, arising from the non-recognition of immunity of its Minister for Foreign Affairs. Yet at the same time, Belgium claimed to be entitled to exercise universal jurisdiction in the circumstances based on its sovereignty. See Application to Institute Proceedings, \textit{Arrest Warrant of 11th April 2000 (Democratic Republic of Congo v. Belgium)}, 2 and \textit{Case of the Arrest Warrant of 11 April 2000 (Belgium v. Democratic Republic of Congo)}, (2002) ICJ Reports No. 121, para 60.

\textsuperscript{32} Morgenthau (n 6) 275 (formal law’s conservatism) and 278. See also Koskenniemi (n 7) 5.

\textsuperscript{33} For example, the failure to seek the extradition of Donald Rumsfeld for alleged war crimes, \textit{Re Criminal Complaint against Donald Rumsfeld et al} (2006) 45 ILM 119 and the failure to arrest a former Uzbek Minister for alleged acts of torture and crimes against humanity, S Zappalá, ‘The German Federal Prosecutor’s Decision not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?’ (2006) 4 Journal of International Criminal Justice 602.
despite the realist critique.\textsuperscript{34} Thus, as the context for the critical project, pragmatism was a retreat from theoretical disputes over the law’s origin and normativity;\textsuperscript{35} it was the belief in the ‘concreteness of doctrinal analysis [that] could give international law binding force, despite the continuing inaccessibility of a universal, coherent theory’.\textsuperscript{36} In response, critics of the conventional approaches to international law have argued that these competing approaches and the move to pragmatism fail to capture the sense of international law as a professional practice.\textsuperscript{37} Underpinning the critical project’s approach is the inseparability of theory and doctrine.\textsuperscript{38} The aim of the critical project is to reinvigorate international legal practice through viewing law as a culture and practice, where practitioners share a language and a professional commitment.\textsuperscript{39} Within this broader critical project, the work of Martti Koskenniemi is informative. His challenge to conventional approaches rests on the critical projects’ structural indeterminacy, which sees law through the lens of literary style.

\textsuperscript{34} The instrumentalist view considered international law as relevant if most States complied most of the time while the legal formalists ignored the realist school and focused on institutions and diplomacy. Koskenniemi (n 17) 246-47.
\textsuperscript{35} Koskenniemi (n 2) 3. See also A Carty ‘Critical International Law: Recent Trends in the Theory of International law’ (1991) 2 European Journal of International law 66, 67. Carty argued that international lawyers attempt to do this (avoid the dilemmas) by using the ‘language of (State) consent as a representational language’. ibid.
\textsuperscript{38} Koskenniemi (n 2) 2-3 and 16-70. See also Koskenniemi (n 7) 15.
2 Challenging Conventional Approaches

Koskenniemi’s critique challenges the failure of both the formalist and realist approaches to appreciate the ‘situatedness’ of those who practice international law: the diplomat, judge, legal adviser or activist.\(^4\) Neither Realism nor Formalism is well-placed to explain why legal opinion on a particular political situation is sought or why certain outcomes occur in spite of the possibility of an (equally ‘valid’) alternative decision. Thus, in contrast, Koskenniemi’s approach describes international law from the perspective of literary style\(^4\) and places the international law practitioner as central to any understanding of international law as a practice. In his view, international law is ‘what international lawyers

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\(^4\) Koskenniemi (n 5) 471. See M Koskenniemi ‘Between Commitment and Cynicism: Outline for a Theory of International Law as practice’ in Office of Legal Affairs Collection of Essays by Legal Advisers of States, Legal Adviser of International Organizations and Practitioners in the field of International Law (New York United Nations 1999) 495 (cannot explain how participants conceive of what they are actually doing when they articulate ‘interests’ or ‘activities’ in terms of international law).

\(^4\) In his understanding of international law as language, Koskenniemi acknowledges the major influence of David Kennedy’s writings. Here, Kennedy was able to illustrate how legal arguments consisted of the endless ‘repetition’ of a particular ‘narrative structure’, whose key feature was its ability to produce irreconcilable oppositions. Kennedy’s writing draws on Saussurean structural linguistics, which conceived speech as composed of its structure (langue) and surface level or speech acts (parole). The langue is the connection of sound and thought; Saussure did not believe that ‘sounds lie outside the nebulous world of thought’ and that they are a ‘ready-made mould, with shapes that thought must inevitably conform to’. Therefore, each unit within the langue has two opposing sides, the signified and signifie, and meaning generation is dependent on both. It is the structure that creates the units of the langue and orders the relations between units, generating meaning. See Kennedy (n 37) and Kennedy (n 1) 29. See also F de Saussure Course of General Linguistics (Philosophical Library New York 1974) 76-77 and 155-7, Allot (n 37) 80-136, R Harris and TJ Taylor Landmarks in Linguistic Thought: The Western Tradition from Socrates to Saussure (2nd edn Routledge London 1997) 210 and TC Heller ‘Structuralism and Critique’ (1984) 36 Stanford Law Review 127, 140.
do and how they think’\textsuperscript{42} and, as such, it is a language generated and spoken by international lawyers.\textsuperscript{43} Based on this understanding, “reality” is subjectively imposed on the social world by the interpreters of [the relevant] facts.\textsuperscript{44} International law is seen as ‘engaged’; it is ‘inside’ social practices rather than outside as an objective language.\textsuperscript{45} This approach explores international law ‘from the inside’\textsuperscript{46} through exploring the participant’s understanding of the cultural practice immanent within, rather than external or independent of, the conventional beliefs.\textsuperscript{47} From this approach, international lawyers are seen as engaging ‘in a complex argumentative practice, in which rules are connected to other rules at different levels of abstractions’.\textsuperscript{48} Therefore, the key competence of an international lawyer is ‘the ability to use the grammar in order to

\textsuperscript{42} Koskenniemi 1999 (n 40) 523. See also Koskenniemi (n 2) 567-569 and M Koskenniemi ‘International Lawyers’ in P Cane and J Conaghan (eds) \textit{The New Oxford Companion to Law} (Oxford University Press Oxford 2008) 619.
\textsuperscript{43} Koskenniemi (n 2) 567-568.
\textsuperscript{45} Koskenniemi (n 5) 489. See also Koskenniemi ‘Style as Method: Letter to the Editors of the Symposium’ (1999) 93 American Journal of International law 351, 356. The ‘language creates worlds, not reflects them’. ibid.
\textsuperscript{46} Kennedy (n 37) 7. See also Carty (n 35) 70 (‘the most appropriate way to criticise a system of meanings is to search for contradictions which are internal to the systems themselves. In this context, a study of the way a society puts its own identity together will, of itself, reveal the grounds of its hostility to another society’).
\textsuperscript{47} D Sabia ‘Defending Immanent Critique’ (2010) 38 Political Theory 684, 692. This means immanent critique operates from the view that cultures have internally ‘a critical potential’. Sabia argues that it is better to view totalitarianism or oppression as a dominant force in society, in a position of hegemony, but that there are still critical voices, those who question or challenge the prevailing belief. ibid 693-694. Immanent critique ‘is a means of detecting the societal contradictions which offer the most determinate possibilities for emancipatory social change’, see RJ Antonio ‘Immanent Critique as the core of critical theory: its origins and developments in Hegel, Marx and contemporary thought’ (1981) 32(3) British Journal of Sociology 330.
\textsuperscript{48} Koskenniemi (n 2) 566.
generate meaning by doing things in argument’. This means that the structure or grammar of the language is the building block or blueprint for the construction of meaning of rules and principles. However, as the blueprint, it also constrains how an international lawyer may construct a legal argument (and in turn, construct the meaning of legal concepts).

It follows, then, that the language possesses a ‘rigorous formalism’ (Formal law). Yet, the structure is binaristic and explains international law’s ‘political open-endedness’ (Realism). Thus, in identifying the structure or grammar, this approach is close to the Critical Legal Studies movement in the United States and the works

49 ibid 571.
50 ibid 563.
51 ibid. See also Kennedy (n 37). Indeterminacy occurs irrespective of whether there is ambiguity in the text. The meaning of the ‘text’ (i.e. rules or principles) is relational to other ‘texts’ (other rules or principles), which are related to one another according to the constraints of the structure of the language. ibid 9. See also Koskenniemi (n 2) 9 and 59-67.
Foucault, Derrida and Levi-Strauss.53 These binary elements of the grammar are traced to liberal assumptions on the rule of law.54 Here, the rule of law is an objective regulator of competing individual desires;55 thus, freedom justifies the order yet order must constrain the freedom of all in order to protect the freedom of all.56 This assumes that if legal rules originate in individual freedom, it can avoid the ‘subjectivity of value’ within theories of justice57 because ‘justice’ is either ‘subjective or necessarily imposed’.58 “Universal” value (or theory of justice) can always seem like unwarranted political preference cloaked in the idea of universalism.59 Instead, the liberal rule of law originates in verifiable social fact or observable experience and thus, is assumed to be apolitical.60 Thus, the rule of

53 In this way, Kennedy and Koskenniemi were inspired by aspects of Derrida’s thought, namely the search for the ‘deep structure’ of the discourse (or the method of deconstructing). Koskenniemi called his method ‘regressive analysis’ and argued that ‘deconstruction’ as a method is a style of argument more appropriate to academic argument than to be used in legal practice. See M Koskenniemi (n 2) 6 and Koskenniemi 1999 (n 45) 357. See also GE White ‘From Realism to Critical Legal Studies: a Truncated Intellectual History’ (1986-87) 40 South Western Law Journal 819, 821 and J Balkin ‘The Crystalline Structure of Legal Thought’ (1986) 39(1) Rutgers Law Review 1 (explaining legal realism’s “debunking” and Critical Legal Studies “deconstruction”). See also N Onuf Book Review and Notes: From Apology to Utopia: The Structure of the International Legal Argument by Martii Koskenniemi (1990) 84 American Journal of International Law 771, 772 and A Rasulov ‘International Law and Poststructuralist Challenge’ (2006) 19 Leiden Journal of International Law 799, 800 (‘the whole of modern culture is essentially grounded in a binaristic sensibility’).
54 Koskenniemi (n 2) 71-157. See also Carty (n 2). Onuf considered that the assumptions for modern international law (that Koskenniemi traced) should described as a positivist theory of law or liberal theory of law and government rather than as a general reflection of the liberal theory of politics. Onuf (n 53) 774.
55 Koskenniemi (n 2) 58-70, 74-94. See also Carty (n 35) 67.
56 R Unger Knowledge and Politics (Free Press New York 1975) 66-103 and A MacIntyre After Virtue a study in moral theory (3rd ed University of Notre Dame Press 2007). See also Koskenniemi (n 2) 106-108.
57 Koskenniemi (n 2) 95-106 and 224 (theories of justice imposed legal rules upon sovereigns that derived from natural or divine law).
58 Onuf (n 53) 774.
59 Koskenniemi (n 25) 8.
60 ibid 5. This means that the individual legal subjects are not subject to normative standards that either pre-exist human society or are imposed by a prior determined
law is verifiable by social or “observable” fact (as observed by the international legal profession) yet paradoxically it must remain distant from observable fact (experience) and normative standard (justice) because fact and norm can only conceal political preferences of actors.

It follows that drawing on the core liberal paradox, Koskenniemi hypothesizes that the twin elements of the grammar’s binary structure are ‘normativity’ and ‘concreteness’. Normativity means the rule of law is opposable to the state (critical of State policy) and concreteness means it is verifiable by the politics of the state (reflective of state policy). Thus, theoretically, freedom is protected because no normative standard of justice is subjectively imposed (reflective of state policy) and freedom of all (or equality) is guaranteed because there is no oppressive rule by the hegemon (critical of state policy). Hence, to be “objective” (on liberal hierarchy, that is, the divine law and natural law ideas of the pre-classical period. But as Koskenniemi argues in the ‘The Future of Statehood’, this assumes that concepts such as nationalism and human rights secure a type of universally desired political society. This assumes that there is an idea of the ‘authentic self’ to be realized and the universally desired character of communal life, which is non-contestable. See M Koskenniemi ‘The Future of Statehood’ (1991) 32 Harvard International Law Journal 397, 405.

61 Koskenniemi defines ‘normativity’ as ‘impartial ascertainment and application’ and ‘concreteness’ as ‘responsiveness to changing State behaviour, will and interests’. The former assumes that the norm/standard is ascertained without political value judgment and applied neutrally while the latter assumes that the ‘observable fact’ may be ascertained scientifically and without political bias. See Koskenniemi (n 2) 19-20. The use of the verb hypothesize in the above is inspired by Kennedy’s observations in ‘The Last Treatise’ that many seem uncritically accept ‘normativity’ and ‘concreteness’ as given, when his thesis in FATU should be viewed as a hypothesis. See D Kennedy ‘The Last Treatise: Project and Person (A Reflection on Martti Koskenniemi)’ (2006) 7 German Law Journal 982.

62 Koskenniemi (n 2) 16-23 and 41-58. In a similar vein, see Kennedy in International Legal Structures refers to these doctrinal structures as ‘soft’ and ‘hard’ rhetoric. See Kennedy (n 37) 29 and Kennedy (n 1) 8.

63 ibid 63 and 309-324. This is why Koskenniemi can criticize the formalist (moderns) claims regarding a ‘general’ consent. This presupposes an ‘objective’
assumptions), every argument must contain the elements of both normativity and concreteness yet these elements are paradoxically both critical and reflective of state policy.64 One can identify the Formalism-Realism dichotomy here: it is formalist in assuming normativity and conceiving the law’s function as normative (higher order or justice) and it is realist in assuming the sovereign is ‘observable’, with its behaviour counting as the only ‘valid knowledge’ and conceiving law’s function as instrumental (state liberty).65

These appeals to either justice or state behaviour act as points of emphasis (emphasizing either normativity or concreteness) and thus, do not remain fixed stably; rather they are in constant movement. Binarism here is read as not static or fixed rather the binary elements merge into each other because they represent contrasting political sensibilities regarding a liberal political society (the individual and the collective/the critical and the consensual).66

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65 Liberal thought establishes a particular view of law’s ‘objectivity’; it is its ability to bind the sovereign irrespective of will yet be divorced from any ‘subjective’ value, which would result in oppressive tyranny. Consequently, law’s ‘objectivity’ and political ‘subjectivity’ are not fixed and stable ideas but rather are bound within the argumentative structure and subject to the same ‘play of argumentation’. They are in opposition yet dependent on one another in order to have meaning. The idea of law as ‘objective’ could only be determined by what is perceived by international lawyers as ‘subjective’. See E Jouannet ‘Koskenniemi: A Critical Introduction’ in M Koskenniemi The Politics of International Law (Hart Publishing Oxford 2011) 28.
66 In other words, Realism-Formalism cannot remain fixed permanently; they are the twin elements of law’s purpose in seeking to realise political values of actors (reflective of State policy) yet also to act as a standard of criticism and means of controlling behaviour (critical of State policy). Thus, the binary elements of reflective/critical of State policy merge because they need to draw from each other to avoid the criticisms of being subjective. See Koskenniemi (n 2) 10, 68 and 513
Thus, when legal arguments are viewed structurally, the ‘surface’
oppositions (appearing as contrasting positions) become
‘indistinguishable’; each opposing argument itself contains a
movement or pattern of oscillating between normativity and
concreteness, which are described as descending and ascending
patterns respectively. The more normative the argument appears
the less related to the social world it seems and may be charged with
the criticism of utopia. But the more concrete (or reflective of the
perceived ‘facts’) the argument is claimed to be, the less normative it
appears and would seem to be facilitating and apologising for the
interests of the powerful. In this way, the opposing positions can
neither be reconciled nor preferred over another because when
brought to their logical conclusion, they ‘cancel each other out’.

and passim. See also M Koskenniemi ‘What is International Law For?’ in MD
Koskenniemi (n2) 65 and 504. This leads to the ‘phenomenon of reversibility’,
where each argument is reversible because structurally, each argument is identical.
This ‘reversibility’ is what sustains the opposing positions, as each position can
pivot their acceptability on their claim that their opponent’s position is ‘subjective’,
that is, either utopia (subjective theories of justice) or apology (subjective
expressions of power). ibid 59.
Koskenniemi uses Kennedy’s themes to describe the perception of opposing
rhetoric. See Kennedy (n 37). Here to describe this movement in terms of the rule of
law, Koskenniemi uses Ullmann’s terms of ‘ascending’ (concrete) and ‘descending’
(normative) patterns, which trace their patterns to social phenomena of ‘facts’ or
‘norms’. See W Ullmann Law and Politics in the Middle Ages: an Introduction the
Jouannet (n 65) 7-8. If objectivity must require a link to subjective preference (or
acceptance) of the State, then normativity is removed as there is no controlling
rule, which binds non-accepting States. In effect, in order for a normative
controlling rule, the law-applier (esp. evident through work of tribunals) would
‘know better’ what the State agreed to (form of objective interests) and there is
some ‘non-acceptance-related criteria’ on which the existence of acceptance can be
determined (‘naturalistic theory of good faith, reasonableness, equity’). See
Koskenniemi (n 2) 64.
Koskenniemi (n 2) 65. This isn’t resolved by trying to make the
normative/concrete compatible as this just causes the argument to be self-
contradictory. Equally, preferring one pattern absolutely only exposes it to the
‘valid’ criticisms of the other. See also Koskenniemi (n 25) 8 and Koskenniemi (n 7)
4.
It follows, then, that indeterminacy explains what appears to be a recurring positivism-naturalism dichotomy. As we observed in the preceding Chapters, the opposing debates are underpinned by philosophical ideas on the nature of the legal order. The principle of universal jurisdiction appears to be subject to an opposition between an approach that appeals to *civitas maxima* and an approach that appeals to a positivist international legal order. The naturalism-positivism debates are irresolvable because neither positivism nor naturalism cannot be prioritized on their own without being accused of subjectivity of value.71 Instead, if international law is approached from the view of literary style, it exposes different styles that are considered to fit into four doctrinal approaches, which vary in how they emphasize normativity or concreteness.72 Although the ‘styles’ are mutually exclusive, they can be neither completely divorced from

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71 ‘Naturalism needs positivism to manifest its content in an objective fashion; ‘justice’, ‘common interest’ or ‘reasonableness’ seems to be arguable in a tangible way only by linking them to what states have thought them to mean –to what they have consented to. Positivism needs natural law in order to answer the question ‘why does behaviour, will or interest create binding obligations’. Koskenniemi (n 2) 308. Thus, indeterminacy undermines any universal essence or truth; ‘behind every notion of a universal international law, there is always some particular view, expressed by a particular actor in some particular situation’. See M Koskenniemi ‘International Law and Hegemony: A Reconfiguration’ (2004) 17 Cambridge Review of International Affairs 197, 199. See also JA Beckett ‘Rebel without a Cause? Martti Koskenniemi and the Critical Legal Project’ 7(12) Germany Law Journal 1045.

72 The four styles or doctrinal approaches are rule-oriented, policy-oriented, idealism and skepticism. The Rule-oriented and Policy-oriented approaches divide according to the normativity/concreteness dichotomy while the Scepticism and Idealist approaches are the extreme challenges to the two principal approaches. Koskenniemi argued that the division between the rule- and policy approaches rests on their interpretation of why the nineteenth century ideas of sovereignty failed and led to the post-WWI disillusionment. The Rule-oriented approach lawyers believed the nineteenth century doctrines were too close to, and reflective of, power and Policy-oriented approach lawyers believed the failure was caused by being too removed from the fervent European nationalism. See Koskenniemi (n 2) 182-223 and Koskenniemi (n 25) 12. Each approach attempts to ‘manage the tension between scientific hope (empirical analysis) and political ideals’ (AOS), see Koskenniemi (n 7) 4.
one another nor combined in order to address inadequacies inherent in each.\textsuperscript{73} They are all subject to the play of argumentation within the structure of the language.\textsuperscript{74} The significance of the chosen style is that the lawyer is unable to set aside their ‘politics’. Here, the choice of style conceals the lawyer’s chosen theoretical assumptions and ‘what use the style is put to, depends on the fears and passions’ of the lawyer.\textsuperscript{75} It is noteworthy here to explore Koskenniemi’s demonstration of indeterminacy in the doctrines of sovereignty (and in turn, jurisdiction). His critique of the opposing positions in the \textit{Lotus} judgment underpins the interrogation of key judgments in the subsequent Chapters and it will be apparent that the ghost of the \textit{Lotus} case is embedded in each legal argument even when the \textit{Lotus} case is not specifically referred to.

\section*{3 Indeterminacy and Doctrines of Sovereignty and Jurisdiction}

We noted in chapter 1 that the doctrine of jurisdiction is an aspect, ingredient or attribute of sovereignty; yet ‘jurisdiction, which

\textsuperscript{73} The move to pragmatism attempts to reconcile normativity and concreteness but once challenged, it must defend itself by either emphasizing normativity or concreteness, which returns the situation back to the original problem raised by either approach. Consequently, the pragmatic move only works if the argument is not contested and when it is, the jurist is compelled to move to context as the concrete/normativity combination will not permit a definite resolution, as both elements can be ‘validly’ criticised. See Koskenniemi (n 2) and Koskenniemi (n 25) 12.

\textsuperscript{74} Koskenniemi 1999 (n 45) 352. This is the reason why Koskenniemi disagreed with the (what he called) ‘shopping mall approach’ of the AJIL Symposium. By lining up the different styles of argument like ‘washing detergent’, it gives the impression that there is some method (unrelated to any method or non-method) for determining the persuasiveness of any style. In particular, academic styles are incapable of being discussed in terms of what benefit they provide to decision-makers in determining legal validity. The success of any style can only be analysed by participation in practice, it is the internal participation which brings about a legal outcome. ibid 352 and 356.

\textsuperscript{75} ibid 356.
in principle belongs solely to the State, is limited by rules of international law’. However, the parameters of each of the principles of jurisdiction are clearly not fixed or finite rather the dominant approach is to turn to notions of reasonableness and interest-balancing in determining whether the claimed jurisdiction is valid or arbitrary. Woosley’s and Politis’s descriptions of jurisdiction perfectly embody the incoherence of the doctrine of jurisdiction. According to Woosley, the individual state decides ‘what exceptions to territorial jurisdiction it supports’ yet this decision must accord with ‘the interests of other States’. Meanwhile Politis contended that the state’s liberty is both ‘limited by international law’ and ‘not regulated by international law’. The contradictory blend of limitation and discretion means that there is a move to context, which considers the ‘character of the social relations which surround [the State]’. Therefore, the content of (or the determination of) the state’s liberty ‘must be capable of determination from a perspective which is external to it’. However, if the state’s liberty is determined from an ‘external (and overriding) normative’ idea, the state loses its “individuality” as a State and any claim to independence and self-determination. This incoherence in the doctrine of sovereignty is

76 Nationality Decrees in Tunis and Morocco Advisory Opinion (1923) PCIJ Rep Series B no 4, 24 (‘the right of the State to use its discretion [when not regulated by international law and within its exclusive domain] is nevertheless restricted by obligations which it may have undertaken towards other States’).
78 N Politis Le Problème des Limitations de la Souveraineté et la théorie de l’abus des droits dans les rapports internationaux (1925) 6 Recueil des Cours 1, 47.
79 Koskenniemi (n 2) 225.
80 ibid.
81 ibid.
explained as the oscillation between a "pure fact" and a "legal" approach.\textsuperscript{82}

The "pure fact" approach was adopted by the majority of the Permanent Court of International Justice in the \textit{Lotus} judgement. \textsuperscript{83} The underlying premise is that state liberty is prior to the legal order and as such, had normative content (or value) (ascending pattern).\textsuperscript{84} International law ‘presupposes [the State’s] existence’\textsuperscript{85} and does not allocate competences (rights). Rather legal principles are a description of ‘what was required to safeguard the anterior liberties,

\textsuperscript{82} The ‘legal’ presumes the liberty exists where legal rules have bestowed this freedom on the State. It seeks to restrict the sphere of liberty as much as possible—thereby characterizing the law as the normative controlling [Kelsen]. The ‘pure fact’ considers State to be free unless there are rules restricting its freedom. It seeks to characterize the wide scope of sovereign powers so the law is concrete, linking with social description or factual behaviour [Schmitt]. Both justify their perspective on the idea that the opposing position lacks objectivity; either an imposed subjective value or a subjective will. See Koskenniemi (n 2) 233.

\textsuperscript{83} Koskenniemi (n 2) 256. Koskenniemi argues that numerous case law before the International Court of Justice follows the assumption of the \textit{Lotus’ obiter}. The ICJ in these judgments did not determine whether rules exist, allocating competence or rights, but whether there are prohibitions against the State’s ‘initial freedom’. \textit{ibid.} See \textit{Case of the SS Lotus (France v Turkey)} (1927) PCIJ Ser A No 10, 18 and 19. Here, international law consisted of a general liberty of states, where ‘rules of law binding on states…emanate from their own free will as expressed in conventions or by usages…’ The function of the law is ‘to regulate relations between these co-existing independent communities or with a view to the achievement of common aims. As rules of law emanate from voluntary will, ‘restrictions on the independence of States cannot be presumed’. See also \textit{Fisheries Jurisdiction case (United Kingdom v. Norway)}, (1973) ICJ Rep No. 56, 25-30, \textit{North Sea Continental Shelf} (1969) ICJ Rep No. 3, \textit{Nuclear Tests (Australia v France)} (1974) ICJ Rep 253, \textit{Case concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US} (1986) ICJ Rep 14 and \textit{The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)} (1996) ICJ Rep 226, para 22, 23 and 67.

\textsuperscript{84} This transposed the notion that legislative power of the State derived from individual liberty (consent), that is, the idea of popular sovereignty. This assumed that the state could determine what is just in the circumstances detached from moral view or politics. According to Carty, the competence theory of law came from the competence of the individual over property within the legal system of the ‘newly industrialised capitalist State’ and the adoption by German public lawyers of private law concepts in the middle of the nineteenth century. See Carty (n 2) 43 and Koskenniemi (n 2) 232.

\textsuperscript{85} C De Visscher \textit{Theory and Reality in Public International law} (PE Corbett tr, Princeton University Press Princeton 1957) 166.
that is, legal rules establish duties (prohibitions) as exceptions to the initial liberty. Koskenniemi concludes that the pure fact approach underlines doctrines such as the requirement of ‘clear and convincing evidence’ of limitations of sovereignty, the inability to derive legal rules by analogy and the need to interpret legal rules restrictively. However, an ascending pattern can be accused of apology for power because it derives the rule of law from state preferences, even though states conflict in their behaviour, and thus, the approach conflicts with the premise of an order regulated by neutral rules. Therefore, to choose between conflicting liberties, the “pure fact” approach moves in a descending pattern and provides evidence ‘beyond liberty’ as to what is just. This is also incoherent because it means that the liberty of a member of society must be delimited by the liberties of other members within the society, which

86 Koskenniemi (n 2) 224. International law only ‘vests’ the state with legal personality and expects the State to fulfil duties. The law merely recognised the State [factual situation] or in other words, any rights, liberties and competences would accrue to the State by reason of its factual status. De Visscher (n 85) 166.

87 ibid 257.

88 ibid 225 and 257. The purpose of the pure fact approach is to protect the State’s liberty from ‘harm’ (or unwarranted and arbitrary interference). It uses state liberty to legitimize ‘what first appear like clear breaches of the state’s international obligations’. However what the harm is in any context is from the state’s view of harm. Otherwise, the description of harm comes from a value external to the state and looks like the legal approach. In other words, it is not based exclusively on a description of the social fact of State behaviour. When faced with two disputing states that claim harm to their respective liberties (violating their sovereignty), the pure fact approach must protect both “harm”s and cannot (without appeal to an external idea of harm) decide a preference or balance between them. In such cases, the only way to resolve the dispute is to call upon an external ‘objective standard’, a method which the ‘pure fact approach’ has rejected. Hence, state voluntary will is clearly incapable of constructing a ‘determinate, bounded conception of statehood as well as giving any content to an international order’. ibid 225.

89 ibid 225.
can only be presupposed on a higher code and undermines the original assumption of the state’s liberty as anterior and normative.\textsuperscript{90}

The “legal” approach underpinned Judge Loder’s dissent in the \textit{Lotus} case.\textsuperscript{91} The underlying assumption is that the legal order (a higher binding code) pre-exists the sovereignty of the state and controls the state (descending pattern).\textsuperscript{92} Sovereignty is delimited and determined within the law and not external to it (or a pre-existing fact).\textsuperscript{93} This assumes that the ‘content’ of sovereignty is the ‘sum of rights, liberties and competences’\textsuperscript{94} that are conferred by law and all sovereign activity must conform to law.\textsuperscript{95} This idea of the totality of competences of the state is based upon the idea of the systematic character of international law; ‘the completeness of the

\textsuperscript{90} ibid. Given the appearance of utopia (descending pattern), the argument moves back to an ascending pattern to locate the law in state’s “concrete” behaviour. But this invariably will be one of the disputing states behaviour argued to be equitable or drawn from a consensus.

\textsuperscript{91} \textit{Case of the S.S. “Lotus”} (n 83) 34 (Judge Loder) and 52 (Lord Finlay) (rejected the notion that ‘everything which is not prohibited is permitted’ or ‘every door is open unless it is closed by treaty or established custom’). See \textit{Annual Report of the Permanent Court of International Justice}, Series E, No.1 (1\textsuperscript{st} January 1922-15\textsuperscript{th} June 1925), 13 (former President of the PCIJ). See also J Brierly ‘The Lotus Case’, (1928) 44 Law Quarterly Review 154, 155 and Higgins (n 27) 77.

\textsuperscript{92} Koskenniemi (n 2) 229. See also M Virally \textit{Panorama du Droit International Contemporain} (1983) 183 Recueil des Cours 5, 79. In pre-classical scholarship, the rights and duties of the sovereign were identified from the Law of Nature, a code superior to and binding on the sovereign and by consequence, sovereignty was merely a description of rights and duties rather than a value from which rights and duties were identified. As such, the superior normative code (law) was prior to state liberty. Pre-classical scholarship sought this higher code in natural law but it is clearly more common for modern lawyers to envisage it in terms interdependence, common interests, a shared progressive morality or legal logic. M Koskenniemi (n 2) 231.

\textsuperscript{93} Virally (n 92) 78.

\textsuperscript{94} Koskenniemi (n 2) 229. See JG Merrills \textit{The Anatomy of International Law: A study of the Role of International Law in the Contemporary World} (2\textsuperscript{nd} ed Sweet and Maxwell London 1981) 45, P Reuter \textit{Principes de Droit International Public} (1961) 103 Recueil des Cours 2, 442, PM Dupuy \textit{Droit International Public} (4\textsuperscript{th} ed Dalloz France 1998), 29, MS Korowicz \textit{Some present aspects of Sovereignty in International law} (1961) 102 Recueil des Cours 1, 12, H Kelsen \textit{Les Rapports de Système entre le droit interne et le droit international public} (1926) 14 Recueil des Cours 4, 311.

\textsuperscript{95} A Verdross \textit{Fondement du Droit International} (1927) 16 Recueil des Cours 1, 318.
legal system’. As the legal order is complete and determinate, international law can ascribe competences and ‘legitimate spheres of action’ to bodies which, it decides, are legal subjects. The state cannot be above or outside the law and is bound by the law regardless of state voluntary will. However, a descending pattern can be criticized as utopian because it derives the rule of law from theories of justice, and thus, the approach conflicts with the premise of an order derived from liberty (and that rejects the idea of a higher moral order). Therefore, the legal approach moves in an ascending pattern and provides empirical evidence of consent to the rule in state behaviour. This invariably is incoherent because it means that “justice” within the legal order is determined from what state’s voluntary will, which undermines the original assumption of a higher or anterior legal order.

96 Koskenniemi (n 2) 230. See also Carty (n 2) 46 et seq., for a discussion of this problem of viewing international relations as a complete system with regard to the ‘law of territory’ or law of jurisdiction. See H Lauterpacht The Function of Law in the International Community (Clarendon Press Oxford 1933) 96. Lauterpacht argued that if one combined a theory of the ‘formal completeness of international law with an emphasis upon the sovereignty of States as a law-creating principle’, this would produce the results unfavourable to the purposes of law’. Consequently, he rejected the ‘dangerous’ theory of sovereignty as a basis and source of law. This implies the support for the formal completeness of international law, but the rejection of sovereignty as an ‘inherent liberty’. ibid.

97 Hart (n 24) 216.

98 Corfu Channel (Albania v. United Kingdom) (1949) ICJ Rep No. 4, 43 (Judge Alvarez).

99 The purpose of the legal approach is to constrain state liberty to protect liberty of all. However, what constitutes as a “just” constraint on liberty is drawn from value yet this is an external objective standard that liberal assumption rejects to turn to state values looks like pure fact approach, which the legal approach rejects. As we noted, the pure fact approach is similarly incoherent because “state values” is a matter of dispute between states.

100 Given the appearance of apology (ascending pattern), the argument moves back in a descending pattern to locate the law in a higher normative code. But this will invariably be one of the contested theories of justice argued to be equitable or the common good.
It is evident that each argument, whether emphasizing norm or fact, ‘preserve the descending and ascending ideas within itself’.101 However, as the pure fact approach when brought to its logical conclusion would negate the law’s ability to be normatively controlling, the dominant approach is to adopt the ‘legal approach’ and reject the Lotus majority’s presumption against limitations.102 Ultimately, given the opposing approaches and their incoherence, it is not possible to determine the content of statehood and thus, there is an attempt to justify legal outcomes within the doctrine of sources.103 Here, Kennedy argues that the doctrine of jurisdiction has an uneasy relationship with the doctrine of sources because jurisdiction attempts to be distant from consensualism (or consent-based approach). This is necessary because the purpose of the doctrine of jurisdiction is to delimit authority between sovereign

101 Koskenniemi (n 2) 226.
102 FA Mann ‘The doctrine of Jurisdiction in International Law’ (1964-I) 113 Recueil des Cours 9, 35. See also J Crawford The Creation of States (Cambridge University Press Cambridge 2006) 32 and G Fitzmaurice ‘The Law and Procedure of the International Court of Justice 1951-1954: General Principles and Sources of Law’ (1953) 30 British Yearbook of International Law 17 (rejecting the usefulness of the Lotus judgment as the Turkish jurisdiction was justified under the territorial principle).
103 The doctrine of sources emerged to provide a method for international lawyers to locate the law. In other words, if the law’s content came from statehood (pure fact) or from a pre-existing code (legal), a sources doctrine would be unnecessary. In the doctrine of sources, it must be assumed that the rule is sourced neither to justice nor consent (as either idea would force lawyers to revert to the difficulties of deducing binding obligations from Statehood or a pre-existing legal code). If either was the ultimate origin of law, they would violate the rule of law’s premise, which is to avoid subjectivity of value. The doctrine of sources seems concrete because they describe the processes within which States create law (social description) and seems normative because they provide an ‘independent method’ for finding rules and principles (political proscription). Koskenniemi (n 2) 303 and 305. ‘Treaties, custom and general principles of law….seem on one hand like descriptions of law-creating processes and on the other, like the objectified results of those processes’. ibid 306.
equals. Yet invariably, the doctrine of sources shows the competing approaches underpinned by a higher order (justice or non-consent) or state liberty (consent). Thus, there are opposing approaches in treaty interpretation, in the analysis of state behaviour in terms of state practice and *opinio juris*. The reason that there can be no reconciliation is because the positions are fundamentally opposed and cannot avoid failing foul of apology or utopia; ‘consensualism is justified only if non-consensualism is not and *vice versa*’. Any attempt to decide a preference between consent and justice has to be based on a higher theory, which would have to be either naturalistic or positivistic.

4 A Site of Politics: Decisionism, Hegemony and the contemporary landscape of functional regimes

It follows then that the endless oscillation of opposing patterns permits any position to be put forward; it is the ability of the lawyer to ‘move from singularity to rule’, to reduce the facts for

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104 Kennedy (n 37) 110 and 118. Thus, jurisdiction (as derived from sovereignty) appears to be the ‘hard’ doctrine in opposition to the softness of the sources doctrine.

105 Naturalism would be pure utopia unless it seeks to connect ‘justice’ or ‘common interest’ to a meaning which States have ascribed to those concepts (i.e. consent). Whereas positivism would be pure apology unless it can explain why behaviour creates obligations, and so it turns to naturalism in order to provide an answer (i.e. justice). Pure consensualism cannot explain the use by the ICJ of non-consensual principles (such as reasonableness, humanitarian values) because it would mean that those principles would be subject to changing State will, interest and behaviour when the Court uses those principles as a constraint on State will. See Koskenniemi (n 2) 307 and 321 respectively. See Carty (n 2) and Carty (n 35) 66 (limit of legal imagination in the failure of the ‘state theory’, which claims a consensual basis for legal rules, yet is forced to adopt hypotheses, such as ‘tacit consent’ (which can only assume an objective theory of justice) in order to accumulate empirical evidence for a legal rule).

106 Koskenniemi (n 2) 321. Consensualism is needed to guarantee concreteness and non-consensualism is needed to justify the rule’s binding force.

107 Ibid.
either side of the debate.\textsuperscript{108} Hence, every situation in international affairs is a ‘product of law’; international lawyers may provide the legal argument justifying the acts of the dictatorical regime as much as providing the argument criticizing those acts by the victims.\textsuperscript{109} However, law’s unique value is how it frames politics; it forces both participation beyond mere particular interests (as lawyers must think in terms of a universal) and a commitment to accountability.\textsuperscript{110} Yet, because of the incoherence of each position, no argument can be preferred over another; they are similarly structured upon a fundamental contradiction. Thus, the Court must move to discretion in order to prefer one argument over another and this means weighing the circumstances and balancing the competing “interests”.\textsuperscript{111} This move to discretion is a move to political choice.

\textsuperscript{108} This is the act of reduction where an “event” in international affairs is reduced by the lawyer into an appeal to the general or an appeal to the particular. On the one hand, the lawyer reduces the decision-maker’s perception of the event as unique and/or a crisis to a pattern or precedent. The lawyer devises an argument to suggest that the event is analogous a certain precedent, leading to a predicted legal outcome. Conversely, the lawyer can reduce the event to its singularity, emphasising what distinguishes the event from any other preceding event. This denies that the event can be reduced to a pattern or precedent and argues from the exception to the rule or from equity or reasonableness; ‘the way it cannot properly and without injustice be treated by reducing it into a pattern’. See M Koskenniemi ‘Forward’ in F Johns et al Events: The Force of International Law (Routledge London 2010) xviii.


\textsuperscript{110} M Koskenniemi 2006 (n 66) 69-70. He argues that ‘Power and law are entangled in such complex ways that it is difficult to interpret particular events as manifesting either one or the other: power works through “formal rules” – just like instead of “naked power” we see power defined, delimited and directed by rules everywhere’. ibid 70. See also Koskeniemi, ‘The Turn to Ethics in International law’ (Bucharest, November 2002), 24.

\textsuperscript{111} The Court cannot prefer any argument because each argument must draw on both logics of Realism and Formalism, which are themselves contradictory and
through the guise of “context”, relativity or normative principles such as equity or reasonableness.\textsuperscript{112} We observed in Chapter 1 that the dominant approach in scholarship on the doctrine of jurisdiction is to consider the determination of jurisdictional disputes based on principles of reasonableness or weighing of interests.\textsuperscript{113} The subsequent Chapters illustrate this discretion at work where each outcome is internally challenged by a dissenting opinion or subsequently challenged by a competing outcome; thus, each legal outcome is determined by what is viewed as just in the circumstances. Of course, theoretically, this cannot be reconciled with the function of the rule of law in liberal theory because exercising discretion undermines the “objectivity” of legal decision-making and questions the integrity of the rule of law as non-political. Nevertheless, legal decision-making is not irrational as only the legal arguments according with the general bias of the law will persuade at each moment.\textsuperscript{114} Thus, international law is not a purely rhetorical

\textsuperscript{112} Koskenniemi (n 2) 65.

\textsuperscript{113} I Brownlie Principles of Public International Law (7th edn Oxford University Press Oxford 2008) 308 and 311 (‘substantial and bona fide connection between subject matter and source of the jurisdiction). See also C Ryngaert Jurisdiction in International Law (Oxford University Press Oxford 2008) 145-150.

\textsuperscript{114} Gentle Civilizer of Nations illustrates how certain arguments have become the persuasive position at particular moments in history. M Koskenniemi The Gentle Civilizer of Nations: International Law 1870-1960 (Cambridge University Press Cambridge 2001). Koskenniemi describes the decision as expressing the ‘interplay’
technique because the rhetorical patterns of argument will work within an institutional setting, which has a particular structural bias, that is, a normative or concrete bias.

It follows, then, that international law ‘offers a defence for hegemonic and non-hegemonic practices equally’.\(^{115}\) This is the operation of the language of international law as a battleground or a site of politics in which participants struggle for hegemony over their opponents.\(^{116}\) Here, the opposing positions present competing approaches to international law that treat the international political world either as anarchical (competing interests) or a ‘functional whole’.\(^{117}\) This allows international lawyers to either appeal to sovereign freedom (individual) or to the binding rule of law (community). As Koskenniemi argues, international law debates suggests that two projects characterize international law; one project claims to transform from ‘sovereign egoism to world unity’ (descending) while the other from ‘oppressive homogeneity to self-determination’ (ascending).\(^{118}\)

[Each] project starts from a negative characterization of the political present and seeks to override it with a legal blueprint conceived alternatively as a project of unity or a project of diversity.\(^{119}\)

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\(^{116}\) Jouannet (n 65) 7.

\(^{117}\) See Koskenniemi 2004 (n 71) 199. See also M Koskenniemi “Not Excepting the Iroquois Themselves?” Sociological Thought and International Law’ (2007) European University Institute, Florence (Max Weber Lecture) and M Koskenniemi ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’ (March 2005) Harvard University, 15.

\(^{118}\) ibid 200.

\(^{119}\) ibid 201.
In this case, each project is formal law that is politically open-ended, allowing ‘any substances to fill the space that which appears to be either “unity” or “identity”. Neither project can trump the other ‘in any general way’; rather they operate as ‘surfaces’ on which lawyers can ‘reciprocally make and oppose hegemonic claims’. This technique is evident in the literature on universal jurisdiction where advocates implicitly appeal to either a systematic world order or civitas maxima, in which every State must secure criminal accountability, or to an anarchical order of independent States, in which each State must avoid arbitrary and unwarranted interference in the domestic jurisdiction of other states.

When seeking to secure the hegemony, there must be an awareness of ‘the moment’s hegemonic and counter-hegemonic narratives’ in order to pitch the right argument at the right time to the right audience in order to be persuasive. This historical (diachronic) view demonstrates how the “centre” moves within the discourse so that today’s hegemonic position is overtaken by the counter-hegemonic position, tomorrow. Of course, both hegemonic

\[\text{\cite{120}}\text{ibid 200.}\]
\[\text{\cite{121}}\text{ibid 202.}\]
\[\text{\cite{122}}\text{This presumes that state jurisdiction over crimes against international law should be as wide as possible and the nature of the crimes as \textit{jus cogens} can justify a complete jurisdiction over such crimes. Immunity must be inapplicable in spite of the rationale of the rule (exception to immunity). See R van Alebeek \textit{The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law} (2\textsuperscript{nd} edn Oxford University Press Oxford 2008) 223 (identifying the two concepts of functional immunity within legal scholarship that she critiques).}\]
\[\text{\cite{123}}\text{This presumes that the principle of universal jurisdiction over crimes against international law must be demonstrable in state behaviour, disputing the existence of a ‘general and consistent practice’ from the evidence cited by proponents. Here, immunity applies unless waived by the respective State or there is demonstrable evidence of an exception in regards to crimes against international law within State behaviour.}\]
\[\text{\cite{124}}\text{Koskenniemi 2004 (n 71) 202.}\]
\[\text{\cite{125}}\text{Koskenniemi 2004 (n 71) 15. Of note is Kennedy’s portrayal of the history of twentieth century international law as an endless recurring movement between}\]
and counter-hegemonic positions fail to avoid the accusation of apology/utopia as they are either less normative/more concrete or less concrete/more normative.\textsuperscript{126} As will be detailed in subsequent Chapters, the reasoning in the \textit{Eichmann} judgments’ was pitched within the context of cooperation with the ICTY and ICTR and the final negotiations of the Rome Statute of the International Criminal Court. Hence, the hegemony of an ‘ending impunity’ project, emphasizing the humanitarian ideal of accountability, meant that \textit{Eichmann} was the right argument at the right time to the right audience. Notwithstanding, there were invariably instances of counter-hegemonic technique challenging the dominant \textit{status-quo} that moved into the hegemonic positions in light of diplomatic incidents,\textsuperscript{127} which were the context for pitching the arguments on personal immunity in the \textit{Arrest Warrant} case.\textsuperscript{128}

It follows then that pitching the right argument means that the hegemony of any one argument depends upon how the legal argument accords with the structural bias of the institution in which the legal argument is pleaded.\textsuperscript{129} At this point, the move to specialization is significant and it is here where ‘the world of legal practice is being sliced up in institutional projects that cater for

narratives of critique and renewal or Moyn’s depiction of the failure of the human rights law narrative to succeed until the 1970s, because the majority of the international law profession from the end of the 1940s were not persuaded by the claim that articles 55 and 56 of the UN Charter possessed legal implications. See D Kennedy ‘When Renewal Repeats: Thinking Against the Box’ (2000) 32 NYU Journal of International Law and Policy 335 and S Moyn, \textit{The Last Utopia: Human Rights in History} (Harvard University Press Boston 2010) 183-190.

\textsuperscript{126} Jouannet (n 65) 7.
\textsuperscript{128} \textit{Case of the Arrest Warrant} (n 31).
special audiences with special interests and special ethos’. Here, by framing the situation in terms of a particular specialism, the issue can be decided within that particular specialism’s institutional setting and ensure the success of certain legal arguments that follows the general bias of the deciding institution. As any legal vocabulary is political open-ended, it means that ‘what gets read into it (or out of it) is a matter of subtle interpretative strategy’. With ingenuity, lawyers can re-describe because there is no self-evident normative concepts and because every legal argument is fundamentally indeterminate and cannot be preferred over another. This technique is the ‘politics of redefinition’ where these specialist vocabularies can be used to ‘push forward’ certain interests ‘while leaving others in the shadows’, all of which is determined by the choice of language. Because the ethos is essential for each specialism, it is irrelevant whether specialisms have the same or different rules as each rule would be ‘applied differently’ in accordance with the different ethos. Furthermore, the specialisms are not delimited between one another and this means that ‘any

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131 ibid 11 and Koskenniemi (n 39) 9. Here, Koskenniemi contends that in response to these regional and functional regimes is a ‘managerial approach’ that sees international law as ‘beyond the state as an instrument for particular values, interests and preferences’, losing the ‘universalism that ought to animate international law’ and the conditions within which international lawyers can exercise their competence.

132 See Koskenniemi (n 129) 9 and Koskenniemi 2004 (n 71) 22.

133 ibid. Thus, re-definition means regimes may be transformed.


135 Koskenniemi (n 39) 12.
international event may be described from any such perspective’. However, specialisms do not develop as a progressive move, rather ‘they grow spontaneously’,

[They] emerge from field-construction of narration, of pinning informal labels on aspects of the world that describe them from the perspective of particular interests or objectives.137

It follows then that rather than a natural occurrence, the use of a particular specialism and its institutional bias is, in fact, ideological. Of relevance here is the assumption underpinning the international criminal law regime, that individual criminal responsibility is ‘universal’, and the regime’s institutions are portrayed as the representatives of the international community in its struggle “against impunity”.138 The international criminal law regime competes with the traditional centre of public international law to define post-conflict situations. Public international law assumes that order and equality is “universal” and its institutions are portrayed as representatives of the international community’s desire for pacific settlement of disputes and the stability between sovereign equals.139

136 ibid.
137 ibid.
138 For example, see Prosecutor v. Dusko Tadic (Decision on Defence Motion on Jurisdiction) IT-94- 1 (10 August 1995), para 42. Here, the Trial Chamber argued that the ‘crimes…are not crimes of a purely domestic nature’ but are ‘universal in nature, well recognized in international law as serious breaches of international humanitarian law and transcending the interest of any one State’. In such an instance, ‘the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world’. ibid.
139 This portrayal of certain tribunals as distinct in terms of function was claimed by the European Court of Human Rights. In its view, its function is distinct from that of the International Court of Justice and thus, the ‘fundamental difference in role and purpose’ warranted a distinguishing Convention practice from that of the ICJ. See Loizidou v. Turkey (Preliminary Objections) Judgment of 23 March 1995, Series A, No. 310, para 85.
As subsequent Chapters will show, the questions of validity of exercises of jurisdiction and the application of immunity of state officials have been treated differently by both idioms’ institutions. As Koskenniemi observes, the Arrest Warrant was a hegemonic struggle over human rights themes where the authority of human rights bodies was challenged by alternative preferences; ‘rights were trumped by traditional rules of diplomatic law’.

That said indeterminacy reveals that every specialism is subject to the same oscillation between individual and community, normativity and concreteness. Consequently, each specialism has its contentious positions,

[Each] group of experts are themselves divided as to how to understand the world and what to do with it as the functional vocabulary is indeterminate.

In the debate on universal jurisdiction, we observed the competing approaches over the justification for and content of the principle. These competing approaches appear on the surface to reflect the hegemonic struggle between the ethos of international criminal law and the original “centre” of public international law. Yet whichever idiom underpins the competing approaches, the same normative and concrete tension is at play. For example, it is suggested that Wehle and Randall (as illustrative of the normative approach) in different ways appear to adopt a more normative, less concrete argument relative to the scholarship of Henzelin and Reydams (as illustrative

140 Koskenniemi 2004 (n 71) 209.
141 Koskenniemi (n 129) 12.
142 ibid 13.
of the social description approach). Likewise, the latter approach appears to adopt in different ways a more concrete, less normative argument relative to former. Meanwhile, Cassese appears to adopt a less normative, more concrete argument relative to Wehle yet a less concrete, more normative argument relative than Reydams. In the end, each approach can be addressed as securing normative ideals of both idioms (such as justice and peace) in the particular context. Here, what these normative concepts of justice and peace mean within each idiom depends on its particular ethos and interests; thus, each idiom will apply and determine the applicable law differently.

5 Conclusion

We observed that indeterminacy can explain why international law is riddled with opposing doctrine where for every principle, there is a counter-principle and for every rule, there is an exception. In this case, the principle of universal jurisdiction is in contradistinction to the rule of immunity of state officials and in this way, the rules cannot exist in the same legal space, they cancel each other out. In light of the inseparability of theory and doctrine, indeterminacy further explains the recurring positivism-naturalism, justice-consent, prior order-state liberty debates that underpin the contradistinctions between rules and the incoherence of each rule. This approach can account for the endless oscillation of opposing approaches that permits any position to be put forward and counter-argued by an opposing approach. Of course, indeterminacy illustrates how no legal argument has preference over another and

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143 See G Wehle Principles of International Criminal Law (2nd edn TMC Asser Press The Hague 2009), Randall (n 27), Reydams (n 29) and M Henzelin Le Principe de l’universalité en droit penal international (Helbing & Lichtenhahn Bruylant 2000).
thus, the language’s structure compels a move to equity and the political choice between opposing legal projects. Nevertheless, we noted how this move to discretion (and equity) is not irrational rather legal decision-making accords with the biases (and preferences) at any historical moment.

It follows, then, that international law ‘offers a defence for hegemonic and non-hegemonic practices equally’.\textsuperscript{144} In light of these observations, the move to specialisms is significant because each situation or event is described according to the preference and ethos of the particular specialism. This chapter notes that the debate over universal jurisdiction and its contradistinction with immunity of state officials engages in a hegemonic struggle between the ethos of international criminal law and the original “centre” of public international law. In the following Chapters, it is evident that each of the landmark judgments is an attempt to be more normative, less concrete or more concrete, less normative. Taken as a whole, the contemporary debate demonstrates a movement back and forth between competing approaches that emphasize either “norm” of accountability or the “fact” of state behaviour. These movements indicate the hegemonic claim of a moralist approach, in sync with the ethos of international criminal law regime, from the 1990s to the \textit{Arrest Warrant} judgment. Thereafter, a formalist approach, in keeping with the ethos of the traditional centre, became the hegemonic approach and has sustained this hegemony, despite counter-hegemonic moves by a resurfacing moralist approach.

\textsuperscript{144} Koskenniemi (n 115) 241.
CHAPTER 4

COMPETING FOR HEGEMONY: MORALIST AND FORMALIST APPROACHES OVER EICHMANN

The legal debate on the principle of universal jurisdiction over crimes against international law is best characterized as a sequence of hegemonic and counter-hegemonic positions within international law.¹ We observed in Chapter 3 that international law ‘offers a defence for hegemonic and non-hegemonic practices equally’;² a battleground or a site of politics in which participants struggle for hegemonic control.³ Within this struggle, the legal debate which envelopes the principle of universal jurisdiction draws out a “dark side” of the international criminal law project because the commitment by the international community to individual criminal accountability as “universal” has not produced its corollary—the “court of humanity” that never adjourns. As Luban argues, the debate on universal jurisdiction is bound within an irreconcilable tension between the ‘momentous and radical project’ (court of

¹ M Koskenniemi From Apology to Utopia: The Structure of the International Legal Argument (Cambridge University Press Cambridge 2005) 61-64. This chronology of the contemporary legal debate will not narrate every legal proceedings pertaining to universal jurisdiction from 1994 onwards rather it will focus on how the battle over the Eichmann judgments’ portrayal ensued. Thus, it will focus particularly on the justification for and criticism of certain key issues, namely the origin of universal jurisdiction, its content in terms of offences and presence of offender, the immunity of state officials and the non-retroactivity of criminal laws. In this way, it will not address the question of amnesty laws or statutes of limitations because the battle between Prosecutor and Defence counsel was dominated by the question of the validity of universal jurisdiction and the application of immunity.
This tension is apparent in the debate on universal jurisdiction, which swings between competing sensibilities of ‘preventing impunity’ and ‘avoiding abuse’ and, in turn, the tension between these competing sensibilities demonstrates how the unquestioned acceptance of certain outcomes has been historically contingent and contextual.

Underpinning these competing sensibilities or approaches are competing depictions that treat the international political world either as anarchical (competing interests) or as a ‘functional whole’; an appeal to either individualism (sovereign freedom) or collectivism (binding rule of law). As discussed in earlier Chapters, competing views on universal jurisdiction are either underpinned by the appeal to a systematic world order, in which every state must secure criminal accountability, or to an anarchical order of independent states, in which each state must avoid arbitrary and unwarranted

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4 D Luban ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ in S Besson and J Tasioulas (ed) The Philosophy of International Law (Oxford University Press Oxford 2010) 575, 578. As will be noted later, this can also be addressed as the tension between impunity and show trial, see M Koskenniemi ‘Between Impunity and Show Trials’ (2002) 6 Max Planck Yearbook for United Nations Law 1.


6 This presumes that state jurisdiction over crimes against international law should be as wide as possible and the nature of the crimes as *jus cogens* can justify a complete jurisdiction over such crimes. Immunity must be inapplicable in spite of the rationale of the rule (exception to immunity). R van Alebeek The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (Oxford University Press Oxford 2008) 223.
interference in the domestic affairs of other states.\textsuperscript{7} Within the contemporary debate on universal jurisdiction, these are posited in this thesis as moralist and formalist approaches. The moralist approach (and its moral naturalism) challenges what it perceives as the injustice of impunity while the formalist approach (and the world of competing interests) challenges what it believes is the injustice of politically motivated or show trials. Irreconcilable, these visions underpin the oppositions regarding the content of universal jurisdiction and its inter-dependency with immunity. Against this backdrop, this thesis argues that the contemporary debate moved from a moralist to a formalist hegemony and aims to explain why the debate moved in this direction and why it seemed the natural and inevitable outcome.

It follows then that the aim of Chapter 4 and 5 is to unpack the contemporary debate and to chart this struggle between these competing moralist and formalist approaches. The debate from the 1990s is a repeated movement between these competing visions, which are themselves within a matrix of binary oppositions (justice-consent, \textit{a priori} order-state liberty). Earlier Chapters challenge the notion that international law is located within a fixed political culture. The grammar of the language is key to understanding why competing arguments on the origin and content of the principle are inevitable and how the legal debate is bound within the matrix of descending (emphasizing normativity) and ascending (emphasizing

\textsuperscript{7} This presumes that the principle of universal jurisdiction over crimes against international law must be demonstrable in state behaviour, disputing the existence of a ‘general and consistent practice’ from the evidence cited by proponents. Here, immunity applies unless waived by the respective State or there is demonstrable evidence of an exception in regards to crimes against international law within State behaviour.
concreteness) patterns of argument. We noted in Chapter 3 that the binary structure of the grammar is composed of contradictory elements, that is, normative (what should be in the interests of justice) and concrete (what is evident in behaviour). These binary elements are not fixed or stable rather there is an endless oscillation between norm and fact and this oscillation means that no single argument can be preferred over another. Instead, the legal outcome is determined by choosing between the competing arguments in the particular context, that is, weighing the argument and determining what is just in the circumstances.

This Chapter will explore the hegemony of the moralist approach until the Arrest Warrant judgment and demonstrate that the Eichmann judgments’ reasoning was implicitly adopted by international and national tribunals in the mid-1990s. Thus, it became generally accepted that universal jurisdiction could be asserted over war crimes, crimes against humanity and genocide. At the polar end of the moralist approach were the Belgian and Spanish Pinochet judgments, which were at the margins of the Eichmann judgments. However, the majority in Pinochet III before the House of Lords attempted to steer a somewhat middle course and as such, their arguments would appear more concrete, less normative than Eichmann. For the moralist approach, Pinochet III constituted a landmark outcome that led to numerous complaints in certain national courts against alleged perpetrators, including former and incumbent senior state officials. Yet within the dissent in Pinochet III

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8 Koskenniemi (n 1) 61-64.
9 Thus, international law is paradoxically opposable to the State (critical of State policy) yet its content is verifiable by the politics of the State (reflective of State policy). M Koskenniemi ‘Human Rights, Politics and Love’ (2001) Mennesker and Rettigheter 4, 33.
was the counter-hegemony of the formalist approach, an approach which underpinned the *Arrest Warrant* judgment. This chapter concludes at the point in time when the moralist hegemony was at its height, which was the context for the *Arrest Warrant* judgment, that is, the reforming vision of universal accountability (or the formalist “debacle” of the world policeman).\(^\text{10}\)

1 The Binary Tensions of sovereign egoism and world unity

As Koskenniemi has observed, international law controversies suggest that two projects characterize international law; one project claims to transform the present from ‘sovereign egoism to world unity’ (descending) while the other from ‘oppressive homogeneity to self-determination’ (ascending).\(^\text{11}\) Any substantive argument can ‘fill the space that which appears to be either “unity” or “identity”’.\(^\text{12}\) This political open-ended-ness arises from the fundamental contradiction in the structure of the legal argument, whose binary elements of normativity and concreteness\(^\text{13}\) are not fixed or stable but rather oscillate endlessly in either descending (emphasizing normativity) or ascending (emphasizing concreteness) patterns.\(^\text{14}\) This is the movement between *a priori* legal order and state liberty in the ‘hard’ doctrine of jurisdiction\(^\text{15}\) and between justice and consent

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\(^{10}\) For the binary concepts of reforming vision and stability, see D Kennedy ‘When Renewal Repeats: Thinking Against the Box’ (2000) 32 NYU Journal of International Law and Policy 335.

\(^{11}\) See Koskenniemi 2004 (n 5) 200.

\(^{12}\) ibid.

\(^{13}\) See Koskenniemi (n 1) 19-20.


\(^{15}\) As noted in chapter 3, Koskenniemi conceived the doctrine of sovereignty as involving an opposition between pure fact and legal approaches. The legal
in the ‘soft’ doctrine of treaty law and custom. In the doctrine of sovereignty, legal arguments swing between justifying state behaviour on state liberty and delimiting competing liberties from a point beyond liberty. In the doctrine of sources, legal arguments swing between validating behaviour on state consent and justifying normative binding rules on an “objective” theory of justice.

This swing between liberty-beyond liberty and between consent-justice is sourced to international law’s liberal political culture with its irreconcilable contradiction between freedom and order. In turn, this movement between contradictory assumptions tries to avoid the full implications of originating binding obligations in statehood or an a priori legal order, namely the accusation of apology and utopia. Hence, each source must be concrete and describe the processes within which states create law (social description) and must be normative and provide an ‘independent method’ for finding rules and principles (political proscription). It follows, then, that neither doctrine (nor the opposition within each doctrine) can establish the ultimate point of law’s origin because they

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16 As noted in chapter 3, Koskenniemi conceived the doctrine of sources as an opposition between objective (non-consensualism) and subjective (consensualism) approaches. In regard to treaties, the legal arguments illustrate a ‘subjective’ and ‘objective’ approach to treaty interpretation to justify to why treaties bind, which draws the consensualism/non-consensualism dichotomy. The ‘subjective’ approach argues that treaties bind States parties because they ‘express consent’. The ‘objective’ approach argues that they bind because of ‘considerations of teleology, utility, reciprocity, good faith or justice’. See M Koskenniemi (n 1) 333. ‘Treaties, custom and general principles of law….seem on one hand like descriptions of law-creating processes and on the other, like the objectified results of those processes’. ibid 305-306. See also D Kennedy (n 15).
would violate the underlying premise of an objective rule of law, which is to avoid subjectivity of value, that is, universal morality or state preferences. Each legal argument moves in constant opposition, continually attempting to be either more normative, less concrete (descending) or more concrete, less normative (ascending) as against its other.\(^7\) Hence, because of the language’s grammar structure, neither project can trump the other ‘in any general way’; rather they operate as ‘surfaces’ on which lawyers can ‘reciprocally make and oppose hegemonic claims’.\(^18\)

In each approach, there is characterization of international law as a project of unity or identity. As noted above, these opposing projects of unity and identity in the debate on universal jurisdiction will be addressed in this thesis as moralist and formalist approaches.\(^19\) Arguments, underpinned by a moralist approach, claim to transform the world from ‘sovereign egoism to world unity’. These arguments depict the social order as a complete system or functional whole and here, the rule of law originates in a moral naturalism. Thus, the appeal that underpins the moralist approach is the utopian ideal of a cohesive community founded on ethical and

\(^7\) Jouannet (n 3) 7-8.
\(^18\) Koskenniemi 2004 (n 5) 202.
humanitarian principles, a version of *civitas maxima* where each state can secure interests of the community. This approach assumes that the rule of law is critical of (and distant from) state policy and thus, universal jurisdiction over crimes against international law is justified upon the nature of the crimes and any limitations upon its exercise are limited (or preferably non-existent) given the gravity of the offences as a shock to the conscience of mankind. Hence, the *Eichmann* judgments portrayal is constructive as these judgments offer legal arguments that justify universal jurisdiction based on the nature of the crimes, the inapplicability of immunity of state officials and lack of a violation of non-retroactivity.

It follows that, from the moralist approach’s perspective, the inadequacy of the “political present” is the accountability-gap created by the lack of criminal prosecutions of alleged perpetrators in the state where the crimes were committed. Here, any limitation on the jurisdiction of national courts gives the state the opportunity to shield itself behind concepts of consent and territorial jurisdiction, that is, sovereign egoism. The inevitable outcome is to impede the campaign to prevent impunity and the commitment to individual criminal responsibility for crimes against international law.

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20 See Koskenniemi 2004 (n 5) 201.
Nevertheless, the fundamental contradiction and incoherence of any legal argument means that there is also an appeal to identity (or ‘sovereign egoism’).\(^{23}\) Here, legal arguments claiming to justify universal jurisdiction appeal at the same time to its right of a state to act independently and determine the extent of its own jurisdiction.

In contrast, arguments underpinned by the formalist approach, claim to transform the world from ‘oppressive homogeneity to self-determination’\(^{24}\) and depict the social order as composed of competing interests and the rule of law originates in state liberty (or individual freedom). Thus, the appeal that underpins this approach is the apology for the behaviour of states jealously guarding their individual interests from arbitrary rule; a world of competing interests where each state secures its own preferences. Here, the rule of law is reflective of (and describes) state behaviour and policy and hence, universal jurisdiction over crimes against international law cannot be justified on the nature of the crimes but can only be justified if the principle is reflected in the behaviour and the will of states and any limitation on its exercise will equally be drawn from observation of state behaviour. Therefore, from the formalist approach, the _Eichmann_ judgments seem to be utopian; they fail to adequately reflect state behaviour because the observable evidence for universal jurisdiction and the removal of immunity can

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\(^{23}\) Koskenniemi 2004 (n 5) 200.

\(^{24}\) ibid.
be called into question. In this way, it cannot be justified that universal jurisdiction is uninhibited rather the principle must accord with limitations imposed by international law. Here, any excessive exercise of jurisdiction by foreign national courts is an arbitrary limitation on states decision-making in post-conflict situations behind the cloak of “universal” interest, that is, oppressive homogeneity. This erodes self-determination and the commitment to the dignity of the state, its independence and to formal equality. Nevertheless, as we have already noted, the fundamental contradiction and incoherence of any legal argument means that there is also an appeal to the opposing project, namely world unity. As such, the state criticizing the exercise of universal jurisdiction appeals to formal equality, the world unity where rule of law protects the freedom of all equally. Thus, respect for the dignity and independence of the state is a “universal” right of all States, that is, the communal interest in securing the equality of each member of the community.

It is evident that both the moralist and formalist approaches struggle with the binary tension at the heart of the acute challenge presented by crimes against international law. This challenge is drawn from the ‘collective nature’ of the crimes,27 what Röling described as ‘system criminality’.28 System criminality is where the system is a contextual reference, that is, the criminality ‘depends on societal forces, rather than personal inclinations’;29 here, the criminal conduct ‘is caused by the structure of the situation and the system…’30 As Luban argues, the decision to address state violence as crime stands outside of the ‘religion of the state, race, ethnicity and nation’.31 System criminality amounts to the dismissal of these political entities ‘as gods that failed; [when] within the religion, crime-talk is blasphemy’.32 Thus, what he calls ‘pure international criminal law’ (or crimes against international law), with its universal application, ‘is a momentous and radical project, equivalent in its way to the early secularists’ deflationary view of state authority as

27 Luban considers these offences as those ‘originating in international rather than domestic law, and international rather than domestic legal institutions’. See D Luban ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ (2008) Georgetown Law Faculty Working Papers, URL: SSRN: http://ssrn.com/abstract=1154177. See also AKA Greenwalt ‘The Pluralism of International Criminal Law’ (2011) 86 Indiana Law Journal 1063, 1071-1072 (discussing how ICL can in a broad sense encompass numerous obligations impacting criminal law, including jurisdiction, and human rights law, as it imposes constraints administration of criminal justice’). However in the usual narrower sense in which ICL is discussed, it refers to ‘specific offences that are directly proscribed by international law’. ibid.


29 ibid (the commission of crimes ‘under official order, official request or official advice or crimes which are not prevented either deliberately or by neglect’). See also E van Sliedregt Individual Criminal Responsibility in International Law (Oxford University Press Oxford 2012), 21.

30 ibid.

31 Luban (n 4) 575, 578.

32 ibid.
manifestation of human rather than divine will’. However, Luban notes that,

[Not] even the so-called “like-minded” states that promote the ICL project are heretical enough to reject the religion of sovereignty. For states to call other states ‘gods that failed’ is a Damoclean sword, for they themselves are nothing more than gods that have not yet failed.

Therein, the ‘gulf between the transcendent claims of sovereignty and its deflation in international criminal law’ presents the challenge to justify prosecutions of nationals of states who object to their trial. Similarly, Koskenniemi’s binary themes of impunity and show trial reflect the swing within the debate on universal jurisdiction between ‘preventing impunity’ and ‘avoiding abuse’. These themes describe the tension, within which the debate over universal jurisdiction takes place, and represent the “valid” criticisms that are used by an argument adopting a moralist approach against a formalist approach and vice versa. Hence, the arguments underpinned by the moralist

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33 Ibid. This Chapter will refer to crimes against international law as a classification for war crimes, crimes against humanity and genocide. As legal arguments in the debate on the principle of universal jurisdiction assume the classification as unproblematic and the focus of this analysis is to critique the debate on universal jurisdiction, this analysis refers to the classification as assumed. It does not critique the assumption, which moves into the contentious debate over the concept of crimes against international law.

34 Ibid. See similarly Greenwalt who notes notes how ‘[ICL]’s creation inevitably perpetuates or even creates inconsistencies and tensions in the domestic criminal justice systems to which it applies […] the international prohibition of genocide necessarily sits in tension with the laws of states that seek to legalize and encourage genocidal practices’. See Greenwalt (n 27) 1068 (criticising the advocacy for uniformity in international criminal law and instead, advocating legal pluralism to ensure among others continued legal protections for the accused under domestic legal systems).

35 Ibid.

36 Koskenniemi (n 4) 1.

and formalist approaches are fundamentally contradictory, battling the tension between radical project and sovereignty at their core, and concealing a bias either towards the justice of accountability (radical project) or the justice of stability (state liberty).

It follows, then, that as we explored in previous chapters, the making and opposing hegemonic claims become the battle between ‘the moment’s hegemonic and counter-hegemonic narratives’. Here, as incoherence of legal argument compels the move to political discretion, legal outcomes are adopted in accordance with the structural bias of institutions before which the arguments are pleaded. We noted how legal practice leads to the awareness that the lawyer must pitch the right argument at the right time to the right audience in order to be persuasive. We also observed how this structural bias of institutions means that the move to specialization in contemporary international law is particularly significant; in this case, international lawyers can use these specialist vocabularies to ‘push forward’ certain interests ‘while leaving others in the shadows’, all of which is determined by the choice of language.

38 See Koskenniemi 2004 (n 5) 202.
40 Koskenniemi (n 39) 11. See also M Koskenniemi ‘The Lady Doth Protest too Much: Kosovo and the Turn to Ethics in International Law’ (2002) 65 Modern Law Review 159. As noted in Chapter 2, the success of the notion of individual criminal responsibility under international law was driven primarily by Hersch Lauterpacht. He used his editions of Oppenheim’s International law, his consultations with the British and American Chief Prosecutors and his own published papers to try to establish an exception to the defence of superior orders and cement the notion of direct liability of individuals under international law. The latter notion of direct liability was drawn from the scholarship on the nature of the

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Because the ethos is essential for each specialism, it is irrelevant whether specialisms have the same or different rules as each rule would be ‘applied differently’ in accordance with the different ethos.\textsuperscript{41} Likewise, the specialisms are not delimited between one another, ‘any international event may be described from any such perspective’.\textsuperscript{42}

As will be demonstrated, the reasoning in the \textit{Eichmann} judgments’ was pitched within the context of cooperation with the International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda, the conclusion of the \textit{Draft Code of Crimes against the Peace and Security of Mankind} and the final negotiations of the Rome Statute of the International Criminal Court. It is significant, therefore, that the context for the emergence of the moralist and formalist approaches within the debate on universal jurisdiction was the burgeoning influence of the regimes of international human rights law and international criminal law. In both of these specialisms, the central pillar is the legal enforcement against violations of human dignity, arising from state action or inertia; both regimes emphasize human dignity and moral duty as the basis for legal obligation.\textsuperscript{43} In the international criminal law

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\begin{itemize}
    \item The institutions within the international human rights regime emphasize non-consensualism and appeal to a moral naturalism and the notion of fundamental community values. The ethos of international human rights law is victim-centric and its tradition is to challenge the activity of the state and advocate for reform. Of note here is the interpretation by human rights institutions of the general duty to protect, fulfil and promote in human rights treaties. They regard the general duty to promote as imposing a corollary duty to investigate and prosecute violations of human rights; this is considered an implied component of the primary obligation to respect and ensure in combination with the individual’s right to a remedy. The

\end{itemize}
regime, the crimes against international law are justified based on the moral reprehension of the offences, as acts that the shock the conscience of mankind, and the enforcement against this system criminality is undertaken through individual culpability, which is the direct liability of an individual under international law that originates in the gravity of the offences. In this way, the international criminal law regime and its institutions emerged as a ‘reforming vision’ that challenged and critiqued the existing status-quo. This reforming vision criticized an antiquated international legal order where the legal enforcement against such atrocities could be precluded under certain existing rules, particularly when the underlying normative purpose is to guarantee non-repetition of human rights violations, ‘since impunity fosters chronic recidivism of human rights violations, and total defencelessness of the victims and their relatives’. See Paniagua Morales et al. (Judgment) Inter-American Court of Human Rights (Ser. C) No. 37 (1998). In this way, it is argued that the ‘bringing to justice the perpetrators of human rights violations’ constitutes one of a number of methods of reparation, which the obligation to ensure the right to an effective remedy requires. See UN Compilation of General Comments and General Recommendations adopted by Human Rights Treaties bodies ’The Nature of the General Legal Obligation imposed on States parties to the Covenant’ CCPR/C/74/CRP.4/Rev.3 (5 May 2003), para 16 (de lege and de facto amnesties and immunities) respectively. From the extensive case law, see in particular Velásquez Rodríguez (Judgment), Inter-American Court of Human Rights Series C No. 4 (29 July 1988), Espinoza v. Chile, Inter-American Commission of Human Rights (case no. 133/99), para 66 and Kaya v. Turkey EHHR (19 February 1998), para 107. See also D Orentlicher ‘Independent Study on Best Practices, including recommendation, to assist States in strengthening their domestic capacity to combat all aspects of impunity’, UN Doc. E/CN.4/2004/88, para 10 and D Orentlicher ‘Report of the Independent Expert to update the Set Principles to Combat Impunity, UN Doc E/CN.4/2005/102 (18 February 2005), para 43. 44 Kennedy (n 10).

45 This is the ‘negative characterization of the political present’ that we discussed in chapter 3, section 4. This is where the legal argument characterizes the present field as the problem and advocates for a project of unity or diversity. See Koskenniemi (n 5) 201. In the case of the IMT Nuremberg, the process was premised upon a project of world unity, a tribunal that prosecuted offences that shocked the moral conscience of mankind on behalf of mankind or international community.
integrity of prosecutions by the state of its own nationals could be called into question.\footnote{CC Joyner ‘Arresting Impunity: The case for Universal Jurisdiction in Bringing War Criminality to Accountability’ (1996) 59 Law and Contemporary Problems 153 (‘since war criminals often operate with the knowledge and assistance of local political and legal authorities, domestic law does little to deter these actors. Prevention and punishment of war crimes thus become legal concerns and moral obligations, not just for those governments in whose territory crimes occurred, but for all States’).}

The international criminal law regime’s reforming vision was significant in accommodating the unquestioned acceptance of certain legal outcomes. As noted in chapter 2, the substantive law of crimes was justified upon “laws of humanity”; the International Military Tribunal judgment spoke of how the ‘very essence of the Charter’ was based on the idea that ‘individuals have international duties which transcend the national obligations of obedience imposed by the individual State’ (emphasis of author).\footnote{1 International Military Tribunal, The Trial of German Major War Criminals by the International Military Tribunal sitting at Nuremberg Germany (1946), reprinted in (1947) 41 American Journal of International Law 172, 220-221.} Underpinning these arguments is the appeal to a moral naturalism and the concept of crimes against international law as “universal” crimes that originate in universal moral code which binds regardless of consent.\footnote{As we explored in chapter 2, this position implicitly invoked the naturalism of Lorimer’s ‘cosmopolitan criminals’, the vision of the international social world as universal order, in the guise of a civitas maxima or natural law order. See J Lorimer The Institutes of the law of nations: a treatise of the jural relations of separate political communities Vol II (Blackwood & sons London 1883-1884) 132.} This “moral law” justification is what Koskenniemi describes as the ‘unthinkability of genocide’: the limits of law, the taboo, the subject that has to be accepted ‘as it is’ and cannot become ‘a matter of technical argument’.\footnote{M Koskenniemi ‘Faith, Identity and the Killing of the Innocent: International lawyers and Nuclear Weapons’, reprinted in M Koskenniemi (n 2) 213. In this regard, the ‘unthinkability of genocide –brings to the surface the limits of rational argument and the character of normative knowledge. Chains of argument and proof can always be traced to a point at which something can no longer be proved}
law’ emerges; it is the difficulty in subsuming the ‘hot vocabulary’ of crimes against international law under the ‘cool vocabulary’ that comprises the daily work of legal practice.50

[Such] an argument about ‘moral law’ is unassailable from a technical point of view, because it is completely unsupported by technical argument. It can only be accepted or rejected because of what it says; not because of any evidence that was brought in to prove it. The Court appeals directly to the reader as a person who will immediately approve of the sentence and feels no need to prove it, to whom the illegality of genocide is not a matter of technical argument at all, to whom the contrary—the lawfulness of genocide—would be quite literally unthinkable. If the reader does not accept the statement as it is, he or she will not be convinced of its truth by any additional argument. […] The sentence propounds a self-evidence that any ‘proof’ could only serve to weaken.51

Interdependent with the concept of crimes against international law is the personal liability under international law for those acts52 and here, international criminal responsibility was justified on nature of the crimes and, in turn, moral naturalism. Ordinarily, a state official or individual acting on behalf of the state is personally immune from the jurisdiction of foreign tribunals for

but must be axiomatic, as something that we know because we could not think otherwise’. He referred to Kelsen the ‘Grundnorm’ as a transcendent hypothesis or Wittgenstein’s ‘bedrock’—‘something that cannot be proved but must be assumed in order for everything else we know about law to make sense’. ibid, 214.

50 M Koskenniemi, Roundtable discussion on ‘Critique, Complicity and Law’ conducted by Michelle Farrell, Irish Centre for Human Rights, NUI Galway (Friday 26th April 2013).

51 Koskenniemi (n 49) 213-4.

52 The irrelevance of official capacity denotes that the guilt of the defendant could be determined despite the fact that the person was an official of a State, who ordinarily would be inviolable within a foreign jurisdiction. It applied to all natural persons without distinction. In parallel, immunity denotes that the tribunal does not have jurisdiction to determine the accused’s guilt because the act was committed by a State official. See van Alebeek (n 6).
acts performed on government orders. However, the International Military Tribunal at Nuremberg addressed the Nazi atrocities as extraordinary circumstances that warranted a distinct legal framework. Crucial to this distinction is a normative and factual claim—normative in terms of a universal moral law and factual in considering the acts as of a different magnitude. As the British Chief Prosecutor at International Military Tribunal Sir Harold Shawcross argued, if the State ‘sets out to destroy that very comity on which the rules of international law depends’, it cannot shelter behind ‘the metaphysical entity which [agents of the State] create and control’. In Prosecutor v. Furundzjia, the International Criminal Tribunal for Former Yugoslavia ruled that the irrelevance of official capacity was ‘indisputably declaratory of customary international law’. In other words, individual criminal responsibility was unquestionably customary international law irrespective of an empirical analysis of state behaviour.

The rule of individual criminal responsibility must be unquestionably accepted because like genocide, it cannot be the subject of technical argument. The rule must be accepted as it is

53 The most important precedent from the 19th century was the McLeod case, where the US Government conceded the British Government position that an individual did not incur personal responsibility for acts conducted under the authority of a foreign State, see RY Jennings ‘The Caroline and McLeod Cases’ (1938) 32 American Journal of International Law 82, 92. See also van Alebeek (n 6) 103-157 and Prosecutor v Blaskic, where the ICTY ruled that Croatian State officials could not be the subject of sanction and penalties as they are ‘mere instruments of a State and their official action can only be attributed to the State’; their conduct ‘is not private but undertaken on behalf of a State’. ‘State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity”’. Prosecutor v Blaskic, IT-95-14 (ICTY Appeals Chamber 1997).
54 H Shawcross ‘Closing Address for the United Kingdom of Great Britain and Ireland’ (1947) Supplement A: Office of the US Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression 61, 91.
55 Prosecutor v. Furundzjia, IT-95-17/1-T (10 December 1998), para 140.
because to do otherwise is to side with the Defence and cement the unimpeachable state in the face of moral outrage. As Shawcross explained, the defence against liability is merely ‘an attempt to clothe crime with impunity because the motive was political rather than personal’.56 The Defence’s claim of immunity from liability then was an ‘arbitrary political doctrine more appropriate to the sphere of power politics than to that in which the rule of law prevails’.57 In other words, applying the rule of immunity in the context of Nazi atrocities would address the unthinkable in the context of the will (and at the mercy) of states. Nevertheless, this legal outcome sidesteps the irreconcilable dilemma, ‘the greatest moral and legal challenge’ that Arendt identifies.58 To impute criminal intent to individuals acting within system criminality assumes that like all “normal persons”, the perpetrators must have understood the criminal nature of the acts,

[However], under the conditions of the Third Reich only “exceptions” could be expected to act normally.59

In Chapter 2, we noted that the notion of personal criminal liability based on the outrage of the international community60 traces back to

56 Shawcross (n 54) 93-94.
57 ibid.
59 ibid.
60 This descending pattern immediately swings to an ascending pattern. The moral conscience involved is one of ‘nations’ as opposed to a divine or natural order; thus, the theory of justice is derived from State values. By appealing to State values, there is an attempt to avoid the accusation of utopia because the conscience of the moral order is verifiable by what States believe is the morality within the order of States.
the opposing debates within the law on piracy yet this approach was not the dominant view in those debates.

It follows then that crimes against international law and personal liability of state officials justifies an exception to the existing status-quo and these exceptional rules compose the radical project that challenges the religion of sovereignty. The emphasis here is placed on the nature of the crimes and the desire for accountability rather than the unequivocal consent of the state of nationality of the accused. This emphasis is understandable because moral naturalism is needed to prevent the operability of the international criminal law project becoming paralyzed by state consent. Given the unquestioned acceptance of the radical project in terms of crime and liability, the formalist approach did not challenge this project, even with its moral naturalism. However, both approaches fall back into their competing fault-lines when addressing the issue of the appropriateness of the tribunal. Here, there is no longer the unimaginable or unthinkable choice of validating state sovereignty as a bar to legal responsibility for atrocities. Rather, in the classic law of peace, issues of jurisdiction and immunity before foreign tribunals are addressed in terms of their normative function in delimiting boundaries; thus, there is a bias towards the religion of sovereignty over the radical project. Therefore, disputes regarding a state’s jurisdiction over acts of foreign state officials pivot on consent, that is, whether the state sits in judgment on another state (par in parem non habet) and not whether moral outrage justifies exercising jurisdiction on behalf of the international community.

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61 As explored in Chapter 2, this concept of the crime of piracy was contested by the more dominant view that piracy was a municipal offence for which States had agreed in their common interest to exercise extraterritorial jurisdiction.
Within this struggle, the arguments, underpinned by a moralist approach, are in accordance with the bias of the international criminal law regime, that is, *a priori* order and justice. As a consequence, the court of humanity has the possibility to never adjourn because the court will always rule that the jurisdiction is justified;\(^2\) to rule otherwise appears to be an (arbitrary) apology for power. Hence, to the moralist approach, universal jurisdiction precludes the travesty and injustice of impunity because individual criminal responsibility as a universal norm can be fully secured. This approach to universal jurisdiction implicitly draws on Nuremberg Prosecutor’s concept of the war criminal as the outlaw who attacks all of humanity.

In contrast, the arguments, underpinned by a formalist approach, are in accordance with the traditional “centre” towards stability and the religion of sovereignty (state liberty and consent). As a consequence, the court of humanity looks like a utopian ideal. Rather than never adjourning, the Defence always succeeds in criticizing jurisdiction where state consent is not manifest; to rule otherwise appears to be (arbitrary) utopia of “universal” justice. Hence, to the formalists, universal jurisdiction looks less like preventing impunity and more like a show trial, where officials of a

\(^2\) *The Einsatzgruppen Trial: Trial of Otto Ohlendorf and Others* (1948) IV Trials of War Criminals before the Nuremberg Military Tribunals Green Series (1946-1949) 499, URL: [http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf) (‘...inconceivable that the law of humanity should ever lack for a tribunal; where the law exists a court will rise […] the court of humanity, if it may be so termed, will never adjourn. […] the scrapping of treaties, the incitement to rebellion, the fomenting of international discord, the systematic stirring up of hatred and violence between so-called ideologies …will never close the court doors to the demands of equity and justice’. It would be an admission of incapacity, in contradiction of every self-evident reality, that mankind…should be unable to maintain a tribunal holding inviolable the law of humanity and by doing so preserve the human race itself’). Ibid.
foreign state are put on trial for the choice of particular justice response to atrocities committed on its territory. This approach implicitly draws on Schmitt’s suspicion of the use of the concept of outlaw because it is the only means to establish mankind or humanity as an entity to be protected and defended. Thus, the concept of the outlaw is only invoked by humanity in order to justify legal enforcement through ordinary criminal law.

2 The moralist approach’s reforming vision

In the 1990s, the dominance of the moralist approach’s narrative on the principle of universal jurisdiction occurred against the backdrop of hegemony of the bias of the international criminal law regime on questions pertaining to crimes against international law. When the jurisdiction was challenged within the international criminal tribunals, the courts confirmed its jurisdiction. Questions regarding the non-application of immunity (as an admissibility plea) were only addressed much later and here too, the courts confirmed

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64 For example, Prosecutor v. Dusko Tadic (Decision on Defence Motion on Jurisdiction) IT-94-1 (10 August 1995), para 42, Prosecutor v Dragan Nikolic (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal) IT-94-2-PT (9 October 2002), Prosecutor v Slobodan Milosevic, (Decision on Preliminary Motions),IT-99-37 PT (8 Nov 2001). Of note here is Prosecutor v. Milutinović et al (Decision on Motion Challenging Jurisdiction), IT-99-37 PT, paras 36 (reject interpretation of Tadic decision that ICTY’s jurisdiction is based on UN membership rather on chapter VII powers), paras 38-39 (in any case, FRY may be considered in fact to have been treated as UN member for certain purposes; deemed sufficient to make FRY amendable to Chapter VII) and para 48(would be bound even if ceases to be a UN member as Security Council purposively empowered to act in interests of international peace and security) This is movement between non-consent (not based on UN membership), consent (may be treated in fact as a member for purposes of chapter VII) and non-consent (bound even if withdraws consent). This is an attempt to avoid the probable outcome of requiring only consent as otherwise a state could withdraw and no longer be bound to co-operate or recognize the tribunal.
their removal.\textsuperscript{65} In other words, in the context of international criminal tribunals, the court(s) of humanity never adjourns (regardless of whether state consent can be conclusively determined). The alternative outcome would appear to be a scandalous impunity; in this way, these challenges were a challenge to the commitment among international lawyers to the international criminal law regime.

It follows then that the dominance of the moralist approach arose from the correlation of opinions among law-appliers in the international criminal tribunals and national courts acting in cooperation. Here, the \textit{Eichmann} judgments’ portrayal is implicit in the \textit{obiter} of international criminal tribunals,\textsuperscript{66} the 1996 \textit{Draft Code of Crimes against the Peace and Security of Mankind} and in the reasoning of \textit{Saric, Jorgic} and others. Thereafter, the Spanish and Belgian \textit{Pinochet} cases constitute the margins of the \textit{Eichmann} judgments’

\textsuperscript{65} In the earlier case law, the Defence counsel did not raise functional immunity as a procedural plea, which would, in effect, argue that the defendant’s state of nationality did not consent to the jurisdiction of the tribunal. As noted by Lord Goff in \textit{Pinochet III}, a waiver of immunity has to be expressly stated in a treaty according to the Vienna Convention on Diplomatic Relations. For example \textit{Prosecutor v Charles Taylor}, SCSL-03-01-I (2004), para 52 and \textit{Prosecutor v Al Bashir (Decision pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to comply with the co-operation requests issued by the Court with respect to the Arrest and Surrender of Al Bashir)}, ICC-02/05-01/09 (12 December 2011).See also \textit{Prosecutor v Blaškic}, para 41 (where immunities recognized in respect of orders of the tribunal on serving state officials).

\textsuperscript{66} The 1990s Tribunals were established by Security Council Resolutions 827 and 955, see UNSC Res. 827, UN Doc. S/RES/827 (25 May 1993), para 2 and UNSC Res 955, UN Doc. S/RES/955 (8 November 1994), para 1. The acronyms are informally referred to as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively. States are obliged to co-operate fully with the Tribunals and must take necessary measures in domestic law to (among other matters) comply with ‘requests for assistance or orders issued by the Trial Chamber’, see UN Doc. S/Res/827, para 4 and UN Doc. S/Res/955, para 2.
portrayal. Nevertheless, *Eichmann* was reframed for a contemporary audience by adopting Randall’s method of reinforcing the *Eichmann* model with notions of *jus cogens* and *erga omnes*. Thus, the nature of the crimes as *jus cogens* prohibitions and offences against the “universal law” is the norm from which all further legal consequences derive. As will be noted later in this section, this justification for the principle of universal jurisdiction over crimes against international law (based on the nature of the crimes) was unquestionably accepted within national courts, even by the counter-
hegemonic position in \textit{Javor}.\footnote{For meticulous general studies on the national court judgments, see Reydams 2003 (n 26), CL Sriram ‘Revolutions in Accountability: New Approaches to Past Abuses’ (2003-2004) 19 American University International Law Review 301 and M Henzelin (n 26).} Neither the International Criminal Tribunal for Former Yugoslavia nor domestic courts discounted their jurisdiction over the accused (unless on the basis of lack of presence) or directly addressed the issue of a plea of immunity for State officials as an admissibility plea.\footnote{In the domestic courts, only the Belgian investigating magistrate in his \textit{Pinochet} order discussed the issue of whether immunity of a former Head of State must apply. \textit{Re Pinochet}, Juge d’Instruction de Bruxelles (6 November 1998).} It was assumed that the outcomes on jurisdiction in international criminal tribunals\footnote{Prosecutor \textit{v. Dusko Tadic} (n 64) para 42.} could apply similarly before national courts (as had been assumed by the Israeli courts in \textit{Eichmann} regarding the International Military Tribunal’s reasoning).\footnote{This follows the IMT Nuremberg template, whereby the provisions of the Charter were incorporated domestically under the \textit{Control Council Law No. 10} or the domestic law of the Allied powers and jurisdiction was established over extraterritorial offences (committed prior to the enactment establishing extraterritorial jurisdiction). Thus, it was assumed justifiable to exercise jurisdiction over crimes perpetrated extraterritorially by non-nationals (at the time of commission of the offence) during the period 1939 to 1945. See \textit{R v. Finta}, 82 ILR, \textit{Polyukovich v. Commonwealth of Australia}, (1990) HCA 40, \textit{R v Wagner}, (1993) SASC 4508. See also \textit{Report of the War Crimes Inquiry}, (HMG Stationary Office, CM 744). See G Triggs ‘National Prosecutions of War Crimes and the Rule of Law’ in H Durham and TLH McCormack (ed) \textit{The Changing Face of Conflict and the Efficacy of International Humanitarian Law} (Martinus Nijhoff The Hague 1999) 175, 177.} As a consequence, the focus turned to debates over the exact parameters or content of the principle, that is; to what extent the principle transcends national boundaries.

It follows, then, that the dominant view within international and national courts in the 1990s endorsed the moral law justification for the principle of universal jurisdiction and all the arguments regarding offences, presence of offender and defences against
liability descended from this premise. The following subsections will reveal how the International Criminal Tribunal for Former Yugoslavia and national court decisions were rooted in the *Eichmann* judgments and explore the latter judgments through the lens of indeterminacy, in order to demonstrate the incoherence of the arguments of a moralist approach.

2.1 *Eichmann* and Universal jurisdiction over crimes against international law

Even before the International Criminal Tribunal for Former Yugoslavia’s establishment, the reference to the principle of universal jurisdiction in the 1994 *Final Report of the Commission of Experts* was implicitly rooted in the *Eichmann* judgments. In the Final Report, the authors assumed that crimes against humanity and genocide gave rise to universal jurisdiction under customary international law and that the grave breaches regime, under the 1949 Geneva Conventions, provided the treaty law basis, in conjunction with customary international law. The *obiter* in International Criminal Tribunal for Former Yugoslavia Trial chamber’s judgments

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76 Joyner (n 46) 165 (jurisdiction based on gravity of offence and discovered presence of criminals).
77 *Final Report of the Commission of Experts*, UN Doc. S/1994/674 (27 May 1994), para 107 (discussing sexual assault and rape as crimes against humanity and acts of genocide), para 45 (grave breaches), para 42 (crimes against humanity and genocide in internal armed conflicts) and para 105 (sexual assault and rape as a grave breach). However, the Report does not refer expressly to universal jurisdiction over war crimes under customary international law; it only referred to universal jurisdiction in reference to grave breaches. Yet it is argued that as the conclusion on crimes against humanity is based on nature of crime under customary international law, then it must be implied that the Report considered universal jurisdiction to apply to grave breaches under treaty and customary international law (probably in addition to war crimes under Hague Regulations.
in Tadić\textsuperscript{78} and Furundžija\textsuperscript{79} followed this portrayal. However, as the indeterminacy of law demonstrates, every legal argument is fundamentally incoherent and when applied to the Eichmann case, the judgments are inconsistent, swinging back and forth between descending and ascending patterns.

In chapter 2, Pavrikko’s contention that the reaction in legal scholarship to the Eichmann judgments was a battle between legal positivists and moralists was examined. The moralists justified Eichmann as an exceptional circumstance that warranted a natural law philosophy. In this way, moralists endorsed the Israeli Courts appeal to the language of moral outrage,\textsuperscript{80} that is, conduct that ‘shocks the conscience of nations’.\textsuperscript{81} The Trial Court in this case argued that the ‘abhorrent crimes’ were international in character

\textsuperscript{78} In Tadić, the ICTY justified the jurisdiction of a temporary international tribunal, established under Chapter VII, based on the ‘universal’ nature of the crimes, which ‘affect the whole of mankind’, ‘shock the conscience of all nations of the world’ and ‘[transcend] the interest of any one State’. Given their nature, the sovereignty of any one State cannot be given precedence over the ‘right of the international community to act appropriately’, including establishing an international tribunal with jurisdiction. See Prosecutor v. Dusko Tadić (n 64) para 42.

\textsuperscript{79} In Furundžija, the ICTY’s Trial Chamber argued that one of the legal effects of the \textit{jus cogens} character of the prohibition against torture (‘bestowed by the international community’) is that ‘every State is entitled to investigate, prosecute and punish or extradite’ alleged perpetrators of torture ‘who are present on its territory’. See Prosecutor v. Furundžija (n 55) para 156. Kamminga argued that this statement had broad scope; it ‘apparently’ applied to domestic courts and to crimes other than torture. MT Kamminga ‘Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences’ (2001) 23(4) Human Rights Quarterly 940, 955.

\textsuperscript{80} Koskenniemi (n 40) 172 (‘every international lawyer today negotiates genocide and war crimes and learns to speak the language of moral outrage as part of a discipline relearning the crusading spirit and the civilizing mission’).

(‘not under Israeli law alone’) and were ‘grave offences against the law of nations itself’, crimes that ‘offended the whole of mankind and shocked the conscience of nations’. Nevertheless, the Israeli Courts moved to support their moral naturalism in social behaviour and, in this way, they moved in a descending-ascending pattern. Thus, moral naturalism was justified as there was no prohibition in state behaviour (the pure fact approach of Lotus’ majority) but in any case, there was permission in law in the guise of universal jurisdiction (the legal approach of Lotus’ minority). Hence, as the Israeli Trial Court explained, ‘far from...negating or limiting the jurisdiction of countries with respect to such crimes’, international law requires the courts of every state to implement international law’s criminal prohibitions in the ‘absence of an international criminal court’. The Appeals Court adopted a similar strategy. The justification for the principle was both normative, in the moral outrage that underpinned the criminality (‘damage to vital international interests’), and concrete in the series of factual

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82 ibid.
83 This moved as follows: descending (moral naturalism in nature of crimes) – ascending (no prohibition) – descending (permission) to ascending (state behaviour).
84 AG v. Eichmann (n 81) 26.
85 ibid 286. Although the court emphasized that there was as yet no consensus in international law on the Lotus dilemma and thus, it decided not to take a position either way. However, the court implicitly assumed that exclusivity of territorial jurisdiction could not be considered universal; this couldn’t bind a State that did not agree. It also used the presumption against limitations in its analysis and thus, did implicitly take a position. ibid.
86 ibid 291 Other justifications for the crimes included ‘impair the foundations and security of the international community’, ‘violate universal moral values and humanitarian principles that are at the root of the systems of criminal law adopted by civilized nations’.
precedents in the ‘developmental stage’ of international criminal law
namely piracy, assaults against diplomatic agents and war crimes).\textsuperscript{87}

That said the ambiguity of the \textit{Lotus} judgment provided the
space for the \textit{Eichmann} judgments to provide a one-sided
representation of legal history.\textsuperscript{88} In chapter 2, we noted that the
judgments’ descending pattern is rooted in the natural law argument
within the debates on the justification for jurisdiction over piracy (the
nature of the crimes). The judgments then applied the piracy analogy
to extend universal jurisdiction to other crimes.\textsuperscript{89} Thus, the Trial and

\textsuperscript{87} ibid 292-3. The Court cited certain writers (Lansing and Kelsen) for the view that
piracy was a crime against mankind for which the pirate was individually
responsible. It cited US authority for the notion that assaults on diplomats ‘affronts
the sovereign and hurts the common safety and well-being of nations’. On war
crimes, it cited Lauterpacht for the view that war crimes were violations of
international law and it dismissed the notion that the 1907 Hague Regulations
excluded individual responsibility, as they pertained solely to state responsibility.
ibid. For the discussion of these opposing theses, see Chapter 2, section 2.2.
\textsuperscript{88} ibid 41 and 295. It is evident that both courts modelled themselves on the IMT
and Control Council Law’s jurisprudence, in particular the Justice Trial. This
combined the normativity of moral outrage (descending) with the concreteness of
the agreement of the international community and certain national jurisprudence
(ascending). Thus, the norms of the Charter must be entitled to ‘judicial respect’, as
‘an expression of international law existing at the time of its creation’.\textsuperscript{88} This had
the ‘international approval and acquiescence’ of parties to the London Agreement
and the subsequent recognition of the UN General Assembly. Here, \textit{Ex parte Quirin}
and \textit{In re Yamashita} became authority for a customary international law practice of
exercising jurisdiction over enemy forces on capture.\textsuperscript{88} That said, to avoid the
accusation of utopia (and victor justice), the trial court noted the Justice Trial’s
ascending move. Here, it also justified its jurisdiction on the fact of the
‘extraordinary’ circumstances in post-war Germany. This fact meant that distinct
rules could apply from those that may preclude extraterritorial jurisdiction. \textit{The
Justice Trial: Trial of Josef Altstötter and Others} (1948) 6 Law Reports of the Trial of
War Criminals 1, 36.

\textsuperscript{89} ibid 26. This arguably takes its cue from Cowles’ 1945 article justifying
universality of jurisdiction over war crimes by drawing similarities to the law of
brigandage (which, he argues, was punished in the same manner as piracy).
Cowles’ uses \textit{Lotus’} assumption and investigates whether there was a legal rule
prohibiting States from exercising extraterritorial jurisdiction over war crimes and
in so doing, assumes that international law permits what it does not forbid. He
argues that any prohibition would have to be conclusively demonstrated by state
behaviour so municipal practice must not be ‘divided’. See WB Cowles,
‘Universality of Jurisdiction over War Crimes’, (1945) 33(2) California Law Review
177, 181.
Appeals courts narrated a history of the principle of universal jurisdiction that historically defined the moralist approach. This portrayal used De Vabres’ history of jurisdiction over vagabonds in the medieval period, combined with endorsements of jurisdiction over offences against the ‘human society’ by leading jurists since the sixteenth century. The Trial Court noted certain contemporary jurists such as Hyde, Glaser and Cowles endorsed the principle.

Likewise, the Appeals court divided the debate into four schools of thought and even though there were clear inconsistencies, the Court claimed that there was a common theme. This recognized that universal jurisdiction could apply to international offences based on the attack on ‘vital interest, common to all civilized States, and of universal scope...’ The Court contended that this ‘vital interest’ was the more accurate justification for piracy and not the ‘recognition’ of universal jurisdiction by states. Though the Court claimed not to adopt a theory, it implicitly

91 AG v. Eichmann (n 81) 26-29 and 298-300. See also Grotius De Jure Belli Ac Pacis Libri Tres, Book II, Chapter XX (FW Kelsey tr Clarendon Press Oxford 1925) 526 and 533.
92 ibid 28. In particular, Hyde quote is indicative of the trial court’s assumptions; Hyde noted the need for a ‘close and definite connection between that act and the prosecutor’, but ‘the connection is, however, apparent when the act of the individual is one which the law of nations itself renders internationally illegal or regards as one which any number of the international society is free to oppose and thwart’. ibid.
93 ibid 298-299. These were Moore’s universal jurisdiction over piracy as sui generis, the Harvard Research’s principle of universality over other crimes as subsidiary jurisdiction (jurisdiction of last resort), Wheaton’s universal jurisdiction over piracy as assimilated to other offences against the law of nations and Lauterpacht’s universal jurisdiction over international crimes as de lege ferenda.
94 ibid 299.
95 ibid. It cited Kelsen that in prosecuting piracy, the State acts ‘as an organ of the international legal community. For it is international law, which the State applies against the pirate’. Similarly, Glueck argued that the ‘violation of law invoked is one which concerns the entire community of nations’. ibid.
endorsed Wheaton’s assimilation theory. Here, the Court concluded that the recognition of universal jurisdiction applied with even ‘greater force’ to crimes against humanity and it noted the expansion of the principle to war crimes within scholarship.\textsuperscript{96} Hence, the Courts assumed that the Lieber Code’s piracy analogy was acceptable and, that, as acts of state could be the subject of ordinary criminal law under individual criminal responsibility, the piracy analogy’s application to acts on government orders was equally justified.

Similarly, the incoherence in the \textit{Eichmann} judgments regarding the justification for the principle permeates the legal arguments justifying universal jurisdiction over each category of “core” crimes. \textsuperscript{97} Invariably (as the major historical antecedent), national courts again mirrored the \textit{Eichmann} judgments when contending with each of the individual crimes. In the \textit{Saric} case, the Danish trial court implicitly accepted that international humanitarian law could transcend national law and the that common repression provisions of the 1949 Geneva Conventions could be invoked under an enabling clause without specific domestic implementation of the offences.\textsuperscript{98} This outcome was also adopted in the \textit{Djajic} case where

\textsuperscript{96} ibid.

\textsuperscript{97} The focus here is on the justification for universal jurisdiction and not on the specificity of each of the crimes or the modes of liability and whether they are definitional distinct from the Nuremberg Charter. For instance, Green argued that the definition of ‘enemy organization’ was wider in the Israeli \textit{Nazi and Nazi Collaborators Act} 1950 than ‘criminal organization’ in the Nuremberg Charter. See LC Green ‘The Maxim Nullum Crimen Sine Lege and the Eichmann Trial’ (1962) 38 British Yearbook of International Law 457, 458.

\textsuperscript{98} Here, section 8(5) provides that the courts will have jurisdiction over extraterritorial offences committed by a non-nationals where the ‘act is covered by an international rule, according to which Denmark is required to have jurisdiction’. However, the offences were classified as grave breaches without any analysis of the international character of the armed conflict and without the domestic implementation, Saric was prosecuted for analogous municipal offences. After the \textit{Saric} trial, the Penal Code was amended to incorporate the Statutes of ICTY and ICTR and later amended by the 2001 implementing legislation for the Rome
the enabling clause under section 6(9) of the Strafgesetzbuch (Criminal Code) was combined with the Geneva Conventions grave breaches regime. Implicitly drawing from *Eichmann*, the court observed that ‘public international law, far from barring prosecution, corroborated and supported the conclusion that the arguments in favour of prosecuting war criminals in Germany prevail over the limiting principle of non-interference’. The Court further justified German jurisdiction on the ‘legitimate interest not to be seen by the international community as sheltering international criminals’.


100 C Safferling ‘Public Prosecutor *v Djajic*’ (1998) 92 American Journal of International Law 528, 530 (noting that the Court justified the continuation of Former Yugoslavia as a state party to the Geneva Conventions based on article 34 of the Vienna Convention on the Succession of States, accepted as customary international law, where the treaties automatically bind upon independence). Contrast AR Ziegler ‘*In re G*’ (1998) 92 American Journal of International Law 78 (where Geneva Conventions had been incorporated into the Swiss military code).

101 ibid, 532 (those accused of ‘most heinous crimes that are rejected by the community of States’ must not be seen to be living in a haven inside German borders’).
implicitly drawing upon De Vabres and the threat of ‘scandalous impunity’.\footnote{D de Vabres Les Principes modernes du droit penal international (Recueil Sirey Paris 1928) 135 (it intervenes, in default of all other States, to prevent in the interests of humanity, a scandalous impunity’).}

In the \textit{Jorgic} case, the German Federal Supreme Court acceded with \textit{Eichmann} judgments in rejecting the argument that article VI of the Genocide Convention could be a limiting rule for treaty parties,\footnote{\textit{Jorgic}, Bundesgerichtshof (30 April 1999) 6. See also \textit{Cvjetkovic}, Obersten Gerichtshofes (13.07.1994). Here, the Austrian Supreme Court justified jurisdiction under article 65 (1.2) of the Penal Code, which asserted jurisdiction over offences committed abroad where the acts are crimes under the law of the State of location of the offence (double criminality). The Supreme Court concluded that the acts (killing of civilians) were punishable under Yugoslavian law at the time of the alleged offences. It also concluded that extradition was practically impossible (i.e. the subsidiary basis of jurisdiction). \textit{Cvjetkovic} was ultimately acquitted by jury.} rather state parties remained free to assert universal jurisdiction over genocide based on customary international law. In \textit{Eichmann},\footnote{Article VI provides that jurisdiction may be asserted by an international penal tribunal where treaty parties recognise its jurisdiction. Invariably, the pivotal focus of Eichmann’s trial was the accusation of committing ‘crimes against the Jewish people’, which was textually comparable to the definition of genocide under article II of the Genocide Convention. In keeping with the Control Council Law proceedings, \textit{, \textit{the Israeli law’s definition of crimes against humanity did not require that the acts were ‘done in execution of, or in connection with’ either war crimes or crimes against peace, which was the frame of the Nuremberg Charter. See Green (n 97) 458.} See Green (n 97) 458.} both courts invoked the ICJ’s \textit{Reservations to the Genocide Convention AO} that affirmed the moral naturalism\footnote{\textit{Reservations to the Convention on Genocide (Advisory Opinion) (1951) ICJ Rep 15, 23-24. See M Koskenniemi (n 1) 368 \textit{et seq.} Here Koskenniemi discusses how the International Court of Justice did not fall into either “pure” consensualism or non-consensualism. On the issue of what reservations could be permitted, the Court turned to the Convention’s object and purpose and then moved to subjective intent. Therefore, reservations must be in conformity with the Convention’s object and purpose, stressing the universal character of the Convention (non-consensualism) but then argues that the object and purpose must be ‘inferred’ from the States intent (consensualism). This ‘affirmed the objectively binding character of the law and then denied it’ because each State decides ‘what is to be considered as conformity and non-conformity’. ‘The Court assumed that a Convention’s object and purpose can be assimilated with what States think to be its object and purpose’. It appears to be ‘a reconciliation between descending and ascending} of the legal
principles that underpinned the convention. However, the courts distinguished the obligation to exercise territorial jurisdiction under article VI; this was considered to derive from state party consent. Here, the Courts presented two interpretations that could reject article VI as a limiting rule only the second interpretation was relevant for Jorgic. The Courts in Eichmann argued that treaty party consent failed to prohibit extraterritorial jurisdiction over genocide under customary international law because if article VI of the Genocide Convention was interpreted as a prohibitive rule, it would...

approach...[but] the Court fails to achieve any determinative rule about the admissibility of reservations’. ibid.

106 ibid. Here, the reference to genocide, as a crime under article 1, was a codification of customary international law norms based on the dictates of humanity or moral conscience, that is, a non-consensual position, a position beyond liberty.

107 The first interpretation was based on one of the basic tenets of treaty law. Here, a treaty cannot bind a state party to acts prior to the treaty’s entry into force unless there is contrary evidence within the treaty or externally. Hence, the treaty obligation could only apply as a legal duty to atrocities committed after the Genocide Convention’s entry into force. Given the context in Eichmann, this was a perfectly useful argument to justify exercising jurisdiction over atrocities prior to the entry into force of the Genocide Convention. However, Jorgic did not have this luxury. If it adopted this section of the Eichmann’s judgments, it could not avoid addressing whether the Convention’s obligations are limiting or prohibiting rules on the extraterritorial jurisdiction of state parties. See Article 28 of the Vienna Convention on the Law of Treaties (1969) states that ‘unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party’. See Vienna Convention on Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

108 Jorgic (n 103) 5-6 (limitation as ‘irreconcilable with the obligation imposed by article 1 to repress the crime’). As will be discussed in Chapter 5, this reasoning was endorsed by the European Court of Human Rights in 2007, see Jorgic v Germany (2007), URL: http://echr.ketse.com/doc/74613.01-en-20070712/. In Eichmann, the trial court claimed that article VI cannot limit the capacity of states parties to determine the extent of their jurisdiction as long as they remain within limits imposed by international law, that is, Lotus majority’s presumption against limitations. Unsurprisingly, no evidence of such a prohibition could be found by the court; rather cases brought under the Council Control Law No. 10 were cited as evidence. See AG v. Eichmann (n 81) 38.
‘foil’ the overall object of the Convention. It also claimed that there was a ‘consensus of opinion’ that the exclusion of universal jurisdiction and failure to establish an international criminal court were defects in the Convention. In this way, the Convention constituted a ‘compulsory minimum’. Nevertheless, this interpretation minimizes the clear evidence within the drafting history of disputing opinions of states.

Jorgic added a further argument. Here, the Federal court drew inspiration from the 1996 Draft Code of Crimes. In the Draft Code, the International Law Commission argued that national courts

109 AG v. Eichmann (n 81) 38 and 304 (Appeals court).
110 ibid 38. See also Jorgic (n 103) 6 (noting that possibility of extraterritorial jurisdiction was noted in the record). As referred to below, in the travaux, it was noted how certain States did not interpret article VI as prohibiting them from exercising jurisdiction over their nationals. See generally WA Schabas Genocide in International Law: the Crime of Crimes (2 edn Cambridge University Press Cambridge 2009).
111 ibid.
112 In the Report of the Sixth Committee during the Convention’s drafting, it referred to the agreement of negotiating parties that article VI ‘in particular…does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State’. Of course, the Israeli court had to contend with the differing interpretations of this phrase and what significance should this phrase have on the issue of what contracting parties consented to. Thus, the court discussed the differing opinions of Robinson and Drost. Robinson adopted a consensualist approach while Drost adopted a non-consensualist approach. First, Robinson cited the Sixth Committee’s Report as indicating that article VI was not intended to resolve jurisdictional conflicts. This assumed a State liberty. He also cited the Committee Chairman as cautioning that any interpretation of the text could only be binding on the majority and could not bind those who oppose it. Second Drost considered that article V clearly did not prohibit exercise of jurisdiction in accordance with national law. He operated from the standpoint that international does not prohibit extraterritorial jurisdiction, therefore there is no need to stipulate in the Convention other jurisdictional powers which all States possess unless specific provisions of international law prohibit or limit the exercise. Robinson was forced to admit that any interpretation cannot bind those States parties that do not consent to the interpretation and Drost failed to contend with the problem because he did not attempts to determine if there is a limitation. See AG v. Eichmann (n 81) 38 and U.N. Doc. A/C.6/SR. 134, 5. 113 Draft Code of Crimes Against Peace and Security of Mankind (1996) Vol. II Yearbook of the International Law Commission Pt II, 28. This was drafted by the International Law Commission in its parallel study on a statute for an international criminal court.
should exercise universal jurisdiction because of the limited capacity of international criminal tribunals to prosecute atrocities that involve large numbers of alleged perpetrators.\textsuperscript{114} Based on this pragmatism,\textsuperscript{115} the Court in \textit{Jorgic} interpreted the obligation on ‘national jurisdictions’ to cooperate under article 9 of the Statute of the International Criminal Tribunal for Former Yugoslavia as referring to both territorial and extraterritorial jurisdiction of UN member states.\textsuperscript{116} The alternative interpretation would have resulted in the obligation applying exclusively to the territorial jurisdiction (that is, the jurisdictions of the Former Soviet Republic of Yugoslavia). This would have established a narrow geographical jurisdiction that could only result in impunity. In \textit{Jorgic}, the Court supported its interpretation in social fact; it referred to instances where the International Criminal Tribunal for Former Yugoslavia Prosecutor declined to exercise jurisdiction and the prosecution was conducted by national courts exercising universal jurisdiction. On appeal in \textit{Jorgic}, the German Constitutional Court acknowledged the need for a ‘sensible nexus’, which, it argued, must depend ‘on the particular

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{114} \textit{Jorgic} (n 103) 6 (referring to statistic of only 10 cases per year). It added that the crimes are usually committed (or at least with its acquiescence) by the State of nationality of the victim. ibid.
\item \textsuperscript{115} Although this pragmatism is clearly premised on a moralist approach as the normative outcome would be greater accountability.
\item \textsuperscript{116} \textit{Jorgic} (n 103) 7 (‘had the international community viewed article VI as conclusive, it would have made explicit in article 9 that the concurrency of jurisdiction was limited to the courts of Bosnia-Herzegovina or better to the courts of the States of the Former Yugoslavia’). It also referred to the \textit{Bosnia v Serbia} that the duties under the Genocide Convention are \textit{erga omnes} and the obligation to prevent and punish genocide is not territorially limited by the Convention). See also \textit{Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)(Preliminary Objections)} (1996) ICJ Rep 595, para 31.
\end{itemize}
\end{footnotes}
nature of the subject of regulation’.\textsuperscript{117} Here, the nature of the crime of genocide as ‘the most severe violation of human rights’ is significant; the crime attacks ‘important legal interests of the international community of states’.\textsuperscript{118} Thus, the principle of universal jurisdiction ‘constitutes such a sensible nexus’\textsuperscript{119} and regardless of the lack of a treaty law obligation, states have permission to exercise if they so decide.\textsuperscript{120} Such a reading appears to be drawn from Hyde’s opinion cited by the trial court in \textit{Eichmann},

[The] [close] connection is…apparent when the act of the individual is one which the law of nations itself renders internationally illegal or regards as one which any member of the international society is free to oppose and thwart.\textsuperscript{121}

Related, the Austrian Supreme Court in the \textit{Cvjetkovic} case similarly rejected article VI as a prohibition to state parties. Instead, extraterritorial jurisdiction was justified in the circumstances where the territorial jurisdiction’s criminal justice system is not functioning and an international criminal court is not established or the State has not consented to its jurisdiction.\textsuperscript{122} This reframed the arguments used to justify the subsidiary basis of jurisdiction explored in chapter 2, in

\textsuperscript{117} Bundesverfassungsgericht, 12 December 2000, para 3(a), available URL: \url{http://www.bundesverfassungsgericht.de/entscheidungen/rk20001212_2bvr129099en.html}.

\textsuperscript{118} ibid para 3(b).

\textsuperscript{119} ibid para 3(a). It distinguished universal jurisdiction from the subsidiary basis of jurisdiction (what is now termed representation principle) on the basis that universal jurisdiction ‘applies only to specific crimes which are viewed as threats to the legal interests of international community of states’. ibid.

\textsuperscript{120} The Court justified the teleological interpretation of international treaties based on the \textit{South West Africa} case (1962) ICJ Rep 319, 336. In \textit{justifiable} cases, priority can be given to the treaty interpretation based on the object and purpose. ‘This is especially the case with respect to prosecution of foreign criminal acts on the basis of international treaties, which often do not clearly identify which jurisdictional nexus will be regulated’.

\textsuperscript{121} \textit{AG v. Eichmann} (n 81) 28 citing C Hyde \textit{International Law (Chiefly as Interpreted and Applied by the United State)} Vol 1 (2nd ed 1947) 804.

\textsuperscript{122} \textit{Cvjetkovic} (n 103).
manner relevant to the specific context of crimes against international law.

2.2 Eichmann and Aut dedere aut punire

In its Commentary to the 1996 Draft Code of Crimes, the International Law Commission discussed the principle of universal jurisdiction as *aut dedere aut judicare*. Under article 8 of the Draft Code, states are obliged to establish jurisdiction over war crimes, crimes against humanity and genocide irrespective of location of the offence or nationality of the offender or victim.\(^{123}\) Universal jurisdiction, in the format of *aut dedere aut judicare*, is understood as triggered when the accused is ‘present’ on the State’s territory, without any further discussion of the meaning of presence. The International Law Commission considered this obligation as composed of an alternative between prosecution and extradition, neither of which has priority.\(^{124}\) In *Eichmann*, the courts did not explore the exact parameters of universal jurisdiction in terms of the presence of the accused. Nevertheless some thoughts on the format of *aut dedere aut judicare* may be derived from the courts’ decision-making. The Defence counsel argued that universal jurisdiction is subject to a limitation whereby the state with custody of the accused must first offer to extradite to the territorial jurisdiction. The Defence

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\(^{124}\) ibid 28-30. Article 8 was premised on the desirability of concurrent jurisdiction of international and national courts, the latter of which should adopt the broadest jurisdiction. However, it established a separate regime for the crime of aggression, which would be dealt with exclusively by an international criminal court.

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claimed that this limitation was implicit in the maxim *aut dedere aut punire*. Yet this adopted De Vabres and Travers concept on the format of universality where the principle applied to any serious offence on a subsidiary basis; although these jurists divided into the naturalism-positivism dichotomy in regards to origin of the principle.

Though the Appeals Court accepted the Defence counsel’s format, it justified the limitation on pragmatic policy; here, the ‘majority of witnesses and the greater part of the evidence’ would be generally located in the state of location of the offence. Thus, the *Eichmann* judgments did not draw fully out the potential implications from their underlying moral naturalism. In other words, the Trial Court claimed that international law required every state to prosecute international crimes yet argued that jurisdiction over such crimes operated in a way that the territorial jurisdiction was given preference. In this way, the judgments appeared more concrete than Milkiszanski’s approach, which considered the custodial state to have the discretion to determine whether to prosecute or extradite. However, even though the Appeals Court accepted the Defence’s use of De Vabres, it appeared to endorse Milkiszanski in its actual decision-making. Here, its decision did not depend on the actions of West Germany; instead, the Courts considered territoriality as a rule.

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125 *AG v. Eichmann* (n 81) 302.
126 As outlined in Chapter 2, international lawyers justified the 19th century legislation of certain European States based on the common practice of those States in asserting jurisdiction when the offender is found in their territory; this drew historical parallels to Italian city states in the Middle Ages and leading international lawyers’ notion of *aut dedere aut punire* and the interpretation of State behaviour in prosecuting piracy on the high seas as a jurisdiction dependent on custody of the offender (as opposed to solely the nature or location of the offence). See D de Vabres (n 102) 135 and 136.
Thus, the Court considered that in the particular factual circumstances, Israel was a more superior *forum conveniens* than West Germany. In this way, the Court weighed the significance of certain facts\(^\text{129}\) and in effect applied a principle of reasonableness.

It follows, then, that the Courts in *Eichmann* did not address whether universal jurisdiction could include extradition from the territorial or third states and criminal proceedings could be initiated despite the lack of presence of the accused in the prosecuting state at the time of the criminal investigation. In other words, was the preference to the territorial jurisdiction a rule of convenience or rule of law? Instead, given Eichmann’s dramatic capture from Argentina, violating Argentina’s territorial sovereignty, the focus was directed on the issue of whether the unlawful capture violated Eichmann’s right to fair trial.\(^\text{130}\) Nevertheless, the US courts’ judgments in the original *Demjanjuk* extradition proceedings demonstrated the first example\(^\text{131}\) where a court brought the moral naturalism of the *Eichmann* judgments to their outermost point. Here, the US Court of Appeal rejected the Defence’s claim that Israeli jurisdiction was

\(^{128}\) *AG v Eichmann* (n 81) 302.

\(^{129}\) Here it noted that Israel had greater access to the evidence and witness testimony, that there was no request for extradition from West Germany and neither West Germany nor any other state contested the right of Israeli courts to prosecute.


\(^{131}\) Inazumi (n 19) 81 (noting *Demjanjuk* as claiming that jurisdiction is not limited to States where the suspect is actually present).
unjustified; instead, it was well-recognized claim of extraterritorial jurisdiction that was ‘not unique to Israel’.\textsuperscript{132} It expressly stated that,

[Whatever] doubts existed prior to 1945 have been erased by the general recognition since that time that there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation […] This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.\textsuperscript{133}

Thus, the Court of Appeal upheld the lower courts’ decision that Demjanjuk could be extradited from the US to Israel. This was notwithstanding the fact that he would, in effect, be involuntarily surrendered as opposed to being voluntarily present in Israel at the time of the proceedings.

2.3 \textit{Eichmann} and the non-application of immunity of state officials

On the immunity of state officials and the non-retroactivity of laws, the 1996 Draft Code is noteworthy because in the 1990s, national courts adopted the International Law Commission’s position which, in turn, is rooted in the \textit{Eichmann} judgments. The ILC concluded that immunity ‘cannot be applied to acts which are condemned as criminal by international law’.\textsuperscript{134} This position appeared concrete when it combined a number of sources in

\begin{itemize}
\item \textsuperscript{132} Demjanjuk \textit{v. Petrovsky} (n 68) 581. Here, the court noted the Restatement III’s discussion, which claimed that universal jurisdiction was demonstrated in state behaviour given the Control Council Law proceedings. The court concurred that these tribunals had a ‘much broader jurisdiction (than traditional military courts) which necessarily derived from the universality principle’.
\item \textsuperscript{133} ibid 582.
\item \textsuperscript{134} International Military Tribunal (n 47) 42.
\end{itemize}
support;\textsuperscript{135} nevertheless those sources were limited and pertained to specific geographical jurisdictions.\textsuperscript{136} In the end, the ILC’s premise is the appeal for complete jurisdiction over international crimes,

\begin{quote}
[T]he absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.\textsuperscript{137}
\end{quote}

The Defence counsel in \textit{Eichmann}, as detailed in Chapter 2, implicitly drew on Kelsen’s rejection of individual criminal responsibility.\textsuperscript{138} If immunity had not been waived by consent of the requisite state, Kelsen stressed that a ‘customary or contractual rule’ had to establish an exception.\textsuperscript{139} Thus, the Defence stressed the importance of landmark judgments that affirmed the immunity of the state and its

\begin{footnotesize}
\textsuperscript{135} Here it referred to the IMT Charter, \textit{Control Council Law No.10} and ICTY and ICTR Statutes.

\textsuperscript{136} \textit{Draft Code of Crimes} (n 113) 27. See also \textit{Final Report of the Commission of Experts} (n 77) para 99 (noting, under culpability for acts of genocide, that alleged perpetrators could not ‘hide behind the shield of immunity’).

\textsuperscript{137} ibid. In fact, the Code went as far to suggest that immunity should not be given on the basis that the accused has assisted in the prosecution of an individual bearing greater responsibility or accused of a more serious offence. This was based on normative argument; (‘contrary to the interests of the international community as a whole to permit a State to confer immunity’). See also H Fox \textit{The Law of State Immunity} (Oxford University Press Oxford 2008) 677 (arguing that where a properly constituted tribunal in international law (established with consent of the State), there should be no further issue of consent to establish jurisdiction and thus, no issue of a waiver of immunity).

\textsuperscript{138} See H Kelsen ‘Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law’ (1947) 1 International Law Quarterly 153, 159. This argues in a similar theme to Kelsen’s contention that acts of State cannot be the subject of personal liability but only of collective or civil responsibility of States. The removal of immunity could only emerge as a result of the ‘special rules of customary or contractual international law’, that is, through the emergence of an exception in customary practice or through consent to a treaty waiving immunity.

\textsuperscript{139} ibid.
\end{footnotesize}
officials before foreign jurisdictions and did not indicate any exception for criminal jurisdiction.\textsuperscript{140} Thus, this rejected the fact of the Nazi atrocities as something so distinct as to extinguish immunity without evident state assent. Invariably, the \textit{Eichmann} judgments attacked these arguments as apology and rooted this position in the International Military Tribunal judgments (and in the pleadings of the American and British Chief Prosecutors).\textsuperscript{141} Hence, the trial court reduced the Nazi atrocities to a singularity and distinguished the factual circumstances of immunity case law as incapable of fitting the ‘realities of Nazi Germany’.\textsuperscript{142} As argued in the \textit{Justice} case, a regime that commits such atrocities as incapable of being treated as \textit{par in paret non habet},\textsuperscript{143} rather the Nazi regime was best characterized as ‘a gang of criminals’.\textsuperscript{144} In this way, the courts appeared to treat the

\textsuperscript{140} \textit{Schooner Exchange v McFaddon} (1812) 7 Cranch 116, 137. Lippmann highlighted the fact that prior to WWII, Germany was ‘an accepted member’ of the international community ‘whose treatment of its domestic minorities provoked little protest’. See Lippmann (n 130) 32. The ‘little protest’ would be a contentious point but certainty the key issue for other States was the prevention of international armed conflict rather than protection of minorities in Germany or its annexed territories.

\textsuperscript{141} \textit{AG v. Eichmann} (n 81) 309. Here, the Appeals court argued that sovereignty was not absolute and an exception must exist where agents of one state commit illegal acts within the prosecuting state’s territory. The court invoked the same argument as Harold Shawcross, the British Chief Prosecutor at Nuremberg; the crimes are ‘outside the “sovereign” jurisdiction of the state that ordered or ratified their commission’, that is, by their nature, the crimes cannot be acts of state. ibid.

\textsuperscript{142} ibid 46.

\textsuperscript{143} In the \textit{Justice} case, the court argued that ‘it can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge’. Similarly the IMT judgment concluded that ‘individuals have international duties which transcend the national obligations of obedience imposed by the individual State’. \textit{The Justice Trial: Trial of Josef Altstötter and Others} (1948) 6 Law Reports of War Criminals 1, 49 and International Military Tribunal (n 47) 220-221 (‘He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law’).

\textsuperscript{144} \textit{AG v. Eichmann} (n 81) 46. Lippmann argued that the removal of immunities and other defences was premised on the notion of Germany as a ‘criminal state whose actions during the Third Reich breached all accepted international norms’. See Lippmann (n 130) 32.
Nazi regime as not a state for the purpose of immunity; this has theoretical difficulties which will we return to in section 4. Likewise, the Appeals court in *Eichmann* concluded that,

> [I]nternational law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions and from this follows the idea which forms the core of the concept of ‘international crime’, that a person who was a party to such a crime must bear individual responsibility for it. If it were otherwise, the penal provisions of international law would be a mockery.

That said, the International Military Tribunal did not contend explicitly with the issue of immunity as an admissibility plea and neither did the Israeli courts in *Eichmann*. Notwithstanding, in the 1990s, it was assumed that the International Military Tribunal’s arguments contended with both the removal of the defence against liability and the procedural bar of immunity before foreign tribunals. Apart from the 1996 Draft Code, the debate over the procedural rule of immunity was first raised by Pinochet’s counsel in the UK extradition proceedings.

On non-retroactivity of laws and crimes against international law, the ILC explicitly sought to avoid prejudicing the prosecution

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145 ibid 310.
146 The implication from its reference to the unconditional surrender (lack of German courts) implied either that the unconditional surrender constituted consent to the IMT’s jurisdiction or the lack of a German court system vitiates consent and required an Allied established system. This is premised upon the necessity for punishment; that is a descending pattern as the jurisdiction would bind regardless of consent. Thus, in the interests of justice, the IMT was the most appropriate tribunal.
147 As noted in chapter 1, the principle of non-retroactivity is one of the principles of legality. The principle prohibits criminal prosecution of an individual for an act which was not criminal at the time of its commission. It is a corollary of the principle of legality that requires criminalization in ‘a publicly-accessible law’ (*nullum crimen sine lege*) and sentencing according to ‘a legally-specified scheme of punishments’ (*nulla poena sine lege*). See O’Keefe (n 22) 742, Green (n 97) 457 and Luban (n 4) 581.
of acts committed before the Draft Code’s entry into force;\textsuperscript{148} thus, the \textit{Eichmann} judgments, combined with relevant provisions in the Universal Declaration of Human Rights and international human rights law treaties, were constructive.\textsuperscript{149} Here, the Trial Court in \textit{Eichmann} followed the same method as its analysis of immunity. The court considered that justice required an exception from the general rule given the extraordinary circumstances.\textsuperscript{150} Rather than ‘conflict…with rules of natural justice […], on the contrary, it enforces the dictates of elementary justice’.\textsuperscript{151} Likewise, the Appeals Court argued that the principle of non-retroactivity ‘loses its moral value and is devoid of any ethical foundation’; ‘one’s sense of justice must necessarily recoil even more from not punishing [those] who participated in such outrages’.\textsuperscript{152} Both courts then moved in an ascending pattern; the principle against non-retroactivity was not a limitation on sovereignty, that is, not a prohibition against state liberty. Instead, it was viewed as solely a principle of justice.

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\textsuperscript{148} \textit{Draft Code of Crimes} (n 113) 39.
\textsuperscript{149} Article 11(2) of Universal Declaration of Human Rights (criminal under national or international law at time of commission), article 15(2) of the Covenant on Civil and Political Rights, article 7(2) of the European Convention on Human Rights, article 9(2) of the American Convention on Human Rights and article 7(2) of the African Charter on Human and People’s Rights.
\textsuperscript{150} AG v. \textit{Eichmann} (n 81)12. See also W Blackstone \textit{Commentaries on the Laws of England} Vol 4 (1st edn Clarendon Press Oxford 1765-1769) 46 (there was an exception for ‘occasions and circumstances involving the safety of the State or the conduct of individual(s)…’).
\textsuperscript{151} ibid 12.
\textsuperscript{152} ibid 282. As discussed in Chapter 1, Section 2.2.2, immunity is a procedural plea before domestic courts which acts as ‘a bar against one State from sitting in judgment on another State’. It prevents private parties from seeking to ‘enlist assistance of the courts of one State to determine the claim against another State’; as such, it avoids a ‘stand-off’ between States over the appropriateness of forum. See H Fox (n 137) 5 and I Brownlie \textit{Principles of Public International Law} (7th edn Oxford University Press Oxford 2008) 324.
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particular to domestic systems, rather than a rule of international law.\textsuperscript{153}

\subsection*{2.4 More normative, less concrete?}

We observed that the \textit{Eichmann} judgments did not draw the potential implications from their moral naturalism. In their attempt to be more concrete, they supported the notion that universal jurisdiction was a subsidiary basis of jurisdiction and therefore prioritized the territorial jurisdiction, although ultimately, the courts determined this issue on reasonableness. However, the reasoning of the Spanish and Belgian \textit{Pinochet} judgments are best situated at the margins of the \textit{Eichmann} judgments portrayal; they drew the most normative position from the moral naturalism that pervaded all the preceding judgments.\textsuperscript{154} Thus, the suspect could be ‘found’ in the prosecuting State’s territory through extradition from a third State. There was no expectation that jurisdiction depended upon the voluntary presence of the accused in the territory of the prosecuting state; instead a criminal investigation could be initiated and custody sought through lawful surrender.\textsuperscript{155} This assumed that the prosecution of crimes against international law must be conducted

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\textsuperscript{153} ibid. Here, the Appeals court referred again to Kelsen, who discounted the maxim as a rule of international law, along with Julius Stone, who argued that the ‘ethical import of the maxim is confronted by the countervailing ethical principles’ supporting punishment ibid.

\textsuperscript{154} This position brought the \textit{Cvjetkovic} argument to its furthermost end, that is, the jurisdiction is reasonable where the territorial jurisdiction is unwilling and an international criminal court does not have jurisdiction. The following discussion will only focus on how these judgments added to or modified the Eichmann judgments’ portrayal. Note that immunity was address only in the Belgian \textit{Pinochet} case and the Court adopted the \textit{Eichmann} position.

\textsuperscript{155} As will be returned to in chapter 5, O’Keefe argues that if there is a permission to exercise universal jurisdiction, then the ’exercise of in absentia is logically permissible also’. See O’Keefe (n 22) 748.
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by states irrespective of the consent of the territorial jurisdiction. The purpose here is to conduct the trial and prevent an injustice through impunity; thus, the voluntary presence of the accused is not the overriding factor regardless of what format historical precedents may indicate. At this outermost point, the ending impunity campaign becomes fully operational; the court of humanity never adjourns and the political present is transformed from sovereign egoism to world unity. Yet, this would appear to the opposing formalist position to be pure morality, oppressive homogeneity and no longer the rule of law.

It is important to note that the Spanish and Belgian Pinochet cases differed in terms of alleged offences. In the Spanish Pinochet case, the complaint involved genocide, torture and terrorism, whereas in the Belgian Pinochet case, the focus was on crimes against humanity.\textsuperscript{156} On genocide, the Spanish High Court (Audiencia Nacional) adopted the Eichmann judgments on the Genocide Convention in a similar way its predecessor Jorgic.\textsuperscript{157} However,

\textsuperscript{156} For a detailed study, see RJ Wilson 'Prosecuting Pinochet: International Crimes in domestic Spanish law' (1999) 21(4) Human Rights Quarterly 927 \textit{et seq} and N Roht-Arriaza \textit{The Pinochet Effect: Transitional Justice in the Age of Human Rights} (University of Pennsylvania Press Philadelphia 2006). Roht-Arriaza notes that Chile and Argentinian investigations were not seriously considered to process; they were believed to be ‘doomed’. ibid 15. It was noted that Pinochet had different titles at different stages, General, President and Senator Pinochet; equally the House of Lords in \textit{Pinochet III} were unable to determine definitely when Pinochet became Head of State as references to his status differed between Decree Laws in 1974. See C Warbrick, EM Salgado and N Goodwin ‘The Pinochet Cases in the United Kingdom’ (1999) 2 Yearbook of International Humanitarian Law 91.

\textsuperscript{157} \textit{Chilean Investigations} (5 November 1998) Audiencia Nacional para 2. It argued that if article VI is interpreted as a limiting rule, it would be contrary to the ‘spirit’ of the Convention. It also noted (as the \textit{Eichmann} judgments did) that the Convention’s \textit{travaux} indicated how certain States did not wish article VI to be interpreted as prohibiting extraterritorial jurisdiction, albeit only nationality jurisdiction is referred to. It concluded that the exclusion of universal jurisdiction in the Convention does not prevent a State party from asserting jurisdiction over a crime that transcends the State and affects the international community (and all humanity) directly.
unlike the German courts in Jorgic, the High Court argued that universal jurisdiction over genocide under customary international law must be applied in accordance with Spanish constitutional law.\textsuperscript{158} Here, article 96 of the Spanish Constitution provided that treaty law obligations prevail over domestic statutes.\textsuperscript{159} As article VI of the Genocide Convention obliges the territorial jurisdiction to prosecute, Spanish Courts are subject to a subsidiarity when exercising extraterritorial jurisdiction. Therefore, they may only exercise jurisdiction where the territorial jurisdiction has failed to prosecute.\textsuperscript{160} Such an approach merged the reasoning in Jorgic on the lack of a prohibition against universal jurisdiction over genocide with the notion of an impunity gap in Cvjetkovic. On state terrorism, the Court controversially assumed that terrorism was accepted as a crime against international law and that the definition of terrorism under Spanish law reflected the definition of the international crime.\textsuperscript{161}

\textsuperscript{158} ibid. It argued that if article VI is interpreted as a limiting rule, it would be contrary to the ‘spirit’ of the Convention. It also noted (as the Eichmann judgments did) that the Convention’s travaux indicated how certain States did not wish article VI to be interpreted as prohibiting extraterritorial jurisdiction, albeit only nationality jurisdiction is referred to. It concluded that the exclusion of universal jurisdiction in the Convention does not prevent a State party from asserting jurisdiction over a crime that transcends the State and affects the international community (and all humanity) directly.

\textsuperscript{159} For copy of Spanish Constitution, see \url{http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf}. Also as referenced in Chapter 1, article 23(4)(a) states that Spanish jurisdiction is also competent to take cognizance of crimes committed by a Spaniard or foreign national outside of the national territory when constituting, under Spanish penal law, as the following acts: (a) genocide…’. For copy of OLJP, see URL: \url{http://www.poderjudicial.es/eversuite/GetDoc?DBName=dPortal&UniqueKeyValue=6577&Download=false&}.

\textsuperscript{160} \textit{Chilean Investigations} (n 157) para 2.

\textsuperscript{161} The Court interpreted the concept of terrorism under Spanish law as constituting an attack against the constitutional order or public peace. If the alleged act of terrorism is not against Spain, then the Penal Code must be
On crimes against humanity, the judge in the Belgian *Pinochet* case concentrated on arguments regarding the direct applicability of customary international law in the domestic legal order because the Belgian 1993 Law provided universal jurisdiction only over grave breaches and violations committed in internal armed conflicts.\(^{162}\) Like the *Saric* case, Vandermeersch argued that crimes against humanity could be prosecuted as analogous domestic offences under the penal code because these acts were confirmed in customary international law (before they were codified in Nuremberg Charter or Statutes of the International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda).\(^{163}\) It was assumed that

interacted as requiring an investigation of the alleged attack on the constitutional order or public peace of the State in which the alleged act of terrorism took place. Emphasis was placed on the fact that the violations of summary executions, assault and illegal detentions were committed clandestinely, ‘not in the regular exercise of the official function... though acting under the colour of such authority’. It also considered that it was unnecessary to deal with the issue of torture as these fact patterns would be addressed within the investigation into the crime of genocide. ‘Order of the Audiencia Nacional dated 5\(^{th}\) November 1998’ in R Brody and M Ratner (ed) *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain* (Kluwer Law International The Hague 2000), 104.

\(^{162}\) *In re Pinochet* (n 73) para 3.3.2. For a detailed exploration of the manner in which the complainants submitted the complaint to Vandermeersch, see N Roht-Arriaza (n 156) 118 et seq. As we noted in chapter 1, the claim that universal jurisdiction may be exercised over violations in internal armed conflicts was a controversial point; here Meron and Boelaert-Suominen presented opposing claims. Meron’s argument here combined the Geneva Conventions’ obligation to ensure respect, with the duty to suppress all violations and the justification for universal jurisdiction based on the nature of the offence; he rejected the significance of the distinction between nature of the armed conflicts (international or internal). However, Boelaert-Suominen observed state behaviour and concluded that states have moved ‘cautiously and selectively’ in claiming universal jurisdiction over violations in internal armed conflicts, which has been ‘limited to a series of fairly elementary prohibitions’. See T Meron *The Humanization of International Law* (Martinus Nijhoff Publishers Leiden 2006), 118 and S Boelaert-Suominen ‘Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?’ (2000) 5(1) Journal of Conflict and Security Law 63, 102.

\(^{163}\) ibid para 3.3.2. He noted two matters: that international instruments, criminalizing crimes against humanity, were concluded after the fact and referred to an existing crime and that the Belgium did not directly incorporate the Genocide
universal jurisdiction applied based on the nature of the offences and the fundamental value they encompass. However, the judge added Randall’s argument that the *jus cogens* status of the crime and the *erga omnes* obligation to invoke responsibility for breach of fundamental interests justified jurisdiction.

On the principle against non-retroactivity, both Courts adopted the *Eichmann* judgments. However, the Spanish Court added a modification; it argued that article 23(4) of the *Organic Law of Judicial Power* is a jurisdictional (procedural) provision rather than substantive. Therefore, proceedings are not *ex post facto* as long as the crime was criminal under Spanish law at the time of its commission (even if Spanish jurisdiction did not extend extraterritorially at the time of commission). Only the Belgian *Pinochet* case explicitly addressed the issue of presence of the accused. In Spanish law, one

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164 ibid (‘either crimes against humanity are among offences that do not transcend borders and enforcement is left to discretion of each State or crimes are of the order of the unspeakable and unacceptable and responsibility for their repression is shared by all’).
165 ibid para 3.3.1 (extradite or prosecute is ‘an expression of need to avoid impunity for crimes against international law and the responsibility of State authorities to ensure the punishment of such crimes regardless of where they were committed’). ibid, para 3.3.3.
166 ibid para 3.22 (like the Spanish courts and *Eichmann*, as long as the crime was criminal in domestic law at the time of its commission it does not violate non-retroactivity; thus, the analysis on whether crimes against humanity as a crime under customary international law had become part of Belgian law). Here, the magistrate (in a similar vein to *Jorgic*) used the ICTY/ICTR co-operation as an indication of the rule’s application in social fact; the Belgian Law of 22 March 1996 recognized jurisdiction over acts committed from 1993 onwards.
167 *Chilean Investigations* (n 157) para 3.
168 Note an earlier submission of a complaint against Pinochet in the Netherlands in 1994, alleging violations of torture and jurisdiction of the Netherlands under the Torture Convention. The Public Prosecutor declined jurisdiction based on Pinochet’s immunity as Head of Chilean Armed Forces and based on the temporal presence (including the inability to demonstrate his continued presence in Netherlands at the time of the complaint). This was upheld on appeal given the
certainty was that Spanish criminal procedure prohibited trial in absentia. However, the implication from the arrest warrant against Pinochet\textsuperscript{169} was the presupposition that jurisdiction was not preconditioned upon voluntary presence. In the Belgian \textit{Pinochet} case, Vandermeersch focused upon the parliamentary intent in implementing universal jurisdiction, citing the preamble to the 1993 Law that the law applied regardless of whether the alleged offender is found on Belgian territory.\textsuperscript{170} Hence, in implementing the 1949 Geneva Conventions, the Belgian legislature assumed that the obligation to search for and punish arose regardless of the voluntary presence of the accused. The common articles on penal repression are invariably politically open-ended and it is suggested that the interpretation of those provisions had not previously focused on whether they could involve presence through involuntary surrender. In the end, the \textit{Pinochet} decision mirrors the outcome in \textit{Demjanjuk} (noted in section 2.2).

Though the issue of domestic amnesty was not raised in the Belgian \textit{Pinochet} case, it was one of the Spanish Prosecutor’s grounds of appeal and here, the \textit{Eichmann} judgments could not be a precedent. However, the international human rights law regime had numerous legal and practical problems involved in undertaking such a prosecution. See discussion in Reydams (n 26).

\textsuperscript{169} In 1998, the Spanish Central Court of Investigation No.5 issued an order for the pre-trial detention and international arrest pending extradition, against Augusto Pinochet, who at the time was receiving medical treatment in London. For a copy of the text of the Order of 16 October 1998, see Brody and Ratner (n 161) 57-59. For a description of the case history prior to the arrest, see M del Carmen Márquez Carrasco and J Alcaide Fernández, ‘Spanish National Court, Criminal Division (Plenary Session)’, (1999) 93 American Journal of International Law 692 and C Malamud, ‘Spanish public opinion and the Pinochet case’ in M Davis (ed) \textit{The Pinochet case: Origins, Progress and Implications} (Institute of Latin American studies London 2003) 145.


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frequently addressed whether domestic amnesties were compatible with human rights treaty law obligations in the 1980s. Based on human rights law arguments, the Spanish Court in *Pinochet* concluded that the Chilean Decree Law 1978 was not binding because amnesties for crimes against international law violated *jus cogens*.\(^{171}\) Similarly, it was argued that as criminal complaints had been dismissed by the Court of Appeal of Santiago de Chile based on the Decree Law, Spanish jurisdiction did not violate the principle of *non bis in idem*.\(^{172}\) In other words, the nature of the crimes overruled domestic post-conflict dialogue. Rather than an unwarranted interference, it was an attempt to secure international justice in the interests of the international community. In the end, both judgments would appear to formalists as being even more normative, less concrete than *Eichmann*, particularly given the stance on presence of the suspect. To moralists, however, these decisions would epitomise the essence of the ‘preventing impunity’ project.

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\(^{171}\) Chilean Investigations (n 157) para 8. In *FIDH v Ould Dah*, the French Court of Cassation considered that the Mauritanian amnesty law did not preclude French jurisdiction, as it would nullify the application of the Torture Convention. It also upheld French jurisdiction over torture committed extraterritorially, based on the Torture Convention, even though applied to acts committed prior to French domestic implementation; this was based on the *Nuremberg/Eichmann* non-retroactivity argument, as the offence was aggravating assault in the domestic code and the Torture Convention did not create a new offence but codified an existing violation of customary international law. See *FIDH v Ould Dah*, Court of Cassation No 02-85379 (23 October 2002), URL: [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/France/Ely_Cassation_23-10-2002.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/France/Ely_Cassation_23-10-2002.pdf).

\(^{172}\) Chilean Investigations (n 157) para 8. But the *Audencia Nacional* considers that this dismissal did not amount to ‘acquittal, pardon or conviction’, namely the facts were not adjudicated upon. ibid.
3 The counter-hegemony of the formalist approach

A number of judgments demonstrate how the counter-hegemonic position of a formalist approach was embedded within the legal debate prior to the Arrest Warrant judgment. This counter-hegemonic position at its margins is the Defence’s arguments in Eichmann. As discussed in chapter 2, Eichmann’s Defence counsel argued that the charge of personal liability for acts on government order was unjustified based on official capacity and a violation of the personal immunity of state officials. Similarly, the jurisdiction was criticized as excessive based on the lack of state consent and a violation of principle against non-retroactivity. The Defence counsel’s arguments were rooted in the opposing debates from the 1920s in which lawyers disputed whether state officials acting on government orders, and operating within military operations, could be personally liable.\textsuperscript{173} This personal liability was contentious because, if accepted, it would reject the outcome of the McLeod case, which had affirmed the personal immunity of state officials acting on government order.\textsuperscript{174} However, in the 1990s, it would have been inconceivable to adopt the Defence counsel’s rejection of the personal liability of state officials. We noted in section 1 of this Chapter that the validity of personal liability of state officials was unquestioned.

\textsuperscript{173} As discussed in Chapter 2, lawyers disputed whether lawful combatants incurred personal liability under the national law of the opposing belligerent. On the issue of unlawful combatants, it was undisputed since the Lieber Code that if enemy forces acted on individual impulses (without commission or authority), they could be subject to ordinary criminal law. But the issue of lawful combatants in violation of laws of war within military operations was a controversial point. See G Manner ‘The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War’ (1946) 37 American Journal of International Law 407 and GA Finch ‘Jurisdiction of Local Courts to Try Enemy Persons for War Crimes’ (1920) 14 American Journal of International Law 218.

\textsuperscript{174} See RY Jennings ‘The Caroline and McLeod Cases’ (1938) 32 American Journal of International Law 82, 92.
by arguments, underpinned by the formalist approach, even though the liability emphasized moral naturalism; here, alternative conclusions can be drawn from the empirical evidence of state behaviour depending on whether one places greater emphasis on deeds or opino juris.\textsuperscript{175}

That said we also observed that the issue of the validity of the jurisdiction and the appropriateness of the tribunal led the competing approaches to fall back into their fault-lines. Likewise, the jurisdictional challenges before international criminal tribunals are, in general, dismissed; the approach here is to argue that while there is, in fact, state consent, the courts would in any case have jurisdiction regardless of the consent of the state of nationality of the accused.\textsuperscript{176} To rule otherwise would bring the normativity of the project into question as the existence of liability, crime and enforcement would depend exclusively on state consent to the requisite treaty regardless of whether there is an “international consensus”. In other words, it would have a paradoxical result in that the project emerged as a challenge to sovereign egoism yet the entire project is ultimately dependent upon the consent of the state, on whose behalf the defendant committed the crime. This would bring legal argument to the vanishing point of state consent and power and thus, the need for moral naturalism becomes crucial in justifying liability, crime and jurisdiction beyond the treaty; it is a means of expressing moral outrage at the unthinkableability of the atrocities.

\textsuperscript{175} The usual citation for the existence of a rule of customary international law are the General Assembly Resolution (1946) affirming the Nuremberg Principles, the International Law Commission’s Principles of the Nuremberg Charter, the 1954 and 1996 Draft Codes on the Peace and Security of Mankind, the Statutes of the ICTY, ICTR, ICC and Sierra Leone. See van Alebeek (n 6) 209.

\textsuperscript{176} See for example Prosecutor v. Milutinović et al (n 64) paras 36, 38-39 and 48.
Notwithstanding this situation within international criminal tribunals, the unease regarding the exercise of universal jurisdiction in national courts began to grow. This is despite the fact that the personal liability is “universal” and binding on all individual directly under international law. Here, the court proceedings neither engage state responsibility in inter-state dispute resolution nor (as argued by Van Alebeek) engage the state as the factual defendant in the proceedings.\(^\text{177}\) Even the International Law Association’s generally supportive report cautioned against ‘jurisdictional imperialism’\(^\text{178}\) and points to the potential for unwarranted interference through excessive exercises of jurisdiction, which would move from world unity into oppressive homogeneity. In this way, the hegemony of the moralist approach would appear to be too political and an arbitrary violation of state liberty.

It follows that arguments adopting the formalist approach emphasized the prohibition against non-interference and the need for demonstrable state behaviour; in effect, the need for the rule of law to reflect the voluntary will of states. From this approach, there was a search for state consent to the principle of universal jurisdiction in regards to crimes against international law. However, given the infrequent historical cases and inconsistencies in state behaviour, the validity of universal jurisdiction \textit{per se} and with respect to each of the crimes could be called into question.\(^\text{179}\) Here,

\(^{177}\) Van Alebeek’s core argument is that when subject to criminal proceedings accused of crimes against international law, state officials are being sued in their personal capacity and therefore, are not being sued in the capacity as the ‘arm and mouthpiece’ of the state. The result is that the subject-matter does not impute the State. See van Alebeek (n 6) 104-107.

\(^{178}\) International Law Association (n 22) 19.

\(^{179}\) Reydams 2003 (n 26), Benavides (n 26) 58 (rejecting \textit{jus cogens} as justification for the principle, though preferring nature of the offence) and R Higgins \textit{Problems and
the conclusions from a number of distinct analyses are informative. Henzelin concluded that what he referred to as delegated universal jurisdiction (treaty law provisions) was the only legal content of the principle of universal jurisdiction. Though the absolute and unilateral theories are evident in legal philosophy, these theories have not been demonstrated in customary or conventional law practice. Likewise, based on his inductive study, Reydams concluded that universal jurisdiction in absentia over crimes against international law certainly demonstrates excessive jurisdiction and there is limited state behaviour in regards to universal jurisdiction over crimes against international law where the state has custody of the accused.

In his study on the law of piracy, Rubin meticulously detailed the practices of key maritime States, in particular during the late 18th and early 19th centuries, and rejected the idea that there was an international rule of law on piracy in historical fact. Finally, Kontorovich challenged the normative claim that jurisdiction over piracy was justified on its heinous character, and in turn, a basis for modern universal jurisdiction. He placed significance upon the parallel practice of privateering that was identical in nature to piracy and recognized by states as lawful means of commercial warfare. In light of this lawful yet identical activity, the heinousness of piracy can be challenged. It is also evident that certain universal jurisdiction laws engage the issue over the principle of non-retroactivity. From a

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(rejecting *erga omnes* as justification).

180 Henzelin (n 26).

181 Reydams 2003 (n 26).


formalist approach, if the state exercises jurisdiction over alleged crimes that occurred prior to entry into force of a treaty\textsuperscript{184} or a domestic statute providing universal jurisdiction, then the state has applied retroactive law. Finally, international and national courts are distinct\textsuperscript{185} and thus, the decision to reject immunity before international criminal tribunals was a distinct matter from immunity’s application before national courts. It was clear that Kelsen was right; either a waiver or an exception in treaty or custom was necessary.\textsuperscript{186}

These counter-moves within the scholarship were combined with challenges to the moralist approach’s hegemony in certain national proceedings. \textit{Javor} is a good example of the sequence of arguments counter-attacking the \textit{Eichmann} model on the issue of jurisdiction while the dissents in \textit{Pinochet I} and \textit{III} are the core strategy of the rejection of the \textit{Eichmann} judgments portrayal on immunity of state officials. In \textit{Javor}, the tribunal of first instance rejected the approach in \textit{Jorgic} on genocide but endorsed the approach of Belgian \textit{Pinochet} on custody, albeit in regards to the Geneva Conventions and Torture Convention. Hence, universal jurisdiction could not be exercised over crimes against humanity\textsuperscript{187}

\textsuperscript{185} Inazumi (n 19) 119-121 (although Inazumi was rejecting the argument that international criminal jurisdiction and universal jurisdiction are the same).
\textsuperscript{186} Kelsen (n 138) 159.
\textsuperscript{187} Here, the complainants argued that French courts had universal jurisdiction over crimes against humanity and genocide based on a combination of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Charter of IMT Nuremberg, the Convention against Torture and the UN General Assembly resolution 3074 (1973) that contended that ‘war crimes and crimes against humanity, wherever and whenever committed, must be subject of an investigation and those individuals…..must be sought out, arrested, prosecuted and if they are found guilty punished’. See \textit{Javor and Others} (2002) 127 International Law Reports 126. See also B Stern ‘\textit{In re Javor} and \textit{In re Muneshyaka} (1999) 93 American Journal of International Law 525, 526.
and genocide because of the diversity in state practice on matters of jurisdiction. Instead, an express provision for establishing universal jurisdiction in article VI of the Genocide Convention was necessary. In contrast, the 1949 Geneva Conventions and the Torture Convention provided the treaty law basis for universal jurisdiction and involved jurisdiction in absentia. This was justified because if the conventions were not interpreted in this way,

...the exercise of jurisdiction would be dependent upon the chance of arresting the perpetrator, which would empty the Convention of its substance and prevent the victims from having the case brought before competent judicial authorities so as to identity and seek out those who had harmed them.

In the Court of Appeal, the court only overruled the lower court’s decision on the 1949 Geneva Conventions and the Torture Convention and thus, the outcome was that French courts had no jurisdiction. Here, the court sided with the Public Prosecutor and rejected the approach in Saric. Thus, the 1949 Geneva Conventions were not self-executing; French courts did not have jurisdiction without a domestic law implementing the conventions. The

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188 Javor and Others (2002) 127 International Law Reports 126. His analysis of State behaviour opposed the complainants’ assessment. He argued that the Convention on Statutory Limitations had not been ratified by France, the Nuremberg Charter was temporally limited to WWII and the UN GA resolution did not have binding force. The implication is that rules of customary international law either did not exist or could not be self-executing in French law. The first assumes that jurisdiction must be permitted; while the latter assumes that while not prohibited, the State has the freedom to determine the scope of its criminal law.

189 ibid. Like Saric, the investigating magistrate did not assess whether the armed conflict was of international character. ibid

190 ibid 129.

191 ibid 131-132. The judge argued that the grave breaches regime created two ‘inseparable obligations’, the obligation to search for persons responsible and the obligation to bring the accused before national courts. See similarly Dakar Court of Appeals, Judgment No. 135 (4th July 2000). See also SP Marks ‘The Hissene Habre Case: The Law and Politics of Universal Jurisdiction’ in S Macedo (ed) Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes against international
‘wording of these texts’ indicates that the obligations are ‘only binding on State parties and are not directly applicable under domestic law’.192 Similarly, the court rejected the approach of the Spanish and Belgian Pinochet judgments. The court argued that the meaning of the phrase ‘is present in France’ in article 689-2 of the French Code of Criminal Procedure must be voluntary presence,193 where the presence of the accused in French territory becomes known to prosecuting authorities. As ‘there is no indication of such presence in France and it follows that French courts have no jurisdiction over the alleged offences’.194 While this claimed to reflect state behaviour, it could not bind Spain and Belgium in terms of consent, as they clearly did not agree. Javor’s legal outcome was similar to the Danish Pinochet case195 and to the German X v.SB and

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192 ibid (‘The provisions in question are of too general a character to create directly rules of extraterritorial criminal jurisdiction. Such rules must necessarily be drafted in a detailed and precise manner’).

193 ibid. The court contrasted the language of the 1949 Geneva Conventions (search and punish) with articles 5(2) and 7 of the Torture Convention (submit case to prosecuting authorities unless decides to extradite). It concluded that there was no obligation to search for perpetrators under the Torture Convention. This could imply that the court considered the Geneva Conventions distinct in that they may allow jurisdiction irrespective of presence of the accused.

194 ibid 129. Subsequently, the Court of Cassation argued that the provisions of section 1 and 2 of the law of 2 January 1995 require that the accused must be present in France (si les auteurs sont trouvés en France). This assumed that the interpretation of ‘present’ or ‘found’ in France could not include securing presence through lawful surrender (extradition). ibid 133.

195 See ‘Opinion of the Director of Public Prosecution’, reprinted in (2000) 3 Yearbook of International Humanitarian law 26-29. Here, the Public Prosecutor refused to initiate an investigation because he contended that Danish courts lacked jurisdiction where the suspect was not present in Denmark. He considered that international treaty law and the drafting history of the Danish Penal Code (combined with scholarship) demonstrated that the presence of the suspect was required under Danish law. Otherwise, ‘there would be no limit on Danish jurisdiction over crimes that are subject of an international convention’.
It was also applied in the German court’s reasoning in *Tadic* and *Djajic*.

4 Pinochet III

*Pinochet I-III* became a sensation because the majorities in both House of Lords judgments ruled that functional immunity does not apply before a foreign jurisdiction where there is *prima facie* case of commission or encouragement in the systematic or widespread practice of torture (as a crime against humanity) and where there is a treaty law obligation to exercise extraterritorial jurisdiction over the offence that is binding on the requisite states. On the

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196 Bundesgerichtshof, 11 December 1998, excerpt reprinted in Reydams (n 26) 151-152. The Federal Supreme Court argued that ‘without a meaningful point of contact respect for the sovereignty of other States (non-interference principle) can hardly be assured; if there were no other limitation than (discretion of Prosecutor to dispense with prosecution of extraterritorial offences), the municipal criminal justice system would be overloaded with “worldwide” prosecutions’. ibid.

197 *Prosecutor v Tadic*, Bundesgerichtshof, 13 February 1994, excerpts reprinted in L Reydams *Universal Jurisdiction: International and municipal perspectives* (Oxford University Press Oxford 2003) 149. In establishing a legitimizing link, the Federal court noted Tadic’s long term residency in Germany, established interests and was arrested in Germany. Similar to the subsequent case of *Djajic*, it considered German competence to be required because of the obligation to punish genocide and the international community’s measures to human rights violations committed in Former Yugoslavia. However, it qualified its focus on Tadic’s residency. It argued that it would not decide in the context of the present case whether such preconditions are ‘always sufficient’.


199 As will be explored, the reasoning in the individual judgments of the majority varied and the difference between the outcomes in *Pinochet I* and *III* in terms of the scope of a lawful extradition to Spain was significant. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. For an analysis of Pinochet as a split between absolutists and proceduralists (albeit from the style of legal determinacy), see S Seyedin-Noor (n 19) 41.

200 This of course, did not require extradition as the responsible Secretary of State (here the Justice Secretary) remains entitled to decide in her discretion whether the accused should be extradited. But on the strict terms of article 5 of the Convention
appropriateness of the tribunal, we noted earlier that Pinochet’s counsel moved away from the bias of the international criminal law regime and revisited immunity from criminal jurisdiction through the ethos of the traditional “centre”. This view brought the distinction between trial stages back out of the shadows. In this way, the open-endedness of the 1996 Draft Code could be equally advantageous and procedural immunity should be inapplicable (as a corollary of the removal of the substantive defence) in *appropriate* judicial proceedings (emphasis of author).\textsuperscript{201} This distinction between the trial stages provided an avenue for Pinochet’s counsel to justify distinguishing the applicable law between liability and admissibility that had not been directly addressed in the *Eichmann* judgments. Thus, all the immunity case law that *Eichmann* had discounted as invalidating personal responsibility (and implicitly the appropriateness of the tribunal) was relevant precedent once more. Ultimately, this was a clever manoeuvre to try and reconcile the unquestioned acceptance of the concept of individual criminal responsibility (moral naturalism)\textsuperscript{202} with the bias towards stability on matters of jurisdiction and immunity (competing interests).

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against Torture, the State should submit the case for prosecution before its own courts if it is determined not to extradite; hence, the move to determine Pinochet’s fitness to stand trial. Article 7(1) of the Convention against Torture states: ‘the State party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution’. See Torture Convention (n 199).

\textsuperscript{201} Draft Code of Crimes (n 113) 27.

\textsuperscript{202} This unquestioned acceptance does not interrogate the customary status of the substantive liability in terms of empirical evidence of State behaviour, that is, a consent-based approach that demonstrates the sense of legal obligation of criminal responsibility of individuals for acts committed under government orders or ostensibly under State authority. In justifying the empirical evidence of a rule of customary international law, van Alebeek cites the General Assembly resolution affirming the Charter of Nuremberg Tribunal, the ILC studies on Principles of Nuremberg and the Draft Code of Peace and Security of Mankind, along with the
In *Pinochet I*, the judgments of the majority in the House of Lords were rooted in the moral naturalism that was evident in the Belgian *Pinochet* judgment. Thus, *Pinochet I* followed the *Eichmann* judgments and contended that the acts could not be within the functions of state. However, in *Pinochet III*, the majority tried to steer a middle course to distance itself from the utopianism of the *Eichmann* judgments yet accord with its ‘moral intuitions’ in securing accountability for systematic practice of torture, which the Torture Convention was designed to address. Here, the various opinions of the majority appeared more concrete because each of the Law Lords premised their overall finding on an interpretation of state party obligations under the Torture Convention. However, though the majority’s overall finding can appear more concrete, there was a descending-ascending pattern; the Law Lords had to devise an interpretation of Torture Convention that it could bind a state party

Statutes of the ICTY, ICTR, ICC and Special Court of Sierra Leone. See van Alebeek (n 6) 209. Invariably, a debate would ensue over the empirical evidence and whether this is merely *opinio juris* without the corresponding behaviour of States in terms of domestic implementation of crimes against international law and the undertaking of criminal proceedings from 1946 onwards. It also moves to open a Pandora’s Box in terms of the validity of individual criminal responsibility as custom when the IMT Nuremberg, Statutes of international criminal tribunals and requisite treaties criminalizing war crimes and genocide derive their explicit recognition from treaty instruments. Instead, it is assumed that the crimes are customary international law and the substantive liability over individuals regardless of official capacity is also custom based on the ‘imagined community’ of mankind and the nature of the acts as offences against humanity (moral naturalism).

Koskenniemi 2002 (n 40) 159.

The combination of the varied opinions is notorious because they facilitate any position. Chinkin categorized the opinions in the High Court and the House of Lords as follows: ‘Of the twelve judges of the House of Lords and the three judges of the Divisional Court who heard the case, six upheld absolute immunity (Lord Bingham, Judge Collins, Judge Richards, Lord Steyn, Lord Slynn and Lord Goff); five denied any immunity for international crimes (Lord Nicholls, Lord Lloyd, Lord Hoffmann, Lord Millett and Lord Phillips) and four denied immunity for international crimes committed at least after December 8, 1988, (Lord Browne-Wilkinson, Lord Hope, Lord Saville and Lord Hutton)’. See C Chinkin, ‘Case Note: In re Pinochet’, (1999) 93 American Journal of International Law 703, 706.
regardless of its consent. Here, Chile evidently disagreed that the Torture Convention could render immunity inapplicable because it intervened in support of Pinochet’s immunity and justified its argument based on state sovereignty.\(^{205}\)

The House of Lords judgments were on foot of an appeal by the Crown Prosecution Service\(^{206}\) against the judicial review of Pinochet’s arrest warrants by the Divisional court. \(^{207}\) In the Divisional Court, it ruled in favour of Pinochet on grounds of functional immunity against the second warrant,\(^{208}\) which was held

\(^{205}\) In *Pinochet III*, Chile had joined with Pinochet’s defence to argue that immunity should be applied and Pinochet should be allowed to return to Chile. Earlier within the Chile investigation in Spain, it has been reported that ‘the Chilean government issued a diplomatic passport to former president Patricio Aylwin when he visited Spain, to shield him from being called to testify. It considered the investigation at most a tiresome irritant in bilateral relations’. See S Brett and C Collins 'The Pinochet Effect: 10 years from London 1988' (Universidad Diego Portales, Santiago de Chile 1998) 11.

\(^{206}\) *Pinochet I* (n 25) 902. In full, the issue raised was ‘the proper interpretation and scope of the immunity enjoyed by a former head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state’.

\(^{207}\) The Spanish arrest warrant had resulted in two British magistrates issuing arrest warrants against Pinochet, who was placed under arrest pending the decision of the Home Secretary as to whether he should face extradition to Spain. In response, Pinochet’s counsel advocated that the Home Secretary exercise his discretion to dismiss. When the Home Secretary failed to do so, Pinochet’s counsel sought an order of habeas corpus and judicial review of the legality of the warrants. See D Woodhouse, ‘The Progress of Pinochet through the UK extradition procedure an analysis of the legal challenges and the judicial decisions’ M Davis (n 169) 87. In regards to the Home Secretary’s powers regarding provisional warrants, section 8(4) of the Extradition Act 1989 provides that the authority, who issued the warrant, must inform the Secretary of State, who may cancel the warrant by order and discharge the person from custody (discretion) or is under a duty to cancel, where the Secretary has decided not to issue an authority to proceed (mandatory). See Section 7(1), 7(4) and 8(4) of the Extradition Act 1989.

\(^{208}\) See *R v. Evans and Bartle and the Secretary of State for the Home Department ex parte Augusto Pinochet* (1998) EWHC Admin 1013 (28th October 1998), para 31, 34 and 42 respectively. See also Brody and Ratner (n 161) 61 and 68-69. The first warrant alleged the offence of the murder of Spanish nationals in Chile. It was found to be unlawful, as it did not pertain to an ‘extradition crime’. The second warrant alleged the offences of torture (as defined under Convention against Torture) and conspiracy to torture between 1st January 1988 and December 1992, the offences of hostage-taking and conspiracy to take hostages between 1st day of January 1982
to address valid extradition crimes. However, the court here perceived the relevant time for assessing whether English law has jurisdiction over the offence as the time of extradition rather than the time when the offence is committed. The focus of the Divisional Court was on the State Immunity Act 1978 as opposed to the domestic incorporation of the Torture Convention because immunity was a preliminary matter, prior to questions of the tribunal’s basis of jurisdiction. Thus, when applying s20 of the State Immunity Act 1978 with ‘any necessary modifications’, the Divisional Court contended that immunity from suit ‘continues’ after a Head of State ceases office in respect of acts ‘in the exercise of [their] functions’.

In the Extradition Act 1989, an ‘extradition crime’ includes ‘an extraterritorial offence against the law of the foreign State’ subject to the conditions in sub-sections 2 (extraterritorial offence would be punishable in UK by at least 12 months imprisonment) and 3 (must be an extraterritorial offence either on basis of nationality of offender or on another basis of jurisdiction which UK also asserts in its law). English law does not assert jurisdiction over murder of a British national committed extraterritorially by a non-national. It only asserts jurisdiction if the perpetrator of murder committed abroad is a British national, under section 9 of the Offences against the Person Act 1861 (24 and 25 Vict.c.100), ibid para 33.

The Lord Chief Justice argued that if the relevant time would be the time of the offence, section 2(1) of the Extradition Act would have to include the reference ‘have constituted’ an offence and section 2(2), ‘would have constituted’. See R v. Evans and Bartle (n 208) para 44. In this respect, the judgment mirrors the non-retrospectivity findings of the Spanish court (albeit in regards to jurisdiction as opposed to extradition).

Warbrick, Salgado and Goodwin (n 156) 91.

Section 1 of 1978 Act states ‘a state is immune from the jurisdiction of the courts of the UK except as provided in the following provisions of this Part of this Act’. Under s14(1), the ‘state’ includes ‘a sovereign or other head of that State in his public capacity’. Section 20 provides that the Diplomatic Privileges Act 1964 subject to ‘any necessary modifications’ applies to a sovereign of other Head of State...’ as ‘it applies to the Head of a Diplomatic mission...’.

R v. Evans and Bartle (n 208) para 75.
This position adopted the argument that the legal position of a Head of State under customary international law is assimilated to the immunity afforded to a Head of Mission under diplomatic immunity. In other words, the Head of State is afforded absolute immunity while in Office (from civil or criminal proceedings whether in regard to official or private acts) and a limited immunity subsisting indefinitely (over acts executed in an official capacity while in Office) (ex-Head of Mission). It rejected the contention that the offences alleged in the arrest warrants cannot be official functions, discussing the case law in the US and UK as failing to demonstrate an exception to the rule of immunity. The House of Lords similarly explored the parameters of immunity of former Head of State through their statutory interpretation of the State Immunity

214 We explored the law of personal and functional immunity in section 2.2.2 of chapter 1 and the debate regarding crimes against international law. Here, we note two key points, which are constructive. In section 39(2) of the Vienna Convention on Diplomatic Relations (1961), the distinction is drawn between the personal immunity or immunity *ratione personae* that applies to the Head of Mission by reason of the latter’s status (and thus irrespective of classification of the act) and a functional immunity or immunity *ratione materiae* that arises by reason of the character or nature of the particular act or omission (as an official act or act executed in an official capacity). Dinstein explained that function immunity is not a ‘new phenomenon, specifically created to meet the needs of ex-diplomats...instead, they regard it as surviving the demise of diplomatic immunity *ratione personae* and as continuing to subsist. This notion of survival and subsistence (which is shared by authorities) signifies that diplomatic immunity *ratione materiae* exists all along, side by side with immunity *ratione personae*. Thus, as Warbrick et al note, a Head of Mission is personally immune from criminal process (arrest, interrogation, detention or trial) irrespective of whether the acts were committed in an official or private capacity. After office, the ex-Head of Mission may be immune depending on the classification of the acts, where if they pertain to the exercise of functions on behalf of the State, immunity continues indefinitely. See Y Dinstein ‘Diplomatic Immunity from Jurisdiction *Rat

Act 1978 yet the majorities overruled the lower court’s finding and in turn, posited diverse reasoning for doing so.

4.1 More concrete than *Eichmann?* Hegemony of *Pinochet III* majority

In *Pinochet I*, the majority of the House of Lords considered the parameters of immunity in the specific circumstances to pivot on whether crimes against international law may be official acts or functions ‘in a public capacity’ of the Head of State.\(^{216}\) Lord Nicholls contended that personal immunity arose in instances where the acts were attributable to the state and thus, excluded personal liability.\(^{217}\) Here, both Lords Nicholls and Steyn interpreted ‘official functions’ from a moral naturalism that emphasized the normativity of the international condemnation of torture and the scheme of accountability that was incorporated into UK domestic law by the Criminal Justice Act 1988.\(^{218}\) The Law Lords did not presuppose that official functions were determined by the state in an exercise of its liberty (competing interests). Instead, Lords Nicholls and Steyn considered that the international condemnation of the crime of torture, as provided under the Torture Convention, barred state officials from exercising functions of state that would contravene the

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\(^{216}\) As explored briefly in Chapter 1, section 2.2, Van Alebeek discusses what she identifies from the scholarship as two concepts of what is functional immunity, either as sovereign acts of State or acts imputable to the State (*Propend Finance v Sing* and *Jones v Saudi Arabia*). The latter arises from the idea that State officials must be immune ‘because their home State would have been immune had it been sued instead’. In this instance, van Alebeek argued that ‘the rule of state immunity appears as a veritable act of state immunity’. See van Alebeek (n 6) 144 and 147 respectively.

\(^{217}\) *Pinochet I* (n 25) 940.

\(^{218}\) *ibid* 939 (‘it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state…Similarly, the taking of hostages…has been outlawed by the international community as an offence’).
prohibition against torture.\textsuperscript{219} Therefore, because the defence against liability was inapplicable in this instance, immunity at the admissibility stage could not extinguish the jurisdiction of a foreign court.\textsuperscript{220} In particular, Lord Nicholls considered that parliamentary intent to remove functional immunity was clear from parliament’s decision to criminalize torture under domestic law. In other words, the 1988 Act provided English courts with the authority to exercise jurisdiction over acts of torture and thus, the claim that such acts are non-justiciable cannot reflect parliamentary intent.\textsuperscript{221} Finally, he contended that neither the Torture nor Hostages Convention could be interpreted as exempting a former Head of State from the respective accountability regimes.\textsuperscript{222} In parallel, Lord Steyn criticized the lower court’s finding because ‘no line’ was being drawn between acts purported to be functions of a Head of State and those which are criminal under international law.\textsuperscript{223} Though acknowledging the complexities, he considered that international law already provided a legal test, that is, whether the act is ‘condemned’ by international law. Hence, both Law Lords concluded that the crime of torture, as defined under the Criminal Justice Act 1988, could not be considered an official function because of its criminalization under treaty and

\textsuperscript{219} Torture Convention (n 199). The relevant aspects of the definition are that the act of torture is describes torture for the purposes of the Convention as ‘…is intentionally inflicted on a person […], when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’. ibid.

\textsuperscript{220} Pinochet I (n 25) 939- 940 (Nicholls) and 944 (Steyn).

\textsuperscript{221} ibid 939. He interpreted the Divisional Court’s decision as erroneously applying the “act of State” doctrine; the act of State doctrine claims that where the acts involve acts under the purported sovereign authority of another State, the dispute is not justiciable. It is a matter of judicial discretion, determining whether to adjudicate is reasonable in the circumstances.

\textsuperscript{222} ibid.

\textsuperscript{223} ibid 944.
custom combined with the treaty obligation to investigate and prosecute. Therefore, functional immunity is extinguished because the act cannot be attributable to the state.\textsuperscript{224}

That said the majority’s opinion in \textit{Pinochet I} would be considered from a formalist approach as an extraordinary violation of sovereignty because one state party is capable, through its account of state treaty consent, to unilaterally determine whether the acts of the state officials can qualify as official functions or are outside the scope of immunity under international law. In a related vein, as Lord Lloyd noted, the majority’s opinion would classify crimes against international law as acts in a private capacity despite their commission within the context of system criminality.\textsuperscript{225} Here, van Alebeek considers that the inconsistencies between national court judgments on question of immunity of state officials arises from the lack of clarity as to whether functional immunity was addressed as ‘acts of State as public acts’ or ‘acts attributable to the State’.\textsuperscript{226} The different concepts could justify the removal of functional immunity either within the rationale of the rule (not public acts) or in spite of the rationale of the rule (exception/not attributable to the state).\textsuperscript{227} Nevertheless, \textit{Pinochet I} was set aside due to the automatic disqualification of Lord Hoffmann,\textsuperscript{228} resulting in a third ruling of the House of Lords.

\textsuperscript{224} ibid 940 and 944.
\textsuperscript{225} ibid 928.
\textsuperscript{226} van Alebeek (n 6) 223. See also J Baker ‘The Future of Former Head of State Immunity after ex parte Pinochet’ (1999) 48 International and Comparative Law Quarterly 937, 943 (preference for attribution theory) and D Akande ‘Immunities and the International Criminal Court’ (2004) 98(3) American Journal of International Law 407, 414 (need for an exception under customary international law).
\textsuperscript{227} ibid 223.
\textsuperscript{228} Famously, Lord Hoffmann did not issue his own opinion but concurred with the majority in \textit{Pinochet I}. Pinochet’s counsel subsequently moved to have Pinochet I
The majority of the House of Lords in *Pinochet III*, refused to endorse the official functions argument. Warbrick argued that the absence of a specific limitation in the 1978 Act assisted the judges in adopting a wide understanding of official functions; thus, the functions were defined by national law (determined by the state), were not confined to location of their exercise (in the state and abroad) and were not restricted to the Head of State’s diplomatic role (international and internal affairs). In this way, as van Alebeek argues, the majority either adhered to the concept of immunity as acts of State (public acts) or an amalgam of the latter and the attribution theory. As a result, similar to *Pinochet I*, the Law Lords explored the terms of the State Immunity Act based on the statutory presumption that the ‘statute must be read in light of the UK’s international obligations’. Here, only Lord Millet traced the source of the crime of torture to customary international law and in turn part of UK law; all the other Law Lords in the majority sourced the crime of torture to UK’s ratification of the Torture Convention.

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set aside. It accused Lord Hoffmann of failing to recuse himself from the bench given his association with one of the interveners, Amnesty International. Lord Hoffmann was an unpaid Director of Amnesty International Charity Limited and Amnesty International was one of the interveners in the *Pinochet I* proceedings. The ruling meant that *Pinochet I* does not have any force in English law. See (1999) 1 All ER 577.

229 Unlike the other Law Lords, Lord Phillips observed that the functions of a Head of Mission and Head of State completely differ, the latter exercising her functions primarily in the Home (Sending) State. Because of the lack of clarity, Lord Phillips argued that the protection of immunity could only be afforded when the Head of State visited the UK. In opposition, the majority argued that the immunity must extend to all activities of the Head of State whether in the Home State or while on foreign visits.

230 Warbrick, Salgado and Goodwin (n 156) 104.

231 van Alebeek (n 6) 224.

232 Warbrick, Salgado and Goodwin (n 156) 105.
Though the majority judgments are famously diverse in reaching their conclusion,233 a unifying point is how all the majority judgments moved in a descending-ascending pattern. The crime of torture and jurisdiction over torture is posited in a descending move in keeping with the moral naturalism in the Eichmann judgments. Lord Browne-Wilkinson considered the crime of torture to be a *jus cogens* crime234 that could be punishable by any State as the offenders are ‘enemies of mankind’.235 Unlike others in the majority, he directly addressed torture in this instance as a crime against humanity.236 He argued that as a ‘totalitarian regime would not permit adjudication in its courts; there was ‘a demand for some international machinery to repress State torture which is not dependent upon local courts where torture was committed’.237 In this way, he conceived the normative function of the convention’s jurisdictional scheme as avoiding an otherwise jurisdictional lacuna or absence of sovereignty. This invokes the justification used by Jenkins in support of the extension of English municipal over acts of piracy committed on the high seas, which we outlined in section 1.2.2 of chapter 2.

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233 ibid 103 (‘it is hard to find any degree of common understanding on a point of international law that might have been relevant to their decision’) and R van Alebeek (n 6) 226 (‘impossible to derive common *ratio decedendi* from the six majority opinions’). See also Baker (n 226) 937.
234 ibid 107 (considering *jus cogens* crime as ‘unknown in international law’; however, Bassiouni referred to crimes against international law as having *jus cogens* status). Lord Browne-Wilkinson used a somewhat standard narrative about the emergence of individual criminal responsibility. He argued that after the affirmation of the Nuremberg Charter by the General Assembly and the ILC’s Nuremberg Principles, individual criminal responsibility was a principle of international law ‘from that date onwards’. ibid 107.
235 R v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) (1999) 2 All ER 97, 109 (‘*jus cogens* nature of international crime justifies States in taking universal jurisdiction over torture whenever committed’).
236 ibid 108.
237 ibid 110.
Lord Millet referred to crimes of such scale as ‘to attack the international legal order’. He argued that crimes against international law must possess a systematic character and if they are of such character, universal jurisdiction arises. Similarly, Lord Hope considered torture an international crime when committed on a widespread basis and was an international crime by time of entry into force of the Torture Convention. Though neither Lord Browne-Wilkinson nor Lord Hope explicitly referred to customary international law as the source of the torture prohibition as a crime against humanity, it appeared to be implied as sourced beyond the Torture Convention. Of note, Lord Browne-Wilkinson considered that the Torture Convention only established that a single act of torture could be made criminal domestically; it did not create the crime of torture committed on a systematic basis. Only Lord Hutton dispensed with the systematic quality requirement and considered that a single act of torture could be a crime against international law. Lord Phillips disagreed with the majority on this point; he considered the question of a right to exercise universal

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240 R v. Bow St. Metro Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) (1999) 2 All ER 97, 151 (Hope) and 164 (Hutton).
jurisdiction as still ‘an open question’, presumably in terms of State behaviour (and therefore ascending).\textsuperscript{244}

That said, even though the Law Lords referred to \textit{jus cogens} as the justification for the crime, they did not adopt the more normative, less concrete argument that the \textit{jus cogens} status of the crime extinguished immunity of state officials. Here, the arguments are either the crime as a norm of \textit{jus cogens} invalidates any conflicting rules of international law\textsuperscript{245} or a violation of a \textit{jus cogens} norm cannot be a sovereign act and thus, immunity of a state official does not arise.\textsuperscript{246} If the Law Lords had adopted the \textit{jus cogens} arguments, functional (and personal) immunity would always be overruled by certain crimes against international law that were deemed \textit{jus cogens} prohibitions. This outcome would be deemed justified regardless of whether it could be established that the obligation to prosecute offences committed extraterritorially was \textit{jus cogens}.\textsuperscript{247} As we observed earlier, this would be the ultimate triumph for the moralist approach; the court of humanity would never adjourn and the court would always rule that the foreign court’s jurisdiction was justified (and reasonable).

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\textsuperscript{244} \textit{R v. Bow St. Metro Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) (1999) 2 All ER 97, 188.}
\textsuperscript{245} \textit{Case of the Arrest Warrant of 11 April 2000 (DRC v Belgium) (2002) ICJ Rep 121 (Joint Separate Opinion), para 85. They argued that state behaviour is gradually recognizing this idea, citing the \textit{Eichmann} judgment. See also Orakhelashvili (n 22) 325.}
\textsuperscript{246} See Orakhelashvili (n 22) 325.
\textsuperscript{247} van Alebeek (n 6) 220. Van Alebeek argued that ‘for the \textit{jus cogens} argument to work it must be established that the obligation to prosecute crimes against international law is \textit{jus cogens} nature. She noted how the treaty law obligations to prosecute invariably could not be \textit{jus cogens} (as they hadn’t resulted in a customary law obligation) and how there was no support in state behaviour for the claim that the right to exercise universal jurisdiction was \textit{jus cogens}. See also Fox (n 137) 151-152 and \textit{Jones v Saudi Arabia} (2006) UKHL 26, para 45 and para 24.
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It follows then that the majority in *Pinochet III* sought to avoid the utopianism of the *Eichmann* judgments (and its reframe in the guise of the *jus cogens* argument). Therefore, even if there could be universal jurisdiction over torture, it did not necessarily mean that the immunity of state officials was removed before foreign national courts. In this way, the outcome depended on whether the intention of the state parties to the Torture Convention demonstrated the consent to the non-application of immunities within the context of the convention. However, this consensualism (or ascending move) was viewed through the lens of moral naturalism, namely the *jus cogens* status of the crime of torture and the explicit normative function of the convention in making ‘more effective the struggle against torture and other cruel, inhuman and degrading treatment.

Therefore, the majority in the House of Lords sought to derive the meaning of the Torture Convention in light of its object and purpose (to which all State parties agree) or to assume subjective intent from the terms of the Torture Convention (by interpreting its terms schematically). Both the object and purpose (descending-ascending) and the subjective intent (ascending-descending) sought to accord with what the Law Lords considered to be the type of justice to be achieved by the Torture Convention. Yet at the same time, they sought to reflect state party subjective intent. This was clearly frustrated by the objection by Chile (a state party) to the claim that functional immunity is waived or extinguished by state consent to the Torture Convention.

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248 *Pinochet III* (n 235) 114 (Browne-Wilkinson), 150 (Hope) and 189 (Philips).
249 Preamble of the Torture Convention (n 199).
250 Interestingly, ‘the Chilean government issued a diplomatic passport to former president Patricio Aylwin when he visited Spain, to shield him from being called
That said, though all the judgments of the majority in the House of Lords adopted descending-ascending patterns of argument, they differed markedly in their analysis. Lord Saville considered that the express terms of the Torture Convention demonstrated a clear (subjective) intent that state parties agreed to the exercise of extraterritorial jurisdiction over ‘alleged official torturers’. Here, he argued that the Torture Convention sought solely to address torture that has been carried out for state purposes. Hence, if functional immunity attaches to the conduct of the State official, it cannot co-exist with the terms of the Torture Convention. He placed more significant weight upon the jurisdictional provisions and the crime’s definition than the silence on the issue of immunities within the text of the Convention and its drafting history. However, Lord Saville’s weighting of the facts can only be justifiable if one accepts that accountability is what is just in the circumstances (moral naturalism).

Lord Hope combined individual criminal responsibility for crimes against international law with the acceptance of
extraterritorial jurisdiction. However, he didn’t clarify whether this interpretation was an express or implied waiver (in regards to the particular instance of a systematic practice). He noted the wider alleged crimes that were excluded under extradition law; this referred to the evidence of systematic practices of torture during the 70s and 80s, that is, prior to the incorporation of the Torture Convention in UK law in 1988. Thus, Lord Hope ‘returned to considerations of customary international law’ because there were ‘remnants of an allegation’ that without doubt constituted crimes against international law. He argued that the prohibition under customary international law was ‘so strong’ as to override any immunity. Hence, after the entry into force of the Torture Convention, it was ‘no longer open to state parties to invoke immunity’ in the face of allegations of systematic practice of

254 Lord Hope, in an initial ascending-descending pattern, dismissed the existence of a general exception in respect of international crimes and any express or implied waiver in the Torture Convention. On the Torture Convention, he made this assumption of State party subjective intent by arguing twofold. First, Burgers and Danelius in their leading commentary had argued that some special immunities may continue, which Hope considered as illustrative of how a general exception did not exist. Second he contended that treaty parties must have been aware of the risk that a former Head of State could be detained for a single act of torture and they never would have agreed to such an outcome. See *Pinochet III* (n 235) 148-151.

255 *Pinochet III* (n 235) 152.

256 van Alebeek (n 6) 231. She argued that his conclusion relied upon an ‘interaction between Torture Convention and concept of crimes against international law’. ibid 232.

257 *Pinochet III* (n 235) 151. See also Lord Phillips judgment. Van Alebeek suggests that his judgment pivots on the existence of extraterritorial jurisdiction and is similar to Lord Hope, although it has internal inconsistencies. Phillips argued that international crime and extraterritorial jurisdiction override the duty against non-interference. Thus, in the instance of an international crime, immunity cannot prevail and where there is extraterritorial jurisdiction recognized over the crime, it makes ‘no sense to exclude from [the extraterritorial jurisdiction] acts done in an official capacity. He argued that there were two ways that the Torture Convention renders immunity incompatible; either immunity could not exist (given the crime and extraterritorial jurisdiction) or there was express agreement that immunity should not apply. ibid 189-190.

258 ibid 152.
torture. Underpinning this invocation of custom was the assumption that justice (moral naturalism) trumps consent. Nevertheless, functional immunity was overruled in the context of the Torture Convention and thus, it would appear to be based on state consent.

Finally, Lords Millet, Hutton and Browne-Wilkinson in different ways placed significance on the official capacity as the ‘essential ingredient’ of the offence. Lord Millet contended that the definition of torture must be ‘inconsistent with the plea of immunity’; he stressed that international crimes were committed with toleration of state authorities and that the offence can only be committed in an official capacity. In such a context, to uphold functional immunity would render the Torture Convention a ‘dead letter’ and therefore, functional immunity doesn’t arise; it is not a matter of a waiver rather functional immunity is extinguished. He contended that international law cannot establish a crime of jus cogens status and at the same time, provide for functional immunity from criminal jurisdiction. Lord Hutton hinged his argument upon the recognition by the international community of a duty to bring perpetrators of crimes against international law to justice and the evident jus cogens status of the crime of torture. He differed from Millet because he denied that the acts could be functions under

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259 ibid 152.
260 ibid 179.
261 ibid 178-9.
262 ibid 179. Lord Millet discussed Eichmann’s justification for jurisdiction and lack of immunity at length.
263 ibid.
264 ibid 163.
international law after the entry into force of the Torture Convention, that is, he mirrored the majority of the House of Lords in *Pinochet I*.265

Lord Browne-Wilkinson noted the normative consequences for accountability if immunity continued to apply in the context of the Torture Convention. It would mean that there could not be any prosecution outside Chile unless the latter waived the functional immunity of its officials; and this would apply to all serving lower level officials.266 Hence, ‘the whole elaborate structure of universal jurisdiction over torture committed by officials [would be] rendered abortive and one of the main objectives of the Torture Convention...frustrated’.267 In order to ensure the normative outcome of accountability, functional immunity cannot prevail within this treaty law regime. Thus, in the limited confines of treaty law, combined with the recognition of the alleged acts as crimes against international law, functional immunity may be extinguished irrespective of the lack of an express waiver of immunity by the requisite state. Notably, in their *obiter*, certain members of the majority argued that the personal immunity of a Head of State was unaffected by the Convention.268 However, as Fox argues, this *obiter* is submitted notwithstanding the fact that there is ‘nothing in the

265 ibid 165-166 (‘the alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime’).
266 ibid 115.
267 ibid 114-5. Van Alebeek points out an internal inconsistency because Browne-Wilkinson argued that torture cannot be committed ‘in any capacity that gives rise to immunity’ yet at the same time, made the claim that official acts underpin the rule of immunity. See van Alebeek (n 6) 230.
268 ibid 164 (Hutton), 168 (Saville) and 189 (Phillips). This was followed in subsequent studies, see Princeton Project on Universal Jurisdiction (n 22) 51, article 13(2) of the Resolution on the Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law (Institute of International Law Vancouver 2001).
wording of article 1 (of the Torture Convention) to support (AOS’)
the status/conduct distinction. In her view, if a head of state is
construed as a ‘public official’ for the purposes of article 1, there is no
basis on which to confine the removal of immunity to a former Head
of State. This recognition of personal immunity regardless of the
nature of the crimes was similarly adopted by the French Court of
Cassation in In re Ghaddafi and by the Spanish High Court in the
Castro, Hassan II and Nguema complaints.

Alongside the functional immunity plea, the majority in the
House of Lords had to determine what allegations in the arrest
warrant were extradition crimes under English law. Their findings
narrowed the list of crimes considerably, namely two charges in 1988
and 1990. The majority considered that the temporal moment for
the purposes of extradition was the date of incorporation of the

270 Gaddafi (2001) International Law Reports 490, 507 and 509. The Advocat General rejected the jus cogens argument, that the prohibition had superiority over an inferior rule of personal immunity, because France had not ratified the Vienna Convention on the Law of Treaties (1969) and thus, the concept of jus cogens as a norm of international law was not recognized in French law. However, the Court of Cassation’s judgment was narrower. It contended that as the alleged crime (of terrorism) ‘did not constitute one of the exceptions to the principle of jurisdictional immunity of foreign Heads of State in office’. ibid.
271 Roht-Arriaza (n 156) 170.
272 Warbrick et al explained that the common law notion of territoriality of crime means that at English common law, only act committed in England may be criminalized unless Parliament extends this narrow reach, such as by the Criminal Justice Act 1988. See Warbrick, Salgado and Goodwin (n 156) 101.
273 There was a tragic irony about this outcome which led to urgent requests from lawyers in England and Spain to find and document cases post 1988 to bolster the accusation. To activists in Chile, the reaction was mixed: ‘to some, such demands seemed bizarre given that the Lords’ decision would exclude Pinochet’s most egregious crimes, the disappearances and executions committed between 1973 and 1978, from prosecution in Spain. Those crimes would probably remain unpunished forever if he was extradited’. See Brett and Collins (n 205) 11.
Torture Convention by the Criminal Justice Act 1988. In this way, the majority interpreted its treaty obligations in terms of its domestic extradition law. This considered UK’s jurisdiction over the crime of torture (as a crime against humanity) as temporally limited to the entry into force of the Torture Convention. In fact, Warbrick et al criticized the Law Lords decision to interpret section 2 of the Extradition Act 1989 in accordance with the language of the Extradition Act 1870. Instead, the language of the latter statute could have been confined to its narrow scope within UK extradition law as opposed to become a lens through which to interpret UK extradition law as a whole. In his criticism within the majority in the House of Lords, Lord Phillips argued that extradition could be proceed irrespective of when the crime was criminalized in UK law and Lord Millet claimed that torture was a crime under international law prior to the Convention against Torture and therefore UK courts had extraterritorial competence prior to the Criminal Justice Act 1988. As discussed in section 1.2, the Spanish courts adopted this position, which was rooted in the Eichmann judgments’ moral naturalism; hence, it was immaterial whether a procedural law (jurisdictional provision) was in force at the time of the commission of the offence.

In the end, the outcome in Pinochet III demonstrated that arguments underpinned by the moralist approach could succeed in

274 In the Obligation to Prosecute and Extradite case, the ICJ similarly interpreted the scope of State parties’ obligations under the Torture Convention as not extending to crimes prior to the Convention’s entry into force. This again interprets the normative standard in terms of State consent; although this time in accordance with the Law of Treaties (art 28) as opposed to extradition law. See Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (2012) ICJ Rep. 144.
275 Warbrick, Salgado and Goodwin (n 156) 91.
276 Pinochet III (n 235) 923.
277 Ibid 912.
regards to a former Head of State. However, ultimately the outcome was a moderate success because it was more concrete, less normative than the *Eichmann* judgments; it narrowed the instances where immunity may be inapplicable to treaty law regimes. Thus, the arguments regarding universal jurisdiction in customary international law over crimes against international were left open to question, that is, whether universal jurisdiction as a rule under customary international law over the crimes against customary international law extinguished functional immunity. Notwithstanding their attempt to steer a middle ground, the opinions of the majority could be accused of leading to ‘international chaos’ where, as Lord Goff maintained,

[The] courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.\textsuperscript{278}

4.2 Too concrete? Counter-hegemony of *Pinochet III* minority

The dissenting minority in *Pinochet I* and *III* provided the counter-hegemonic position that would transform the oppressive outcome of the majority in *Pinochet* back into self-determination and respect for state independence. According to this counter-hegemonic position, the legal effect of *jus cogens* is uncertain and when observing state behaviour, states are moving cautiously and thus, so must national judiciary.\textsuperscript{279} The *Pinochet* proceedings demonstrated that there was evident disagreement among state parties regarding the content of their legal obligations and thus, the majority of the

\textsuperscript{278} ibid 861. This would also be applied to the argument of Lord Saville that the treaty expressly extinguished functional immunity, because Lord Goff argued to the contrary.

\textsuperscript{279} *Pinochet I* (n 25) 913 (Slynn).
House of Lords’ interpretation would contravene the consent of the state party that does not agree. In contrast, the dissenting opinions in both *Pinochet I* and *III* offer counter-arguments to the majority opinions ‘official functions’ (*Pinochet I*) and ‘object and purpose’ (*Pinochet III*) positions.

In *Pinochet III*, Lord Goff sought to determine the subjective party intent of state parties to the Torture Convention. He noted the concurring commentary of Oppenheims International Law and the International Law Commission\(^{280}\) that the waiver of immunity by treaty ‘must always be express’ and he considered that these opinions confirmed Chile’s submissions on requisite rules of international law.\(^{281}\) Thus, the waiver must be agreed by a written contract (or declaration) or alternatively, in advance by treaty. In regards to latter, Lord Goff concluded that it must be expressed in a treaty provision; there was no possibility of consent to a waiver being implied into the treaty. Instead, an implied waiver can only exist where it would explain a recognized exception (such as actual submission to jurisdiction of the courts of another state).\(^{282}\) Lord Goff

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\(^{280}\) According to *Oppenheim’s International law*, a waiver must be expressed by either submitting to the foreign jurisdiction or in advance, by consent in a treaty. It may also be implied by behaviour, in certain instances where the state either instigates or intervenes in proceedings or in some way takes steps regarding the merits of the case. Here, the ILC’s 1991 Draft Articles was cited; thus, immunity cannot be invoked if expressly waived through treaty, written agreement or declaration before the court. Any implied consent ‘as an exception to general principles’ should be viewed as ‘an added explanation or justification for an otherwise valid and generally recognized exception’. ‘No room for implying the consent of an unwilling state which has not expressed its consent in a clear and recognizable manner’. See RY Jennings and A Watts *Oppenheim’s International law* (9th ed Longman London 1992) 351-355 and International Law Commission ‘Draft Articles on Jurisdictional Immunities of States and their Property’, (1991) Yearbook of the ILC Vol. II Part 2, 26-27, para 7-12 (commentary on article 7(1)).

\(^{281}\) *Pinochet III* (n 235) 861.

\(^{282}\) Jennings and Watts (n 279) 354. Here, it stated that if a state takes part in proceedings in order to assert its immunity, it cannot be deemed to have waived its
deemed this analysis to form part of UK domestic law under section 20 of the State Immunity Act 1978. Hence, he stressed the importance of article 32(2) of the Vienna Convention on Diplomatic Relations, which requires a waiver to be expressed in treaty.\textsuperscript{283} Thus, he interpreted the silence on the issue of immunity within the travaux preparatoire of the Torture Convention as indicating that state parties did not agree to waive their immunity.\textsuperscript{284}

In contrast to the majority in the House of Lords, Lord Goff focused on the single act of torture, which he argued, was principally what the Torture Convention sought to address; therefore states would still want to assert immunity in some circumstances as ‘extradition can nowadays be sought in some parts of the world on the basis of a simple allegation unsupported by prima facie evidence’.\textsuperscript{285} Rather than assuming that states would preserve immunity to ‘shield public officials’ from foreign jurisdiction, he focused on threats to post-conflict reconciliation\textsuperscript{286} or the possibility of ‘misguided or even malicious’ allegations.\textsuperscript{287} Lord Goff also

\begin{footnotesize}
\textsuperscript{283} Article 32(2) of the Vienna Convention on Diplomatic Relations (adopted April 18 1961, entered into force 24 April 1964) 500 UNTS 95 (waiver must always be express).

\textsuperscript{284} \textit{Pinochet III} (n 235) 862.Here, Lord Goff posited ideas as to why immunity was addressed; it ‘may have been recognition at an early stage that so many states would not be prepared to waive their immunity that the matter was not worth pursuing’.

\textsuperscript{285} ibid.

\textsuperscript{286} ibid. (‘In certain circumstances, torture may, for compelling political reasons, be the subject of an amnesty or some other form of settlement, in the state where it has been or is alleged to have been committed’).

\textsuperscript{287} ibid. (‘It can therefore be effective to preclude any such process in respect of alleged crimes, including allegations which are misguided or even malicious—a matter which can be of great significance where, for example, a former head of state is concerned and political passions are aroused’.)
\end{footnotesize}
interpreted Burgers and Danelius in a different way to Lord Hope.\footnote{Ibid 148-151 (Hope). Lord Hope in an initial ascending-descending pattern dismissed the existence of a general exception in respect of international crimes and any express or implied waiver in the Torture Convention. On the Torture Convention, he made this assumption of state party subjective intent by arguing twofold. First, Burgers and Danelius in their leading commentary had argued that some special immunities may continue, which Hope considered as illustrative of how a general exception did not exist. Second he contended that treaty parties must have been aware of the risk that a former Head of State could be detained for a single act of torture and they never would have agreed to such an outcome. As discussed above, he posited a different argument regarding allegations of crimes against international law. Ibid.} Here, the lack of an explanation of ‘special immunities’ must mean that both personal and functional immunity continue to apply in all circumstances; otherwise the authors would have ‘been bound to refer to it’.\footnote{Ibid 863 (Goff).}

That said any attempt to deduce subjective party intent faces the same problem as the schematic approach (as we noted in section 4); the deduction of intent must somehow bind a state party that does not agree. In other words, Lord Goff’s opinion reflected only the Chilean interpretation of its obligations under the Torture Convention and not the Spanish interpretation. Even so, it appears possible to adopt Lord Goff’s opinion and argue in the opposite direction. Here, it can be argued that inapplicability of functional immunity was an exception recognized by certain Control Council Law proceedings and Eichmann in regards to crimes against humanity as, in all these cases, the courts proceeded to exercise extraterritorial jurisdiction. Of note, in the majority’s judgments in Pinochet III, they consistently emphasized that their conclusions pertained to a systematic practice of torture. This can then be combined with the state consent to recognize the extraterritorial jurisdiction of other state parties over acts of torture committed
within the territories of any state party. In this way, it could be contended that the implied term is an explanation for “recognized exception”, including the actual submission to jurisdiction of foreign courts.

It follows then that because Lord Goff dismissed the claim that the Torture Convention extinguished functional immunity, he turned to examine whether there is an exception under customary international law in regards to crimes against international law and drew heavily from Lord Slynn’s judgment in *Pinochet I* in three ways. First, he argued that the nature of official functions could only be determined by national law.

Second he endorsed Watt’s legal

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290 In Lord Slynn’s search for subjective intent in *Pinochet I*, he analysed the ordinary meaning of ‘public official’ and made an analogy to other treaties where the Head of State would be addressed separately to other public officials, along with the Vienna Convention on Diplomatic Relations provision on the requirement for an express waiver of immunity. Making an analogy is of course contextual; it assumes that the facts are similar in actual fact (when a distinction on the facts can always be made). Here, Lord Slynn considered that the term ‘public official’ was not wide enough to include Head of State. However, this interpretation would have the result that a Head of State was exempt from liability under the Torture Convention; therefore, immunity would not even need to be addressed. See *Pinochet III* (n 25) 917. According to Nigel Rodley, the definition is not ambiguous; it refers to the instigation by or at direction of public of official and lack of defence under Article 2(3) when a superior order by superior officer or public authority. ‘This is broad language. It aimed to catch not only the, usually, relatively lowly policeman or soldier who typically inflicts the torture but also those who require or allow him to do it by virtue of their superior authority, hierarchical or political’. See also N Rodley ‘Introduction – the beginning of the end of immunity and impunity of Officials responsible for Torture’ in Brody and Ratner (n 161) 3.

291 *Pinochet I* (n 25) 907. Another inconsistency in the judgment (that will not be detailed below) is with regard to the issue of immunity of a Head of State for acts committed within the Home (as opposed to Forum) state. Here, Slynn noted the ambiguity of article 39 of the Vienna Convention (1961) which on a literal interpretation would confine the protection only to visits to the Forum State. However, he interpreted article 39 in accordance with his object and purpose (descending pattern) that considered the normative function of immunity as protection from legal process that would adjudicate state responsibility. Given that the principle functions of a Head of State are performed in the Home state, there must be immunity ‘where it is most needed’. Thus, immunity extended to both acts in the official’s Home state as well as visits to foreign states.

292 *Pinochet I* (n 25) 908.
test based on whether the act had involved actual or ostensible authority of the State\textsuperscript{293} and finally, he distinguished the trend in international criminal tribunals from distinct practice before national courts.\textsuperscript{294}

On official functions, Lord Slynn noted that international law does not proscribe a list of official functions rather it recognises functions attributed by law or practice of the state.\textsuperscript{295} Hence, the commission of a crime cannot render the activities of the official outside the scope of official functions because, if it did, immunity from criminal jurisdiction ‘would be deprived of much of its content’.\textsuperscript{296} If executive power is used in the planning and executing the act, it must be deemed an act in official capacity.\textsuperscript{297} Consequently, there must be a rule of customary international law or a general principle of law recognizing that a particular act is not a function of State, that is, an exception in treaty law or custom.\textsuperscript{298} Thus, as the acts were clearly performed under state authority, Lord Slynn investigated whether there was an exception to the rule of functional immunity that applied to crimes against international law.

Notwithstanding, it is apparent that his investigation was underpinned by an emphasis on the normative function of the rule of

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\item \textsuperscript{294} Pinochet I (n 25) 910.
\item \textsuperscript{295} ibid 908. See also van Alebeek (n 6) 223 (concept of immunity as barring jurisdiction over acts attributable to the state).
\item \textsuperscript{296} ibid.
\item \textsuperscript{297} ibid. He approved Watts’ legal test, ‘whether the conduct engaged in is under the colour of or in ostensible exercise of Head of State’s public authority’. See Watts (n 292) 56.
\item \textsuperscript{298} ibid 928. Similarly, Lord Lloyd criticized the inevitable outcome of the majority’s opinions where crimes against international law become recognized in law as private acts only and even though, the official is acting in an official capacity, it is not recognized for the purposes of immunity. Thus, grave crimes are private acts but minor criminal offences continue to be recognized in law as acting within official capacity.
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immunity in protecting state dignity and independence. Lord Slynn rejected the *Eichmann* position that nature of the crimes resulted in universal jurisdiction and an automatic removal of immunity. Here, the definition of crimes against humanity was by no means universally accepted and there was little evidence that the legal consequence of *jus cogens* give rise automatically to universal jurisdiction. Instead, he argued that there was some recognition of a removal of immunity for certain crimes before international tribunals that demonstrated a developing trend. However, he rejected evidence of the recognition before national tribunals that all crimes against international law were justiciable, rather, he argued, the evidence in state behaviour signalled a lack of an exception under customary international law; arguments of an exception were ‘aspirational’. At this juncture, he made a distinction between international and national tribunals even though, as we earlier observed, both tribunals are prosecuting individual criminal responsibility that descends from a moral naturalism. Thus, he considered that the statutes of international criminal tribunals only referred to individual criminal responsibility, that is, the removal of the defence against liability. Therefore, these statutes must be interpreted as removing defence against liability before tribunals with jurisdiction. This, of course, assumed that the tribunal’s jurisdiction could not be called into question, which, as we noted above, has been

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299 ibid 909.
300 ibid 913.
301 ibid 913.
302 ibid 910.
challenged by Defence motions in the international criminal tribunals.303

In the end, the dissenting minority in the House of Lords assumed that the intent of the parties and state behaviour is objectively determinable when, in fact, states conflict over the nature of their legal obligations and justify their behaviour on their sovereignty (and consent).304 If the legal test for the purposes of immunity can only be whether the act is done under authority of the state, then an exception in the case of crimes against international law could never emerge in state behaviour. Thus, Lord Goff’s position is based on the assumption that the treaty parties only intended to define the crimes of torture and impose obligations to establish and exercise jurisdiction. As a normative outcome, every criminal proceeding on the basis of extraterritorial jurisdiction (that states parties are obliged to undertake) would be preconditioned on an express waiver by written declaration or by submission to proceedings.305 This would result in substantially narrowing the potential for repression of torture through ordinary criminal law

303 As previously referenced, see Prosecutor v. Dusko Tadic (n 64) para 42, Prosecutor v Dragan Nikolic (n 64), Prosecutor v Slobodan Milosevic (n 64). Of note here is Prosecutor v. Milutinović et al (n 64) paras 36.

304 To illustrate the problem of the vanishing point of State power, a comparison can be made with the history of piracy and privateering. States condoned comparable acts to piracy by validating those acts legally through the State’s commission or authority, precluding other States from interfering with property rights or punishing the privateering for acts of pillage under their own laws. Case of the Arrest Warrant (n 244) (Joint Separate Opinion) para 85. The Judges referred to the view that crimes against international law could not be functions of the state and that this view was ‘underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts’. ibid.

305 Compare Browne-Wilkinson’s point noted in section 4.1, see Pinochet III (n 235) 114-5.
when the treaty expressly was designed to broaden the potential.\textsuperscript{306} In all likelihood, extraterritorial jurisdiction would be operable only if there was regime change in the state where the alleged crimes were committed, which appears to sit uncomfortably and frustrate addressing the scenario that was the backdrop for the Torture Convention’s negotiations in the 1970 and 80s, that is, Pinochet’s Chile and other military regimes engaged in systematic practices of torture and enforced disappearances.

5 The repercussions of the reforming vision in \textit{Pinochet III}?

\textit{Pinochet III} became a watershed moment; it galvanized international and local non-governmental organizations to submit criminal complaints under universal jurisdiction laws.\textsuperscript{307} This dramatic upsurge in criminal complaints, albeit primarily within civil law jurisdictions, came to be referred to as the “Pinochet

\textsuperscript{306} \textit{Pinochet III} (n 235) 862. In fact, Lord Goff considered that the majority of cases under the convention would involve a situation where the public official is present in the state where the alleged crime took place. He argued problematically that in such instance, no question of immunity would arise; ‘there is no reason to assume that state immunity will be asserted by the state of which the alleged torturer is a public official’. ‘On the contrary, it is only in unusual cases, such as the present, that this is likely to be done’. ibid.

Effect”. Many of these complaints involved non-resident, former and incumbent foreign state officials, who were not in the territory of the prosecuting state at the time of the petition. Amongst these cases, the Butare 4 trial is significant because it became one of the major success stories of the late 1990s, even though the Defence did not challenge the validity of court’s jurisdiction. During this period, the Belgian legislature significantly amended its Law of 16 June 1993, extending the scope of the law to the crimes of genocide

308 Roht-Arriaza (n 156) and Brett and Collins (n 205).
309 The following section will discuss certain judgments that are the most illustrative of this reforming vision. This is not an exhaustive study of State behaviour during the period 2000 to 2002.
310 Here, civil party complainants had attempted as early as July 1994 to engage the provisions of the War Crimes Act 1993 against Rwandan nationals residing in Belgium. However, an examining magistrate was only appointed after the Minister for Justice used an exceptional power to open criminal proceedings by ordering the Public prosecutor who appointed the examining magistrate. The investigation involved 10 investigations into 21 individuals; however certain suspects were arrested to be surrendered to the ICTR. For a detailed analysis of trial (including from witnessing the proceedings), see L Reydams ‘Belgium’s First Judicial Application of Universal Jurisdiction: the Butare Four case’ (2003) 1 Journal of International Criminal Justice 18 and Reydams (n 26) 109-112. In 2000, the four defendants were convicted of committing violations of article 3 of Geneva Conventions and fundamental breaches (article 4(2(a)) of Additional Protocol II and sentenced to prison terms of between 12 and 20 years. Their convictions were upheld on appeal in 2001. See also Cour D’Assises de Bruxelles, URL: http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm
311 This is despite the controversy over individual criminal responsibility and the violations of common article 3 (internal armed conflicts). The Law of 16 June 1993 established universal jurisdiction over grave breaches and common article 3 violations, despite the lack of an obligation under the 1949 Geneva Conventions in regards to the latter. See Prosecutor v. Dusko Tadic (n 64). See also Meron (n 22) 554-577 and T Graditzky ‘Individual Criminal Responsibility for violations of international humanitarian law committed in non-international armed conflicts (1998) 80 International Review of the Red Cross 29.
312 Law Relative to the Repression of Grave Violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977, No. 877/1 (25 January 1993). In the 1993 Law, Article 7 provided that Belgian courts were competent to take cognizance of violations proscribed in the present law, ‘independent of the location where the offences had been committed’. This was considered to be an implementation of aut dedere aut judicare in the Geneva Conventions. Article 6 expressly removed the defence of superior orders but there was no mention of whether sovereign immunity should applied. The 1993 Law was also the first extension of universal jurisdiction in statute law to violations committed in armed
and crimes against humanity and expressly removing application of function and personal immunities before Belgian courts. In the latter, the Commission of Justice explained that its inclusion conformed to the principle espoused under Article 27(2) of the Rome Statute, as well as comparable provisions in other international treaties and the Statutes of the International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda. In this way, the Commission rejected the distinction between international and national courts in the counter-hegemony conflicts not of an international character. The Commission of Justice in the Chamber of Representatives argued that extension to common violations of article 3 was necessary given ‘the frightful violations of international humanitarian law which are committed in the purely internal armed conflicts, such as Bosnia-Herzegovina, Somalia…’. See Chamber of Representatives ‘Report for the Commission of Justice’, Doc 877/2-9293 (27th May 1993), URL: http://www.lachambre.be/FLWB/PDF/48/0877/48K0877002.pdf. See also A Andries et al, ‘Commentaire de loi du 16 Juin 1993 relative à la répression des infractions graves au droit international humanitaire’, (1994) 74 Revue de Droit Penal et de Criminologie 1114 (particularly 1132-33, 1169 and 1173-74). 313 Act Concerning Grave Breaches of International Humanitarian Law (1999) 38 ILM 918. The Amendment Law incorporated the Genocide Convention definition of the crime of genocide and all but three of the list of offences under article 7 (crimes against humanity) of the ICC Statute. This incorporation meant that both crimes were subject to universal jurisdiction under article 7 of the 1993 Law. The Amendment Law expressly removed immunities under Article 5(3), in keeping with In re Pinochet (1998); thus, ‘immunity attached to official capacity of a person does not prevent the application of the present law’. This was considered to conform with article 27(2) of the Rome Statute, except it did not transpire article 27(2). Ongena and Daele highlighted that article 5(3) was broad enough to disregard constitutional immunities and those granted by international law. As such, the 1999 Act gave Belgian courts ‘quasi unlimited jurisdiction’. See T Ongena and I van Daele ‘Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium’ (2002) 15(3) Leiden Journal of International Law 687, 691. Despite the influence of the Rome Statute, this legislation did not address the relationship with the international criminal court. In 2001, article 12bis was inserted into the Code of Criminal Procedure that established jurisdiction over offences which Belgian was obliged to exercise jurisdiction under international treaties. Article 27(2) states that ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’. 315 Chamber of Representatives ‘Report of the Commission of Justice’ Doc. 1863/1 - 98/99 (7th December 1998).
of Lord Slynn’s *Pinochet I* and assumed the recognition of individual criminal responsibility and universal jurisdiction extinguished immunities of state officials.

Alongside the *Pinochet III* and *Butare 4* victories, activism by human rights organizations led to the opening (or continuation) of numerous investigations. In Spain, the Central Court’s investigation into Argentina’s ‘Dirty War’ resulted in two extradition requests to Argentina in 1999 and 2001, which involved 66 accused, both requests were initially rejected by Argentinian authorities. However, while the Argentinian authorities refused, the Mexican Central Court of Instruction issued an international arrest warrant against a former military officer and operative in the infamous ESMA, Ricardo Miguel Cavallo. The Court adopted, yet modified, the *Eichmann* judgments on non-retroactivity in regards to the crime of genocide and the crime of torture, with reference on the latter to

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316 *Eichmann* was even more notable in regard to the jurisdiction issue as the complaint referred to Spanish nationals among the disappeared. For a detailed narrative of the “Pinochet Effect” in regards to investigations in Belgium, France, Italy and Germany into crimes committed against nationals of those States during the Chilean and Argentinian dictatorships, see Roht-Arriaza (n 156) 118-139.

317 Roht-Arriaza (n 156) 139. Although when a subsequent extradition request was made in 2003, after the Argentinian President had declared that the government would no longer oppose extraditions, the Spanish Government intervened to refuse to issue formal extradition requests because Argentina was proceeding to investigate the accused. ibid.

318 When Mexican investigative journalists identified Cavallo as a military officer who had worked in the infamous ESMA (Navy School of Mechanics), the Mexican authorities arrested Cavallo for falsifying his identity. On 25 August 2000, within the 48 hour window, Spanish lawyers requested an immediate arrest warrant and extradition, which was issued by the Spanish magistrate and executed by Mexican authorities who detained Cavallo pending judicial review of the extradition request. See Roht-Arriaza (n 156) 143.

319 On genocide, the 1870 OLJP was combined with the incorporation of genocide in the Penal Code in 1971. The former law included extraterritorial jurisdiction over crimes committed against the security of the State, that is, the protective principle. Here, he contended that the 1985 law was continuation of extraterritorial jurisdiction. Thus, there was a combination of 1870 Act and 1971 Act to ground jurisdiction at the time of commission of the offence, with the further combination
article 15 of the *International Covenant on Civil and Political Rights* (CCPR). On jurisdiction, the Court implicitly adopted the *Cvjetkovic* approach that reframed the concept of universal jurisdiction as an absence of sovereignty (used in the piracy debates). Thus where there is an evident unwillingness by the territorial jurisdiction to exercise its jurisdiction and the lack of an international criminal court with jurisdiction, it is reasonable for a state with no legal nexus to the crime to exercise universal jurisdiction. With this reframe, the court could argue that there was an absence of alternative jurisdictions and thus, Spanish courts assumption of jurisdiction was justified in the circumstances.

That said this position had to assume that the Spanish Court’s claim was not objected to when in fact the Argentinian authorities refused to execute the other arrest warrants within the wider Spanish
investigation. Thus, to the formalist approach, this position appears to be too normative, ignoring the competing interests of Spain and Argentina. Based on this approach, the amnesty law and the rejection of jurisdiction by Argentinian courts was a valid determination of its jurisdiction. On appeal, the Mexican Federal Criminal Court adopted the same (more concrete, less normative) approach as *Pinochet III* and justified Mexican and Spanish jurisdiction over the crimes of genocide and terrorism on their reciprocal international treaty obligations. However, the Federal Criminal Court adopted a more normative, less concrete approach than *Pinochet III* on the question of non-retroactivity; here, it accorded with the *Eichmann* judgments and therefore, the principle of non-retroactivity cannot be violated where the acts were crimes against international law at the time of their alleged commission.

In the *Bouterse* case, the Dutch Court of Appeal followed the hegemony of the moralist approach yet the Supreme Court adopted

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323 Although in regards to immunity as barring foreign jurisdiction where the latter would interfere with amnesties and post-conflict reconciliation, see Lord Goff’s opinion in *Pinochet III* (n 235) 862


325 After the judicial review of the extradition request and the affirmation that Cavallo could be extradited in accordance with the extradition treaty, it moved to the executive for decision on whether to extradite. The new Minister for Foreign Affairs had just published a study on the Argentinian Dirty War and the Government as a whole sought to give greater emphasis to human rights in Mexican foreign policy. In this frame, the Minister for Foreign Affairs approved the extradition on genocide and terrorism. He also reinstated the request for extradition on allegations of torture based on the Torture Convention and the non-statutory of limitations for crimes against humanity. See Roht-Arriaza (n 156) 147. As will be discussed in Chapter 5, Cavallo sought an *amparo* (judicial review) alleging breach of constitutional rights. The Mexican Supreme Court ruled that Cavallo could be extradited to Spain under the Protocol to the extradition treaty between Mexico and Spain.
the counter-hegemony of the formalist approach.\textsuperscript{326} First, the Court of Appeal adopted John Dugard’s opinion to the Court.\textsuperscript{327} Here, Dugard argued that jurisdiction over the complaint could be established based on customary law\textsuperscript{328} in combination with the Torture Implementation Act 1988.\textsuperscript{329} He emphasized the distinction between retroactive and retrospective applications of a statute, rejecting any violation of non-retroactivity.\textsuperscript{330} On seeking extradition, he argued that presence was not a precondition for jurisdiction because in this regard, \textit{Pinochet I-III} demonstrated the operation of the European Convention on Extradition. The Court of Appeal reaffirmed Dugard’s opinion through applying the principle of reasonableness.

\textsuperscript{326} In \textit{Knesevic}, the Dutch Supreme Court had upheld the jurisdiction of ordinary criminal courts over violations of common article 3 of the 1949 Geneva Conventions. See Netherlands Supreme Court (11 November 1997) Judgment No. 3717. On \textit{Bouterse}, see L Zegveld ‘The Bouterse Case’ (2001) 32 Netherlands Yearbook of International Law 97.

\textsuperscript{327} Wijngaarde and Iloost, Court of Appeals of Amsterdam, reprinted in (2001) Netherlands International Law Review 266, 278-279.

\textsuperscript{328} See Dugard’s Opinion, URL: http://zoek.rechtspraak.nl/detailpage.aspx?ljn=AA8427. Dugard drew on international human rights treaties, General Assembly resolutions in 1970s, the recognition of \textit{jus cogens} in the Vienna Convention (1969) and the preamble of the Torture Convention (1984), that referred to its part in the struggle against torture, as evidence that torture was an independent crime by 1982 and probably punishable under international law in time of peace as a species of crimes against humanity.

\textsuperscript{329} ibid. He stated: ‘The Convention against Torture is declaratory of existing customary law in so far as its prohibition, punishment and definition of torture are concerned. This applies particularly to the crime of torture in so far as it meets the requirements of the crime against humanity of which it was, and still is, an integral part. Thus it might persuasively be argued that the 1988 Torture Act could be applied retrospectively to cover conduct that was illegal under Dutch law before 1989 but was not criminalized under the name of torture -such as assault, murder, etc’.

\textsuperscript{330} Dugard cited Doherty (1982) on the Canadian Charter of Rights, who distinguished between retroactive and retrospective; ‘A retroactive application takes an act or omission that was not previously criminal, and retroactively deems that act or omission to be criminal as at a later date. A retrospective statute, on the other hand, does not create new offences. Rather, as in this case, it merely operates to retrospectively give Canadian courts’ jurisdiction over criminal offences committed outside of Canada’. See Dugard’s Opinion, URL: http://zoek.rechtspraak.nl/detailpage.aspx?ljn=AA8427.
and a balancing of interests, that is, based on weighing the significance of further Dutch interests. However, the Supreme Court upheld the Procurator General’s appeal; the Court argued that the Torture Convention does not oblige the application of the Convention with retrospective effect. In this way, the Court rejected the Belgian *Pinochet* stance and contended that the Dutch Torture Implementation Act must be interpreted similarly to article 5 of the Torture Convention, which required an interest by way of presence of the suspect in the Netherlands at time of arrest.

Against the backdrop of these developments within national courts, there was a cautious optimism within legal scholarship. The justification for the principle of universal jurisdiction was rarely disputed, even if different justifications were tendered. Rather the content of and any prohibitions upon the exercise of the principle was contested. Hence, the scholarship drew upon the moral naturalism of the international criminal law regime as justification for the principle (descending pattern) but disputed whether to adopt the frame of moral naturalism or competing interests when determining the content of the principle. Increasingly there was an acceptance that universal jurisdiction could be exercised for war

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331 This included the lack of proceedings in the territorial State, the public outrage at the crimes, the Dutch nationality or residency in the Netherlands of some of the victims.
332 *Bouterse*, ILDC 80 (NL 2001), para 4.5-4.7. Even if it could be established that customary international law obliged retroactive effect, this would conflict with the Dutch Torture Implementation Act, which would prevail under article 94 of the Constitution. Therefore, article 7(2) of ECHR did not arise.
333 *ibid* para 8.5
334 There were also the polar opposites in terms of justification and criticism; the contrast between Roth and Kissinger is a good illustration. See Kissinger (n 26) 86 and K Roth ‘The Case for Universal Jurisdiction’ (2001) 80(5) Foreign Affairs 150.
335 For example, Bassiouni (n 26) 81, Cassese (n 26) 589 and Benavides (n 26) 19. Contrast M Henzelin (n 26) and AP Rubin ‘*Actio Popularis, Jus Cogens and Offences Erga Omnes*’ (2000-2001) 35 New England Law Review 265.
crimes, crimes against humanity and genocide\textsuperscript{336} and this appeared to be reflected in the implementation, by a number of states, of legislation which established universal jurisdiction over the crimes defined in the Rome Statute.\textsuperscript{337} Certain legal reports endorsed the content of universal jurisdiction as involving jurisdiction over core crimes, seeking extradition to secure custody (\textit{in absentia}) and distinct rules between personal and functional immunity.\textsuperscript{338} Hence, there was some optimism that the hegemony of a moralist approach would be assured.

\textsuperscript{336} Bassiouni (n 26) 81, MC Bassiouni \textit{Crimes against Humanity in International Criminal Law} (Kluwer Law International The Hague 1999), Principle 21, \textquote{Question of the impunity of perpetrators of human rights violations (civil and political)}, Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997), Roht-Arriaza (n 306) 311 and Brody (n 306) 321. See also Princeton Principles on Universal Jurisdiction (n 22) and the International Law Association (n 22).

\textsuperscript{337} See Crimes Against Humanity and War Crimes Act (2000, c 24) (asserting jurisdiction when \textit{after} the time the offence is alleged to have been committed, the person is present in Canada’) and section 8 of the New Zealand International Crimes and International Criminal Court Act 2000 (No.26) (jurisdiction over crimes ‘regardless of’ nationality, whether or not offence committed in New Zealand, whether or not at time of offence or at time of decision to charge).

\textsuperscript{338} Princeton Project on Universal Jurisdiction (n 22) (Principle 1 and Principle 5). The Commentary noted at the beginning that the Principles are both \textit{lex lata} (law as it is) and \textit{de lege ferenda} (law as it ought to be) but they should not be understood to limit the future evolution of universal jurisdiction. Ibid, 37. On Principle 5, the Report argued that ‘none of the (ICT) statutes addresses the issue of procedural immunity. Customary international law, however, is quite clear on the subject: heads of State enjoy unqualified “act of State” immunity during their term of office. Similarly, diplomats accredited to a host state enjoy unqualified \textit{ex officio} immunity during the performance of their official duties. A head of state, diplomat or other official may, therefore, be immune from prosecution while in office, but once they step down any claim of immunity becomes ineffective, and they are then subject to the possibility of prosecution’. However, they added a qualification; ‘the principles do not purport to revoke the protections afforded by procedural immunity, but neither do they affirm procedural immunities as a matter of principle’. Ibid, 50.
6 Conclusion

What emerges from this exploration of the hegemonic control of the moralist approach until 2002 is how the competing approaches were wrestling with the commitment to the radical project of international criminal law that requires a universalist-constitutionalist mind-set, and the religion of sovereignty. It is apparent that the Eichmann judgments fitted neatly into the dominance of the international criminal law regime’s bias in the 1990s because the judgments offered a particular representation of the legal history of the principle of universal jurisdiction. In turn, this principle could assist the common cause in securing a complete jurisdiction over crimes against international law. In this way, international criminal law would become more akin to a domestic criminal justice system where jurisdiction is the rule rather than the exception (the court of humanity that never adjourns). Thus, it was assumed that universal jurisdiction applied to crimes against international law even without a treaty obligation, evident from with statements of International criminal tribunals, the International Law Commission and implied in scholarship. Yet it is also evident how the arguments underpinned by the moralist approach are fundamentally incoherent; indeterminacy usefully unpacks its biases. Invariably, this approach then led to different positions among national courts, including the extension of the Eichmann judgments to their outermost point of argument.

That said Pinochet III was a landmark judgment that attempted to be more concrete and less normative than Eichmann. The majority primarily focused on the Torture Convention; only Millet and Hutton seemed to suggest a broader removal of immunity
for crimes against international law. This focus had mixed results where the majority’s interpretation of the Torture Convention was near incomprehensible in its diversity and Lord Goff, in dissent, argued in the opposite direction. Every possible position in the debate on jurisdiction and immunity was accounted for; the hierarchy of norms, the nature of public acts and the exception (either by treaty or custom). From a formalist approach, the majority’s outcome was too normative and could easily be accused of violating state sovereignty under the dubious guise of determining state party consent. The majority’s conclusion would have to assume that treaty parties consented to any treaty party interfering in delicate conflict and post-conflict reconciliation, when the treaty practice thus far could not give credence to such an interpretation. The moralist approach can be accused of seeing humanity where there is really only a world of states with their competing interests. However, to the moralist approach, the dissenting opinion could easily be accused of completely undermining the project of preventing impunity because accountability would require further express consent to justify exercising extraterritorial jurisdiction and thus, the probability of treaty enforcement would remain exclusively in the hands of the territorial jurisdiction, which runs counter to establishing an international dimension in the first place.

Even with its moderate moralist leanings, Pinochet III caused a sensation and led to a stream of complaints in Belgium, Spain, France and Senegal. These complaints were fairly rapidly depicted as reaching monumental proportions and brought lawyers face to face with the full potential implications of the Eichmann judgments. This led to a retreat in the name of international stability even though the entire international criminal law regime is rooted in the moral
naturalism upon which the *Eichmann* judgments are based. Against this backdrop, the counter-hegemony of *Javor* and *Pinochet I-III* dissents were able to take on a greater significance. The counter-hegemony appealed to the sensibility of those, who desired a return to the status-quo. This context was the crucial backdrop for the *Arrest Warrant* case which, this thesis considers, is the turning point for a formalist approach’s hegemony.

It follows then that, as briefly noted in section 5, the theme of “avoiding abuse” entered the debate, with references to ‘jurisdictional imperialism’ and need for safeguards given that proceedings are not undertaken at the place of commission of the offence. Mindful of an avalanche of complaints, the Princeton Project noted that ‘insofar as universal jurisdiction is exercised, and seen to be exercised, in a reasoned, lawful and orderly manner, it will gain wider acceptance’. These reactions illustrated how the inconsistencies, drawn out by the formalist approach’s counter-hegemony, had some measure of influence; they showed the picture to be more nuanced. This influence of a formalist approach was combined with an increasing distrust of the utopianism of the *Eichmann* judgments. It was this nuanced picture and the varieties in state behaviour that became more marked after the stream of complaints submitted to Belgian magistrates. Belgium became the centre stage for the clash between moralist and formalist approaches. Prior to the *Arrest Warrant* judgment and the Belgian amendment legislation of 2003, the criminal complaints to Belgian courts pertained alleged atrocities committed during major global political

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339 Kamminga (n 79) 963, International Law Association (n 22) 19-20 and Princeton Project on Universal Jurisdiction (n 22) 43.
340 Princeton Project on Universal Jurisdiction (n 22) 43.
crises: Israeli incursions into Lebanon, Ivory Coast, Cuba, Iraq, DRC among others. In contrast to the Butare 4 case, many of the states, where the alleged crimes took place, did not support foreign court proceedings against their nationals. In this context, criminal investigations in foreign jurisdictions could appear to be more like “show trials” and thus, the moralist approach’s hegemony looked too political. As will be discussed in greater detail in Chapter 5, the Yerodia and Sharon cases were particularly significant for the shift towards a formalist approach’s hegemonic control. The ‘bell tolling’ for the moralist approach appeared inevitable in light of the contentious legal disputes and the diplomatic fall-out between Belgium and the DRC and Israel respectively. Invariably, the formalist approach’s bias towards stability was more attractive, paving the way for the shift in hegemony.

341 Ongena and Daele provide the following list: former DRC Minister for Foreign Affairs Ndombasi Yerodia, Rwandan President Paul Kagame, former Chadian Head of State Hissène Habré, former Iranian President Rafsanjani, three former leaders of Cambodia, former and incumbent Ivory Coast Presidents Guëi and Gbagbo, Ivory Coast’s Ministers for Internal Affairs and Defence, former Moroccan Minister of Internal Affairs, then Iraqi President Saddam Hussein, then incumbent Israeli Prime Minister Ariel Sharon, Palestinian Leader Arafat and then Cuban President Fidel Castro. See Ongena and van Daele (n 312) 693 and SR Ratner ‘Belgium’s War Crimes Statute: A Postmortem’ (2003) 97 American Journal of International Law 888, 890. See also International Law Commission Annex A (listing Republic of Congo’s President Sassou Nguesso and Fidel Castro in France).

342 Here, Rwanda had expressly called on States to prosecute any alleged perpetrators on their territory; this echoed the policy of the ICTR Prosecutor.

343 Re Yerodia Ndombasi, Tribunal de Premier Instance de Bruxelles [11 April 2000] and Case of the Arrest Warrant (n 244).

344 Cassese (n 26) 589.
CHAPTER 5

RETURN TO THE STATUS-QUO?

The Pinochet Effect would bring the international legal profession face to face with the full potential of *Eichmann* and the problem of exercising jurisdiction over nationals whose state objects to their trial.\(^1\) Hence, there was a swing back towards Luban’s religion of sovereignty because the full potential of a “court of humanity” that will never adjourn became obvious. ‘Politically troublesome cases’ were allowed to be entertained, including from opposing sides in the Middle East conflict,\(^2\) and thus, the vision of “avoiding abuse” became the dominant approach, viewing these criminal complaints as being more like “show trials”. In this environment, the move away from the margins of the *Eichmann* judgments’ portrayal intensified even though the international criminal law project draws from the moral naturalism that was invoked in *Eichmann*. This Chapter charts the shift in the hegemonic control of the narrative on universal jurisdiction in which the formalist approach assumed the hegemonic position and a reframed moralist approach moved to the counter-hegemonic position.\(^3\) This move began with the *Arrest Warrant* case, which was the tipping point in the struggle between moralist and formalist approaches.

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\(^3\) Similar to chapter 4, this is not an exhaustive study of all universal jurisdiction applications but an exploration of cases that demonstrate a movement between competing approaches.
Here, the International Court of Justice concluded that personal immunity was not extinguished in the context of crimes against international law. Within the separate opinions, there were powerful critics of universal jurisdiction *in absentia* by Judges Guillaume and Rezek. These critics appeared even more profound when the Belgian legislature decided to amend their universal jurisdiction laws in 2003. However, the Joint Separate Opinion in the *Arrest Warrant* case offered a middle ground that was influential for a reframed moralist approach. This approach had proponents in the Institute of International law and within legal scholarship, as well as the Spanish Constitutional Court and the Committee against Torture.

Nevertheless, the formalist approach continued to prevail in the legal decision-making of national courts, amendments of universal jurisdiction laws and certain ICC incorporation acts. These developments marked the attempt to avoid “frivolous” applications. Even so, there was the attempt to move towards the middle ground and the call for a more reasonable or alternative vision of universal jurisdiction, albeit premised on the formalist approach’s vision of stability. One response was to distinguish the *Butare 4*-type cases from other criminal complaints. As Reydams argued, *Butare 4* could be a reasonable exercise of jurisdiction for a number of reasons; one feature in particular was the approval of Rwanda to the prosecution

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Another feature can be the obligation to co-operate with the international criminal tribunals, illustrating support of the international community through either Security Council approval or treaty based regime. In contrast, complaints such as Sharon and Arafat could be criticized as being more show trial than ending impunity. These complaints lacked the approval of the state of location of the offence or the Security Council and they did not pertain to crimes under a state or Security Council referral to the International Criminal Court. Against the backdrop of the formalist approach’s hegemony, the International Court of Justice in the Obligation to Prosecute or Extradite case struggled between approaches. It could appear moralist with its emphasis on the object and purpose of the Torture Convention on locus standi and content of article 7(1) of the Convention yet formalist with its refusal to address customary international law and on non-retroactivity.

1 Arrest Warrant case

1.1 Personal Immunity: The return of Pinochet III’s dissent?

The Arrest Warrant judgment marked a major turning-point because the International Court of Justice determined that personal immunity bars foreign criminal jurisdiction irrespective of whether the proceedings relate to crimes against international law. The

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7 Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) (2002) ICJ Reports No. 121, para 58. For approval of this finding on personal immunity, see R van Alebeek The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (Oxford University
dispute between Belgium and the Democratic Republic of Congo (DRC) arose from a Belgian court’s decision to exercise jurisdiction over (and issue an arrest warrant in absentia against) Yerodia Ndombasi, who, at the time, was the DRC’s Minister for Foreign Affairs. In issuing the arrest warrant, Judge Vandermeersch considered Belgian courts to be competent irrespective of whether the accused is present in Belgium at the initiation of the investigation. In response, Yerodia’s counsel made a series of unsuccessful interventions in the Belgian courts and as the investigation was allowed to continue and the arrest warrant remained outstanding, the DRC filed an application to the International Court of Justice. This claimed a violation of par in


8 Counter-Memorial of Belgium, Part 1, para 1.3-1.5. The civil party complaints were lodged at the Brussels Court of First Instance by twelve civil party complainants, all of whom were resident in Belgium and five of whom were of Belgian nationality.

9 Re Yerodia Ndombasi, Tribunal de Premier Instance de Bruxelles [11 April 2000], para 3.4. Here, Vandermeersch interpreted the parliamentary intent for article 7 of the 1993 Belgian Law as excluding the Act from article 12(1) of the Code of Criminal Procedure (Preliminary Title), which requires the presence of the suspect in Belgium. See Re Pinochet, Tribunal de Premier Instance de Bruxelles [6 November 1998], para 3.2.1.

10 In October 2000, the Chamber du conseil rejected Yerodia’s application to have access to the dossier of complaints and his appeal to the Chamber des mises en accusation in the same month was also rejected in the interests of personal security of complainants and witnesses. See Counter-Memorial of Belgium (n 8) para 1.14.

11 See Application to Institute Proceedings Arrest Warrant of 11th April 2000 (Democratic Republic of Congo v. Belgium). Subsequent to the application, there was a cabinet reshuffle and Yerodia was given the National Education portfolio, which Belgium described as a ‘metamorphosis’. See Counter-Memorial of Belgium (n 8) para 2.26-2.38.
parem non habet,

arising from an excessive and arbitrary exercise of jurisdiction, and the violation of immunity of its Minister for Foreign Affairs from foreign criminal jurisdiction. It is noteworthy that, in contrast to Pinochet III, the arrest warrant pertained to allegations of crimes against humanity that did not engage the prohibitions under the Torture Convention and thus, the Courts’ judgment rested entirely upon an analysis of customary international law.

It is evident that the Court addressed the issue of the appropriateness of a tribunal in accordance with the ethos of the traditional “centre”. As Koskenniemi observes, the Arrest Warrant was a struggle over human rights themes where the authority of human rights bodies was challenged by alternative preferences; ‘rights were trumped by traditional rules of diplomatic law’.

Perhaps unsurprisingly, as the International Court of Justice is an

12 Par in parem non habet translates as ‘has no equal’. The state is ‘supreme internally’ but obliged not to intervene in the internal affairs of other states. See MN Shaw International Law (6th ed Cambridge University Press Cambridge 2008) 647.

13 Application to Institute Proceedings (n 11) 2.

14 Note that the judgment did not determine the validity of the Belgian universal jurisdiction law. In the Oral Hearings, the Democratic Republic of Congo stated that the issue may have to be addressed by the Court but this was not at the request of the DRC, whose key concern was the question of immunity. In parallel, Belgium invoked the non ultra petita rule and argued that the Court was confined to issues raised in the DRC’s final submissions (as opposed to those raised in its application). In the former, the DRC only discussed immunity and requested an annulment of the arrest warrant as reparation. See Counter-Memorial of Belgium (n 8) para 0.25 and Memorial of the DRC, para 97.

15 The alleged acts in the Yerodia application involved a widespread practice of ‘unlawful arrests, detentions and summary executions’. However, Yerodia was accused of incitement as opposed to complicity in crimes against humanity and incitement to commit grave breaches of the Geneva Conventions and the allegations did not pertain to a systematic practice of torture. Here, the human rights abuses were claimed to have been instigated by public speeches made by Yerodia, at the time Director of the Office of the President Kabila, that were alleged to involve the incitement of ethnic hatred against those of Tutsi origin. See Counter-Memorial of Belgium (n 8) paras 3.2.22 and 3.2.27.

institution that is representative of the desire for pacific settlement of disputes ‘in conformity with the principles of justice and international law’.\(^\text{17}\) Thus, the Court adopted Lord Goff’s method of analysis in \textit{Pinochet III}. First, its normativity emphasized the normative function of the rule of immunity (as opposed to the normative purpose of individual criminal responsibility) and sought to deduce whether personal immunity applies to a Minister for Foreign Affairs. Second, the Court stressed that an express waiver of immunity by the state of nationality of the accused was required and finally, as this did not arise, it determined whether an exception to immunity under customary international law in the context of crimes against international law had emerged.

As noted in Chapter 1, there has been uncertainty regarding the relevant persons to whom personal immunity applies;\(^\text{18}\) this includes the debate over whether the Convention on Special Missions reflects customary international law.\(^\text{19}\) Thus, the Court moved in a descending-ascending pattern and sought to determine whether an analogy could be made between the Minister for Foreign Affairs and Head of State. Here, the Court turned to (what it interpreted as) the object and purpose of the Vienna Convention on

\(^{17}\) See articles 92, 1(1) and 2(3) of the Charter of the United Nations (26 June 1945, October 24 1945) 3 Bevans 1153.


\(^{19}\) If the treaty reflected customary international law, then all states would have to recognize personal immunity of state representatives on “special mission” in third states for the duration of the mission. For a discussion of national case law regarding immunity of special mission in terms of customary international law, see Akande and Shah (n 7) 822-823. For example, see \textit{Re Bo Xilai} (2005) 128 ILR 713 and \textit{Counter-Memorial of Belgium} (n 8) paras 1.11-1.12 and 3.2.32.
Diplomatic Relations and concluded that immunity of state officials was to ensure ‘the effective performance of their functions on behalf of their respective States’. The Court assumed that, given the greater frequency of international travel, this portfolio involved a greater level of state representation abroad than other cabinet portfolios. On this basis, the Court considered that there was a greater risk to the effective performance of ministerial duties if the Minister could be deterred from travelling internationally because he or she would be exposed to foreign criminal proceedings. Thus, a legal analogy was warranted given the similarities with a Head of State in representing the state abroad.

Nevertheless, the Court was unable to cite any instance of state behaviour in terms of national legislation or criminal proceedings. Rather its conclusion was based purely on legal analogy, similar to the *Eichmann* judgments’ piracy analogy. The only connection to state behaviour was the Court’s acknowledgment that both Belgium and the DRC had agreed that a Minister for Foreign Affairs is personally immune. However, if the Court’s reasoning was ultimately dependent on this acceptance by disputing parties, then the Court would be unable bind a state that did not

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20 *Case of the Arrest Warrant* (n 7) para 53. See also Preamble of the Vienna Convention on Diplomatic Relations (n 18).
21 *Case of the Arrest Warrant* (n 8) para 55. Judge Bula Bula emphasized the lack of execution of the arrest warrant by African States and the difficulties for Yerodia in attending meetings in Europe, Japan and China because his immunity could not be guaranteed. He also referred to inconsistencies in the Belgian behaviour because its foreign ministry requested that the DRC take over the case and proceed to investigate the fact domestically. ibid (Judge Bula Bula) para 51.
23 *Counter-Memorial of Belgium* (n 8) 118 (para 3.4.1) and *Case of the Arrest Warrant, Oral Hearings Monday 15th October 2001*, 27.
agree to extend personal immunity to a Minister for Foreign Affairs. Instead, the Court’s legal outcome looks like apology, the preference of a particular voluntary will. In fact, if the judgment was entirely based on an ascending move (state liberty as the origin of law), then the Court would be unable produce a legal outcome as both states justified their arguments on their sovereignty.

That said, when the Court examined whether there was an exception to immunity,\textsuperscript{24} it moved in an ascending-descending pattern that emphasized state voluntary will and concealed a preference for the project of ‘identity’.\textsuperscript{25} Here, the Court’s analysis of state behaviour was clearly underpinned by a normative desire, embedded in a formalist approach, for international stability (and the original descending move regarding the normative function of immunity). This normativity was necessary to bind Belgium regardless of its lack of consent because the Court chose the DRC’s interpretation of its sovereignty (over that of Belgium).\textsuperscript{26} Thus, the Court rejected Belgium’s pleadings, which assumed that the position of the judgment in Eichmann was sound\textsuperscript{27} and recognized individual criminal responsibility and the removal of the defence against

\textsuperscript{24} It argued that the Vienna Convention on Diplomatic Relations’ provision on the waiver of immunity by the Sending State constituted a codification of customary international law. Case of the Arrest Warrant (n 7) para 52.

\textsuperscript{25} Koskenniemi (n 16) 200.

\textsuperscript{26} The Court agreed with the DRC that immunity from jurisdiction does not mean impunity, adding the threshold element of ‘irrespective of….gravity’. While procedural immunity may constitute a bar to prosecution, it cannot exonerate the person…from all criminal responsibility’. Case of the Arrest Warrant (n 7) para 60.

\textsuperscript{27} In Eichmann, it is recalled that the Israeli Courts reduced the fact of the atrocities to a singularity, a unique crisis that required an exception to the general rule. In the Arrest Warrant, Belgium’s argument adopted the same method.
liability (and arguably the procedural plea) by international criminal tribunals and national courts.\textsuperscript{28}

Instead, the Court sided with the DRC, which accorded with the Court’s bias towards stability. Thus, the Court deduced a distinction between the rules that applied to international tribunals and to national courts\textsuperscript{29} and adopted the \textit{Pinochet III} position that personal immunity is unaffected by international conventions obliging states to prosecute or extradite.\textsuperscript{30} In the end, the Court implicitly stressed the significance of Pinochet counsel’s argument before the House of Lords, that is, the different trial stages require distinct rules\textsuperscript{31} and the only precedents were the \textit{Pinochet III},\textsuperscript{32} \textit{Gaddafi}\textsuperscript{33} and \textit{Castro cases},\textsuperscript{34} in which personal immunity was upheld.

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\textsuperscript{28} The normativity within the Belgian arguments was the norm of accountability (descending), citing the Draft Code of Crimes reference to immunities). In terms of state behaviour, Belgium interpreted the exclusion of immunities either implicitly (Versailles) or explicitly (Nuremberg) as being justified on the \textit{nature of the offence} as opposed to the international character of the tribunal. It relied heavily on the provisions in the statutes of international criminal tribunals recognizing the irrelevance of official capacity and argued that these instruments are transposable to national courts because they are evidence of a customary practice, which national courts can invoke. See \textit{Counter-memorial of Belgium} (n 8) para 3.5.26 and 3.5.27.

\textsuperscript{29} \textit{Arrest Warrant Oral Hearings} (n 23) 28. Unlike the specificity of \textit{Pinochet III}, the Court does not address whether there should be a distinction drawn between conventions which define an act as a crime where committed by public official, namely torture and war crimes- whose object and purpose would be defeated if immunity is applied--and those conventions where commission by a state official is not explicitly referenced.

\textsuperscript{30} \textit{Case of the Arrest Warrant} (n 7) para 58. Belgium’s argument was based on \textit{Re Pinochet} where Judge Vandermeersch, like the \textit{Eichmann} judgments, dismissed the acts as legitimate functions of state. He argued that the acts ‘cannot be expected to be in normal exercise of functions of Head of State, one of whose tasks is precisely to protect its citizens’. See \textit{Re Pinochet} (n 9) para 3.1.

\textsuperscript{31} \textit{Arrest Warrant Oral Hearings} (n 23) 28. Counsel for DRC argued that there was a clear distinction between criminal responsibility and immunity from jurisdiction for crimes against international law. On the former, the DRC did not contend that there was a defence against liability and immunity could exempt personal liability of the accused.

\textsuperscript{32} \textit{R v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)} (1999) 2 All ER 97, 164 (Hutton), 168 (Saville) and 189 (Phillips)

\textsuperscript{33} \textit{Gaddafi} (2001) International Law Reports 490, 507 and 509.
in either the *obiter* or *ratio*. This assumed that “justice” in the circumstances was the protection of dignity of the state and that, in turn, the infrequency of criminal proceedings (as a demonstration of state liberty) confirmed the absolute rule.

That said, the Court cannot avoid the accusation of apology because the normative outcome of its judgment frustrates the creation of a complete jurisdiction over crimes against international law and may ultimately shield alleged perpetrators from justice. As detailed in Chapter 4, a legal test based only on whether the act is performed under actual or ostensible authority would prevent an exception in the case of crimes against international law from ever emerging. We also noted the inconsistency when this outcome is compared to the unquestioned acceptance of individual criminal responsibility and the substantive law of crimes. Both concepts descend from moral naturalism, and cannot be proved by technical argument yet, unquestionably, apply before both international and national tribunals. These inconsistencies raised by the Court’s normative outcome are arguably left unaddressed by the Court’s four avenues for accountability. It is evident that these scenarios are identified through the lens of the judgments’ normativity; in other words, the Court identifies how, in a world of competing interests, a senior state official could be the subject of foreign criminal jurisdiction.

The first and second scenarios are clearly underpinned by state voluntary will, namely the territorial jurisdiction (where no immunity under *international law* is available) and a foreign court exercising extraterritorial jurisdiction where the immunity of an

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incumbent or former Minister for Foreign Affairs has been waived. The meaning of the third and fourth scenarios has become a matter of controversy but only the third will be addressed here. This scenario arises where on ceasing office, the Minister for Foreign Affairs may be prosecuted before a foreign tribunal ‘provided it has jurisdiction’ in regard to ‘acts committed before and subsequent to assuming Office and acts committed during Office in a private capacity’. Fox and Gaeta interpret this phrase as treating a serving and former Minister as analogous; thus, the change of status does not admit a different framework rather both personal and functional immunities remain applicable. However this would mean that functional immunity that applies to the acts of both serving and former lower-level state officials must be applied before foreign national courts. Therefore, proceedings undertaken against lower-level officials in regards alleged crimes committed in the Former Yugoslavia and Rwanda could only be justified on an implied waiver. In this way, the entire international criminal law project

35 Case of the Arrest Warrant (n 7) (Judge van Wyngaert) para 61. This would be a waiver of either personal immunity or on ceasing office, functional immunity. It appears to be distinct from the third scenario on the basis that the third scenario claims that a Minister would no longer enjoy all immunities accorded under international law to other states.

36 The fourth scenario was ‘may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction’. Case of Arrest Warrant (n 7) (Judgment) para 61.

37 Case of the Arrest Warrant (n 7) (Judge van Wyngaert) para 61.

38 Fox (n 7) 697. We observed in chapter 1, section 2.2 her argument that if functional immunity is removed, it could impinge arbitrarily upon state officials in the exercise of their functions during office and would render the entire internal administration of a state to the jurisdiction of foreign tribunals. See also P Gaeta ‘Rationale Materiar Immunities of Former Heads of State and International Crimes: The Hissene Habre case’ (2003) 1 Journal of International Criminal Justice 186,189 and A Winants ‘The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction’ (2003) 16 Leiden Journal of International Law 491, 499.

39 Note Lord Goff’s critic of implied waiver in the context of treaty law as discussed in chapter 4, section 4.2. See Pinochet Ugarte III (n 32) 861-862.
rests on the consent of the state of nationality of the defendant. As Akande and Shah argue, this is contrary to the ‘extensive’ post-WWII state practice. Alternatively, the Court could have been referring to the “private acts” argument, namely that such crimes cannot be functions of state. However, as we addressed earlier, strong criticisms of this position have been raised by Lord Steyn and Lord Slynn in *Pinochet I.*

In contrast, Van den Wyngaert’s dissenting opinion adopted the margins of the moralist approach in a counter-hegemonic position. On the Minister’s immunity, she moved in an ascending-descending pattern that criticized the Court’s analogy. She drew an alternative conclusion from the infrequent instances of criminal proceedings and the uncertainty within legal scholarship regarding an analogy between a Minister for Foreign Affairs and a Head of State. Thus, van den Wyngaert argues that this “negative” practice

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40 Akande and Shah (n 7) 839.
41 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Pinochet I)* (1998) 4 All ER 897, 939-940 (Nicholls) and 944 (Steyn). See also Akande and Shah (n7) 839.
42 ibid 928 (despite the acts commission within system criminality; would mean minor offences are official acts while grave offences are private acts) and 908 (if under actual or ostensible authority of the state, that is, if governmental in nature).
43 *Case of the Arrest Warrant* (n 7) (Judge van Wyngaert) para 11 and 12 (referring to the few cases cited before the Court that involved Heads of State and a single case involving a Minister for Foreign Affairs). See also Watts (n 22) 108-109 (citing *Ali Ali Reza v Grimpel* (1961) ILR 47, 275 (immunity upheld for Foreign Minister of Republic of Korea).
44 Watts noted the different views from the competing positions of national courts, the International Law Commission’s 1991 draft on Jurisdictional Immunities of States and the implication of article 21(2) of the Convention on Special Missions. Here, national courts had applied personal immunity to foreign Heads of Government and Minister for Foreign Affairs (only three cases cited in total). However, article 21(2) of the Convention on Special Missions could be read as signifying the latter officials are afforded immunities under international law in addition to those granted by the Convention. Article 21(2) states that ‘Head of Government, Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy …, in addition to what is granted by the present Convention, the facilities, privileges and
can be interpreted either as courtesy (as opposed to sense of obligation) or political or practical considerations. It did not demonstrate a ‘conscious decision’ among states to generate a rule of customary international law. She also noted the distinguishing features between diplomatic agents and Ministers for Foreign Affairs, as well as the restrictive view of immunities in the International Law Commission’s Draft Code of Crimes and the Institute of International Law’s 2001 Resolution on Immunities.

Through her moralist’s lens, the Court’s analogy and balancing act produces a problematic legal outcome. It is an “equitable” judgment call and if another cabinet post involves extensive foreign travel, there is nothing to prevent an analogy from immunities accorded by international law’. Although Watts concedes that the terms of article 21(2) are not inconsistent with the alternative view, ‘that it accords jurisdictional immunity as a matter of treaty law only…’. However, the International Law Commission did not include Heads of Government and Ministers for Foreign Affairs in its 1991 draft article 3(2) on the privileges and immunities afforded to Heads of State. See Watts (n 22) 108-109. See also Convention on Special Missions (adopted on 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231 and Yearbook of the International Law Commission (1989) Vol. II, Pt 2, paras 446, 450 (pp102-103).

45 Case of the Arrest Warrant (n 7) (Judge van Wyngaert) para 13.

46 ibid.

47 ibid para 15. ‘Diplomats reside and exercise their functions on the territory of the receiving states whereas Ministers normally reside in the state, where they exercise their functions. She also noted how Minister for Foreign Affairs does not “impersonate” the state in the same way as Head of State. ibid.


49 See Resolution on the Immunities (n 7). An earlier draft assimilated Heads of Government and MFA with Heads of State but in the final draft, only Heads of Government were assimilated. Likewise, the Convention on Special Missions distinguishes between Head of State and MFA, see Special Missions Convention (n 44). See Case of the Arrest Warrant (n 7) (Judge van Wyngaert) para 21 and (Joint Separate Opinion) para 81-82 and 20 respectively.
being made to that cabinet post. This is facilitated by the politically open-ended terminology as personal immunity also applies to ‘certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’, suggesting that the list is not exhaustive. Here, the normative outcome may be the immunization of most or all cabinet posts during office even though, in a situation of system criminality, it is the leadership that is the most responsible. As van den Wyngaert argues, it is a ‘signpost for the guilty’, ‘male fide governments could appoint suspects of serious human rights violations to Cabinet posts’ and in turn, shield them from prosecution in other states. Nevertheless, her empirical analysis is vulnerable to accusation of being political because it concealed its normativity of universal accountability. In her analysis, she assumed that an analogy was unjustified, that negative practice must be interpreted as she outlined and that cabinet appointments would be made based on avoiding foreign prosecutions.

50 Fox (n 7) 671 and Akande (n 22) 412.
51 Case of the Arrest Warrant (n 7) para 51. See the critic of the debates on the extension of personal immunity to other cabinet posts in Akande and Shah (n 7) 820 et passim.
52 Winants (n 38) 498 (‘very doctrinal and narrow-minded one and is likely...to lead to a de facto total impunity of high-ranking office holders [...] It is beyond doubt that the four cases mentioned by the ICJ are highly hypothetical’).
54 Case of the Arrest Warrant (n 7) (Judge van Wyngaert) para 21. Akande and Shah offer another argument. If the ICJ’s normative function is accepted as the basis for personal immunity (and they offer symbolization of the state and non-interference as a combined justification), then justification for immunity of a Minister for Foreign Affairs on private visits must be sought elsewhere because private visits are not ‘necessary for the international relations of the state’. Hence there is a distinction with Heads of State and Government, who may be considered to symbolically embody the state, and this would justify immunity while on private visits. See Akande and Shah (n 7) 824.
When van de Wyngaert turned to the issue of an exception, she moved in a descending-ascending pattern and stressed the international advocacy on accountability for war crimes and crimes against humanity. She assumed that the *jus cogens* status of the crimes was hierarchically superior and overruled immunity of state officials. From this approach, the infrequency of criminal proceedings was a failure to implement individual criminal responsibility rather than a confirmation of immunity. She drew significance from provision on irrelevance of official capacity in statutes of international criminal tribunals as the debate was ‘about individual versus State responsibility’ rather than procedural or substantive rules of immunity of state officials. In fact, she observed that ‘most authorities do not mention the distinction at all or even reject it’.

Meanwhile, the Joint Separate Opinion (JSO) attempted to establish a middle ground and described the trends developing within international criminal law as a ‘balancing of interests’ between the interest of mankind in preventing impunity and the interest of the community of states in protecting state liberty from arbitrary interference. However, ‘the weights on the two scales are

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55 *Case of the Arrest Warrant* (n 7)(Judge van Wyngaert) para 26.  
56 ibid para 28. She considers the Court to have taken a ‘minimalist’ approach, a narrow interpretation of ‘no immunity clauses’ in statutes of international criminal tribunals.  
57 ibid para 21.  
58 ibid para 30 (she cited the Princeton Principles on Universal Jurisdiction (2001) as one of the few that endorsed the distinction and noted how the statutes of the international criminal tribunals ‘do not address the question of procedural immunity’).  
not set for all perpetuity’ rather a ‘discernible’ trend exists that rejects impunity and in turn, makes possible the wider assertions of jurisdiction and the limited availability of immunities.\textsuperscript{60} They agreed with the Court’s judgment on the application of personal immunity regardless of the gravity of the offences. However, they argued for a different framework for functional immunity and though they raised the same criticism of the four scenarios as van den Wyngaert,\textsuperscript{61} they argued that immunities were not merely unavailable where impunity would occur. Rather immunities served ‘their own intrinsic value’ and it cannot be a situation where one value trumps another. Instead, there must be a balancing or weighing of interests and in exercising this balancing act, the commitment to accountability meant that immunities must be ‘recognized with restraint’.\textsuperscript{62}

It follows, then, that though they approved of inviolability during office, they distinguished the situation on ceasing office based on the “not official functions” argument; in fact, they explicitly cited \textit{Eichmann}.\textsuperscript{63} This attempt to steer a middle course (similar to \textit{Pinochet III}) appears to be more concrete, less normative than van den Wyngaert, but too normative and not concrete enough in comparison to the Court’s judgment. Invariably, this move to reasonableness would appear to the polar ends of the moralist or formalist approaches as inconsistent and arbitrary; a political choice cloaked as law. Nevertheless, though van den Wyngaert position was reflected

\textsuperscript{60} ibid para 75.
\textsuperscript{61} ibid para 78 (noting the improbability of trials with regime change or possibility of shielding an accused by keeping the Minister in office for an indeterminant period).
\textsuperscript{62} ibid para 79.
\textsuperscript{63} ibid para 85 (‘state-related motives are not the proper test for determining what constitutes public state acts’).
in scholarship,64 the JSO’s template found particular favour in scholarship given its move to equity and its attempt to accommodate both accountability and stability goals.65

1.2 It’s got a name now: Universal Jurisdiction in absentia

The Court in the Arrest Warrant case began from a hypothetical and sidestepped whether the Belgian legislation prescribing for universal jurisdiction in absentia was legally valid.66 The Court’s caution was most likely due to the division among the judges as indicated by the separate opinions and dissents. However, it meant that theoretically the Court’s discussion of immunity in terms of the contradistinction with universal jurisdiction was premised upon the Lotus majority’s presumption against limitations.67 In other words, Belgium was presumed to be acting lawfully in determining the extent of its jurisdiction (ascending). Yet the Court determined whether international law restricted Belgium’s jurisdictional claim by imposing a prohibitive rule of immunity (descending) and consequently, the enforcement measures


65 See Cassese (n 7) 866-870, Akande and Shah (n 7) 841, Van Alebeek (n 7) 223, Gaeta (n 38) 186 and S Wirth ‘Immunity for Core Crimes? The ICJ’s Judgment in the Congo v Belgium case’ (2003) 13(4) European Journal of International Law 877. However, scholars have provided their own particular justifications, they generally have not used the ‘private acts’ argument. For an earlier argument that personal immunities continue but functional immunities may be inapplicable, see Q Wright ‘War Criminals’ (1945) 39 American Journal of International Law 257, 269 (based on ‘not public acts’ argument).

66 Case of the Arrest Warrant (n 7) para 48.

67 ibid (Joint Separate Opinion) para 71. As the Joint Separate Opinion noted, immunity reflects ‘an interest which in certain circumstances prevails over an otherwise predominant interest’. ‘[Immunity] is an exception to jurisdiction which normally can be exercised and it can only be invoked when the latter exists. (AOS)’. ibid.
performed within its own territory were excessive. In their competing analyses, van Wyngaert and Guillaume based their decisions upon the opposing theories of the *Lotus* judgment and its dissents, whereas the Joint Separate Opinion treated *Lotus* as having a continued potential yet a ‘high water mark of laissez-faire’ in international relations.\footnote{ibid (Joint Separate Opinion) para 51.}

As well, van den Wyngaert adopted the margins of the moralist approach. She assumed that universal jurisdiction derives from the ‘international reprobation for certain very serious crimes’\footnote{ibid (Dissent of van den Wyngaert) para 46.} and its normative purpose is ‘to avoid impunity’ or prevent De Vabres’ scandalous impunity.\footnote{ibid (Dissent of van den Wyngaert) para 46.} She followed the *Eichmann* judgments’ method; thus, international law granted the right to exercise universal jurisdiction from the nature of the offence (descending) yet the content of this right was determined from state behaviour in punishing piracy committed on the high seas (ascending).\footnote{AG v. *Eichmann* (1968) 36 ILR 5, 26-28 (citing Hyde, Glueck and Cowles in support) and 299-300.} Again, this interwove the piracy analogy\footnote{MC Bassiouni ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 Virginia Journal of International Law 81, 108 and K Randall ‘Universal Jurisdiction in International Law’ (1988) 66 Texas Law Review 785, 798. See also AG v. *Eichmann* (n 71) 24-25 and *Prosecutor v Furundzija* (Judgement) IT-95-17 (10 December 1998).} and the *jus cogens* argument.\footnote{A Orakhelashvili *Peremptory Norms in International Law* (Oxford University Press Oxford 2006) 288, *Prosecutor v Furundzija* (n 72) para 156 and *Pinochet III* (n 32) (Lord Millet).} Nevertheless, moral naturalism can appear utopian and hence, van den Wyngaert moved in a descending-ascending pattern. It follows, then, that, underpinned by moral naturalism, she searched for a prohibitive rule and implicitly
invoked the *Lotus* majority’s presumption. Here, she rejected the idea that the predominance of national legislation, which requires custody, and the limited examples of proceedings constituted a prohibition. This could only arise if there had been a ‘conscious decision’ of states to prohibit jurisdiction unless the suspect was voluntarily present on the state’s territory. On the contrary, she tendered the Belgian and Spanish legislation as evidence of the lack of a prohibition. Similarly, in treaty practice, the 1949 Geneva Conventions and other multilateral treaty obligations do not explicitly indicate that presence of the suspect is required and may be interpreted as not prohibiting (permitting) a broader jurisdiction than provided in the treaty. However, van den Wyngaert’s analysis of legislation and treaty provisions were schematic because she attempted to bind the DRC despite its objection that Belgian jurisdiction was excessive and a violation of the DRC’s sovereignty. Therefore, her argument returns to her point of departure—moral naturalism—which presupposes the desirability of a wide discretion on states in determining the scope of extraterritorial jurisdiction in order to secure greater criminal accountability.

In contrast, Guillaume adopted the margins of the formalist approach and drew somewhat upon the Defence counsel’s arguments in *Eichmann*. Guillaume moved in an ascending-descending pattern because he explicitly rejected the *Lotus* majority’s

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74 *Case of the Arrest Warrant* (n 7) (Dissenting Opinion of Wyngaet) para 51.
75 ibid para 56.
76 We noted this same argument in regards to the existence of the Israeli *Nazi and Nazi Collaborators Act 1950* in *Eichmann* in chapter 2. See *AG v Eichmann* (n 71) 283-285.
77 *Case of the Arrest Warrant* (n 7) Dissenting Opinion of Wyngaet) para 54.
78 ibid para 61.
presumption and searched for a permissive rule. Nevertheless, his analysis of state behaviour is diametrically opposed to van den Wyngaert’s. He considered the requirement of voluntary presence of the accused in most national legislation as significant and concluded that only Israel’s Nazi and Nazi Collaborators Act 1950 would qualify as similar to the Belgian legislation. In treaty practice, he considered the Hague Convention’s jurisdictional clause as an incorporation of Grotius’ doctrine of aut dedere aut punire. Therefore, he concluded that there is a near complete lack of state behaviour to justify the Belgian claim. It follows, then, that the only true instance of universal jurisdiction under customary international law, according to Guillaume, is the crime of piracy committed on the high seas. Here, he considered the jurisdiction to be based on the absence of sovereignty over the location of the offence as opposed to the nature of the offence, similar to what was presented by Eichmann’s Defence counsel (‘absence of a competent court’).

That said Guillaume’s analysis implicitly assumed a ‘wide measure of discretion’ of states, despite his express rejection of Lotus because his conclusions claimed to be the true reflection of content of

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79 *Case of the Arrest Warrant* (n 7) (Separate Opinion of Guillaume) para 14. He also claims that Lotus’ implication must be rejected in light of the reference to sovereign equality in the UN Charter and the application of the *uti possendi* rule during the period of decolonization. ibid, para 15.

80 ibid para 12. He discusses the French provision (Article 689 I of the French Penal Code), the German provision (Article 6 of the Strafgesetzbuch) and Dutch implementation of the Convention against Torture but did not refer to the Spanish provision (Article 23(4) of the Organic Law of Judicial Power), which was interpreted contemporaneously in a similar manner to the 1993/1999 Belgian Law. ibid.

81 ibid para 9. This required presence on the prosecuting state. However, Grotius’ notion required a prior conviction, which is not the situation of the Hague Convention’s provisions.

82 ibid para 5.

83 *Written Pleadings submitted by Counsel for the Appellant Adolf Eichmann* (31 January 1962), Part II,(b)(2)(b).
state liberty. However, his conclusion could not bind Belgium by consent as the latter claimed that its legislation was a legitimate exercise of its sovereignty. Consequently, Guillaume moved in a descending pattern to bind Belgium regardless of consent and here, he returned to his point of departure, namely the world of competing interests. It is apparent from the tenor of his analysis that he emphasised the territorial character of the criminal law as fundamental and the recognition of sovereign equality in the UN Charter that strengthened the territorial principle. While he acknowledged the corpus of international criminal law and treaty obligations regarding extraterritorial jurisdiction, he argued that ‘at no time’ has universal jurisdiction in absentia been envisaged; ‘to do this would, moreover, risk creating judicial chaos’.

Finally, the Joint Separate Opinion (JSO) attempted to move to a middle ground in between the margins. They first moved in a descending-ascending pattern because they argued that state liberty cannot determine the exact scope of the state’s legal rights. As states were not required to legislate as far as permitted in international law, it was evident that international law may permit a wider scope than that adopted by states. However, this would no longer be reflective of state behaviour and thus, the JSO conducted a detailed exposition of state legislation and criminal proceedings. Yet the JSO’s assessment did not adopt van den Wyngaert’s absence of prohibition or Guillaume’s absence of permission approach. Rather, the JSO concluded that state behaviour was inconclusive or ‘neutral’. Here,

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84 Case of the Arrest Warrant (n 7) (Separate Opinion of Guillaume) para 15.
85 ibid.
86 ibid.
87 ibid (Joint Separate Opinion) para 45.
88 ibid.
they dismissed the relevance of international penal conventions, as those conventions proscribed obligations to establish and exercise jurisdiction over a suspect present on state party territory. Rather these were considered ‘sensible realities’ in light of the extradition component. They similarly discounted national legislation as national legislation only divulged what states have decided to establish. Unlike Guillaume, they discounted the usefulness of the punishment of piracy, given its distinction in terms of the location of the offence. The JSO implicitly represented state behaviour as providing evidence of a possible permission under international law (because states are not required to legislate as far as permitted). Yet at the same time, the JSO explicitly considered that treaty or national practice cannot evidence a prohibition against extradition to secure custody.

The inability to identify a permission or prohibition forced the JSO to move back to a descending pattern. More obvious than van den Wyngaert, it stated that its assessment of state behaviour fits the ‘underlying purpose of designating certain acts as international crimes [which] is to authorize a wide jurisdiction to be asserted over persons committing them’. Given the irreconcilability between van den Wyngaert and Guillaume, the JSO turned to the normative principle of reasonableness in order to balance the conflicting ‘valid’

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89 ibid para 32.
90 ibid para 57.
91 ibid para 21 and 45. Their conception of the doctrine of universal jurisdiction is where there is no legal link to the prosecuting State; as such, they do not consider national legislation in Australia, UK, France, Netherlands and Canada, as providing for universal jurisdiction, as classically understood. The implication is that the doctrine of universal jurisdiction as classically understood does not require presence of the suspect (any link to the prosecuting State). ibid.
92 ibid para 54.
93 ibid para 58.
liberties of the states exercising universal jurisdiction *in absentia* and the state of location of the offence.\(^94\) This balancing of interests between preventing impunity and stability can be ensured through various safeguards, including the prior offer ‘to the national State of the prospective accused person the opportunity itself to act upon the charges concerned’.\(^95\) Therefore, *in absentia* may be theoretically valid but it must be exercised in accordance with reasonableness.

In the end, it is apparent that van den Wyngaert’s moralist approach was diametrically opposed to Guillaume’s formalist approach and Joint Separate Opinion once more tried to steer a middle ground. These competing approaches were replicated in scholarship, dividing among those who approved van den Wyngaert,\(^96\) Guillaume\(^97\) or the JSO.\(^98\)

2. The formalist approach’s hegemony in Belgium and beyond...

The *Arrest Warrant* judgment was a critical juncture for the Belgian universal jurisdiction law as it led to the cancellation of Yerodia’s arrest warrant and initiated a rear-guard move, which

\(^{94}\) Ibid para 59.

\(^{95}\) Ibid.

\(^{96}\) A Poels, ‘Universal Jurisdiction in Absentia’, (2005) 23(1) Netherlands Quarterly of Human Rights 64, 76-8 and M El Zeidy, ‘Universal Jurisdiction in Absentia: Is it a Legal Valid Option’, (2003) 37 International Lawyer 835, 852. O’Keefe supported the outcome of van den Wyngaert, that is, the validity of *in absentia*. But we noted in chapter 1, section 2.1.3 that he criticized the opinions as conflating jurisdiction to prescribe and enforce. He concludes that if there is a permission to exercise universal jurisdiction, then the ‘exercise of in absentia is logically permissible also’. See R O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 Journal of International Criminal Justice 735, 748.


\(^{98}\) Institute of International Law ‘Resolution on Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes’ (Krakow 2005).
began with the *Re Sharon* case. In particular, the Belgian Court of Cassation’s judgment became one of the model arguments for reframing the moralist approach. This argument validated universal jurisdiction *in absentia* and distinguished between the continued application of personal immunity and the inapplicability of functional immunity. On *in absentia*, the Court adopted Vandermeersch’s moral naturalism and concluded that presence of the suspect prior to an investigation was not required. 99 Earlier, the Belgian Court of Appeal had adopted Guillaume’s formalist approach and observed how treaty law provisions, and the requisite Belgian incorporation of same, did not demonstrate the recognition of *in absentia*. 100 Thus, because there was no evidence that the alleged perpetrators were either present or their presence was immediately anticipated, 101 the exercise of jurisdiction was excessive. In contrast, the Court of Cassation argued that as the crimes under the 1993/1999 Law were excluded from the list of offences outlined in article 12, parliamentary intent sought to exclude the precondition of presence. 102 This interpretation was underpinned by the Court’s moral naturalism as the normative outcome would be a broader jurisdiction to secure greater accountability. On immunity, the Court applied the *Arrest Warrant* ruling on personal immunity and

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100 *Re Sharon and Yaron* (2005) 127 ILR 100, 115 and 117 (‘so long as section 12 was not amended or repealed’, presence must be required; article 12bis (regarding international treaty obligations) requires presence of the accused and this was considered to have general application; there was also a reference to sovereign equality).
101 *Re Sharon and Yaron* (n 100) 121.
102 *Re Sharon* (n 99) 598. The Court also did not consider the Genocide and Geneva Conventions as coming within the scope of article 12bis regarding multilateral treaties because the former Conventions did not include an obligatory rule to extend jurisdiction that derogates from principle of territoriality. ibid.
dismissed the complaint against Ariel Sharon. However, significantly, the Court allowed the complaint against Commander Amos to proceed, which implied that functional immunity was inapplicable. This was contentious given the dispute over the meaning of the *Arrest Warrant*'s obiter. Here, the Court’s position followed the Joint Separate Opinion in an attempt to balance competing interests in a context of preventing impunity.

That said, the subsequent developments in Belgium seemed to negate this reframed moralist approach and the shift to hegemonic control of the formalist approach became clearer with further critical decisions in Spain and UK. In Belgium, the *Loi du 16 Juin 1993* was repealed and substantive amendments were made to the Code of Criminal Procedure in August 2003. These developments arose from the political offensives mounted by those states that objected to

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103 ibid 599. The Court argued that the Genocide Convention removes immunity only before the territorial jurisdiction while the Geneva Conventions did not provide any obstacle to the application of immunity. ibid. See also *Re Mugabe* ILDC 96 (UK 2004).

104 ibid 600.

105 The following description is a brief outline of the immunity and jurisdiction provisions. Article 1bis (inserted into chapter 1 of Preliminary Title of the Code of Criminal Procedure) excludes prosecutions of heads of state, government and MFAs during office and other persons ‘whose immunity is recognized by international law’. This latter phrase leaves scope for interpretation either according with Fox’s interpretation of the *Arrest Warrant*'s obiter or the positions of the JSO, van Alebeek and Akande and Shah. Articles 6(1)bis and 10(1)bis provide for nationality and passive personality jurisdiction; they are broad assertion because they both include residency, albeit article 10(1) requires consent of the Federal Prosecutor and has detailed dismissal criteria. Article 12bis provides extraterritorial jurisdiction over crimes under treaty or custom where Belgium is obliged to submit the case for prosecution; this also requires consent of the Prosecutor and has the same dismissal criteria. Finally, article 12 expressly excluded the precondition of presence of the suspect from the above jurisdictional claims. See Belgian Amendment Law (2003) 42 ILM 1258, 1265, 1266 and 1267 respectively. For a careful study, see L Reydams (n 4) 679, 684-688 (observing how a ‘lack of clarity remains’ on the scope of universal jurisdiction).
criminal investigations involving their nationals.\(^{106}\) The transitional provisions of the 2003 Law facilitated the dismissal of a range of criminal complaints, including *Yaron* and *Bush et al.*,\(^{107}\) and signalled a dramatic retreat from the moral naturalism of *Eichmann*.

Second, in the *Guatemalan Generals* case, the complainants’ appeal to the Spanish Supreme Court\(^{108}\) dramatically changed the content of the Spanish universal jurisdiction law under article 23(4) of the OJLP.\(^{109}\) Earlier, the Spanish High Court had ruled that Guatemalan courts could not be considered inactive ‘at this time’ and

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\(^{106}\) Ratner (n 2) 888, 889 (Israel withdrew its ambassador and US warned that Belgium risked its status as a diplomatic capital and host state to NATO).

\(^{107}\) Article 29(3) obliged the Prosecutor to set aside those complaints, which were only pending in the investigation phrase while article 29(4) obliged the Federal Prosecutor to set aside the complaints pending in prosecution phrase unless at the time of entry into force of the law, an investigative measure had been taken and at least one civil party is a Belgian national or at least one of the alleged suspects has a principal residence in Belgium. See Belgium Amendment Law (n 105) 1269.

\(^{108}\) This was an appeal against the Spanish High Court’s decision that Spanish Courts did not have jurisdiction. Under Article 9(6) of the OJLP, the investigating magistrate must examine whether there is a lack of jurisdiction and reach a determination subsequent to a hearing with the Prosecutor. The latter’s Report rejected the validity of Spanish jurisdiction over the alleged offences. However, this finding was not adopted by the Central Court of Investigation. Instead, the Court concluded that the Guatemalan justice system was inactive and this triggered Spanish jurisdiction over genocide. In response, the State Prosecutor successfully appealed to the *Audiencia Nacional*. The civil party petition had accused certain former civilian and military leaders of crimes of genocide, torture, terrorism, murder and illegal detention in Guatemala, particularly between years 1980 and 1984. It also alleged the murder of Spanish, Guatemalan and foreign nationals in the Embassy of Spain in 1980. For a discussion of the case history, see H Ascensio ‘Are Spanish Courts Backing Down on Universality? The Supreme Tribunal’s Decision in Guatemalan Generals’ (2003) 1 Journal of International Criminal Justice 690, 691.

\(^{109}\) Article 23(4)(a) of the Organic Law of Judicial Power (OJLP) states that Spanish jurisdiction is also competent to take cognizance of crimes committed by a Spaniard or foreign national outside of the national territory when constituting, under Spanish penal law, as the following acts: (a) genocide... and (h) ‘any other crime which under international treaties or conventions should be prosecuted in Spain’. For copy of OJLP, see URL: [http://www.poderjudicial.es](http://www.poderjudicial.es).
thus, Spanish jurisdiction was inoperable;\textsuperscript{110} this conclusion was made based on the Court’s test of \textit{subsidiaridad}.\textsuperscript{111}

In the appeal to this ruling, the Supreme Court’s formalist approach emphasized the normative desire of avoiding jurisdictional conflict and inter-state tension. From their particular normativity, they argued that priority criteria were needed to resolve ‘supposed effective and real concurrence’ of active jurisdictions.\textsuperscript{112} Thus, similar to the \textit{Arrest Warrant} judgment, the Court sought to determine the limitations on universal jurisdiction and their content.\textsuperscript{113} Nevertheless, their enquiry was underpinned by the \textit{Lotus}’ dissents as they considered that any limit must recognize the territorial state as the natural primary jurisdiction to the exclusion of all others.\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{110} \textit{Guatemalan Generals case} (2000) Judgment No. 15/2000 (13 December 2000) para 3. It justified its “inactivity” test based on how Spanish proceedings could not infringe the rights of other state, ‘acting in competition to be the prosecuting State’. Nevertheless, extra-territorial jurisdiction was needed in the absence of effective exercise of jurisdiction by the territorial state. However, on the facts, the High Court observed that the Law of National Reconciliation excluded genocide from the amnesty; so there was no legal bar jurisdiction. The Guatemalan Commission on Historical Clarification’s recommended criminal investigations and its Report was only issued in February 1999. Thus, the \textit{Audiencia Nacional} concluded that these facts cannot \textit{at this time} result in a declaration of inactivity.
\item\textsuperscript{111} \textit{Guatemalan Generals case} (2003) 42 ILM 686, 691-2 and 694. The doctrine of \textit{subsidiaridad} determined whether Spanish jurisdiction should be engaged based on the territorial jurisdiction’s inactivity. This only applied to the crime of genocide. Controversially, the Supreme Court contended that due to the \textit{public importance}, it was \textit{reasonable} to adjudicate the matter even though the Prosecutor challenged its powers of review. ibid 695. Ascensio argues that by examining the necessary conditions for exercising universal jurisdiction over genocide, the judicial review ‘went beyond the scope of the legal questions raised by the plaintiffs [and thus], acted \textit{proprivo motu} on the ground that jurisdiction is a matter of public order’. See Ascensio (n 108) 692.
\item\textsuperscript{112} ibid 695.
\item\textsuperscript{113} ibid 697.
\item\textsuperscript{114} ibid 695. See also Preamble of the Inter-American Commission on Human Rights, Resolution on Trial for International Crimes No.1/2003 (‘the principle of territoriality must prevail in the case of a jurisdictional conflict, provided that there are adequate, effective remedies in that state to prosecute...’). In the operative part, principle 5 states that territoriality prevails over nationality where the former state ‘wishes to bring [accused] to justice’ and ensure fair trial guarantees.
\end{enumerate}
\end{footnotesize}
Hence, Spanish jurisdiction was only justified ‘as a default to tribunals initially competent’ under the Genocide Convention.\textsuperscript{115} Like \textit{Eichmann}, this interwove the piracy analogy and the subsidiary basis of jurisdiction.\textsuperscript{116} However, the Supreme Court’s normativity differed from that of the Israeli Courts in \textit{Eichmann}, \textsuperscript{117} as it paid more deference to the territorial state.

That said the Supreme Court replaced the inactivity test\textsuperscript{118} with the prohibition against intervention as the necessary priority criteria.\textsuperscript{119} Though the former criterion was also premised upon non-intervention, that test had allowed Spanish Courts to probe whether another state’s criminal justice system was effective\textsuperscript{120} when such a determination would pass judgement on the judicial capacity of a foreign sovereign state.\textsuperscript{121} Thus, the Court considered the inactivity test as an encroachment on Spanish executive power to conduct

\begin{footnotesize}
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\item \textsuperscript{115} ibid.
\item \textsuperscript{116} \textit{AG v Eichmann} (n 71) 302.
\item \textsuperscript{117} ibid. The Israeli Courts considered themselves competent to determine whether they must prioritize the territorial jurisdiction in the particular circumstances, as opposed to deferring to the territorial state. They assessed West Germany’s inaction as approval of Israeli jurisdiction that appeared to invoke Mikliszanski’s ideas. According to Mikliszanski, the custodial state has the primary right to determine whether to prosecute or extradite. See K Mikliszanski ‘Le système de l’universalité du droit de punir et le droit penal subsidiare’ (1936) Revue de science criminelle et de droit pénal comparé 331, 338.
\item \textsuperscript{118} \textit{Guatemalan Generals case} (n 111) 695.
\item \textsuperscript{119} ibid 698. It was submitted that ‘no state may unilaterally establish order through criminal law, against everyone and the entire world, without there being some point of connection which legitimizes the extra-territorial extension of its jurisdiction’. Intervention cannot be executed unilaterally by a state or one of its organs because it decides that intervention is necessary. The Court interpreted \textit{aut dedere aut judiciare} in treaty law as more supplemental jurisdiction or representative criminal law than universal jurisdiction ibid.
\item \textsuperscript{120} ibid 695. The Court rejected the complainant’s evidence because their interpretation could not be substituted for that of the judicial organ of the State itself. It claimed that the arguments of the complainants were ‘based on nothing but their own particular interpretation of the law in force…..cannot be substituted for one made by the courts in interpreting their own country’s legislation’.
\item \textsuperscript{121} ibid 696.
\end{itemize}
\end{footnotesize}
foreign relations, particularly as any judicial pronouncements could have a destabilizing effect. Invariably, the Supreme Court moved to demonstrate that its approach reflected state behaviour and this was heavily influenced by the German Court’s legitimizing link in *Tadić* and *Djajic*. This is because the acts in the *Guatemalan Generals* case were alleged to have been committed on the territory of another sovereign State; consequently, piracy could not be a precedent because the location of the crime was a distinguishing feature.

Nevertheless, the Court’s descending-ascending pattern is also inconsistent when set against its recognition of universal jurisdiction over genocide. We earlier observed how this argument draws on *Eichmann’s* piracy analogy, which, in turn, prefers the nature of the offence justification. Similarly, the notion of “legitimizing link” is politically open-ended. In *Eichmann*, the Trial

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122 ibid.

123 ibid. It noted that Guatemala, the subject of the assessment, is a sovereign State with which Spain ‘maintains normal diplomatic relations’. It is ‘not legally viable to place a question of competence before a foreign court given that no mechanism or supranational court exists for either the positive or negative resolution of the eventual conflict’. Instead, it preferred the power of the UN to determine the appropriate measures to suppress genocide under article VIII of the Convention. ibid 690.

124 ibid 701. The court claimed that there is evidence in national practice of a requirement for a legitimizing link between offence and the prosecuting State. Therefore, article 23(4) must be interpreted that presence of the suspect or nationality of the victim are the necessary legal nexuses to justify Spanish jurisdiction. ibid.

125 We noted in chapter 4 section 3 that the Federal court noted a number of factors that indicated Tadic’s connection to Germany, see *Prosecutor v Tadic*, Bundesgerichtshof, 13 February 1994, excerpts reprinted in Reydams (n 5) 149. *Prosecutor v Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997, excerpts reprinted in Reydams (n 5) 151.

126 *Guatemalan Generals case* (n 111) 697. Here, the Supreme Court adopted *Jorgic* (and in turn *Eichmann’s*) argument that the Genocide Convention does not exclude the right of a state to claim universal jurisdiction over genocide under customary international law. ibid.

128 ibid 695.
Court cited Hall’s conclusion that in the case of universal jurisdiction, the nature of the offence constituted the requisite close connection (or legitimizing link). Likewise, the concept of a legitimizing link draws from specific national decision and could be accused of apology. In attempt to avoid these challenges, the Court returned to its descending move to justify the concept on normative grounds. Here, the legitimizing link (along with reasonableness) accorded with the prohibition against intervention and thus, jurisdictional conflict would be averted by weighing the requisite interests in terms of reasonableness and good faith, albeit premised upon deference to the territorial jurisdiction.

In the UK, Re Mofaz confirmed the fear, in some quarters, that the normative outcome of the Arrest Warrant’s political open-endedness would result in personal immunity being applied to other cabinet portfolios. The English Magistrates Court argued predictably that the International Court of Justice’s statement was non-exhaustive and equated an Israeli Defence Minister in terms of function with a Minister for Foreign Affairs. The Defence ministry’s mandate involves foreign travel of a similar status to the Minister for Foreign Affairs and consequently, personal immunity should apply to avoid interference in the effective performance of the Minister’s mandate.

130 Guatemalan Generals case (n 111) 699. In the end, the majority dismissed the complaint based on genocide because there were victims of Spanish nationality. However, in the case of the complaint of torture, the allegations included the alleged murder of Spanish priests as well as the murder of several Spanish citizens during an attack on the Spanish Embassy instigated by government officials. It based jurisdiction on article 5 of the Convention against Torture.
131 Re Mofaz ILDC 97 (UK 2004) para 14 and 15. Note O’Keefe’s caution that as this is not a decision of a superior court of record, it has no formal precedential value in English courts. ibid 2. In the decision, the magistrate argued that the portfolio of
The moralist approach’s counter-hegemony

In response to the Arrest Warrant judgment and the fact that Re Sharon provided a model that proved influential, there was a need to reframe the moralists discourse if criminal accountability was to be re-established as universal. The content of universal jurisdiction as involving jurisdiction over crimes against international law was to include investigation *in absentia*[^132] and to be of a subsidiary character that prioritized the territorial jurisdiction[^133]. Likewise, the issue of immunity of state officials[^134] was either ignored or acknowledged to apply without directly addressing whether there must be distinct rules between the different immunities[^135]. Although the moralist approach proved influential in the Spanish Constitutional Court and the Committee against Torture, such a view remained in the counter-hegemonic position.

[^132]: Institute of International Law (n 98) Principle 3(b) (‘apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State...’). As a theoretical support for this avenue, see O’Keefe (n 96) 735 and C Kress ‘Universal Jurisdiction over International Crimes and the Institut de droit International’ (2006) 4 Journal of International Criminal Justice 561. Of note, Vandermeersch draws significance from the fact that the ICJ annulled the arrest warrant against Yerodia but did not annul any other procedural measures. See D Vandermeersch ‘Prosecuting International Crimes in Belgium’ (2005) 3 Journal of International Criminal Justice 400, 407.


[^134]: ibid.

[^135]: Institute of International Law (n 98).
In the Guatemalan Generals case, the Spanish Constitutional Court famously overturned the Supreme Court’s judgment and returned the Spanish universal jurisdiction law to the margins of Eichmann. Therefore, though presence of the suspect was required for trial, it was not a precondition for the exercise of jurisdiction and initiation of judicial processes. Instead, extradition can be used to implement universal jurisdiction over crimes that ‘affect the entire international community’. In this way, the Court approved the 2005 Resolution of the Institute of International Law that recommended investigation in absentia.

The Constitutional Court then turned to the issue of subsidiarity and approved the Supreme Court’s dissenting minority opinion. There, the minority considered that the only limitation on universal jurisdiction was res judicata (or final judgment in another jurisdiction) rather than non-intervention and a legitimizing link. This assumed a wide discretion that would be in keeping with van den Wyngaert and the JSO in the Arrest Warrant. Thus, like Eichmann, the minority similarly interwove the piracy analogy and subsidiary

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136 Guatemalan Generals Case (n 133) para 8–9. It is ‘exclusively based on the individual characteristics of the crimes, whose harmfulness (paradoxically in the case of genocide) extends from one of the victims and reaches the international community as a whole’ (translation of author). This is similar to Eichmann’s notion that the crimes against Jewish people were international in character. ibid. See also Art 161(b) of the Spanish Constitution which permits individual petitions (recursos de amparo) against violation of the rights contained in section 53(2) of the Constitution and there is no appeal (art 164).

137 ibid para 8.


139 It is also suggested that the Constitutional Court endorsed the idea that universal jurisdiction applied regardless of whether the state asserted universal jurisdiction over the offences at the time that they were committed because, arising out of its decision, Spanish courts would have jurisdiction over acts committed prior to 1985. Guatemalan Generals case (n 111) 704. The minority cite article 24(2)(c), which states ‘the offender has not been acquitted, pardoned or sentenced in another country...’. ibid.
concept of universal jurisdiction that, they argued, constituted the true nature of universal jurisdiction. However, the minority dissent changed the precondition of the subsidiary basis of jurisdiction; here, the precondition was the unwillingness to genuinely prosecute in keeping with the inactivity concept. Thus, a court must assess whether there is a ‘necessity of judicial intervention’ or the crime is effectively being prosecuted by the territorial jurisdiction.\textsuperscript{141}

However, the minority’s legal test did not resolve the Supreme Court’s criticism of making ‘pejorative’ judgments on the national reconciliation processes in other states. The minority’s test combined reasonableness and a higher threshold of seriousness to determine if the state proceeded in an effective manner, albeit ‘without implying any pejorative judgement on the political, social or economic conditions’ that led to ‘a de facto’ impunity.\textsuperscript{142} The Constitutional Court dispensed with the difficult wording of the minority’s dissent.\textsuperscript{143} Rather, the Court considered that the principle of non bis in idem was the only express limitation without any further elaboration\textsuperscript{144} and argued that this principle introduced some rule of priority that was essential to avoid duplicity of proceedings.\textsuperscript{145} The Guatemalan Generals case never advanced beyond the historic hearing

\textsuperscript{141} ibid 705.
\textsuperscript{142} ibid.
\textsuperscript{143} Guatemalan Generals Case (n 133) para 3. Using this assessment, the dissent held that, based on the documentary evidence, ‘it is manifestly clear that many years have passed since the occurrence of these acts and for some reason or another, the courts in Guatemala have not been able to effectively exercise jurisdiction with regard to genocide of the Mayan population’. ibid.
\textsuperscript{144} ibid. This refers to article 24(2)(c), prohibiting prosecution where an individual has been acquitted, pardoned or convicted by another State.
\textsuperscript{145} ibid para 4. However, although lower courts in Guatemala responded to extradition requests, the Guatemalan Constitutional Court ruled that the state was not obliged to execute the extradition request. This led to a strong rebuke by the Spanish investigating magistrate, see unofficial translation of Judge Pedraz regarding Guatemalan Constitutional Court decision of December 12, 2007 (16 January 2008), ULR: www.ccrjustice.org.
of witnesses because the situation in Guatemala changed considerably when Rios Montt lost his parliamentary immunity in 2012. As a result, he was joined as co-defendant in a trial regarding massacres, deportation, sexual violence and torture in the Quiche region. However, the trial was plagued by repeated suspensions, appeals and a constitutional review regarding the rights of fair trial. The final judgment in May 2013 was overturned by the Guatemalan Constitutional Court that ordered a partial re-trial that will involve a re-hearing of defence witness testimony and closing arguments.

Another development in the moralist’s discourse was the 
Habré complaint before the Committee against Torture (CAT). In its communication, Senegal was accused of violating articles 5(2) and 7 of the Convention against Torture because of Senegal’s failure to investigate and exercise jurisdiction. Though the crime of torture

146 Of note, the issue of whether Rios Montt and others were entitled to functional immunity was not addressed at any stage in the Guatemalan Generals case. This followed the earlier Pinochet case and as we noted in chapter 4, it implied that Spanish courts deemed functional immunity inapplicable in keeping with Eichmann’s portrayal.

147 For a time-line commentary of the trial proceedings, see The Trial of Efrain Rios Montt, URL: www.riosmontt-trial.org.


149 Here, the Chadian victims had submitted a communication against Senegal to the Committee against Torture in 2001. They argued that there were victims of a violation of the Convention against Torture by Senegal, because of the refusal by Senegalese courts to act on a complaint against Habré. Senegal argued that ‘subject to its jurisdiction’ meant a violation within State territory or by State nationals. The Committee ruled that ‘the principle of universal jurisdiction in article 5(2) and 7 implies that the jurisdiction of States parties must extend to potential complainants in circumstances similar to the complainants’. See Guengueng v Senegal: Communication No. 181/2001 (Senegal 19/05/2006) CAT/C/36/D/181/2001, para 6.4.

150 The Senegalese investigating magistrate indicted Habré as an accomplice to torture and crimes against humanity and placed him under house arrest. However, Habré’s defence counsel challenged the magistrate’s jurisdiction before the Senegalese Appeals Court (meanwhile the initial investigating magistrate was
had been criminalized in Senegal’s Penal Code, the legislature did not amend its Code of Criminal Procedure to assert the various bases of extraterritorial jurisdiction as required by article 5 of the Convention.\footnote{151} In its defence before CAT, Senegal argued that the treaty was silent on a timeframe for states to comply with their obligations.\footnote{152} This invoked the \emph{Lotus} majority’s presumption against limitations that underpins legal arguments such as the need to interpret legal rules restrictively.\footnote{153}

Predictably, moral naturalism and the “object and purpose” of the Torture Convention underpinned the Committee’s conclusions.

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\item removed from the case. The Appeals Court agreed with Habré that Senegalese courts did not have extraterritorial jurisdiction over acts of torture. The relevant provision, article 669 of the Code of Criminal Procedure, asserted extraterritorial jurisdiction over specific crimes such as counterfeiting currency. The Court rejected the civil parties claim that CAT (to which Senegal was a party) could be a legal basis for jurisdiction without domestic implementation of article 5(2). The civil parties invoked Senegalese constitutional law; hence, national law must be interpreted to accord with international law obligations. However, the Appeals Court distinguished CAT from the Nuremberg Charter because the former had obligation on state parties to establish jurisdiction. It implicitly drew on \emph{Lotus’} dissent, emphasizing the territoriality of the criminal law (‘the nature of the sanctioning criminal law tends to protect the interests of society’). The nature of the crime did not result in Senegalese jurisdiction; an incorporation statute was required. The Court of Cassation upheld the Appeals Court decision. The Court of Cassation rejected the argument that international legal obligations prevailed over contrary national law because CAT obliged a prior legislative enactment. See \textit{Ministre Public contre Habre} (2000) Dakar Court of Appeal Judgment No. 135 (4 July 2000), para 3 and \textit{Re Habré}, Appeal decision, Cassation No. 14, ILDC 164 (SN 2001), para 37 and 38. For case history, see SP Marks ‘The Hissène Habré Case: The Law and Politics of Universal Jurisdiction’ in S Macedo (ed) \textit{Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law} (Pennsylvania University of Pennsylvania Press 2003).
\item Article 5(2) obliges each state party to ‘establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the states in paragraph 1 (of article 5)’. On extradition, article 7(1) obliges that the state ‘if does not extradite him, submit the case to its competent authorities for the purpose of prosecution. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85.
\item \textit{Guengoung v Senegal} (n 149) para 7.13.
\item M Koskenniemi \textit{From Apology to Utopia: The Structure of the International Legal Argument} (Cambridge University Press Cambridge 2005) 257.
\end{itemize}
Their approach implicitly emphasized the punishment scheme for torture that was the heart of the Convention’s provisions.\textsuperscript{154} Invariably, the Committee turned to reasonableness in order to interpret the Convention’s silence on a requisite time frame for fulfilling the obligations to implement the Convention. It is suggested that the Committee’s move to reasonableness was underpinned (and prompted) by the complainants’ references to non-consensualism in the law of treaties.\textsuperscript{155} Thus, on the facts, Senegal exceeded this ‘reasonable time frame’.\textsuperscript{156} In its interpretation of article 7(1),\textsuperscript{157} the Committee did not view the obligation to submit the case to prosecuting authorities as dependent upon a refusal of an offer to extradite.\textsuperscript{158} The only situation where extradition could act as a precondition (to the custodial state’s determination) was when another state party sought extradition of the accused. This interpretation is evidently premised upon the Committee’s moral naturalism because if the obligation under article 7(1) is not dependent on an extradition request, the state party is always under an obligation to investigate (and to prosecute if it so determines). Otherwise, an impunity (or jurisdictional) gap would arise because

\footnotesize{\textsuperscript{154}See also the response of the UN Special Rapporteurs on Torture and Independence of the Judiciary to the Appeals Court judgment in 2000. This reminded Senegal of its obligations under CAT and of the recent Commission on Human Rights Resolution 2000/43 that stressed the duty of all States to make an inquiry in regards to allegations of torture and to punish, cited in Guengueng v Senegal (n 149).

\textsuperscript{155}Guengueng v Senegal (n 149) para 8.6 and 8.8. See also article 26 (performance of treaty obligations in good faith) and article 27 (internal law cannot justify failure to perform a treaty), Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

\textsuperscript{156}ibid para 9.5.

\textsuperscript{157}Article 7(1) stated that ‘the state party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution’. See Torture Convention (n 151).

\textsuperscript{158}Guengueng v Senegal (n 149) para 8.12.}
the custodial state could simply not proceed where no extradition request is forthcoming.

It follows, then, that the custodial state party has the discretion to choose between the alternatives of either extraditing or submitting the case to its own competent authorities. This prefers the approach adopted in *Eichmann* rather than the Spanish Supreme Court’s deference to the territorial jurisdiction in the *Guatemalan Generals* case. Naturally, this appears too normative to a formalist approach, which would analyse the Convention through the lens of extradition law. This presupposes that the punishment scheme is designed to ensure a pool of jurisdiction, supplemented by extended co-operation in extradition. As Harrington argues, the phrase ‘if it does not extradite’ must be interpreted as obliging extradition. Thus, the obligation to submit the case to prosecuting authorities only arises if the state party does not extradite. This appeals to “identity” rather than the Committee’s “unity” because the Convention looks more like a reciprocal co-operation agreement.

### 4 Securing of the formalist approach’s hegemony

Despite these successes, it is apparent that the moralist approach remained in the counter-hegemonic position and that the

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159 ibid para 9.7. The Committee found Senegal in breach of its obligations in two ways. It violated its obligation to submit the case to prosecuting authorities since the Court of Cassation judgment anulled the possibility of an inquiry into the complaint. It also violated its obligation to determine whether to extradite or prosecute given the Belgian extradition request in 2005. ibid 9.9 and 9.11.


161 J Harrington ‘The obligation to “Extradite or Prosecute” is not an obligation to “Prosecute or Extradite”’ (EJIL:Talk! 23 February 2009), URL: [http://www.ejiltalk.org/the-obligation-to-extradite-or-prosecute-is-not-an-obligation-to-prosecute-or-extradite/](http://www.ejiltalk.org/the-obligation-to-extradite-or-prosecute-is-not-an-obligation-to-prosecute-or-extradite/)
formalist approach was increasingly in hegemonic control. In the Spanish Tibet complaint, the High Court tried to steer a middle course between the moral naturalism that pervaded the Constitutional Court’s judgment in Guatemalan Generals case and the caution against “avoiding abuse” that underpinned the Supreme Court’s judgment in the same case. As a result, the High Court’s opinion seemed more concrete, less normative than the Constitutional Court’s judgment. While the only limitation was res judicata, the exercise of Spanish jurisdiction must be determined by balancing certain interests. Thus, the Court argued that even if other jurisdictions are unwilling or unable and the International Criminal Court does not have jurisdiction, the Spanish Courts should ensure that the jurisdiction is reasonable and there is not ‘a case of excessive use or abuse of this jurisdiction’ because there is absolutely no legal nexus, 

...being concerned with crimes or places entirely foreign and/or remote and the claimant of the crime or plaintiff [does] not [demonstrate] a direct interest in or relationship with the latter (AOS).

In 2003, Germany amended its Code of Criminal Procedure (Strafprozessordnung) to impose a duty on the Federal Prosecutor to

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162 In the interests of brevity, the Canadian case law will not be addressed. It is referenced here as further examples of Butare 4-type cases, where there is a Security Council approved post-conflict justice model and the cooperation of the territorial state. See Mugesera v Canada (Minister of Citizenship and Immigration) (2005) 2 SCR 100 and C Fedio ‘Jacques Mungwarere not guilty of genocide in Rwanda, Ontario judge rules’ Ottawa Citizen (Ottawa July 5 2013), URL: http://www.ottawacitizen.com/news/Jacques+Mungwarere+guilty+genocide+Rwanda+Ontar+io+judge+rules/8621075/story.html

163 Fundación Casa del Tibet and ors v Zemin and ors, Appeal Judgment on Admissibility ILDC 1002 (ES 2006). This was an appeal from the Central Court of Investigation decision to reject jurisdiction based on Supreme Court interpretation of universal jurisdiction law.

164 ibid para 10.

165 ibid.
investigate and prosecute crimes under the Rome Statute of the International Criminal Court.\(^{166}\) Under article 1 of the CCAIL, the duty to investigate arose ‘even when the offence was committed abroad and bears no relation to Germany’.\(^{167}\) This abolished the ‘legitimating link’ that had been applied in the \textit{Tadic}\(^{168}\) and \textit{Djajic}\(^{169}\) cases. Here, the Prosecutor can determine whether to exercise universal jurisdiction when ‘the accused is not resident in Germany and not expected to so reside’ (irrespective of ‘sufficient factual indications’ of the commission of an offence).\(^{170}\) This discretion operates alongside other possibilities for dispensing with

\(^{166}\) Under article 3 of the Code of Crimes Against International Law, the crimes defined in the Code (war crimes, crimes against humanity and genocide) are subject to the same duty to investigate and prosecute as under s152(2) of the German Code of Criminal Procedure where the Prosecuting authorities ‘must take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications’. For English translation of Code, see also C Wehle and F Jessberger ‘International Criminal Justice is coming home: The New German Code of Crimes Against International Law’ (2002) 13 Criminal Law Forum 191, 213.

\(^{167}\) Section 1 of the Act to Introduce the Code of Crimes Against International Law of 26 June 2002 (Germany) (2003) 42 ILM 998. Satzger stresses that if the definition of crimes under the German code went beyond the definitions recognized under customary international law, then the “genuine link” (base on the nature of the offence) would no longer be met. See H Satzger ‘German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes Against International Law’ (2002) 2 International Criminal Law Review 261, 280.

\(^{168}\) \textit{Prosecutor v Tadic} (n 125) 149.

\(^{169}\) \textit{Prosecutor v Djajic} (n 126) 151. See Satzger (n 167) 280 (‘the “genuine link”…follows from the specific wrong of those crimes as such’).

\(^{170}\) Section 153(f)(1) of the German Code of Criminal Procedure. In the case of German nationals (as opposed to non-nationals), the discretion to dispense will only arise where the offence is being prosecuted by an international court, by the territorial jurisdiction or by passive personality jurisdiction (nationality of the victim). Under s153(f)(2), the Prosecutor may dispense with prosecuting an offence in the case of extraterritorial offence if (i) no German is suspected of having committed the crime, (ii) the offence was not committed against a German, (iii) no suspect is, or is expected to be, resident in Germany and (iv) the offence is being prosecuted by an international court of justice or by the territorial or passive personality jurisdictions. In other words, the discretion arises where the case involves a non-national against a non-national abroad where residency or anticipated residency does not arise and the offence is being prosecuted by other competent jurisdictions. See Code of Crimes against International Law (2003) 42 ILM 998, 1007-8.
investigations into extraterritorial offences, including ne bis in idem.\textsuperscript{171}

In the \textit{Abu Ghraib} case, the Federal Prosecutor decided to dispense with the complaint against former Defence Secretary Rumsfeld and other senior US officials.\textsuperscript{172} The Federal Prosecutor argued that the ‘principle of universal jurisdiction does not automatically legitimize unlimited criminal prosecution’.\textsuperscript{173} Rather the prevention of impunity ‘must occur in the framework of non-interference in the affairs of foreign countries’.\textsuperscript{174} Imitating the Spanish Supreme Court in the \textit{Guatemalan Generals} case, the Federal Prosecutor argued that ‘a third State cannot examine the legal practice of foreign states according to its own standards or correct or replace it in specific cases’.\textsuperscript{175} Instead, the competence of ‘uninvolved’ third States is ‘a subsidiary competence, which should prevent impunity, yet not inappropriately push aside the primarily

\textsuperscript{171} Section 153(c)(2) of the German Code of Criminal Procedure. Note Ryngaert’s statistic that my mid-2007, there had been 70 complaints to the Federal Prosecutor but only two complaints were admitted and investigations opened; these complaints regarded allegations of torture in US military prison in Mannheim and allegations of human rights abuses in Eastern Democratic Republic of Congo. See C Ryngaert ‘Universal Jurisdiction over Violations of International Humanitarian Law in Germany’ (2008) 47 Military law and Law of War Review 377, 392.


\textsuperscript{173} Decision of the General Federal Prosecutor at the Federal Court of Justice: Center for Constitutional Rights et al v. Donald Rumsfeld et al (February 1th 2005) (2006) 45 International Legal Materials 119, 120. This decision was issued the day before Rumsfeld was due to attend a Security Conference in Munich and as a result of the Prosecutor’s decision, he attended. See Gallagher (n 172) 1105.

\textsuperscript{174} ibid.

\textsuperscript{175} ibid. It argued that like the Rome Statute, universal jurisdiction in this instance is subsidiary to that of the territorial or national jurisdictions. A third State only takes action when the primary States are unwilling or unable to prosecute.
competent jurisdictions’. Hence, the territorial jurisdiction must have the freedom to decide ‘in what order and with what means’ it conducts an investigation. It is only when the investigation is ‘being carried out only for the sake of appearances or without a serious intent to prosecute’ that the German courts exercising universal jurisdiction are engaged. This hierarchy is justified given the ‘special interest’ of the territorial and passive personality jurisdictions.

That said it is evident that there is an extraordinary deference to the territorial and national jurisdictions, which raises the issue of how to determine when a state is genuinely willing to prosecute. As illustrative of this challenge, the Federal Prosecutor’s analysis of the facts defers entirely to the US authorities,

The means and timeframe envisioned for the investigation of further possible suspects in connection with the violations…must be left to the judicial authorities of US.

In the end, the Stuttgart Court of Appeals rejected the petition for judicial review, which would have compelled the Federal Prosecutor to initiate an investigation. This exercise of discretion was also

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176 ibid. Here, the Federal Prosecutor cited German academic writers and the memo for the Draft Law of CCAIL. ibid.
177 ibid.
178 ibid.
179 ibid.
180 ibid 121. Regarding the accused, who were resident in US Army bases in Germany, the Federal Prosecutor determined that they were subject to US jurisdiction and thus, in legal terms, were assimilated to residency in the US. As non-residents, the same conclusions as above applied. ibid. As there is ‘unlimited access to a suspect … there is thus no need for extradition. The same holds in the case of an expected, temporally limited sojourn in the territory if the investigation of the overall series of events is being carried out in the state of the primary jurisdiction’. Note s153(f)(2)(2) allows the Federal Prosecutor to dispense with proceedings where extradition is permissible and intended
181 AH Mahawis Derweesch et al v Rumsfeld et al, Oberlandesgericht, 13 September 2005, para 2(b) (use of prosecutor’s discretion is justified to avoid
used to dismiss a complaint against Rumsfeld regarding Guantanamo\textsuperscript{182} and against the Uzbek Interior Minister.\textsuperscript{183}

These cases demonstrate that a more cautious approach to Universal Jurisdiction undoubtedly prevails and are joined by further developments in other jurisdictions. In France, prosecuting authorities adopted Fox and Gaeta’s interpretation of the \textit{Arrest Warrant’s obiter} and dismissed a complaint against Rumsfeld because functional immunity must be applied irrespective of the gravity of the offence. Here, the French authorities endorsed the concept of immunity based on ‘acts as public acts’ and they partially rejected the \textit{Pinochet I} argument that the acts are not official functions.\textsuperscript{184} As

\textsuperscript{182} Re Rumsfeld et al, Prosecutor General, Federal Supreme Court (5 April 2007), Part B(2)(a) and (b). The Prosecutor interpreted the purpose and meaning of presence and anticipated presence in terms of close connections with Germany, re-introducing the legitimizing link. In the end, the Prosecutor referred to the balancing test between individual criminal responsibility (militates in favour of prosecution) and the need to prevent forum shopping, forcing investigating authorities into ‘complicated but ultimately unsuccessful investigations’. He clearly considered the balance struck as reasonable because of the difficulties in gaining legal assistance from the territorial state, the inability to execute enforcement measures on the territory of another state and the purpose of s153(f) in preventing ‘overburdening through inexpedient investigations’. ibid. This sidestepped an assessment based on the willingness of US authorities to investigate, see Ryngaert (n 171) 395.


\textsuperscript{184} Gallagher (n 172) 1110 \textit{et passim}. They used the ‘not public acts’ argument to distinguish \textit{Pinochet III}. They claimed that in \textit{Pinochet III}, the acts could not be official functions. See also Second Report on Immunity of State officials from foreign criminal jurisdiction’, UN Doc. A/CN.4/631 (10 June 2010) para 74-78 (rejecting arguments on an exception to immunity for crimes against international law). Contrast the decision of Spanish courts regarding the complaints against incumbent and former Rwandan senior military and civilian officials. Here, the court adopted the \textit{Re Sharon} model; thus, it deemed President Kagame as personal immune during office but that functional immunity for other state officials in the indictment was inapplicable. See Commentator ‘The Spanish Indictment of High-ranking Rwandan Officials’ (2008) 6 Journal of International Criminal Justice 1003 and \textit{Sala et al v, Kabarebe and ors} ILDC 1198 (ES 2008), paras 4 and 5. See also
well, both Spain and the UK, the two states at the centre of the
Pinochet III proceedings, amended their laws. In 2009, the Spanish
parliament passed an amendment to the Organic Law on Judicial
Power, which restricted extraterritorial jurisdiction over crimes
against international law to passive personality jurisdiction or
universal jurisdiction, if the alleged perpetrators are present in
Spain. Thus, in any prospective complaints, the Constitutional
Court’s approval of investigation in absentia was overruled.

According to Zahar and Sluiter, there appears to be a trend in state’s
incorporation acts of the Rome Statute of the International Criminal
Court in regards to instances where jurisdiction without any other
legal nexus has been asserted; these incorporation acts generally only
establish jurisdiction over a situation where the alleged offender is
present on the state’s territory.

Decision of Swiss Federal Criminal Court (25 July 2012) para 5.3.5-6. The court did not
apply personal immunity to serving Defence Minister unlike the UK’s Re Mofáz.

Amended article 23(4) states that Spanish courts have cognizance over the
offence where ‘the alleged perpetrators are found in Spanish or there are victims of
Spanish nationality or there is an important connecting link with Spain’ and that
another jurisdiction or an international criminal court has not initiated
investigative proceedings and effective prosecution of those offences. See Boletín
Oficial Del Estado, No. 266 (4 November 2009).

As the legislation did not apply retroactively, the Guatemalan Generals case and the
Tibet case continued irrespective of the lack of presence of the accused in Spain.
Note Cavallo proceedings, where Spanish courts annulled proceedings in light of
proceedings against Cavallo had been initiated in Argentina and an extradition
request from Argentina. In 2007, the Supreme Court argued that Spanish courts
could not ‘give the right’ to the territorial jurisdiction to proceed. It required that
procedures be duly followed and Mexico’s consent to Cavallo’s re-extradition to a
third state be sought; this was done and Cavallo was extradited to Argentina in
2008. See Cavallo case, Supreme Court Criminal Division (18 July 2007). Note also
Weil’s discussion of the Gaza case, S Weill ‘The Targeted Killing of Salah
Shehadeh’ (2009) 7 International Criminal Justice 617.

See assessment in A Zahar and G Sluiter, International Criminal Law (Oxford:
Oxford University Press, 2008) 501. For example, see article 2(a) of the Netherlands
International Crimes Act 2003 (‘if the suspect is present in the Netherlands’), article
23642 (if the person is present in South Africa after the commission of the act) and
article 4 of the Argentinian Ley de implementación del Estatuto de Roma de la Corte
In parallel, the UK amended its laws on the capacity of a private citizen to commence a prosecution by applying to a magistrates’ court for an arrest warrant.\textsuperscript{188} This amendment was introduced in light of arrest warrants against General Almog\textsuperscript{189} and Tzipi Livni,\textsuperscript{190} both of whom ultimately did not disembark or enter the UK. Under section 153(1) of the \textit{Police Reform and Social Responsibility} Act 2011, there is a restriction on the power of a magistrate to issue arrest warrants, arising from private prosecutions, for certain qualifying offences unless the consent of the Director of Public Prosecutions is obtained.\textsuperscript{191}

Finally, the arrest warrants against Rwandan officials in Spain\textsuperscript{192} led to calls for more reasonable jurisdiction and “avoiding abuse”. This in turn led to various inquiries on the parameters of universal jurisdiction. The African Union Report adopted a formalist

\textit{Penal Internacional} 2007 (when present on territory and does not extradite to other jurisdiction or ICC).

\textsuperscript{188} Under article 6(1) of the Prosecution of Offences Act 1985, ‘any person’ may institute ‘any criminal proceedings or conducting any criminal proceedings to which the Director’s duty to take over the conduct of proceedings does not apply’. See \textit{Prosecution of Offences Act} 1985, c.23.

\textsuperscript{189} \textit{Israeli evades arrest at Heathrow over army war crime allegations}, The Guardian, 12 September 2005.


\textsuperscript{191} Section 153(1) amended section 1(4) of the Magistrates’ Courts Act 1980, applying to qualifying offences that are alleged to have been committed extraterritorially, including piracy, grave breaches, numerous terrorism treaties, torture, hostage-taking and unlawful seizure of aircraft. See also \textit{Former Israeli Minister Tzipi Livni to visit UK after change in arrest law}, The Guardian, 4 October 2011, \textit{Consent refused for Tzipi Livni UK arrest warrant}, The Guardian, 6 October 2011 and Hansard ‘Written Answers to Questions: Benny Gantz’ col 427W (12 July 2013). The Foreign Office deemed both visits as special missions in order to invoke personal immunity; both UK and Israel are parties to the Convention on Special Missions. Note Akande and Shah’s critic on what constitutes a ‘special mission’, Akande and Shah (n 7) 815.

\textsuperscript{192} \textit{Sala et al v. Kabarebe and ors} (n 184) paras 4 and 5.
approach while the AU-EU Report attempted to reconcile the margins. More recently, both the UN Secretary General’s Reports on Universal Jurisdiction and the General Assembly debates illustrate that states adopt either the project of unity or identity that


194 The African states emphasized how the European indictments give the perception of abuse on political or other grounds; they are being singularly targeted and the cases are ‘politically selective’. European states emphasized the ending impunity, disagreed that cases were politically selective and argued that trial and conviction has been the exception. Recommendations include the avoidance of ‘impairing friendly international relations’ (R6), need for presence ‘within their custody or territory’ unless they decide to extradite; and priority to the territorial/national jurisdictions based on the legal tests of willingness and ability (R4) and accord with all immunities (R8). See Report of AU-EU Technical Ad-hoc Expert Group on the Principle of Universal Jurisdiction (15th April 2009), para 34, 40 and Part V (Recommendations). See also J Geneuss ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Report on the Principle of Universal Jurisdiction’ (2009) 7 Journal of International Criminal Justice 945. See also Report of the International Commission of Inquiry on Darfur, URL: [http://www.un.org/news/dh/sudan/com_inq_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) (25 January 2005) 610-614 (a complementary means of ensuring accountability, justified on nature of the crimes, applicable to the “core” crimes and subject to conditions of presence on prosecuting state’s territory and a prior offer to the territorial jurisdiction to proceed unless refuse extradition or are unwilling or unable). See also M Vajda ‘The 2009 AIDP’s Resolution on Universal Jurisdiction: An Epitaph or a Revival Call?!’(2010) 10 International Criminal Law Review 325.

195 For example, Reports of the UN Secretary General Ban Ki-Moon on ‘The scope and application of the principle of Universal Jurisdiction’: UN Doc A/65/181(29 July 2010) and UN Doc. A/67/116 (28 June 2012).
we have observed in legal decision-making and scholarship.\textsuperscript{196} Within these debates, the dominance of the formalist approach and its “avoiding abuse” theme is apparent and the only universal is that universal jurisdiction applies to war crimes, crimes against humanity and genocide.

5 Another Pinochet III? The Obligation to Prosecute or Extradite case

In September 2005, a Belgian investigating magistrate issued an arrest warrant \textit{in absentia} against Hissene Habré.\textsuperscript{197} However, the Senegalese Appeals Court had ruled that the extradition request could not be acceded to because functional immunity applied.\textsuperscript{198} The Appeal Court adopted the Fox-Gaeta interpretation of the \textit{Arrest Warrant’s obiter} that was also subsequently adopted by the French courts in \textit{Rumsfeld}. Given repeated requests for extradition, Belgium applied to the International Court of Justice arguing that Senegal failed to fulfil its treaty obligations under the Torture Convention.\textsuperscript{199}


\textsuperscript{197} \textit{Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)} (2012) ICJ Rep. 144, para 21.

\textsuperscript{198} ibid para 22.

\textsuperscript{199} This was against a backdrop of three important developments. First Senegal referred the issue of Habre to the African Union, which resolved to establish a Committee of Eminent African Jurists on the Case of Hissene Habre. The Committee recommended that either Senegal or Chad should try Habre or alternatively an ad hoc tribunal should be established or any other African state party to the Torture Convention. See African Union ‘Report of the Committee of Eminent African Jurists on the Case of Hissene Habre’, paras 27-33, URL: \url{http://www.africa-union.org} and African Union ‘Decision on the Hissene Habre Case and the African Union’ (1 July 2006) Doc. Assembly/AU/3(VII). In response, Senegal amended its law in 2007 to establish universal jurisdiction over war crimes.
Similar to the *Arrest Warrant*, the Court moved first in a descending-ascending pattern on the question of Belgian capacity to invoke responsibility and on the content of article 7(1) of the Convention. It then turned to an ascending-descending pattern to address the issue of temporal scope of a state party’s obligations and its silence on the question of functional immunity. In terms of overall approach, *Pinochet III* resonated in Court’s judgment in that the judgment primarily adopted a moralist approach yet to avoid appearing too normative, leaned towards a formalist approach on certain issues. Similarly the Court focused on treaty law as opposed to addressing universal jurisdiction as either a right or duty under customary international law.\(^{200}\)

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\(^{200}\) However in its final submissions, Belgium argued that Senegal violated its obligation to prosecute or extradite under customary international law, which it claimed was demonstrated in general practice and *opinio juris*. The Court excluded this claim as it was not part of the dispute between the parties at the time of filing the application. See *Obligation to Prosecute or Extradite* (n 197) para 54. Contrast *Obligation to Prosecute or Extradite* (n 197) (Judge Abraham) para 14. His ascending move dismissed the evidence of such an obligation rather it ‘is very far from being reached’, based on a numerical count of states that have established universal jurisdiction and diversity on the issue of presence of the suspect. In his view, these states represent only a minority that is insufficient to establish a customary rule. For certain offences, he argued that it is unclear if these states acted upon treaty obligations or on a sense of obligation under customary international law. Outside of treaty regimes, it is unclear whether states that adopt legislation unilaterally are doing so out of sense of obligation or in belief that they are permitted. ibid. See also Fourth Report (n 196) paras 74-77 and 94 and International Law Commission ‘Report on the work of its 63rd Session’, (2011), UN Doc. A/66/10, Chapt V, paras 323-326.
It follows, then, that the Court side-stepped the contentious debates that were outlined in chapter 1 regarding multi-lateral treaty provisions. Here, it remains disputed whether the treaty provisions are customary international law and further whether those provisions cumulatively give rise to an obligation *aut dedere aut judicare* under customary international law. It is also noteworthy that the Court did not address the issue of functional immunity (albeit this was not requested by the parties). Instead, the Court merely acknowledged the letter of the Chadian Government to the Belgian magistrate regarding Habre’s immunity. It did not explore if this amounted to a waiver of immunity under international law by Chadian authorities or whether functional immunity was extinguished by virtue of Habre’s personal liability under international law, that is, to explore the “true” meaning of its *Arrest Warrant obiter*. This silence demonstrates the Court’s deference to state policy; to await more state behaviour that ultimately would negate law’s normativity.

5.1 *Locus Standi* and the Content of the Obligation under article 7(1)

As would be expected, the Court unquestionably accepted the *jus cogens* status of the prohibition against torture under customary

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201 As discussed in chapter 1, Bassiouni and Wise’s *Principle of Aut dedere Aut Judicare* is a good point of departure for the theoretical division. Bassiouni’s thesis presumes a *civitas maxima* that considered the cumulative weight of the treaties as a basis for a customary duty. However, Wise notes the anarchical character of social relations; he emphasizes how multi-lateral treaties can differ in the format of their *aut dedere aut judicare* provisions. See MC Bassiouni and EM Wise, *Aut dedere Aut Judicare: The Duty to Extradite or Prosecute In International Law*, (Martinus Nijhoff Dordrecht 1995).

202 Gaeta described the Chadian letter as ‘puzzling’ as the waiver relied on Chadian internal legislation that removed Habre’s immunity before Chadian courts, which has no bearing on issues of functional immunity under international law. See Gaeta (n 38) 187.
international law.\textsuperscript{203} Here, the court invokes the same ‘unthinkability’ that we noted in regards to genocide; the acceptance of the criminalization \textit{as it is} and without the need for technical argument.\textsuperscript{204} Thus, though the Court analysed state behaviour, there was an evident preference for the ethos of the international human rights law regime and in turn, accountability for human rights abuses. Thus, \textit{jus cogens} was demonstrated as the domestic law of almost all states prohibited acts of torture and there was acknowledged international condemnation.\textsuperscript{205} The Court’s descending move was crucial in justifying Belgium’s capacity to invoke Senegal’s responsibility. Here, Senegal interpreted article 7 through the formalist approach’s lens of extradition law; \textsuperscript{206} thus, from a textualist approach, article 7 can only involve extradition to another state party whose jurisdiction is provided for in article 5(1).\textsuperscript{207} In opposition, the Court emphasized its normativity and stressed the significance of the references in the Convention’s preamble to the shared values of the international community and the common interest in the repression of the crime of torture. Thus, the Court argued that any State party could invoke the responsibility

\textsuperscript{203} \textit{Obligation to Prosecute or Extradite} (n 197) para 99.


\textsuperscript{205} As evidence of this international condemnation, the Court cites ICTY jurisprudence and the Human Rights Committee’s General Comment 24 on article 7 of the Covenant on Civil and Political Rights.

\textsuperscript{206} Article 5(2) states ‘…it does not extradite him … to any of the States mentioned in Paragraph 1 of this article’. The States in article 5(1) are the territorial jurisdiction, nationality jurisdiction and passive personality jurisdiction. See \textit{Torture Convention} (n 151)

\textsuperscript{207} Senegal argued that Belgian jurisdiction could not be based on passive personality jurisdiction. The complaint in Belgium involved a Belgian national of Chadian origin, who was not a Belgian national at the time that the offence was committed. \textit{Obligation to Prosecute or Extradite} (n 197) (Dissent of Judge Skotnikov) para 4. Under the Belgian August 2003 Law, the complaint met the conditions under the transitory provisions, see (2003) 42 ILM 1258, 1269.
of another state party based on an allegation that the latter breached its *erga omnes* obligations.\textsuperscript{208}

Hence, state parties do not have interests of their own rather the punishment of the crime is in the community’s common interest.\textsuperscript{209} In this way, Belgium could invoke responsibility without necessarily having a special interest.\textsuperscript{210} This mirrored the argument justifying universal jurisdiction; the nature of the crime is the requisite close connection as it is a legal interest of the entire international community. As Donoghue submitted, it was not a ‘far-fetched’ hypothetical that the Convention’s obligations would be ‘entirely hallow’ unless responsibility could be invoked *erga omnes*.\textsuperscript{211}

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\textsuperscript{208} *Obligation to Prosecute or Extradite* (n 197) para 69 (to confirm view that common interest (*erga omnes* obligations)...equates to procedural right of one State party to invoke the responsibility of another...’). ibid para 16. See also Shah (n 199) 358 (noting how this is a ‘remarkable step forward...that will please many human rights lawyers’).

\textsuperscript{209} It is also similar to the implication from *Pinochet III*, where extradition to Spain was valid for complicity in torture of Chilean as well as Spanish nationals. The Law Lords did not address this point but their overall determination (that extradition on certain offences since 1988 would be valid) implied the UK’s acceptance that extradition could be to a State other than those in article 5(1). See *Pinochet III* (n 32).

\textsuperscript{210} In her opinion, Judge Donoghue argued that if there is a duty on all States to prosecute or extradite, then there was a corresponding right of same or all other States. This was justified on the ‘nature of treaty relations’ where the consequence for all States to adhere to commitments is that those commitments are owed to all. This conceives treaty relations from the perspective of the order as a ‘functional whole’ as opposed to competing interests where all obligations operate on reciprocity. However, it was noted by Judges Skotnikov and Owada that Belgium was inconsistent in its pleadings as it referred to itself as injured State and as a State other than an injured State at different points. See *Obligation to Prosecute or Extradite* (n 197) (Judge Donoghue) para 9, (Judge Skotnikov) para 6 and (Judge Owada) para 15 respectively.

\textsuperscript{211} Donoghue outlined the scenario where the State of custody of the accused would owe no duty to any other State in the instance when the act of torture is committed in the State of custody’s own territory, by one of its nationals against one of its nationals. If the State of custody is unwilling to investigate, it would mean impunity and if the alleged perpetrator fled to another State party, the only injured State would be the territorial jurisdiction (i.e. crime committed in the State, by national against national). If the latter State didn’t invoke responsibility of the State to which the perpetrator fled, there would again be impunity. Therefore,
In other words, if only states with a “special” interest could invoke responsibility, then this suggests an arbitrary encroachment on securing the normative object of the Convention.

The descending move was maintained in the Court’s interpretation of the content of article 7(1), which the Court interpreted as obliging the submission of the case unless the state chooses to extradite. It first considered that the obligation to prosecute is not dependent upon a prior request for extradition of the suspect. Rather if the state party receives a request for extradition, it can relieve itself of its obligation to prosecute by acceding to that request. It then interpreted the state party’s discretion to choose as somewhat qualified because it did not consider that the two alternatives are given same weight. Instead, extradition is an option open to custodial state whereas the submission of the case for prosecution is an international obligation, binding regardless of an extradition request. This template of obligation to prosecute and an alternative option to extradite is more in keeping with Mikliszanksi’s universal right to punish and distinct from the subsidiary basis of jurisdiction of 19th century European States as embodied in the 1883 Resolution of Institute of International law and the Harvard Draft

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212 It stressed that the purpose of these obligations (inquiry and submit to prosecuting authorities) are to achieve the object of the Convention in avoiding impunity. *Obligation to Prosecute or Extradite* (n 197) (Judge Donoghue) para 74.
213 ibid para 94.
214 ibid.
215 ibid para 95.
216 ibid.
217 Mikliszanski (n 117) 338. This was the primary right of the custodial state and not subsidiary to the territorial jurisdiction, dependent on a prior refusal of an offer to extradite. ibid.
Convention on Jurisdiction with respect to crime. Finally, the Court found that Senegal had breached its article 7(1) obligation because it delayed submitting the case against Habre pending the outcome of the AU referral and the ECOWAS judgment. However, the Court contended that these development could not justify the delay in compliance, which, Shah argues, implies that 'primacy ought to be afforded to CAT obligations'.

Skotnikov and Xue adopted a formalist approach and criticized the utopian moral naturalism underpinning the ruling on locus standi. Skotnikov moved in an ascending pattern and drew an analogy to other human rights treaties. He argued that there is no precedent for the capacity of a state party to invoke responsibility erga omnes solely based on a treaty party. In fact, the Convention against Torture permitted state parties to deny jurisdiction to the International Court of Justice and Committee against Torture. In this way, the erga omnes element of the Convention was optional. If the state did have a right erga omnes, the Convention would not permit any discretion or exceptions to inter-state or International Court of Justice jurisdiction. Thus, there should be an express provision; the right should not be implied into the Convention through its object and purpose; ‘the Convention does not go as far as the Court

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218 Institute of International Law (1883-5) 7 Annuaire de l’Institut de droit international (Munich Session 1883) and Harvard Research on International law, Draft Convention on jurisdiction with respect to crime, (1935) 29 American Journal of International law Supplement 439, 574.
219 Obligation to Prosecute or Extradite (n 197) 109.
220 Shah (n 199) 363.
221 Obligation to Prosecute or Extradite (n 197) (Dissent of Judge Skotnikov), para 20. He cited the inter-State petition under the European Convention on Human Rights and he noted the failure of inter-State petitioning under human rights treaties in general.
222 ibid para 15. See also (Dissent of Judge Xue), para 19-20.
223 ibid para 18.
suggestions’. Following on a similar theme, Xue argued that the Court’s interpretation has no precedent; the Barcelona Traction case did not indicate the parameters of an *erga omnes* obligation. He drew a distinction between the interest of every state in compliance and the right to invoke responsibility for breach in international dispute mechanisms. Instead, if a state sought to invoke responsibility, it had to demonstrate an injury; ‘procedural rules don’t diminish *jus cogens* and *jus cogens* do not automatically trump procedural rules’. Consequently, the Court’s interpretation ‘goes beyond the legal framework of the Convention’. It is clear that this conceived the Convention as a reciprocal arrangement

5.2 Non-retroactivity and the Torture Convention

In its submissions, Belgium invoked the *Eichmann* judgments’ position; as we observed in chapter 2, the Israeli Courts reduced the Nazi atrocities to a singularity (‘an extraordinary instance’) and thus, an exception to non-retroactivity was not excessive rather ‘it

224 ibid para 16.
225 ibid (Dissent of Judge Xue), para 11. *Barcelona Traction* only discussed the *locus standi* in regards to breach of a bilateral obligation and thus, Xue contended that the Court’s judgment misused the *obiter in Barcelona Traction*. ibid.
226 ibid para 17.
227 ibid. This is comparable to Hazel Fox’s argument on the question of the procedural plea of immunity of State officials discussed in Chapter 1 and 4. The defence against liability may be removed by *jus cogens* because the defence is a substantive rule that negates responsibility for violation of *jus cogens*. However, the procedural plea only relates to the issue of appropriateness of tribunal and therefore, there is no substantive content to which *jus cogens* can bite.
228 ibid para 39. In fact, Xue contended that the Court cannot pronounce on Senegal’s compliance with its obligations if Senegal has decided to prosecute or is considering whether to accede to the extradition request. He interpreted Senegal’s decision-making differently; he did not see
229 *Obligation to Prosecute or Extradite* (n 197) para 98. See also V Spiga ‘Non-retroactivity of Criminal Law: a New Chapter in the Hissène Habré Saga’ (2011) 9 Journal of International Criminal Justice 5.
enforces the dictates of elementary justice’. Applying the same approach to the Torture Convention, Belgium argued that the procedural obligations could apply to crimes committed before entry into force of Convention as the acts were criminal under customary international law at the time of their commission. As we noted earlier, the majority in the House of Lords in Pinochet III rejected this interpretation. Nevertheless, it is significant that Senegal did not contest Belgium’s argument. In fact, Trinidad noted that the Court was not ‘formally asked to pronounce itself on this point’ and thus, imposed a ‘temporal limitation’, which is not explicitly provided for.

It is clear that the Court’s ascending pattern, emphasising consensualism, could have simply acknowledged the agreement of the parties. But this would appear to negate law’s normativity and thus, the Court analysed the Torture Convention in terms of consensualism in the Law of Treaties. The Court contended that the applicable rule of interpretation was article 28 of the Vienna Convention, which precluded a state party from being bound by treaty obligations in relation to facts prior to the treaty’s entry into force. The Court assumed that article 28 reflected customary international law even though it did not tender any instances of state

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230 AG v. Eichmann (n 71) 12.
231 Obligation to Prosecute or Extradite (n 197) para 98. The Court’s only support for this conclusion was a 1988 communication to the Committee against Torture. Here, the Committee concluded that ‘torture for purposes of Convention can only mean torture that occurs subsequent to the entry into force of the Convention’. See OR, MM and MS v Argentina (No. 1/1988, 2/1988 and 3/1988) CAT/C/WG/3/DR/1,2 and 3/1988.
232 ibid (Judge Trinidade) para 160.
233 ibid (Judgment) para 100.
234 Article 28 states that ‘unless different intention, provisions don’t bind a party in relation to act or fact which took place…before date of entry into force of that treaty with respect to that party’. See Law of Treaties Convention (n 155).
behaviour. Based on this ascending move (and the need to interpret treaty obligations restrictively), the Court interpreted the lack of any provision on non-retroactivity as evidence that the principle should continue to apply. Thus, nothing in the Convention ‘reveals an intention’ to exercise jurisdiction over acts committed prior to the Convention’s entry into force ‘for that state’. However the normative outcome would be that the proceedings either in Senegal or Belgium could only involve acts committed after 1987 or 1996 respectively. The latter outcome would be seriously problematic for the moralist approach as Habre was ousted from power in 1990 and thus, extradition to Belgium would be completely futile. In fact, even the Senegalese proceedings will be quite limited. It is evident that the Court’s interpretation narrowed the Convention’s temporal scope even further than the Committee against Torture’s ruling in OR, MM and MS.

Nevertheless, the Court moved to reasonableness to address the time frame for the state implementing its obligations. This reasonableness was justified on non-consensualism in both the Law of Treaties and the Torture Convention. Here, the Court adopted Guengueng’s argument before the Committee against Torture, that is, Senegal cannot invoke internal law as a defence for non-compliance. In the Court’s descending move, it interpreted the absence of any express provision on a time-frame in the Convention as allowing a timeframe to be imposed (as opposed to being left entirely at the state’s discretion). It then adopted the Committee against Torture’s move to reasonableness and deduced that the

235 ibid para 99.
236 OR, MM and MS v Argentina (n 231).
237 Guengueng v Senegal (n 149) para 8.6.
obligations must be performed within a ‘reasonable time’ in manner compatible with object and purpose of Convention.238

That said it is possible to read the Court’s approach towards non-retroactivity as apology. As Trinidade argued, the Court adopted ‘voluntarist reasoning [that] focused on the will of states within the confines of the strict and static inter-State dimension’.239 Trinidade premised his analysis explicitly on the idea that international law preceded the State240 and argued that universal jurisdiction ‘transcends inter-State dimension’ because it secures fundamental interests of the international community.241 From this view, he chastised the Court for ignoring approaches in international criminal law regarding the pleas of non-retroactivity. Here, non-retroactivity becomes a ‘moot question’ because the crimes are prohibited by customary international law ‘at the time of their repeated or systematic commission’.242 He referred to jus cogens as providing an ethical content to international law. Invoking the margins of Eichmann, there could be ‘no limits in time or space’ for this ‘universalist international law’. This supplanted the interstate model with a community where the individual must be central.243

238 Obligation to Prosecute or Extradite (n 197) para 113 and 115 (without undue delay). It also raised a problem regarding Belgium’s ability to invoke the responsibility of Senegal for prosecution of acts prior to entry into force of Convention for Belgium in 1999. The Court got around this problem by claiming that the issue of non-compliance arose in 2000, with the Senegalese court decisions, which was after Belgium became a state party.
239 ibid (Judge Trinidade) para 166. See also Obligation to Prosecute or Extradite (n 197) (Judge Donoghue) para 19.
240 ibid para 177 (‘international law itself precedes the inter-State dimension’).
241 ibid.
242 ibid para 165-166.
243 ibid para 182-183. As he noted, if the ‘inter-State dimension had not been surmounted’, the developments of the past few decades would not have taken place. Here, the pinnacle of such developments is the notion of individual criminal responsibility becoming embedded in legal consciousness to the extent that it is unimpeachable.
Based on this moral naturalism, Trindade argued that the procedural obligations were ‘not conditioned *ratione temporis* by the date of the alleged acts of torture’ as this would be counter to the Convention’s object and purpose.\(^{244}\)

**6 Conclusion**

It is apparent that the shift in hegemonic control over how Universal Jurisdiction was to be understood and applied was prompted by the realization that the *Eichmann* judgments’ portrayal could result in a wave of criminal complaints in national courts. We observed in chapter 2 how legal positivists in the 1960s argued that *Eichmann* should be viewed as an exceptional case and warned against its reasoning becoming a precedent.\(^{245}\) In opposition, moralists contended that *Eichmann* was a necessary and justified response to extraordinary circumstances.\(^{246}\) This battle between competing positions had not been given another opportunity to compete, apart from *Demjanjuk* in the 1980s. Nevertheless, during the moralist hegemony prior to the *Arrest Warrant*, the *Eichmann* narrative became the rule rather than an exception and in turn, this appeared to move towards realizing the court of humanity that will never adjourn. However, the *Arrest Warrant* precipitated a retreat from this move and the dominance of the moralist approach.

\(^{244}\) ibid para 164. The Convention is ‘focused on the victimized human beings who stand in need of protection…Human conscience stands above the will of States’. ibid para 166.

\(^{245}\) D Lasok ‘The Eichmann Trial’ (1962) 11 International and Comparative Law Quarterly 355, 373.

It follows, then, that the battle for hegemony between moralist and formalist approaches dramatically changed and the swing back to Luban’s religion of sovereignty was increasingly apparent. The Butare-4 type cases appeared to be an uncontroversial implementation of the international community’s fundamental values. But the situation appeared to be different when complaints involved on-going conflicts and the territorial jurisdiction did not agree to the trial of their nationals. Here, the margins of the Eichmann judgments appeared to be establishing a dangerous situation where “frivolous” complaints could be investigated and “show trials” could be the final outcome. Consequently, the move towards Eichmann’s Defence counsel’s argument appeared to be warranted in the interests of stability between sovereign equals. Thus, the Arrest Warrant judgment’s formalist approach on personal immunity and Guillaume’s on in absentia was an attempt to ‘accommodate their moral intuitions with their professional competence’. Here, they sought to secure the normative purpose of immunity of state officials and territorial independence against the context of the appeal to end impunity (project of identity). Conversely, van den Wyngaert’s moralist approach invoked the margins of Eichmann in her attempt to accommodate moral inclinations, namely the normative purpose of individual criminal responsibility and universal accountability against the context of the appeal to respect dignity of the state (project of unity). The Joint Separate Opinion tried to “balance” the opposing margins while accommodating its moral intuitions, namely the normative purpose of preventing impunity within a context of territorial independence and respect for immunities of state officials.

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247 Koskenniemi (n 53) 159.
These various attempts were adopted within scholarship and in subsequent national court judgments.

We observed that post-Arrest Warrant, the dominant view has been the formalist approach and that van den Wyngaert’s approach appeared too utopian when set against the situation that prompted the Arrest Warrant case, that is, a contentious dispute between states over their respective liberties. Thus, subsequent legislative amendments in Belgium, UK and Spain appeared from a formalist approach as inevitable. Similarly, the Spanish Supreme Court’s judgment in Guatemalan Generals case, the Spanish High Court in the Tibet case and the German Federal Prosecutor’s discretion and French courts in their respective Rumsfeld complaints illustrated the hegemony of the formalist approach’s appeal to avoid abuse, to prioritize the territorial jurisdiction and to interpret rights and obligations restrictively. Significantly, the theme of “avoiding abuse” and of the need to comply with limitations has been foremost within more recent debates. This dominant view has similarly isolated the preference for prioritizing the territorial jurisdiction and in turn, claiming that universal jurisdiction is subsidiary, interweaving the piracy analogy with the subsidiary basis. However, the subsidiary precondition has been reframed in a guise similar to the Rome Statute’s article 17 conditions of unwillingness and inability.248

That said the moralist counter-hegemony has had a degree of influence. The Re Sharon model on immunity and in absentia found favour in other national courts even though there has been an obvious retreat. The preferences of the dominant approach have drawn upon the reframed moralist arguments, such as the first offer

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248 Although these conditions have some lineage in the debates on the subsidiary basis of jurisdiction as discussed in chapter 2, section 1.1.
to the territorial jurisdiction to proceed. These preferences were in turn, influenced by the Joint Separate Opinion. It is also evident that increasingly, there is an unquestioned acceptance of universal jurisdiction over crimes against international law that has overruled the influence of Javor and the Pinochet I and III dissents. Finally, the Obligation to Prosecute or Extradite marked somewhat of a return to Pinochet III as the Court adopted a moralist approach with formalist leanings on certain issues to avoid being too normative. Nevertheless, it is clear that in the overall picture Eichmann has been replaced by specific instances, namely Butare-4 type cases, a broad concept of nationality or passive personality jurisdiction and obligations arising from treaty law to exercise jurisdiction based on custody of the offender.

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249 Note the German proceedings against Rwandan militia in DRC, see European Centre for Constitutional and Human Rights Report, URL: www.ecchr.de/
251 Obligation to Prosecute or Extradite (n 197). In August 2012, Senegal concluded an agreement with the African Union to establish the ‘Extraordinary African Chambers’ to prosecute Habre for alleged crimes committed in Chad. In December 2012, Senegal passed the legislation to establish the EAC and proceedings began in February 2013. Under article 2 of the Statut, the EAC has a chamber within each level of the Senegalese court system. Though each chamber has judges and deputy judges of Senegalese nationality, the chambers within the Assize and Appellate Assize courts will be presided by judges from other member states of African Union (article 11). See Shah (n 199) 364 and Statut des Chambres africaines extraordinaires, URL: http://www.hrw.org/node/113271. See also BBC ‘Nepalese army officer denies torture’ (28 June 2013) URL: http://www.bbc.co.uk/news/uk-23103018.
CONCLUSION

When criminal law and diplomacy meet the result is likely to be either undermining diplomatic freedom of action – or turning criminal justice into show trials. Any middle ground is both narrow and slippery.¹

Endeavouring to both define and examine the application of universal jurisdiction and immunity of state officials, reveals competing approaches in academic scholarship or jurisprudential guidance. In one approach universal accountability is emphasized, whilst in the other, state voluntary will. Out of these competing approaches has emerged a third, in an attempt to reconcile and move these contrasting approaches to a middle ground. These contrasts are also to be found within the historical debates that can be traced from the end of the 19th century which, for purposes of this examination were divided into embryonic and incubation periods. The Eichmann case was the culmination of these two gestation periods because the opposing approaches were drawn upon to justify and criticize Israeli claims to jurisdiction. Here, the Israeli courts extracted the piracy analogy based on the nature of the crime from the incubation period and combined this analogy with the concept of a subsidiary basis of jurisdiction from the embryonic period. Likewise, the Defence Counsel in this case extracted the opposing approach which considered jurisdiction over piracy to be justified based an absence of sovereignty. In this way, both the Courts’ judgments and the Defence pleadings isolated their preferences and presented their legal portrayals as compelling.

On the surface level, these competing approaches in the historical and contemporary debates appeared to be underpinned by the recurring naturalism-positivism dichotomy, a dichotomy which hinges upon the irreconcilable debate over whether origin of law traces to state liberty (individual freedom) or a prior legal order (community). However, as demonstrated throughout this thesis, indeterminacy explains why these recurring naturalism-positivism or a priori order (justice)-liberty (consent) debates occur and, it follows, how each legal argument is fundamentally incoherent. Such incoherence in turn explains how no legal argument may be preferred over another and how there is a political choice framed in terms of context or normative principles such as reasonableness in order to prefer one argument over another. Thus, international law ‘offers a defence for hegemonic and non-hegemonic practices equally’\(^2\) and international law debates suggest two projects that characterize international law—a project of unity or identity.\(^3\) These projects of unity or identity are situated in the debate enveloping the principle of universal jurisdiction. Here, advocates implicitly appeal to either a systematic world order or civitas maxima, in which every state must secure criminal accountability, or to an anarchical order of independent states, in which each state must avoid arbitrary and unwarranted interference in the domestic jurisdiction of other states. We refer to these competing projects of unity and identity as moralist and formalist approaches.

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\(^3\) M Koskenniemi ‘International Law and Hegemony: A Reconfiguration’ (2004) 17 Cambridge Review of International Affairs 197, 201. One project claims to transform the world from ‘sovereign egoism to world unity’ (descending) while the other from ‘oppressive homogeneity to self-determination’ (ascending). ibid 200.
It follows, then, that the issue of structural bias of institutions is crucial. Legal outcomes are adopted in accordance with the structural bias of institutions before which the arguments are pleaded and hence, there is awareness that the lawyer must pitch the right argument at the right time to the right audience in order to be persuasive. This structural bias of institutions means that the move to specialization in contemporary international law is particularly significant;\(^4\) in this case, international lawyers can use these specialist vocabularies to ‘push forward’ certain interests ‘while leaving others in the shadows’, all of which is determined by the choice of language.\(^5\) Of course, both hegemonic and counter-hegemonic positions fail to avoid the accusation of apology or utopia as they are either less normative-more concrete or less concrete-more normative.\(^6\)

The *Eichmann* judgments’ portrayal was pitched within the context of the operation of the ICTY and ICTR and the final negotiations of the Rome Statute of the International Criminal Court. This portrayal was implicitly adopted in pre-*Pinochet III* environment in which the ICTY and national courts justified universal jurisdiction on the nature of the crimes as *jus cogens*\(^7\) and the *Draft Code of Crimes* described the format of universal jurisdiction as *aut dedere aut judicare* and deemed illogical the continued application of the procedural

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7 Prosecutor v. Dusko Tadic (Decision on Defence Motion on Jurisdiction) IT-94- 1 (10 August 1995) para 42. See also Prosecutor v Saric as cited in L Reydams *Universal Jurisdiction: International and Municipal Perspectives* (Oxford University Press Oxford 2003) 126 et seq (self-executing character of international humanitarian law) and Jorgic, Bundesgerichtshof (30 April 1999) (lack of a prohibition against exercising universal jurisdiction over genocide).
plea of immunity of state officials before foreign national courts. The descending-ascending pattern of argument in *Eichmann* and the pre-*Pinochet III* case law illustrate how the *Lotus* dilemma is embedded within each of the legal opinions. As detailed in Section 2.4 of Chapter 4, the Spanish and Belgian *Pinochet* judgments brought the *Eichmann* judgments’ portrayal to its margins, through a combination of *Eichmann* and *Demjanjuk*, and appeared more normative than *Eichmann* in their reach for the moralist approach’s “horizon”. Yet to the formalist, these judgments concealed the violation of state independence behind their universal justice. Instead, the counter-hegemonic position in *Javor* that questioned the validity of universal jurisdiction over each crime appeared more concrete than *Eichmann* in its reach for formalist approach’s horizon. Nevertheless, to the moralist, *Javor* concealed the impenetrable protection of state policy behind its state consent.

*Pinochet III* marked a landmark turning point when universal criminal accountability appeared achievable, rather than confined to co-operation with the international criminal tribunals. Though the House of Lords’ majority emphasized the radical project (and justified Spain’s interpretation of its obligations), the different opinions tried to reconcile the competing approaches (as represented by Spain and Chile) by remaining within the “confines” of the Torture Convention. However, the Law Lords diverse attempts would appear inadequate to either approach to a lesser or greater degree. In contrast, *Pinochet III*’s dissent stayed at the margins of the

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formalist approach (and justified Chile’s interpretation) but this would appear to frustrate the purpose of the Torture Convention by narrowing the Convention’s application considerably. 

Pinochet III led to a stream of complaints in EU national courts, a situation that was viewed either as laudable or a debacle. This Pinochet Effect would bring the international legal profession face to face with the full potential of Eichmann and the problem of exercising jurisdiction over nationals whose state objects to their trial. In an environment of diplomatic disputes and accusations of breaches of state independence, the formalist approach’s bias towards stability was more attractive. From this approach, the denouncement of the moralist approach would appear inevitable as “universal” criminal accountability must have its limits; the threat of politically motivated trials was viewed as authentic because disputes can exist over the accused’s classification as an international outlaw.

The Arrest Warrant prompted this shift to the formalist approach’s hegemony and it is noteworthy that the clash of projects of identity and unity are illustrated in the judgment and its separate opinions.11 In both the judgment and in the arguments laid out by Guillaume, the ideal of stability was the horizon to reach for whereas the appeal to prevent impunity could become an oppression of state independence. For van den Wyngaert, the ideal of universal accountability was the horizon to reach for whereas the appeal to dignity of the state could become a suppression of the voiceless. The Joint Separate Opinion (JSO) tried to balance the opposing margins while accommodating its bias toward preventing impunity. This was a moralist approach with formalist leanings that became the template

for reframing the moralist approach. Ultimately, post-Arrest Warrant “fear” of the abuse of state independence through excessive jurisdiction became the dominant sensibility in subsequent legal developments. Nevertheless, the General Assembly debates demonstrate a formalist hegemonic control with moralist leanings. Here, the caution against “abuse” or ‘jurisdictional imperialism’ is dominant but there is also the general acceptance of universal jurisdiction over crimes against international law.

Against this backdrop, the Obligation to Prosecute or Extradite case appeared to be a move back towards a moralist approach. Nevertheless, even though the Court emphasized universal accountability, it ignored the issue of functional immunity, avoided delving into universal jurisdiction under customary international law and appeared to discount the Committee against Torture’s approach towards non-retroactivity. Like Pinochet III, even with its moralist emphasis, the Court’s approach remains within the confines of the Torture Convention. The post-Arrest Warrant environment demonstrates how the formalist approach’s hegemonic control is not a return to the status-quo but a return to a reframed status-quo where there is increasing approval of a formalist approach with moralist leanings. In this new status-quo, the Butare 4-type cases, treaty law obligations and broad interpretations of other principles of jurisdiction (in the context of co-operation with international tribunals) look as if justice and consent are reconciled. These different avenues for criminal accountability are viewed as acceptable legal mechanisms because the requisite state is deemed to have

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13 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (2012) ICJ Rep. 144.
consented to the trial either through state treaty acceptance or the international community’s approval.

This hegemonic struggle within the debate that envelopes the principle of universal jurisdiction also serves as a critique of the international criminal law project as the debate involves both the invocation and retreat from ‘the court of humanity’ that will never adjourn.\textsuperscript{14} In the \textit{Einsatzgruppen Trial}, the Court considered that a ‘court of humanity’ was necessary to confront crimes that ‘shock the conscience of nations’.\textsuperscript{15} As the Court argued, it is ‘...inconceivable that the law of humanity should ever lack for a tribunal’,

It would be an admission of incapacity...that mankind...should be unable to maintain a tribunal holding inviolable the law of humanity and by doing so preserve the human race itself.\textsuperscript{16}

In other words, this universal jurisdiction “experiment” demonstrates the irreconcilable struggle between the ‘radical project’ and the ‘religion of sovereignty’ that Luban addresses.\textsuperscript{17} The invocation of a ‘court of humanity’ would deflate the ‘transcendent claims of sovereignty’ and thus, the religion of sovereignty returns to the fore when the state objects to the trial of its nationals.\textsuperscript{18} This obscures the international community’s commitment to the radical project because the moral naturalism, upon which the radical project

\textsuperscript{14} D Kennedy \textit{The Dark Sides of Virtue: Reassessing International Humanitarianism} (Princeton University Press Princeton 2005) and \textit{The Einsatzgruppen Trial} (1949).
\textsuperscript{15} \textit{AG v Eichmann} (1968) 36 ILR 5, 26. See also \textit{Prosecutor v. Dusko Tadic} (n 7) para 42 (‘the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world’).
\textsuperscript{16} \textit{The Einsatzgruppen Trial: Trial of Otto Ohlendorf and Others} (1948) IV Trials of War Criminals before the Nuremberg Military Tribunals Green Series (1946-1949) 499.
\textsuperscript{17} D Luban ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ in S Besson and J Tasioulas (ed) \textit{The Philosophy of International Law} (Oxford University Press Oxford 2010) 575, 578.
\textsuperscript{18} ibid.
depends, is trumped by the moral naturalism underpinning the concept of the dignity of the state. This is significant because the unquestioned assumptions of the radical project (such as the crimes and personal liability) are necessary to avoid extinguishing the moral consensus entirely through state inertia or intractability.  

This follows Arendt’s idea that the ‘demand for justice’ justifies criminal prosecutions, which cannot be ‘ignored out of deference for considerations of temporality and retroactivity’. Similarly in human rights law, the state is the ‘potential threat’ and hence, state interests are the ‘exception…and always somehow suspect in view of attempts to articulate a moral consensus’. Thus, any move away from a universal ‘court of humanity’ shadows the moral consensus (or universal dimension) of Eichmann’s portrayal of universal jurisdiction, which, for the Israeli courts, was considered to be crucial. This universal dimension signalled how the crimes perpetrated against Jewish victims were crimes against “humanity”, not merely against the interests of a single state, and thus, Israeli courts represented humanity in prosecuting Eichmann.

It follows, then, that the formalist approach with moralist leanings fails to evoke a remarkable or extraordinary universal dimension because the approach assumes that universal jurisdiction can only be justified upon consent of the state of nationality of the defendant. The state exercising universal jurisdiction no longer acts

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19 F Mantovani ‘The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer’ (2003) 1 Journal of International Criminal Justice 26, 28. See also R Cryer Selectivity in International Criminal Law (Cambridge University Press Cambridge 2005) 198 (‘accusations of selective enforcement involve allegations that…such crimes are ignored where it is considered politically expedient to do so’).


21 M Koskenniemi and P Leino (n 1) 579.
as an “agent” of the international community but rather “in default” of another competent jurisdiction to prevent a scandalous impunity (where the latter consents to the trial). Ultimately, we (as a part of humanity) are bound by a rule based on justice but securing accountability requires consent (as part of a world of competing state interests). This change from the radical project on crimes and liability to the religion of sovereignty on questions of extraterritorial jurisdiction is paradoxical. In turn, the debate on universal jurisdiction, with its swing back and forth between ‘preventing impunity’ and ‘avoiding abuse,’ cannot be reconciled as each vision cancels the other out.

If the court of humanity is the logical corollary of individual criminal responsibility, then the debate on the principle of universal jurisdiction raises the question: is the retreat from the court of humanity that will never adjourn “good” politics? This is debatable because both invocation and retreat would appear to be good politics to either competing approach whilst, at the same time, results in uneven justice. The invocation involved a range of investigations that depended upon particular victim advocacy (although these did at least involve both global north and south) and the possibilities of an

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24 M Koskenniemi ‘What Use for Sovereignty Today? (2011) 1(1) Asian Journal of International Law 61, 62 (‘we have interpreted these developments (fragmentation and constitutionalization) by taking up Immanuel Kant’s project for perpetual peace to point to the philosophical weight of our assumption that ‘universal history’ has a ‘cosmopolitan purpose’ and that the direction is towards some form of world unity beyond formal statehood. In practice, we have used sovereignty to limit sovereignty (AOS)’).
25 Report of the UN Secretary General Ban Ki-Moon ‘The scope and application of the principle of Universal Jurisdiction’ (29 July 2010) UN Doc A/65/181 para 9 (‘an essential jurisdictional instrument in the fight against impunity’ yet requires constraints to avoid any ‘manipulation for political ends’).
investigation differed in extent between different states depending on whether the state claimed universal jurisdiction in its laws and whether there was civil party procedure or prosecutorial discretion. This greater capacity to enforce is ‘good politics’ from a moralist position; otherwise the uneven justice can be accused of being show trials. Meanwhile, the retreat has narrowed the investigations to the global south (and not the Great Powers). Here, it is even more selective; the investigations increasingly pertain only to allegations where the state does not object to the trial. This defence of state independence can only seem like good politics to a formalist approach; otherwise the uneven justice can be accused of ensuring impunity.

It is also debatable because the retreat has had broader normative consequences than envisaged within the debate on universal jurisdiction. In the Arrest Warrant, the International Court of Justice (ICJ) established a lens where international criminal law would be viewed through the ‘narrow channel of state party consent’. As Koskenniemi and Leino argue, the ICJ is constitutionally incapable of engaging with ‘the universalist logics of humanitarian law…’ because the Court’s only access point to these logics is through consent. From this lens, the idea that state parties to the ICC must execute the arrest warrant against Al Bashir, even though Sudan is not a state party to the Rome Statute, appears too normative. Yet the ICC’s Pre-Trial Chamber was returning to the

26 M Koskenniemi and P Leino (n 1) 576.
27 ibid (referring to flexible standards in human rights law, such as margin of appreciation).
28 Prosecutor v Al Bashir, ICC-02/05-01/09 (12 December 2011) para 41-42. See also The Prosecutor v Al Bashir (Decision Regarding Omar Al-Bashir’s Visit to the Federal Republic of Nigeria), ICC-02/05-01/09 (15 July 2013). For the argument that national courts of state parties must uphold Al–Bashir’s personal immunity and decline to
ICTY’s ethos in *Tadic* where the Court justified national courts exercising universal jurisdiction over crimes against international law solely on justice or non-consensualism. In this way, the *Arrest Warrant’s* formalist approach would allow ‘diplomatic technique’ to have primacy over international criminal law regime’s ‘abstract humanitarianism’, a reversal of the general tendency in the latter regime.29 This reversal of a victim-centric perspective shadows the significant visibility that victims had earlier in the debate and hence, victims are now faced with the normative outcome that though the identifiable perpetrators are personally liable under international law, no court can exercise jurisdiction unless the state of nationality consents to the trial.

It follows that the retreat sought to ‘temper missionary zeal by conservative concerns’30 and this led to certain avenues being closed within the debate on the principle of universal jurisdiction in order to bring about this tempering effect. In other words, we have chosen to lose some of the universalist logic or aspiration of the radical project. It is, of course, quite plausible that the demand for justice may again shift the tide back to the moralist’s “horizon.” As the *Eichmann* case reminds us, universal jurisdiction is a project, an aspiration that invokes a belief system. Hannah Arendt’s critique of the Nazi trials is well documented31 yet she still believed that they were ‘completely execute the arrest warrant, see P Gaeta ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7(2) Journal of International Criminal Justice 315 and WA Schabas ‘http://humanrightsdoctorate.blogspot.ie/2011/12/obama-medvedev-and-hu-jintao-may-be.html.

29 M Koskenniemi and P Leino (n 1) 578.
30 ibid 579.
necessary’.\textsuperscript{32} Arendt’s demand for justice reflects our feeling that doing nothing is inconceivable and this may answer why the hegemony of the formalist approach hasn’t led to an abandonment of the idea of universal jurisdiction entirely. Yet, as we have seen, the ‘neutral language of legal rules and humanitarian moralities’ suggests that ‘a policy of a global public realm’\textsuperscript{33} is illusory at best as the swing between humanity and the state in the principle of universal jurisdiction will always exclude or shadow part of the world. Even so, the utopian ideal that underpins universal jurisdiction endures because it appeals to our desire that justice will never be extinguished even when all other hope is lost and our belief that through accountability a measure of healing is possible,

Questions of how much justice is enough, and for whom, are profoundly troubling in post-conflict settings. The questions are not only legal, they implicate our ideas about expiation of sin, reconciliation, forgiveness and judgment. […] And most profoundly, they confront the anger, the profound unhealable hurt, at times the obsession of those who suffered the most, not to let those responsible get off without an accounting.\textsuperscript{34}

\textsuperscript{32} Quoted in M Koskenniemi ‘Between Impunity and Show Trials’ (2002) 6 Max Planck Yearbook of United Nations Law 1, 2.


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