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**Allies and enemies, past and present:
An analysis of the rationale for the development of
universal jurisdiction over serious crimes under
international law.**

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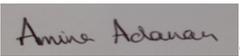
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DECLARATION

I, Amina Adanan, certify that the Thesis is all my own work and that I have not obtained a degree in this University or elsewhere on the basis of any of this work.

Signed:----- -----

Date: --3 November 2017-----

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Abbreviations

AP I	Additional Protocol I to the Geneva Conventions
AP II	Additional Protocol II to the Geneva Conventions
CED	Convention for the Protection of All Persons from Enforced Disappearances
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HCP	High Contracting Parties
IAC	International armed conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
NIAC	Non-international armed conflict
NMT	US National Military Tribunals
Rome Conference	United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court
Rome Statute	Rome Statute of the International Criminal Court
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCLOS I	First United Nations Conference on the Law of the Sea
UNGA	UN General Assembly
UNSC	UN Security Council
UNWCC	United Nations War Crimes Commission

INTRODUCTION

1. The principle of universal jurisdiction in international law and recent developments

Universal jurisdiction is a type of extraterritorial jurisdiction in international law. It permits *any* State to prosecute persons accused of committing certain grave human rights abuses regardless of where the offence occurred and irrespective of the nationality of the accused person(s) or victims.¹ It, therefore, allows a State without a nexus to an offence to prosecute an offence that occurs outside of its territory. The inhumanity of the act demands that the perpetrator be prosecuted,

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I), Art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II), Art 50; Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III), Art 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV), Art 146; International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention), Art 5; Protocol Additional 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 1978) 1125 UNTS 3 (Additional Protocol I; AP I), Art 85; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1987, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT), Arts 5(2), 7; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UN Convention on the Law of the Sea), Art 105; Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 212 (Second Protocol to the 1954 Hague Convention), Art 16 (1); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entry into force 23 December 2010) 2716 UNTS 3 (Convention on Enforced Disappearance; CED), Arts 5, 9(2), 11(1); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, Constitutional Court of South Africa, 30 October 2014; *Public Prosecutor v Higaniro et al*, Assize Court of Brussels, 8 June 2001.

because he/she violates the common interests of the world community. As such, it is a rationale-based jurisdiction. The crimes to which the jurisdiction applies are international piracy, the slave trade, genocide, war crimes, crimes against humanity, apartheid, torture, enforced disappearances, and extrajudicial killing.² The jurisdiction also applies to certain transnational offences.³ Leaving piracy aside, the crimes to which universal jurisdiction applies, under international criminal law, were historically committed by, or with the complicity of, State authorities. Today, non-State actors such as rebel groups and corporations can also commit or be ancillary to the commission of the offences.

Jurisdiction in international law is defined as ‘...the limits of the legal competence of a State or other regulatory authority... to make, apply, and enforce rules of conduct upon persons’.⁴ It is a concept that is integral to State sovereignty,⁵ as it denotes the reach of State power. The ability of a State to make laws that apply to persons or property is known as ‘prescriptive jurisdiction’ or ‘legislative jurisdiction’, while ‘adjudicative jurisdiction’ refers to the capacity of a State to host litigation in respect of persons or property in its legal system.⁶ Enforcement jurisdiction is the capacity of a State to enforce non-compliance with its laws, including breaches that occur abroad.⁷ The latter jurisdiction is the focus of this thesis. Nonetheless, States may not exercise enforcement jurisdiction in the territory of another State

² See chapters 1-8.

³ For example, see International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371, Art 9; International Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936, entered into force 26 October 1939) 198 LNTS 299, Art 8; International Convention on the Prevention and Punishment of Terrorism 1937 (adopted 16 November 1937, did not enter into force), Art 10.

⁴ Christopher Staker, ‘Jurisdiction’ in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2010) 309.

⁵ Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 5-6.

⁶ Roger O’Keefe, *International Criminal Law* (OUP 2015) 4.

⁷ Staker (n 4) 331-33.

'...failing the existence of a permissive rule to the contrary',⁸ unless the consent of the affected State is granted.⁹ Conversely, States may wield prescriptive jurisdiction in respect of acts that occur outside of their territory.¹⁰

The universality principle exists alongside six other types of enforcement jurisdictional competence in international law. These are: the territorial principle, the active (or nationality) principle, the passive personality principle, the flag principle, the protective principle and the representation principle.¹¹ The territorial principle is exercised when the State in which the crime occurred activates its enforcement powers. The active or nationality principle allows a State whose national is accused of committing the offence to pursue the prosecution. The passive personality principle authorises the State whose nationals are victimised by the crime to try the offender(s). In effect, the flag principle is an extension of the territorial principle and is important in the context of vessels navigating the seas (both territorial and other) and aircrafts flying in air space or operating in other States' territories. The protective personality principle allows a State to try the offender(s) when its national interest is affected by the act. Finally, the representation principle enables a State to engage its enforcement powers on behalf of a State with a closer nexus to the offence. The distinction between universality and representation principles is often blurred.¹² Traditionally, territoriality is preferred by common law jurisdictions, whereas the nationality and passive personality principles are conventionally utilised by States from the civil law tradition. In

⁸ *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927) p 18.

⁹ Staker (n 4) 331.

¹⁰ *Lotus Case* (n 8).

¹¹ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 21-24.

¹² *ibid* 24.

more recent times, the majority of States rely on a number of the types of enforcement jurisdiction provided under international law.¹³

States may exercise extraterritorial jurisdiction to the extent that it does not interfere with a rule of international law, as established by the Permanent Court of International Justice (PCIJ) in the *Case of the SS Lotus (France v Turkey)*.¹⁴ Here, a French steamer, the *SS Lotus*, collided with a Turkish vessel, the *Boz-Kourt*, on the high seas, which resulted in the deaths of eight Turkish nationals.¹⁵ Thereafter, the Turkish authorities arrested, detained and tried the French captain of the *Lotus* for manslaughter.¹⁶ The French Government challenged the authority of Turkey to try a French citizen under the passive personality principle (as provided under Article 6 of the Turkish penal code), and initiated proceedings before the PCIJ. The French Government relied on the 'permissive rule' approach to extraterritorial jurisdiction and argued that there was no rule of international law that authorised Turkey to exercise enforcement jurisdiction in this way.¹⁷ Rather than adopt this approach, the PCIJ found that States can exercise extraterritoriality to the extent that it does not conflict with a rule of international law. It affirmed, '...all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.¹⁸ Thus, the Court affirmed that the exercise of jurisdiction by a State is firmly linked to its sovereignty under international law. The PCIJ stated that this principle, known as the '*Lotus* principle', applied to both civil and criminal matters.¹⁹ The Court then moved on to consider whether such a rule preventing the

¹³ Dinah Shelton (ed), *International Law and Domestic and Domestic Legal Systems: incorporation, transformation and persuasion* (OUP 2011).

¹⁴ *Lotus Case* (n 8).

¹⁵ *ibid*, p 5.

¹⁶ *ibid*, pp 11, 13.

¹⁷ *ibid*, pp 19-22.

¹⁸ *ibid*, p 19.

¹⁹ *ibid*, p 20.

enforcement jurisdiction of Turkey existed under international law,²⁰ finding that no such rule existed.²¹ In 2002, the successor to the PCIJ, the International Court of Justice held that the immunity afforded to incumbent heads of State under international law is one such rule that limits the exercise of universal jurisdiction *in absentia* (where the offender is not present in the forum State).²² Thus, under customary international law, States can rely on universal jurisdiction so long as they stay within the boundaries of international rules. It follows that the development of universal jurisdiction over crimes can occur outside of conventional international law.²³

There are criticisms of the exercise of universal jurisdiction, which should be noted. Some writers and States assert that it allows for political abuse.²⁴ Others profess that it sanctions neo-colonialism,²⁵ because, more often than not, it is used to try the nationals of less strategically powerful States. Conversely, others complain that the principle does not go far enough.²⁶ It must also be recalled that not all investigations initiated on the basis of universal jurisdiction result in a conviction. However, there are additional benefits to reliance on the principle. Importantly, the initiation of an investigation into alleged

²⁰ *ibid*, 21.

²¹ *ibid*, p 26.

²² *Arrest Warrant Case (DRC v Belgium)* (Judgment) [2002] ICJ Rep 3. This judgment is further explored in chapter 8.

²³ See chapters 5, 7 and 8.

²⁴ See comments by representatives from Algeria, Cuba, Lebanon, South Africa and Sudan before the UNGA in UNGA, 'Summary record of 12th meeting on The scope and application of the principle of universal jurisdiction' (5 November 2015) UN Doc. A/C.6/70/SR.12; Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86.

²⁵ Council of the European Union, 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (Brussels, 16 April 2009, 8672/1/09 REV 1) para 37.

²⁶ Redress and the International Federation for Human Rights, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union* (December, 2010) <www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf>; Amnesty International's 'End Impunity Through Universal Jurisdiction: No Safe Haven' series <www.amnesty.org>. The date of last access for all web links is 13 September 2017.

crimes and / or the commencement of a trial creates pathways for future legal proceedings. Moreover, it also allows the victim(s) the opportunity to have their story publically acknowledged.²⁷ What is more, it provides for historical record keeping of the commission of international crimes as well as setting precedent for future investigations and trials.²⁸ In addition, the initiation of a prosecution in a foreign court can trigger an investigation and trial in the territorial State.²⁹

Since the early 2000s, there has been a trend in States codifying the active personality principle in respect of the above-mentioned crimes, as opposed to universal jurisdiction. In such instances, the forum State legislates to prosecute offences committed abroad only where the accused is a national, a resident or where he/she subsequently acquires the nationality of the forum State after committing the crime.³⁰ Thus, enforcement jurisdiction is limited to extraterritorial offences that have a nexus to the forum State via nationality or residency. This change is much criticised.³¹ Naomi Roht-Arriaza comments:

...[R]equiring a nexus through the nationality or residence of the victims, or through “national interest”, ignores the fundamental claim of universal jurisdiction to be based on the interests of all states in suppressing certain heinous crimes that affect

²⁷ Richard J Wilson, ‘The Spanish Proceedings’ in Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International 2000) 23.

²⁸ *ibid.*

²⁹ This occurred in respect of international crimes committed in Guatemala. See Roht- Naomi Roht-Arriaza, ‘Guatemala Genocide Case’ (2006) 100 *American Journal of International Law* 207, 212. In addition, the Pinochet litigation in Europe resulted in attempts to bring Pinochet to justice in Chile.

³⁰ The forum State is the State in which universal jurisdiction is exercised. For further definitions used in this thesis, see below.

³¹ Luc Reydam, ‘The Rise and Fall of Universal Jurisdiction’ in William Schabas and Nadia Bernaz (eds), *The Routledge Handbook on International Criminal Law* (Routledge 2010) 350; Roht-Arriaza (n 29); Steven R Ratner, ‘Belgium’s War Crime Statute: A Postmortem’ (2003) 97 *American Journal of International Law* 888.

international order-and thereby reduces universal jurisdiction to a variant of passive personality jurisdiction.³²

The exercise of universal jurisdiction is more far reaching than the nationality or passive personality principles because it permits the forum State to try *all* persons regardless of nationality. Thus, it is more likely to prevent impunity for international crimes.

Since its adoption at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) on 17 July 1998, the Rome Statute of the International Criminal Court (Rome Statute) has significantly influenced the operation of the international criminal justice system.³³ Article 5 of the Rome Statute lists the 'core crimes' or the crimes over which the International Criminal Court (ICC) can exert *ratione materiae* (subject matter) jurisdiction. These are genocide,³⁴ crimes against humanity,³⁵ war crimes³⁶ and the crime of aggression.³⁷ Jurisdiction over the latter crime has yet to be activated. Notwithstanding the significance of the ICC in prosecuting international crimes, the primary responsibility for the prosecution of these offences rests with States, whether or not they are parties to the Rome Statute.³⁸ Moreover, the admissibility criteria outlined in the Rome Statute specifies that the Court may only intervene in a situation when a State with jurisdiction over the offence is unable or unwilling to carry out the prosecution.³⁹ Today, the ICC is the fundamental international penal tribunal tasked with prosecuting international crimes. Notwithstanding its achievements, there are undoubtedly serious shortcomings in the

³² Roht-Arriaza, *ibid* 212.

³³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

³⁴ Rome Statute, Art 5(a), Art 6.

³⁵ Rome Statute, Art 5(b), Art 7.

³⁶ Rome Statute, Art 5(c), Art. 8.

³⁷ Rome Statute, Arts 5(d), *8bis*, *15bis* and *15ter*.

³⁸ Rome Statute, Preamble, para 6.

³⁹ This is further explored in chapter 6.

functioning of the Court.⁴⁰ Like similar institutions, it performs its task in a highly politicised international environment and is imperfect. It has a limited caseload reflecting its finite resources and limited finance. In addition, there are procedural issues facing the Court. In the past it has been criticised for targeting core crimes committed in African countries,⁴¹ which has resulted in increasing hostility from the leaders of African nations.⁴² Hence the responsibility to punish serious crimes under international law cannot be left to the ICC. At a time where the number of civilians who are victim to international crimes is increasing, reliance on universal jurisdiction is more pertinent today than ever.

2. The purpose and scope of the study

Against this background, and keeping the recent developments concerning extraterritorial jurisdiction in mind, it is important that the modern rationale for universal jurisdiction is identified. The jurisdiction is, after all, rationale-based. This thesis attempts to provide a comprehensive analysis of the rationale for the development of universal jurisdiction over the crimes to which it applies, and an examination of this rationale in the context of State reliance on the principle today. For this reason, it provides an in-depth analysis of the development of universal jurisdiction over the crimes to which it

⁴⁰ William Schabas, *An Introduction to the International Criminal Court* (5th edn, CUP 2017); Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015).

⁴¹ David Scheffer, 'Whose Lawfare is It, Anyway?' (2010) 43 *Case Western Reserve Journal of International Law* 215; ICC Forum, 'Africa Question: Is the International Criminal Court targeting Africa inappropriately?' (March 2013-January 2014) <<http://iccforum.com/africa>>.

⁴² Africa Union, 'Draft 2: Withdrawal Strategy Document' (12 January 2017) <www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf>; Library of Congress, 'African Union: Resolution Urges States to Leave ICC' (10 February 2017) <www.loc.gov/law/foreign-news/article/african-union-resolution-urges-states-to-leave-icc/>; Schabas (n 40) 42-44. Burundi recently withdrew from the Rome Statute, see Jennifer Trahan, 'Reflections on Burundi's withdrawal from the International Criminal Court' (Opinio Juris, 31 October 2017) <<http://opiniojuris.org/2017/10/31/reflections-on-burundis-withdrawal-from-the-international-criminal-court/>>.

applies. This is necessary in order to assess if measures involving the exercise of the active and passive personality principles are realising the rationale for universal jurisdiction. Universal jurisdiction is a tool of significant value in today's international criminal justice system and the topic is presently before the UNGA Sixth Committee.⁴³ This thesis critically analyses the trend in State practice away from universality in favour of the active and passive personality principles. The aim of this thesis is to illuminate the historical development of the principle so as to provide clarity on how universal jurisdiction can be better utilised today, and to shed some light on its scope under customary international law.

The research focuses on universal criminal jurisdiction, however, universal civil jurisdiction is referred to where it contributes to the development of the former. For this thesis, the term 'serious crimes under international law' is used to describe the category of crimes to which universal jurisdiction applies in international criminal law. These are defined as:

...[G]rave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.⁴⁴

⁴³ The Sixth Committee has been seized on the matter since 2009. See documentation of 71st session of the Sixth Committee (Legal) <www.un.org/en/ga/sixth/71/documents_all.shtml>.

⁴⁴ ECOSOC, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc. E/CN.4/2005/102/Add.1, p 6.

Such crimes are also referred to as the ‘most serious crimes of international concern to the international community’,⁴⁵ because they are viewed as violating universally recognised principles. There is a lack of agreement on the definition of the term ‘international crime’,⁴⁶ however, the term generally denotes an offence constituting a serious human rights abuse criminalised in conventional or customary international law that is contrary to humanitarian norms.⁴⁷ In practice, such acts are often committed against a particular group that is targeted on discriminatory grounds.⁴⁸

As the focus of this research is international criminal law, the remit is limited to crimes associated with the discipline. The scope of this study includes the offences to which universal jurisdiction applies under international conventions and customary international law. Due to the breadth of this research, transnational crimes are not analysed in detail, although they are referred to when they are relevant to the development of the principle in respect of serious crimes.⁴⁹ Similarly, given that universal jurisdiction does not apply to the crime of aggression, a detailed examination of the crime is excluded from the thesis. However, reference to the crime is included where relevant to the research mandate.

This research first comprises an examination of the history of universal jurisdiction and then analyses the use of universal jurisdiction

⁴⁵ Rome Statute, Preamble, para 4.

⁴⁶ Paola Gaeta, ‘The Interplay Between the Geneva Conventions and International Criminal Law’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 737, 738.

⁴⁷ O’Keefe (n 6) 47-84.

⁴⁸ Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 4.

⁴⁹ Transnational crimes are distinction from international crimes, as they typically involve more than one country as they are carried out across borders. Such offences are normally carried out by organized criminal gangs, and include people trafficking, drug trafficking, counterfeiting of currency and money laundering. For more information see Frank G Madsen, *Transnational Organized Crime* (Routledge 2009); JD McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its protocols* (OUP 2007).

in modern times. The origins of the exercise of universal jurisdiction can be traced to the prosecutions of international piracy in the 17th century, and for this reason the development of universal jurisdiction over piracy is the starting point for the thesis. The timeline comparison is based on the adoption of the Rome Statute in July 1998, because many recent cases under universal jurisdiction were on the basis of legislation incorporating the Rome Statute into domestic law.⁵⁰ Indeed, certain States that had not previously legislated for universality did so after the creation of the Rome Statute.⁵¹ Thus, the establishment of the ICC provides a concrete pointer to differentiate the exercise universal jurisdiction in modern times from its early usage.

3. Research questions and methodology

The primary research question for this study is: *Is the exercise of universal jurisdiction today in line with the original rationale for the principle?* To answer this question parts one and two of this thesis first analyse the development of universal jurisdiction over the crimes to which it applied prior to the creation of the Rome Statute to extract the rationale cited for this evolution. The preliminary research question for these segments is: *What is the rationale for the development of universal jurisdiction over the crimes to which it applies?* In respect of the expansion of universal jurisdiction from international piracy to other crimes, an additional guiding research question is: *How did universal jurisdiction transpose from piracy to other crimes?* These research questions are important in order to analyse the legitimacy of States opting for the active and / or passive personality principles instead of the universality principle. This is particularly important because the primary duty for the prosecution of international crimes rests with States.⁵² Moreover, the principle of complementarity under the Rome Statute reiterates this duty as it applies to States parties. Universality is

⁵⁰ See chapters 6 and 7.

⁵¹ *ibid.*

⁵² This is explored in chapter 7.

a wider scope of extraterritorial jurisdiction than the active and passive personality principles, which increases the likelihood of impunity. Keeping in mind the duty of States to prosecute international crimes, it is important that the move towards the active and / or passive personality principles is studied.

In terms of methodology, this research employs a traditional doctrinal method, as well as a historical methodological approach. The *travaux préparatoires* (preparatory documentation) for the international treaties relevant to the study are analysed in order to deduce the rationales put forward by States as to *why* universal jurisdiction applies to certain crimes. Indeed, the justifications expressed in opposition to the inclusion of universal jurisdiction are also explored. Legislation and accompanying explanatory memoranda are examined in the case study, as well as the content of inter State communications on a bi-lateral and diplomatic conference level. Here, materials were gathered from the Belgian Diplomatic Archives and the UK National Archives.

Belgium was chosen as a case study because it is a State that, at one point, introduced wide-ranging legislation on universal jurisdiction, and then significantly reduced the scope of its application following altercations with other States. It is a State that has experienced the process of substituting universal jurisdiction with the active and passive personality principles.⁵³ The exercise of universality in Belgian courts received much commentary and there are many sources

⁵³ Ratner (n 31); Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1, 26-32; Damian Vandermeersch, comments that the changes were made hastily and without extensive public debate, Damian Vandermeersch 'Prosecuting International Crimes in Belgium' (2005) 3 *Journal of International Criminal Justice* 400; Kissinger (n 24); George P Fletcher, 'Against Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 580; Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589.

available.⁵⁴ As such, it provides ample space to conduct extensive research on the issue.

4. Structure

This research is separated into four parts. Parts one and two provide a historical analysis of the rationale for the development of universal jurisdiction over the crimes it applied to up until the creation of the Rome Statute in 1998. Part one is entitled ‘the British era’ and examines the period when universal jurisdiction was first applied in practice to international piracy and the slave trade. It was the British Government that initially asserted the application of the principle to these offences, and this is explored in chapters one and two respectively. Chapters one, two and three include the development of the concept of universal jurisdiction as originally declared by the early writers on the topic, such as Alberico Gentili (1552-1608), Hugo Grotius (1583-1645) and others. Part two is entitled ‘the Allied era’ because it illustrates how universality was adopted, first by the World War II (WW II) victors and then by other States, and applied to offences other than international piracy and the slave trade. This part is composed of three chapters that examine the transposition of the universality principle from piracy to war crimes, genocide, crimes against humanity and torture, apartheid and enforced disappearance. Chapter three focuses on the transposition of universal jurisdiction to war crimes committed in international armed conflict and crimes against humanity (which at the time included genocide), and in particular, the role of the United Nations War Crimes Commission (UNWCC) in advancing these developments. Chapter four examines the evolution of the principle in the codification of international treaties after WW II. Chapter five scrutinises the application of universal jurisdiction to serious crimes under international law at a national level prior to the creation of the Rome Statute. The preliminary research question for parts one and two is

⁵⁴ For example, *ibid.*

What is the rationale for the development of universal jurisdiction over the crimes to which it applies? The additional qualifying research question for chapters two, three, four and five is: *How did universal jurisdiction transpose from international piracy to other crimes?*

Part three of this study is concerned with the exercise of universality over serious crimes under international law since July 1998. Chapter six examines in detail the reasons why proposals to allow the ICC to operate on the basis of the universal principle were excluded from the Rome Statute. This chapter also explores the relationship between universal jurisdiction and the ICC. Chapter seven examines the practical application of universal jurisdiction to serious crimes under international law since the adoption of the Treaty, identifying the obstacles and issues that have arisen. The research questions for chapter seven are: *What is the rationale for the development of universal jurisdiction over the crimes to which it applies? Second, how did universal jurisdiction transpose from piracy to other crimes? Third, is the exercise of universal jurisdiction today in line with the original rationale for the principle?* Part four consists of the case study on Belgium. The preliminary and primary research questions are analysed in the context of the incorporation and practical application of the principle in these jurisdictions. Belgium is an example of a State that openly accepted the principle of universality over international crimes and then rejected it in favour of a restrictive nexus requirement and this trajectory is explored in chapter eight. Finally, the conclusion attempts to answer the central research question for the thesis and sets out the observations made in respect of the analysis of universal jurisdiction since it was first applied to international piracy.

5. Definitions and terminology

The phrases 'reliance on/ utilising/ exercising/ universal jurisdiction' are used where the forum State is investigating or prosecuting the

extraterritorial offence. 'Forum State' denotes the State that is exercising universal jurisdiction. 'Presence' refers to when the accused person is in the territory of the forum State, whether or not he or she is in State custody. The term 'custodial State' refers to when the accused is in State custody in the forum State. The term 'international crimes' in this study refers to the core crimes over which the ICC currently exercises jurisdiction: genocide, war crimes and crimes against humanity. 'War Crimes' refers to violations of the laws and customs of war committed in both international and non-international armed conflict, except where this is stated otherwise. To reflect the terminology utilised by 20th century writers on the topic, the phrase 'universal repression' is used interchangeably with universal jurisdiction in chapters one to four. The phrase 'the universality principle' is also used substituted for the wording 'universal jurisdiction'.

6. Challenges in completing the research

Like all doctoral theses there were challenges to this research. In particular, the scope of the research proved to be wide, which came into conflict with the word count requirements. In result, a case study that was completed on the history of universal jurisdiction in the United Kingdom was removed from the thesis. In addition, it was sometimes difficult to access case law in other jurisdictions, and this was particularly problematic for more recent cases. For this reason, secondary reports on case law had to be relied on, rather than primary sources on occasion. In addition, language limitations prevented further research on the position of two other post WWII Allies, China and Russia, on universal jurisdiction, particularly in the context of chapter 3 concerning the UNWCC.

7. Contribution

The topic of universal jurisdiction receives much attention from academics, and the jurisdiction is observed from a variety of perspectives.⁵⁵ Although, other studies analyse the development of universal jurisdiction in the context of its rationale,⁵⁶ no study analyses this trajectory in the development of universal jurisdiction in the context of the transition towards the active and passive personality principles. What is more, no study uses the methodology employed in this research,⁵⁷ as most employ a doctrinal or statistical methodology.⁵⁸ In addition, other studies do not comprehensively explain how universal jurisdiction transposed from piracy to other offences. Chapters one to seven of this thesis illustrate and analyse how universal jurisdiction transposed from piracy to other offences, the first of these examines how universal jurisdiction developed over the crime of international piracy.

⁵⁵ See for example Reydams, *Universal Jurisdiction* (n 11); Cassese (n 53); Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735; Aisling O' Sullivan, *Universal Jurisdiction in International Criminal Law* (Routledge 2017); Langer (n 53); Kenneth Randall, 'Universal Jurisdiction under International Law' (1987-1988) 66 *Texas Law Review* 785; Ryngaert (n 5) 120-42; M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81; Cedric Ryngaert, *Unilateral Jurisdiction and Global Values* (Eleven 2015).

⁵⁶ Randall, *ibid*; Bassiouni, *ibid*.

⁵⁷ See section 3.

⁵⁸ Langer (n 53) employs a statistical and doctrinal approach. The most common methodology used is the doctrinal method, see sources in note 55.

CHAPTER 1
THE ORIGINS OF THE APPLICATION OF UNIVERSAL JURISDICTION
TO INTERNATIONAL PIRACY

1.1 Introduction

International piracy or piracy *jus gentium* refers to robbery and violent acts, such as kidnapping and murder, carried out on the high seas by a group of individuals acting independently of a State.¹ The acts are carried out indiscriminately, against persons of all nationalities and the motivation is generally economic gain. The international community deemed piracy to be the first ‘crimes against the law of nations’ or international crime.² As this chapter demonstrates, it was the first crime to which the principle applied. Universal jurisdiction over the crime is enshrined in Article 105 of the UN Convention on the Law of the Sea, and can be exercised by the warship of any state.³ Article 105 is reflective of customary international law⁴ and reads:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates,

¹ International piracy is defined in the United Nations Convention on the Law of the Sea, Art 101, which reads ‘(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)’.

² William Schabas, *Unimaginable Atrocities* (OUP 2012) 29.

³ Art 107 of the UN Convention on the Law of the Sea.

⁴ Anna Petrig, ‘Piracy’ in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 844-45.

and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.⁵

This chapter analyses the development of universal jurisdiction over international piracy, the purpose of which is to extract the rationale for this advancement. The origins of the suppression of piracy began during antiquity and section two examines the reasons asserted for this evolution. The criminalisation and prosecution of pirates legally developed in the 16th century, and is explored in section three. From the late 19th century, attempts were made to include some acts committed during armed conflict within the remit of universality, by declaring such actions to be piratical, and this endeavour is explored in section four. Section five analyses the codification of universal jurisdiction in respect of piracy in the 20th century. The exercise of universal jurisdiction in respect of piracy after 1998, the year in which the Rome Statute was created, is examined in section six. Finally, the conclusion collates the various elements of the rationale for the application of universal jurisdiction to piracy in the context of answering the research questions.

1.2 Pirates as outsiders: The suppression of piracy during antiquity

Piracy was not always discouraged and was originally considered a credit worthy endeavour.⁶ However this perception changed with the advent of maritime trade and property rights.⁷ In the great ancient

⁵ A pirate ship is defined in Art 101 of the UN Convention on the Law of the Sea.

⁶ Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington 1842* (Gould baks & Co 1845) 2.

⁷ Philip De Souza, *Piracy in the Graeco-Roman World* (CUP 1999).

civilisations, pirates, no matter how organised, were declared to be outsiders.⁸ In Ancient India, pirate ships were seized and destroyed.⁹ On the other hand, piracy was deemed an acceptable method of warfare in Ancient Greece and was used by Greek armies as a form of reprisal during the 4th century BC.¹⁰ The differentiation between piracy (carried out by groups unaffiliated with early civilisation) and piracy as a method warfare (carried out by armies) began around the Archaic to Classical period (500-330 BC) and coincides with advancements in warfare and the formation of organised states.¹¹ The pirates of the Mediterranean antiquity were hostile towards Roman dominance. These groups posed an obstacle to the expansion of the Roman Empire and represented a threat to the Roman way of life.¹² The Romans sought to suppress these pirates in order to progress their political interests.¹³ Likewise, the Ancient Greeks used the suppression of piracy to advance their hegemony.¹⁴

The concept of pirates as outsiders was integral to their treatment in Ancient Rome. To Cicero (106-43 BC), a form of law called *jus gentium* applied only to persons living in groups governed by a centralised authority.¹⁵ For him, *jus gentium* was an ‘...intermediate between the state-centric posited laws and the “true laws” of the cosmos’.¹⁶ For the Romans, the laws of war did not apply to those outside of this community.¹⁷ Pirates and others could not be trusted to

⁸ *ibid* 41.

⁹ Sekharipuram Valdyanatha Viswanatha, *International Law in Ancient India* (Longmans, Green & Co 1925) 200.

¹⁰ De Souza (n 7) 26, 34.

¹¹ *ibid* 25.

¹² Alfred P Rubin, *The Law of Piracy* (2nd ed, Transnational Publishers 1998) 18-19.

¹³ Martin Murphy, ‘Counterpiracy in Historical Context: Paradox, Policy and Rhetoric’ (2012) 35 *Studies in Conflict & Terrorism* 507, 510-11.

¹⁴ De Souza (n 7) 38-39.

¹⁵ William E Conklin, ‘The Myth of Primordialism in Cicero’s Theory of *Jus Gentium*’ (2010) 23 *Journal of International Criminal Justice* 479.

¹⁶ *ibid* 481.

¹⁷ Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol 2 (MacMillan 1911) 375.

abide by the laws of war, as they ‘threatened the social order by violence’,¹⁸ which justified their execution. In 44 BC, Cicero stated, ‘For a pirate is not counted as an enemy proper, but is the common foe of all’.¹⁹ Around 100 BC, the Romans created the first law to suppress piracy, the *lex de provinciis praetoriis*.²⁰ It was aimed at combatting piracy in the Eastern Mediterranean,²¹ declaring pirates and their associates to be enemies of Rome.²² As such, the repression of pirates originates from their status of being outside of a dominant central authority, although, the label ‘pirate’ was also used subjectively in Ancient Rome,²³ and in Ancient Greece.²⁴

1.3 Amity and enmity: The Anglo origins of the application of universal jurisdiction to piracy

The concept of pirates as enemies operating outside of a state-like authority developed further in the 16th century, most notably through the writings of Alberico Gentili (1552-1608). By this period, the evolution of the nation state was well under way.²⁵ Gentili was greatly influenced by Cicero’s essays²⁶ and, like the Roman philosopher before him, he considered the legitimacy of pirates in terms of the application of laws of war.²⁷ To him, pirates were different to public enemies, against whom war could be waged legitimately, because they were not

¹⁸ Comments by M T Griffin and E M Atkins in Marcus Tullius Cicero, *De Officiis* (M T Griffin tr, CUP 1991) 78. (This text is based on the version of the book published in 44 BC) 78.

¹⁹ *ibid* 141.

²⁰ Michael H Crawford (ed), *Roman Statutes*, vol 1 (Institute of Classical Studies, University of London 1996) 234.

²¹ De Souza (n 7) 113.

²² Murphy (n 13) 510.

²³ De Souza (n 7) 135.

²⁴ *ibid* 41.

²⁵ Wilhelm G Crewe, *The Epochs of International Law* (Walter de Gruyter 2000) 141-81.

²⁶ Coleman Phillipson, ‘introduction’ in Alberico Gentili, *De Iure Belli Libri Tres*, vol 1 (John Carew Rolfe tr, Carnegie Endowment for International Peace 1933).

²⁷ Gentili, *ibid*, vol 2, book I, chapter 4.

affiliated with state-like governance. Gentili affirmed that “*Piratae omnium mortaliū hostes sunt communes*” [Pirates are the common enemy of mankind] the laws of war cannot apply to them’.²⁸ Rules derived from the laws of mankind could not apply to pirates by virtue of this status.²⁹ Instead, pirates could be ‘attacked with impunity by all’.³⁰ Gentili presupposed that *jus gentium* consisted of the part of the law of nations that all nations agreed on.³¹ Of course, Gentili was a state lawyer not immune from an imperialistic agenda.³²

During Medieval times, many of the great seafaring nations engaged in piracy, which was authorised by a State license known as ‘letters of marque’.³³ The license was awarded to private persons for the purpose of raiding enemy ships and seizing enemy goods. The word pirate was used interchangeably with ‘corsair’, which became known as privateering in the 17th century.³⁴ Corsairs committed the same acts as pirates, however, their motivation was different, as they were acting on the behalf of a state.³⁵ The conduct was carried out in retaliation for offences, such as the plundering of a merchant vessel in foreign seas, which did not warrant a belligerent response.³⁶ These State-sponsored pirates also attacked the trading vessels of wartime enemies.³⁷ As such, the motivations for committing the act were public, rather than private.

The first substantial piece of legislation criminalising piracy was Statute 28 Hen VIII c 15 (1536), which formally granted jurisdiction for

²⁸ *ibid* (insertion added).

²⁹ *ibid*.

³⁰ *ibid*, book 3, chapter 23.

³¹ Introduction by Phillipson in *ibid* 22a.

³² Rubin (n 12) 28-30.

³³ Walter Ashburner, *The Rhodian Sea-Law* (OUP 1909) cxlv.

³⁴ Richard Blakemore, ‘The Politics of Piracy in the British Atlantic, c 1640-1649’ (2013) 25 *International Journal of Maritime History* 159, 161.

³⁵ During the 17th century, the Netherlands, France, and England employed such action, to attack Portugal and Spain in the New World, Marcus Buford Rediker, *Villains of All Nations* (Verso 2004) 24.

³⁶ Stephen C Neff, *War and the Law of Nations* (CUP 2005) 76.

³⁷ Rediker (n 35) 21.

the prosecution of piracy to the English Admiralty Court.³⁸ It also established commissions to punish Englishmen who had committed piracy against 'the Subject of any Prince or Republique in Amity with the Crow of England'.³⁹ Significantly, in order for the crime to be punished in England, the victim state or the state whose ship and nationals had been attacked, must not have been at war with Britain. The statute was used to try the pirates in the famous *King v Marsh* case in the English Admiralty Court.⁴⁰ The statement of Cook, CJ that '...the Danes coming hither, did commence and prosecute indictments... in the Court of Admiralty, for piracy'⁴¹ suggests that the statute had extra-territorial reach that was not expressly mentioned therein.⁴² It is likely that this is the first piece of legislation providing for extraterritorial jurisdiction in respect of piracy.

Ownership of the seas was a preoccupation for the dominant nations of the age as they were motivated by economic power and national interest. By the end of the 17th century the Great Powers conceded that part, but not all, of the seas could be owned. It was against this background that Hugo Grotius (1583-1645) asserted, 'All peoples or their princes in common can punish pirates and others, who commit delicts on the sea against the law of nations'.⁴³ Grotius believed that this power also applied in respect of brigands operating in lands not owned by a dominant central power.⁴⁴ In effect, this contention was the beginning of the punitive origins of the application of universal jurisdiction to offences committed on the seas not owned by any Power. At the time, Grotius believed that the seas were *terra nullius* or owned

³⁸ Rubin (n 12) 51.

³⁹ Cited in *ibid* 95-96.

⁴⁰ *King v Marsh* (1615) 3 Bulstr 27, 30.

⁴¹ *ibid* 27.

⁴² However, see Rubin (n 12) 52.

⁴³ Hugo Grotius, *Mare Liberum* (David Armitage ed, Liberty Fund 2004) 128. *Mare Liberum* was published in 1609.

⁴⁴ *ibid* 128.

by no one.⁴⁵ Thus, part of the rationale for the right of any Power to punish pirates or brigands was due to a vacuum of State authority in the space where the offence was committed.⁴⁶

In 1625, in *The Rights of War and Peace*, Grotius further elaborated on his thesis:

We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations.⁴⁷

Piracy was included in the category of ‘violations of the law of nature or nations’.⁴⁸ Grotius classified these types of offences as violations of natural law, which in effect are the foundation of the modern concept of ‘international crimes’.⁴⁹ Reference to the serious nature of the offence warranting punishment by any state leader was affirmed in *Dawson’s Trial* in 1696, in which the pirates are reminded of the ‘heinousness’ of their crime.⁵⁰ In *US v Smith*, this right is referred to as being part of the

⁴⁵ In the first editions of *Mare Liberum* Grotius was of the belief that all the seas were free i.e. that territorial seas could not exist under international law. However after a dispute between Britain and the Netherlands over British fishing rights in Dutch seas, in which Grotius was counsel for the Dutch Government, Grotius amended the later editions of the treatise to advocate for the existence of territorial seas. See ‘introduction’ in Grotius, *Mare Liberum*, *ibid* xi-xx.

⁴⁶ Grotius’ concept of central authority was not the same as the notion of the nation State that developed later, see Roger O’Keefe, *International Criminal Law* (OUP 2015) 68.

⁴⁷ Hugo Grotius, *The Rights of War and Peace* (Richard Tuck ed, Liberty Fund 2004) 1021. This book was published in 1625.

⁴⁸ *ibid* 1023-24.

⁴⁹ O’Keefe (n 46) 68-69.

⁵⁰ *The Trials of Joseph Dawson and others* (John Everingham, Bookseller, at the Star in Lutgate Street, London, 1696) 28. This book provides a report of *Dawson’s Trial* 13 How St Tr 451.

'universal law of society'.⁵¹ Thus, the moral justification for the exercise of jurisdiction is evident in early piracy cases.⁵² This ideology is reflective of the natural law thinking that dominated the formation of international law and the interpretation of international rules during the 16th and 17th centuries.⁵³ It is clear that the entitlement to exercise enforcement jurisdiction over the offence was a right as opposed to an obligation at the time. What is more, it was directed towards leaders of centralised orders of power, or more acutely, the European powers that monopolised international law in that epoch.

Just as the pirate was declared an outsider during antiquity, Grotius developed the narrative of pirates as enemies cut off for the rest of human society. Citing Seneca, Grotius affirmed, '...tho'he is at a Distance from my Nation, yet of he disturbs his own; so great a Depravity of Mind has cut him off from human Society, and makes him to me, and all the World, a Foe'.⁵⁴ In carrying out the act, the perpetrator is no longer a part of the society of mankind. This analogy was used by Chief Justice Edward Coke in 1615 in *King v Marsh* where he famously declared pirates to be '*hostis humanis generis*' or enemies of mankind.⁵⁵ The phrase came to signify the conceptual loss of nationality that the pirate experiences once the offence is committed. The judiciary in the Anglo-American world relied on this hypothesis.⁵⁶

⁵¹ *United States v Smith* 18 U.S. 153 (1820) 161.

⁵² See also *The Tryals of Joseph Dawson and Others* (n 50) 6, 28; *The Tryals of Major Stede Bonnet and Other Pyrates* (printed for Benj Cowse at the Rose and Crown in St Paul's Church-Yard in 1719) 1298. This book is a report of *Bonnet's Trial* (1718) 15 How St Tr 1231.

⁵³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 35.

⁵⁴ Grotius, *The Rights of War and Peace* (n 47) 1023-24.

⁵⁵ *King v Marsh*, 27. Rubin suggested that Chief Justice Coke might have borrowed the phrase from another unknown source, see Rubin (n 12) 17. The Roman term for a legitimate enemy or stranger was *justi hostes*, Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol 2 (MacMillan 1911) 375.

⁵⁶ *United States v Furlong* (Supreme Court, 1820) page 18 U S 184, 193; *The Tryal of Captain Thomas Green and his crew pursued before the judge of the High Court of Admiralty of Scotland* (Published by the Heirs and Successors of Andrew Anderson 1705) 13; *The Tryals of Joseph Dawson and others* (n 50) 6.

Indeed, punishment of piracy was not unique to the European and American world.⁵⁷

Part of the criteria for the prosecution in any national court was that there be good relations between the victim State and the State prosecuting the crime. This is referred to in case law as ‘amity’ between the two nations. Indeed, in *Kidds Trial*, this concept of amity was linked to the definition of piracy. Here, Judge LCB Ward reminded the jury members that ‘...to make it Piracy it must be the taking Piratically and Feloniously, upon the High Sea, within the Jurisdiction of the Admiralty of England, the Goods of a friend, that is such that are in Amity with the King’.⁵⁸ In *Dawson’s Trial*, the idea of amity or good relations was linked to ‘trade and correspondence’.⁵⁹ This prerequisite was also noted by judicial scholars⁶⁰ and was provided for in English piracy laws.⁶¹ It may be the case that the amity element of the prosecution was established to further distinguish the crime of piracy from privateering. Conversely, it may also be the case that the application of universal jurisdiction to the crime of piracy was a means of prosecuting privateers without resorting to belligerency with the state that authorised the privateering. Indeed, it was sometimes in the interest of the Great Powers not to prosecute pirates who made things difficult for their competitors.⁶² It is notable that some of the issues relevant to contemporary universal jurisdiction practice arose in early piracy cases.⁶³ *Bonnet’s Trial* recognised the concurrent enforcement jurisdiction that occurred in

⁵⁷ Kwan Wai, *Piracy in Ming China during the 16th Century* (Michigan State University Press 1975) 107.

⁵⁸ *The Arraignment, Tryal and Condemnation of Captain William Kidd for Murther and Piracy* (Printed for J Nutt, near Stationers Hall 1701) 32. This book is a report of *Kidds Trial* (1701) 14 How St Tr 123.

⁵⁹ *The Tryals of Joseph Dawson and others* (n 50) 6.

⁶⁰ Charles Molloy *De jure maritimo et navali* (Printed for R Vincent in Clifford’s Inn-Lane 1701) 58.

⁶¹ Statute 28 Hen VIII c 15 (1536) and subsequent legislation expressly referred to the element.

⁶² Gerry Simpson, *Law, War and Crime* (Polity Press 2007) 175.

⁶³ See chapters 7 and 8.

respect of prosecuting piracy.⁶⁴ In addition, the acknowledgement that the best evidence would be found in the country where the offence had been committed was accepted in *US v Pedro Gilbert & Others*.⁶⁵

It is important to remember that piracy negatively affected international commerce as it caused financial loss for governments and the rich merchant classes.⁶⁶ The disturbance that piracy posed to international trade is noted in *Dawson's Trial*, where Counsel for the King, Dr. Newton, reminds the jury that piracy ‘...disturbs the Commerce and Friendship between different Nations’.⁶⁷ The interference that piracy causes to international commerce was also recognised in international treaties created during the 19th century.⁶⁸ Moreover, Anglo and American legislators grouped the crime of piracy with treason,⁶⁹ perhaps because both crimes negatively impacted state interests. Thus, it can be convincingly argued that States were victims of piracy at the time that universal jurisdiction began to apply to the crime. By the end of the 19th century many States agreed on the application of universal jurisdiction to piracy. Central to this principle was that the offence was carried outside of the territorial seas of a State.⁷⁰

⁶⁴ *The Tryals of Major Stede Bonnet and Other Pyrates* (n 52) 1234.

⁶⁵ 2 Sumner 19 (1834). The information on this case is taken from Rubin (n 12) 151-52.

⁶⁶ Rediker (n 35) 128.

⁶⁷ *The Tryals of Joseph Dawson and others* (n 50) 27. See also *The Tryals of Major Stede Bonnet and Other Pyrates* (n 52) 1234. Later see, Harvard Research in International Law, ‘Part IV- Piracy’ (1932) 26 *American Journal of International Law Supplement Research in International Law* 739, 832.

⁶⁸ For example a treaty created by Great Britain and Borneo on 18 December 1846 in FO 93/16/1: Treaty. Friendship and Alliance. Labuan Piracy.

⁶⁹ See 28 Henry VIII c 15 (1536); 11&12 William 111 c 7 1700; An Act for the Punishment of Certain Crimes against the United States 1790. See also Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (Printed at London by M Flesher for W Lee and D Pakeman 1644) 111-13.

⁷⁰ See for example International Treaty on International Penal Law (adopted 23 January 1889 at the first South American Congress on Private International Law) Art 13.

1.4 Outsiders, enemies and the laws of war

The non-application of the laws and customs of war to persons classified as outsiders continued in the late 19th century. Article 82 of the Lieber Code (General Orders No 100 of the United States Federal Army 1863) described irregulars or those not categorised as part of 'the organised hostile army' as 'pirates'.⁷¹ The legal repercussion was that they were outside the remit the law, and were excluded from the granting of prisoner of war status. Attempts to bring the acts of insurgents during civil war under the scope of universal jurisdiction were made at the League of Nations,⁷² and again, the absence of a link to a centralised power was pivotal to this discourse. In 1945, Willard B Cowles who argued that universal jurisdiction applied to public officials deemed to be war criminals expanded upon this idea.⁷³

In the early 20th century, there was a notable attempt to declare State affiliated persons as pirates. Submarine warfare was a concern for the Great Powers, particularly after the sinking of the *Lusitania* off the coast of Ireland in 1915,⁷⁴ and during the interwar period.⁷⁵ In April 1917, then US President Wilson declared that 'The present German submarine warfare against commerce is a warfare against mankind...It

⁷¹ It reads, 'Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers - such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates'. One notes that 'highway robbers' interfered with commerce on land.

⁷² Committee of Experts for the Progressive Codification of International Law at the League of Nations composed a Draft Provisions for the Suppression of Piracy, Art 5.

⁷³ See section 3.4.

⁷⁴ Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books MIT Press 2009) 137.

⁷⁵ Rubin (n 12) 316.

is a war against all nations'.⁷⁶ Language previously reserved for non-state actors was applied to enemy states. Here, Germany was the 'outsider' or enemy entity.

The deliberation of the 1922 Treaty Relating to the Use of Submarines and Noxious Gases in Wartime signifies the first attempt to codify universal jurisdiction over offences committed during wartime by public officials. The offence in question was 'commerce destroying' committed during wartime.⁷⁷ The Treaty codified the belligerent right to search, visit and seize merchant vessels carrying contraband to the enemy, which was previously practiced by State war ships in the early 19th century.⁷⁸ Article 3, the enforcement provision reads as follows:

The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

The fact that the offence took place on the high seas was central to this proposition. Like piracy, submarine warfare was committed on the seas and disruptive to international commerce. The reference to 'acts of piracy' was inserted in the treaty purely 'to justify world-wide

⁷⁶ President Woodrow Wilson, speech before Congress, 2 April 1917.

⁷⁷ TNA file ADM 1/8622/54: Washington Conference. Root resolutions regarding the use of Submarines, dated 28 December 1921 and 28 Feb 1922.

⁷⁸ Art 1. This right is further discussed in chapter 2 concerning the slave trade.

jurisdiction over submarine offences and the trial of the offender'⁷⁹ became a reality. However, not all states understood what the application of universal jurisdiction to the crime entailed.⁸⁰

Notwithstanding the lack of entry into force of this Treaty, it is significant that the States parties were prepared to create a new crime subject to universal jurisdiction. This assertion is particularly notable in the context of the reluctance of states to allow the slave trade to be punished as piracy throughout the 19th and 20th centuries.⁸¹ It is clear that part of the rationale for the efforts to include 'commerce destroying' in the same category as piracy was because it affected commerce on the seas. Despite efforts to extend the scope of universality to a (State) crime, the definition of piracy as applying to non-State actors remained during this period.⁸² Other types of extraterritorial jurisdiction could have been availed of as the passive personality principle was established by the early 20th century,⁸³ and therefore provided another option for the prosecution. It is clear that the Treaty was directed at one State, Germany, a non-State party that was unlikely to accede. There was a certain pariah status attached to the label of being declared a 'pirate' given its nexus with offences against mankind.⁸⁴ The lack of state practice reliance on universal jurisdiction over violations of submarine warfare was recognised by Ronald F Roxburgh,⁸⁵ which illuminates the political motivations behind this attempt to extend the scope of universal jurisdiction.

⁷⁹ Ronald F Roxburgh, 'Submarines at the Washington Conference' 3 *British Yearbook of International Law* (1922-1923) 150, 155.

⁸⁰ This was the opinion of the British delegate at the diplomatic conference, ADM 1/8622/54: Washington Conference. Root resolutions regarding the use of Submarines: Memorandum and Minute from Alex Flint, dated 23 Feb 1922.

⁸¹ See chapter 2.

⁸² *Re Piracy jus gentium* [1934] All ER Rep 506, 507.

⁸³ John Bassett Moore, *A Digest of International Law* (G P O 1906) 593, 600-01.

⁸⁴ This is evident in the concerns of the British Naval Service, ADM 1/8622/54: Washington Conference. Root resolutions regarding the use of Submarines.

⁸⁵ Roxburgh (n 79) 155.

1.5 The codification of universal jurisdiction over piracy in the 20th century

By the early 20th century, the application of universal jurisdiction to international piracy was recognised by many states⁸⁶ as well as research organisations⁸⁷ and academic scholars.⁸⁸ The definition of piracy further developed in the 20th century with the inclusion of air piracy in the definition adopted in the International Law Commission (ILC) draft articles on the regime of the high seas, which made the offence 'liable to all the resulting consequences'.⁸⁹ At that time, no treaty existed comparing aircraft piracy to piracy on the high seas, however the matter had been previously addressed by Romania at the League of Nations.⁹⁰ The Harvard Research in International Law acknowledged that piracy could include aircraft piracy in the future.⁹¹ What is more, Spain and Mexico had already codified universality over aircraft piracy in their national laws.⁹² The ILC draft Articles facilitated the application of universal jurisdiction to pirate aircrafts, so long as the state of registration of the aircraft agreed.⁹³ Thus, state sovereignty was preserved.

Universal jurisdiction over piracy was not at issue during the First United Nations Conference on the Law of the Sea I (UNCLOS I). However, whether piracy should be limited to the acts of private individuals was contentious. During the creation of the UN High Seas

⁸⁶ Draft Provisions for the Suppression of Piracy (n 72).

⁸⁷ Harvard Research in International Law (n 67); outcome of 1st Conference for the Unification of Penal Law, Warsaw, 1927 <www.preventgenocide.org/lemkin/madrid1933-english.htm>.

⁸⁸ Henri Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Editions Panthéon Assas 2004). This was originally published in 1928.

⁸⁹ ILC, 'The law of the air and the draft articles concerning the law of the sea adopted by the International Law Commission at its eighth session' (UN Doc A/CONF.13/4) 4 October 1957, para 50.

⁹⁰ *ibid*, para 51.

⁹¹ As cited in *ibid*, para 52.

⁹² Harvard Research in International Law (n 67).

⁹³ *ibid*, para 53.

Convention in 1958 some delegates preferred that the piracy provisions be removed because the crime 'no longer constituted a general problem'.⁹⁴ Instead, they proposed that submarine piracy or commerce destroying be included in the definition of piracy given that they were contemporary issues.⁹⁵ However, this idea was rejected and universal jurisdiction over international piracy committed by non-state actors was affirmed in Article 19 of the UN Convention on the High Seas 1958. In 1982, this provision was expanded in Article 105 of the UN Convention on the Sea to include air piracy. The definition of piracy as being carried out for private rather than public means was reiterated in the definition of piracy under Article 101 of the UN Convention on the Law of the Sea 1982.

1.6 The application of universal jurisdiction to piracy in modern times

Today, the prohibition of piracy is classified as a *jus cogens* peremptory norm.⁹⁶ This classification places the offence in the category of crimes universally prohibited by States. Modern piracy is limited to specific regions of the world, most notably, off the coast of Eastern Africa. States from various parts of the globe exercise universality over piracy committed on the high seas,⁹⁷ however, the treatment of pirates before

⁹⁴ Petrig (n 4) 841.

⁹⁵ 'Consideration of the report of the Second Committee' (A/CONF.13/L.17 to L.19) 23 April 1958, comments by Mr. Tunkin (Russia); Letter from the Permanent Mission of Poland to the United Nations (UN doc A/CONF.13/5 and Add. 1) 3 October 1957.

⁹⁶ MC Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers 1997) 777.

⁹⁷ UNSG, 'The Scope and Application of Universal Jurisdiction' (23 July 2014) UN Doc A/69/174, para 35-39; *Republic of Korea v Araye*, No. 2011 Do 12927, Supreme Court of the Republic of Korea, 22 December 2011; Eugene Kontorovich and Steven Art, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2009) *American Journal of International Law* 436, 444; Christiane Ahlborn, 'Adjudicating Somali Piracy Cases-German Courts in a Double Bind' (*Cambridge Journal of International and Comparative Law Blog*, 3 January 2013) <www.sharesproject.nl/adjudicating-somali-piracy-cases-german-courts-in-a-double-bind/>.

national courts is inconsistent.⁹⁸ The release of pirates apprehended off the coast of Somalia by Dutch authorities, due to the absence of a forum state willing to carry out the prosecution has been publicised.⁹⁹ Notably, non-American and European States are more likely to exercise the jurisdiction over piracy.¹⁰⁰ The United Nations Security Council (UNSC) expressly mentioned the framework provided for in the UN Convention on the Law of the Sea as one way to combat piracy off the coast of Somalia.¹⁰¹ Somalia is a failed state, and thus there is a lack of a central power willing and able to carry out the prosecution.¹⁰²

1.7 Conclusion: The rationale for the development of universal jurisdiction over piracy

This chapter analysed the development of universal jurisdiction over piracy *jus gentium* in order to answer the question *What is the rationale for the application of universal jurisdiction to piracy?* The rationale for this growth can be divided into two categories. The first category is composed of the practical reasoning, while the second category contains justifications related to the philosophical concept of a community of mankind and ideas of a common humanity.

In the age of ownership of the seas, the practical matter arose concerning how persons who committed piracy in the part of the seas owned by no State were to be punished. Pirates were not affiliated with any State. They were large, organised groups that threatened the expansion of empires.¹⁰³ Integral to the application of universality to piracy was that it did not interfere with State sovereignty, as the same

⁹⁸ Kontorovich and Art, *ibid*.

⁹⁹ Luc Reydam, 'The Rise and Fall of Universal Jurisdiction' in William Schabas and Nadia Bernaz (eds), *The Routledge Handbook on International Criminal Law* (Routledge 2010) 350.

¹⁰⁰ China, India, Kenya, and Yemen prosecute pirates using universal jurisdiction. Kontorovich and Art (n 97) 437.

¹⁰¹ UNSC Res 1950 (23 November 2010) S/RES/1950.

¹⁰² Kontorovich and Art (n 97) 438.

¹⁰³ Simpson (n 62) 163.

punitive response was not warranted in respect of pirates operating in a State's territorial waters. Pirates carried out indiscriminate attacks against the nationals of all nations. They put the lives of seafarers under risk and interfered with the profits of trading nations. At the time that universal jurisdiction first applied to piracy, mercantilism was the dominant economic system, as such, States were the main victims of international piracy. Ultimately, the exercise of universal jurisdiction allowed the commercial world to protect its interests. As Alfred P Rubin stated that 'The legal interest [in prosecuting pirates] seems to have been felt to derive from a universal duty to the "commercial world" to safeguard property rights based on natural law, and not on the particulars of any country'.¹⁰⁴

By labeling a pirate *hostis humanis generis*, the Great Powers could apply their laws to individuals ordinarily outside of their enforcement jurisdiction. The creation of this legal framework occurred in the context of the natural law ethos that dominated the law of nations until the 18th century.¹⁰⁵ Cicero framed the categorisation of pirates as enemies of mankind in terms of their exclusion from a hegemonic central community. At the core of this exclusion is the notion that pirates operate outside of a central authority, thus a jurisdictional gap arose from the perspective of administering punishment for the offence. This point is illustrated by the failed attempts to apply universal jurisdiction to State action. This chapter further demonstrates that the development of universal jurisdiction over piracy was a British phenomenon that was later adopted by other states. British motivations in enforcing universal jurisdiction over international piracy must be questioned. While the British Admiralty Courts were declaring pirates to be *hostis humanis generis*, the

¹⁰⁴ Rubin (n 12) 152.

¹⁰⁵ *Filártiga v Peña-Irala* (2d Cir 1980) 630 F 2d 876, 890; *Regina v Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet* UKHL, 24 March 1999 reprinted in (1999) 38 *International Legal Materials* 581 (*ex parte Pinochet*), separate opinion of Lord Millett.

Netherlands was the most powerful nation active on the seas in the 17th century.¹⁰⁶ What is more, British commerce expanded significantly in the late 17th century,¹⁰⁷ resulting in Britain becoming a major figure in international trade. Moreover, by the beginning of the early 19th century, Britain had the largest navy in the world.

The similarity of the language used to describe pirates as enemies of mankind subject to universal jurisdiction and the language later used to describe war criminals, torturers and génocidaires is significant. It connects the exercise of universal jurisdiction today to its piratical origins. Indeed, the term *jus gentium* comes from the set of laws that applied to outsiders in Ancient Rome. Moreover, perhaps the declaration of international piracy as the first international crime in international law is unsurprising given the origins of the status of pirates in terms of the application of the laws of war. As Chapter 2 asserts, universal jurisdiction began to apply to State action from the early 19th century onwards.

¹⁰⁶ Rediker (n 35) 20.

¹⁰⁷ *ibid* 21.

CHAPTER 2

UNIVERSAL JURISDICTION AND THE SLAVE TRADE

2.1 Introduction

Until the 19th century, the slave trade was a widely accepted means of economic progress.¹ During the Atlantic Slave Trade era (1519-1867) approximately 11-12 million people from the African continent were sold into slavery in exchange for goods and money, and transported by sea, to Europe, the Americas and the Indian Ocean Basin.² It was a time when slaves were bought and sold, in all parts of the world,³ and many factors contributed to the continuance of the trade. People living on the African mainland were taken from communities and transported to the Western Africa Coast, as part of a network of slavery that existed before European involvement on the continent.⁴ Rulers and merchants from Britain, Denmark, France, Holland, Portugal, Spain and Sweden facilitated and profited from the trade.⁵

From the beginning of the 19th century there were occasions when universal jurisdiction applied to the slave trade committed on the high seas. As in the case of piracy, at the time universal jurisdiction equated to a right of search, visit and seizure over suspect slave vessels upon the high seas. This right manifested as the ability of the warship of a State to 'visit' or embark upon a foreign registered vessel on the high seas, examine the vessel's papers and search it in order to ascertain if it was carrying slaves. In the event that the suspicions were well founded,

¹ David Eltis, *Economic Growth and the Ending of the Transatlantic Slave Trade* (OUP 1987) 3-4; Seymour Drescher, 'From Consensus to Consensus: Slavery in International Law' in Jean Allain (ed), *The Legal Understanding of Slavery* (OUP 2012) 85.

² Seymour Drescher, *Abolition: A History of Slavery and Antislavery* (CUP 2009) 36.

³ Eltis (n 1) 31.

⁴ Jean Allain, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade' (2007) 77 *British Yearbook of International Law* 342, 345.

⁵ David Brion Davis and Robert P Forbes, 'Foreword' (2001) 58 *The William and Mary Quarterly* 7, 7.

the warship officers could seize the vessel and bring it to its nearest Admiralty Court for adjudication. The latter action was referred to as the 'right of seizure'.⁶ The right emanated from the privilege of belligerent States to visit neutral vessels suspected of being involved in blockade running or conveying contraband to enemies, which was an established principle of the law of nations by the end of the 18th century.⁷ The exercise of the right interfered in the affairs of the State of the searched ship because it impeded commercial trade, and caused significant offence if exercised in error.⁸ As such, the origins of the right of visit in respect of suspect slave vessels was linked to belligerency.

There were similarities between piracy and the slave trade. Both acts were carried out on the high seas, and consisted of violence and inhumane treatment being inflicted on individuals. The purpose of this chapter is to answer the following research questions: *How did universal jurisdiction transpose from piracy to the slave trade? Second, what was the rationale for the application of universal jurisdiction to the slave trade?* As this chapter illustrates, Great Britain played a leading role in asserting the application of universal jurisdiction to the slave trade. This chapter is divided into two parts. Part one focuses on the application of universal jurisdiction to the slave trade during the 19th century. Section two of Part one is divided into a number of subsections that analyse the efforts taken by Britain to extend universal jurisdiction to the slave trade during this period. These measures included relying on the belligerent right to visit neutral vessels, the creation of bilateral and multilateral agreements with other States, as well as the creation of

⁶ In this thesis, the term 'right of visit' is used to denote the exercise of the rights of search, visit and seizure except where otherwise specified. This terminology reflects the phraseology used in the literature on the topic.

⁷ Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington 1842* (Gould baks & Co, 1845) 319.

⁸ TNA file FO 881/1014: General: Memo. Right of Search. Instances in which Belligerents have enforced the Right of Searching Neutral Vessels on the High Seas, for the Persons or Properties of their Enemies 1780-1855.

'Mixed Commissions'. Part one of the chapter concludes by examining the nexus between the slave trade and States during the 19th century.

Part two of the chapter examines the application of the universality principle to the slave trade from the 20th century onwards. The prohibition of slavery was dealt with by the major international institutions of the 20th century: the League of Nations, the International Labour Organisation (ILO), the United Nations (UN), the Council of Europe, the European Union and the Organisation of American States. As a result, it is prohibited under a number of international instruments.⁹ Part two of this chapter begins by examining the assertion that the universality principle applied to slavery and the slave trade in academic writing in the early 20th century. It then analyses how universal jurisdiction over slavery at sea was addressed in international treaties concluded before the League of Nations and the UN. Part two ends with a discussion on the scope of the right of search, visit and seizure in international law today. Finally, section 6 concludes the chapter by answering the research questions.

⁹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Art 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 8; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (as amended) (ECHR), Art 4; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, Art 5; Rome Statute, Art 7-8; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 6; Convention concerning Forced or Compulsory Labour (International Labour Organisation No 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55; Abolition of Forced Labour Convention (ILO No 105) (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291; Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No 182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161.

PART ONE

2.2 Efforts to apply universal jurisdiction to the slave trade in the 19th century

From the late 17th century onwards, Britain sought to have the Atlantic Slave Trade abolished and, as part of this policy, it persistently advocated for the application of universal jurisdiction to the trade. To this end, Britain argued that the slave trade should be ‘assimilated to piracy’,¹⁰ meaning that the legal repercussions that applied to piracy should also apply to the slave trade carried out on the high seas. Not all States supported the move, as the prohibition of warships exercising visitation rights in time of peace was part of the principle of freedom of the high seas.¹¹ The utilisation of universal jurisdiction over slavers increased the cost of transporting slaves across the Atlantic for States that had not abolished the trade.¹²

2.2.1 The exercise of the right of search over the slave trade and its enforcement in Anglo and American courts

The British Navy exercised the right of visit over suspect slave vessels throughout the Napoleonic Wars 1803-1815,¹³ this was carried out on the basis of the belligerent right to visit neutral vessels. Ships found with slaves on board or fitted out for the purpose of carrying slaves in the future were brought to the nearest British Vice Admiralty Court for

¹⁰ This phrase was used by the British Government to assert the application of universal jurisdiction to the slave trade. See FO 371/123801, dossier S2183/3: draft brief, para 21; FO 371/123801, dossier S2183/5: letter from Mervyn Brown to Derek N Brinson, dated 14 Jan 1956; CO 323/958/ 4: League of Nations draft Slavery Convention 1926.

¹¹ John Bassett Moore, *A Digest of International Law* (GPO 1906) 886-87; FO 27/112: No. 14, Foreign correspondence: *Les Règlements* in correspondence between the Duke of Wellington and the British Foreign Office, dated 3 December 1814.

¹² David Eltis (n 1) 81.

¹³ Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012) 24-26.

condemnation as prize.¹⁴ If the Court decided that the vessel had been captured legally, the ship was condemned or resold and a bounty was paid to the captors.¹⁵ Slaves found on board were freed, though this did not mean their lives fared better.¹⁶ If the Court judged the ship to have been captured illegally, the vessel, cargo and slaves were returned to the owners.¹⁷ The British Admiralty Courts were cognisant that they could not condemn a ship engaged in the slave trade, where the ship was flying the flag of a State that had yet to abolish the trade.

With the end of the Napoleonic War, the British Admiralty courts could no longer rely on the belligerent right to visit neutral vessels in order to condemn slave ships. The cases of *Le Louis* and *the Diana* demonstrate first, that the right of search, visit and seizure only applied to the slave trade during wartime; and second, that in order for the right of search to be legal, the flag State of the slaver vessel must have legislated for the abolition of the slave trade.¹⁸ The latter observation evidences the British Admiralty Court's creation of a legal norm, within the confinements of positivism. The principle of equality of States was an established part of the law of nations by the 19th century,¹⁹ and this prohibited Britain from extending its anti-slavery laws to other States.²⁰ In *The Amedie*, Sir William Grant was cognisant of the principle of sovereignty, and noted:

...[W]e cannot legislate for other countries; nor has this country a right to control any foreign legislature that may think proper

¹⁴ Jenny S Martinez, 'Antislavery Courts and the Dawn of International Human Rights Law' (2008) 117 *Yale Law Journal* 550, 565.

¹⁵ Robert Burroughs, 'Eyes on the Prize: Journeys in Slave Ships Taken as Prize by the Royal Navy' (2010) 31 *Slavery and Abolition* 99, 101.

¹⁶ *ibid*; David Northrup, 'African Morality and the Suppression of the Slave Trade: The Case of the Biafra' (1978) 9 *The Journal of Interdisciplinary History* 47.

¹⁷ *The Diana* (1813) 1 Dod 95; *Le Louis* (1817) 2 Dods 209.

¹⁸ *Le Louis*, *ibid* 259-64; *The Diana*, *ibid* 102.

¹⁹ Moore (n 11) 62-63.

²⁰ *Le Louis* (n 17) 243.

to dissent from this doctrine [the abolition of slavery] and give permission to its subjects to prosecute this trade.²¹

The US Navy was originally hostile towards the exercise of the right of search,²² but overtime it began to utilise the right and the question of legitimate capture arose before the US Courts.²³

The principle that the right of visit could not be exercised over vessels registered with a State that had yet to abolish the slave trade corresponds to the core positivist principle that ‘...states are the principal actors of international law and they are bound only by that to which they have consented’.²⁴ The judicial reasoning of the Anglo-American Courts during the 19th century is reflective of the positivist ideology that dominated the law of nations during the 19th century.²⁵ The principle of sovereignty forbade a foreign State from making a binding decision on another State. A core concept of positivism was that States could only be bound by laws to which they consented.²⁶ Notably, references to the inhumanity of the slave trade are lacking in the case law from this period. In contrast to the early piracy case law, the judiciary in the Anglo-American world did not rely on the fact that the slave trade violates unwritten laws of humanity.²⁷ In respect of the application of universal jurisdiction to piracy, the universal condemnation of the offence was one reason that the conduct could be prosecuted by all nations. However, the slave trade was not universally condemned in the early 19th century.

²¹ (1810) 1 Acton’s Admiralty Reports 240, 250.

²² In 1812, Britain entered a war with America to defend its right to visit American ships, see *Eltis* (n 1) 84.

²³ *The Antelope* (1825) 23 U S 66, 122.

²⁴ Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in nineteenth Century International Law’ (1999) 40 *Harvard International Law Journal* 1, 2.

²⁵ Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996) 15.

²⁶ Anghie, *Finding the Peripheries* (n 24) 2.

²⁷ *The Diana* (n 17) 99; *Le Louis* (n 17); *The Amedie* (n 21); *The Antelope* (n 23).

2.2.2 The application of universal jurisdiction to the slave trade in bi-lateral treaties

After the end of the Napoleonic War, Britain began to create bilateral treaties with other States that permitted a mutual right of search and visit over merchant vessels registered in each State party.²⁸ Many treaties prohibited the subjects of each State party from engaging in the slave trade,²⁹ and prohibited the slave trade from being carried out under the flag of the States parties.³⁰ A minority of the treaties contained express provisions equating the slave trade to piracy.³¹ However, the exercise of universal jurisdiction provided for in these treaties was restricted to specific geographical locations.³² Thus, the scope of universal jurisdiction provided for in the treaties was not the same as that which applied to piracy. Notwithstanding this, the treaties played an important role in the development of universal jurisdiction because they authorised the application of the principle to the subjects of other States. For the first time, persons under State authority were subject to universal jurisdiction. Not all States supported the British concept of a right of visit over their vessels suspected of being involved in the slave trade. Bilateral treaties not ratified by the other State party could not be enforced by Britain,³³ in line with constitutional

²⁸ See for example FO 94/294: Treaty for the Suppression of the Slave Trade signed with Spain in 1817; FO 94/318: Treaty for the Suppression of the Slave Trade signed with Sweden in 1824; FO 94/548: Treaty for the Suppression of the Slave Trade signed with the United States in 1862.

²⁹ Treaty with Spain, *ibid*; Treaty with Sweden, *ibid*; FO 94/352: Treaty for the Suppression of the Slave Trade between the United Kingdom of Great Britain and Ireland and Mexico, signed 24 February 1841; FO 93/48/28: Treaty for the Suppression of African Slave Trade between the United Kingdom of Great Britain and Ireland and Italy, signed 14 September 1889.

³⁰ See for example Treaty with Spain, *ibid*; Treaty with Sweden, *ibid*; Treaty with Mexico, *ibid*; Treaty with Italy, *ibid*.

³¹ Treaty with Mexico, *ibid*; Treaty with Italy, *ibid*.

³² For example Treaty with Spain (n 28) Art 10.

³³ See FO 5/194: draft correspondence between the British Foreign Office and US representative Richard Rush, dated 26 August 1824.

requirements of the 19th century.³⁴ Indeed, some treaties made express reference to the necessity of treaty provisions being incorporated into domestic law.³⁵

2.2.3 Mixed Commissions

A number of bilateral treaties with other powerful states created 'Mixed Commissions' before which slave vessels were condemned after capture.³⁶ Such treaties were concluded between Britain and the Netherlands, Spain, Portugal and the US, beginning in the early 20th century.³⁷ When a slave ship was seized (after the exercise of the right of visit), it was brought for adjudication to the nearest Court with jurisdiction over the offence. The Commissions were tribunals composed of judges from the States parties. However, they were distinct from criminal courts³⁸ and the applicable rules depended on the treaty provisions. The Mixed Commissions are considered to be the first human rights tribunals, although their effectiveness is questionable.³⁹

2.2.4 The application of universal jurisdiction to the slave trade in multilateral treaties

Collective steps were also taken by States to suppress the slave trade. As part of this, Britain lobbied for the inclusion of provisions permitting

³⁴ Wilhelm G Crewe, *The Epochs of International Law* (Walter de Gruyter 2000) 487.

³⁵ FO 93/8/12: Convention to have the Slave Trade declared as Piracy between United Kingdom of Great Britain and Ireland and the United States, signed at London 13 March 1824, Art 10. This treaty did not enter into force. See also Treaty with Mexico (n 29), Art 3.

³⁶ Martinez, *The Slave Trade and the Origins of International Human Rights Law* (n 13).

³⁷ *ibid* 67-78. The Courts were located in a variety of places in the jurisdiction of both parties, including on the African continent and in the Americas.

³⁸ Eltis (n 1) 86.

³⁹ Martinez, *The Slave Trade and the Origins of International Human Rights Law* (n 13).

the right of visit over vessels of States parties suspected of being engaged in the slave trade.⁴⁰ In 1815, the Declaration for the Abolition for the Slave Trade was issued at the Congress of Vienna,⁴¹ pronouncing the trade to be 'repugnant to the principles of humanity and universal morality'.⁴² However, the trade continued to be carried out by subjects of some of these States. At the 1822 Congress of Verona, Britain sought a multilateral statement declaring the slave trade to be assimilated to piracy, but the move was not supported by others states.⁴³

In the 1841 Treaty for the Suppression of the African Slave Trade, Austria, Hungary, Prussia and Russia agreed 'to prohibit all trade in slaves, either by their respective subjects, or under their respective flags, or by means of capital belonging to their respective subjects; and to declare such traffic as piracy'.⁴⁴ The treaty continued, 'Their Majesties further declare, that any vessel which may attempt to carry on the Slave Trade, shall, by that fact alone, lose all right to the protection of their flag'.⁴⁵ This provision is notable considering it subjected slave traders to treatment that was previously reserved for pirates. What is more, it appears to be the first international treaty to categorise persons associated with a State as international pariahs. However, this advancement is of limited significance given that the prosecution of the persons engaged in slavery remained firmly in the hands of the flag State.⁴⁶ Thus, the same punitive treatment that applied to piracy did not apply to the slave trade.

⁴⁰ Crewe (n 34) 554-69; Allain, Allain, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade' (n 4) 379-86.

⁴¹ Reprinted in M Cherif Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers 1997) 639-40.

⁴² Art 3, *ibid*.

⁴³ Jean Allain, *The Slavery Conventions: The Trauvauux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff 2008) 19.

⁴⁴ Bassiouni (n 41) 642. Belgium acceded to the treaty in 1848, see FO 94/383.

⁴⁵ Bassiouni, *ibid* 642.

⁴⁶ Art 10, *ibid* 643.

In 1890, Austria-Hungary, Belgium, The Congo, Denmark, France, Germany, Italy, the Netherlands, Persia, Portugal, Russia, Spain, Sweden- Norway, Turkey, the United Kingdom and the United States signed the General Act of Brussels.⁴⁷ Article 22 allowed the contracting States to utilise the right of visit upon the seas, within specific geographical limitations.⁴⁸ The right could only be exercised over vessels of a certain tonnage, registered in one of the signatory States.⁴⁹ Article 5 of the Brussels Act is worth noting. It affirmed that in the event of a suspect fleeing to another jurisdiction they:

...[S]hall be arrested... by the authorities who have ascertained the violation of the law, or on production of any other proof of guilt by the power in whose territory they may have been discovered, and shall be kept, without other formality, at the disposal of the tribunals competent to try them.⁵⁰

Importantly, this provision had the effect of allowing the custodial state jurisdiction to arrest the suspect.

2.2.5 The nexus between the slave trade and the State

By the end of the 19th century, universal jurisdiction had yet to develop over the slave trade carried out during peacetime. As this part of the chapter has shown, the application of the right of search, visit and seizure to suspect slave vessels during the Napoleonic Wars was the closest thing to modern day universal jurisdiction. In contrast, many

⁴⁷ Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors (adopted 2 July 1890, entered into force 31 August 1891) 17 Martens Nouveau Recueil, ser. 2, 345 (Brussels Act) reprinted in *ibid* 648.

⁴⁸ Art 21.

⁴⁹ Hugo Fischer, 'The Suppression of Slavery in International Law' (1950) 3 *International Law Quarterly* 28, 50.

⁵⁰ Reprinted in Bassiouni (n 41) 651.

States accepted the application of universal jurisdiction to the crime of piracy.

The nexus between the perpetrator and the State was very different in the commission of the two acts. When the pirate carried out her/his crime s/he was not affiliated with a State, and this justified the application of universal jurisdiction to the act. In comparison, a vessel that engaged in the slave trade had to be registered with a State to carry out the activity. In exercising the right of visit over suspected piratical ships, State sovereignty was not violated. In the case of a suspect slaver, there was a risk of State sovereignty being infringed, because the flag State may not have abolished the trade. Where the searching State interfered with a vessel of a State that had not abolished the slave trade, the searching State was interfering with the affairs of the flag State and as such, was violating the sovereignty of that State. There was a legitimate link between the slave trader and its State. The labelling of slave traders as pirates would have had the derogatory effect of identifying slave traders as outlaws. But, at the time, could persons affiliated with a state be categorised as outlaws?

A further reason for the difference between the two offences lies in the categorisation of the victims of each crime. Piracy was carried out indiscriminately against the nationals of *any* State. As was demonstrated in chapter one, States were the victims of piracy as the crime impeded international commerce. On the other hand the Atlantic Slave Trade was carried out against a specific group of persons, whose countries were not classified as full members of international society during the nineteenth century.⁵¹ In this regard it is worth reflecting on the words of counsel for the appellant, Dr. Lushington, in *Le Louis*:

... [T]he slave trade was entirely different from piracy. All nations had a right to seize pirates, because they were general

⁵¹ Anghie, 'Finding the Peripheries' (n 24); Grovogui (n 25).

robbers, *hostes humani generis*; their violence was not confined to one nation, but it was universal... but the slave trade it was quite different. The acts of injustice were confined to one description of persons with whom other nations had no concern; and there was no possibility of the same acts being practiced against Great Britain.⁵²

The exercise of the right of search, visit and seizure over suspect slave vessels in the early 19th century was the beginning of the application of universal jurisdiction over the slave trade. Britain was the first, and for a long time, the only State to exercise the right over suspect slave vessels. However, it must be pointed out that at the time Britain was asserting the application of universal jurisdiction to the slave trade it had the largest Navy in the world, thus it commanded dominance in the exercise of the right. Similarly, any bilateral arrangement it entered into was one-sided.⁵³ Moreover, Britain did not support the application of the right over its own vessels.⁵⁴ As David Eltis comments, completing binding treaties with other States, provided ‘...a license for the British Navy to capture and the joint courts to condemn the ships of other nations’.⁵⁵ Indeed, while the British Navy was exercising universal jurisdiction over the trade upon the seas, British nationals were financing and providing goods used in the Brazilian and Cuban slave trade.⁵⁶ Thus, humanitarian concerns were not the primary goal of asserting the right of visit over the slave trade.

⁵² *Le Louis* (n 17) 220.

⁵³ This was one of the reasons why France opted not to participate in the Mixed Commissions. See Martinez, *The Slave Trade and the Origins of International Human Rights Law* (n 13) 85. See also Yearbook of the International Law Commission 1951, vol 2, p 83.

⁵⁴ Here one notes that Britain opted out of Art 1 of the 1841 Treaty for the Suppression of the African Slave Trade. In addition, the British authorities showed dismay when a French cruiser removed a Mexican national from a British Warship in 1838, FO 881/1014.

⁵⁵ Eltis (n 1) 85.

⁵⁶ *ibid* 83.

Moreover, there was a high mortality rate among slaves who remained on vessels docked at the port of adjudication while awaiting judgment.⁵⁷ There were also instances of abuse of slaves by Navy officials. It should also be noted that the anti-slavery lobby significantly influenced British abolition policy in both the 19th,⁵⁸ and 20th centuries.⁵⁹ Economic factors were the motivation for abolition policy. Eltis notes that ‘...abolition coupled with the continuation of the protective system to midcentury slowed the shift to an international division of labour in which Britain became the workshop of the world’.⁶⁰ Other measures, such as imposing taxes on slave-produced goods entering Britain were not implemented.⁶¹ In this regard, it should also be noted that the Great Powers collectively agreed to codify a limited application of universal jurisdiction to the slave trade once the Atlantic Slave Trade was coming to an end.

By the end of the 19th century the Atlantic Slave Trade had come to an end, and the institution of slavery was abolished in the New World.⁶² Despite this, the problem of slavery persisted into the 20th century and its suppression continued to be an international issue. From the early 20th century, States and academics addressed the application of universal jurisdiction to the slave trade.

⁵⁷ Northrup (n 16) 47.

⁵⁸ Chaim D Kaufmann and Robert A Pape, ‘ Explaining Costly International Moral Action: Britain’s Sixty-Year campaign against the Atlantic Slave Trade’ (1999) 53 *International Organization* 631; Eltis (n 1) 85.

⁵⁹ Amina Adanan and Noelle Higgins, ‘Britain’s Influence on the Regulation of the Slave Trade in the Twentieth Century’ in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law 1915-2015* (BRILL/Martinus Nijhoff 2016) 277.

⁶⁰ Eltis (n 1) 12.

⁶¹ This would have had the knock on effect of raising the cost of slave trading, until the buying of slaves off the coast of Africa, was no longer worthwhile, *ibid* 81.

⁶² Drescher, *Abolition* (n 2) ix.

PART TWO

2.3 Universal jurisdiction and the slave trade in early 20th century academic writing

At the beginning of the 20th century, the slave trade continued to exist in some parts of the world.⁶³ In particular, slavery persisted in the form of forced labour and debt bondage.⁶⁴ Many international jurists argued that universal jurisdiction or ‘universal repression’, as they termed it, existed in respect of certain offences, including the slave trade. In 1928, the French jurist Henri Donnedieu de Vabres, who later became a judge at the International Military Tribunal in Nuremberg, listed the slave trade and traffic in women and children as crimes subject to universal jurisdiction.⁶⁵ This view was also held by the members of the First Conference for the Unification of Penal Law in 1927, who included the crime under the heading of ‘délits du Droit Des Gens’.⁶⁶ They affirmed:

Any other crime or offense committed abroad by an alien, will be punished... as provided in the preceding articles, if the accused person is on the State's territory... and if the extradition was not requested or could not be granted and the Minister of Justice requires the prosecution.⁶⁷

⁶³ Jean Allain, *The Slavery Conventions* (n 43) 9.

⁶⁴ *ibid.*

⁶⁵ Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Editions Panthéon Assas 2004) 144-46, this book was originally published in 1928. See also Raphael Lemkin, ‘Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations’ (Additional explications to the Special Report presented to the 5th Conference for the Unification of Penal Law in Madrid, 14-20 October 1933) <www.preventgenocide.org/lemkin/madrid1933-english.htm>.

⁶⁶ Harvard Research in International Law, ‘Jurisdiction with Respect to Crime’ (1935) 29 *American Journal of International Law* (Supplement) 437, 642.

⁶⁷ Art 7 of the articles adopted by the First Conference for the Unification of Penal Law 1927 reprinted in *ibid.* The requirement of the Minister for Justice to grant permission is worth noting in the context of executive consent for prosecutions under the universality principle in modern times, see chapters 7 and 8.

The 'universal repression' proposed by academics writing in the early 20th century is akin to the principle of *aut dedere aut judicare*, or the obligation to prosecute or extradite in modern times.⁶⁸ Although it should be noted that all academic writers did not support the application of universal jurisdiction to the slave trade.⁶⁹ In 1935, the Harvard Research Group in International Law declared that repression of a crime via an international agreement was a logical test to use to compile a list of crimes that are subject to 'universality', but noted that this methodology had not matured into a principle of international law.⁷⁰

2.4 The assertion of universal jurisdiction over the slave trade in international treaties in the 20th century

The international effort to prohibit slavery throughout the 20th century included attempts to incorporate universal jurisdiction over the slave trade at sea into a number of international treaties. This began with the deliberations to create an anti-slavery convention at the League of Nations.

2.4.1 The Slavery Convention 1926

In March 1924, the final Report of the Temporary Slavery Commission at the League of Nations called for the creation of an international treaty on slavery, recommending that the slavery at sea should 'be regarded as an act of piracy' to be included as a provision therein.⁷¹

⁶⁸ See also Vespasian V Pella, *La Criminalité Collective des États et le Droit Pénal de l'Avenir* (Imprimerie de l'Etat 1926); de Vabres (n 65); Emil Stanislaw Rappaport, 'Le problème de l'unification internationale du Droit Pénal' (*Revue Pénitentiaire de Pologne* 1929).

⁶⁹ Lassa Oppenheim, *International Law* (Arnold McNair ed, 4th edn, Longmans, Green & Co 1928) 590; Harvard Research in International Law (n 66) 569.

⁷⁰ Harvard Research in International Law, *ibid* 571.

⁷¹ Allain, *The Slavery Conventions* (n 43) 33.

Britain prepared a draft convention that was presented to the Assembly of the League of Nations by Viscount Cecil of Chelwood, its Representative to the League of Nations.⁷² Article 5 of the British draft convention proposed that, the slave trade at sea, ‘...be deemed to be an act of piracy, and the public ships of the signatory States shall have the same rights in relation to vessels and persons engaged in such acts and persons engaged in piracy’.⁷³ Britain believed that if States assimilated the slave trade to piracy, it would ‘...have a psychological value in solemnly decreeing by the greatest international authority [the League of Nations]... that the slave trade was the most heinous crime’.⁷⁴ Here, the application of the word ‘heinous’ to the slave trade is notable, given that was previously used in respect of the crime of piracy.⁷⁵ However, the second paragraph proposed that persons engaged in the slave trade should be handed over to their State of nationality for punishment.⁷⁶ In effect, this was more akin to the active personality principle, which was an accepted part of international law at the time.⁷⁷ Hence, it cannot be said that the jurisdiction Britain asserted was the same as that which applied to piracy. The proposed Article 5 of the British Draft was not supported.⁷⁸ The Belgian delegate was concerned that the right of search and visit could be abused.⁷⁹ Draft Article 5 was renamed Article 3 and amended to allow for the creation of ‘separate agreements’ providing for the right of search between parties.⁸⁰

⁷² Suzanne Miers, ‘Slavery and the Slave Trade as international Issues 1890-1939’ 19 (2) (1998) *Slavery and Abolition* 16, 27.

⁷³ Reprinted in Allain, *The Slavery Conventions* (n 43) 81.

⁷⁴ CO 323/958/ 4 (insertion added).

⁷⁵ Indeed, the word is part of the language used in respect of universal jurisdiction today.

⁷⁶ Reprinted in Allain, *The Slavery Conventions* (n 43) 81.

⁷⁷ Bassett Moore (n 11) 558.

⁷⁸ Allain, *The Slavery Conventions* (n 43) 19, 82; CO 323/958/ 4.

⁷⁹ Belgian Diplomatic Archives file reference 10.752/II.

⁸⁰ Reprinted in Allain, *The Slavery Conventions* (n 43) 82.

On 26 September 1926, the Assembly of the League of Nations adopted the Slavery Convention,⁸¹ but not before the British delegate once again sought to include a provision to have the slave trade treated as piracy.⁸² Notably, Article 3 on the slave trade at sea does not allow for universal jurisdiction.⁸³ In summary, the first paragraph of this article places the responsibility for suppression of the slave trade firmly in the hands of the States parties. The second paragraph makes reference to the future creation of an international treaty dealing with the suppression of the slave trade at sea. In the meantime, States were permitted to conclude bilateral treaties to suppress the slave trade, as they had done in the previous century. Jean Allain describes sub paragraphs two and three of Article 3 as ‘dead letter law’ given that nothing came of them.⁸⁴ It cannot be concluded that universal jurisdiction over the slave trade had reached customary international law status by 1926.⁸⁵

The tension between the mostly European Great Powers and the non-European states is evident in the treaty negotiations. Moreover, the

⁸¹ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

⁸² Allain, *The Slavery Conventions* (n 43) 87.

⁸³ Art 3 reads: The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.

The High Contracting Parties undertake to negotiate as soon as possible a general Convention with regard to the slave trade which will give them rights and impose upon them duties of the same nature as those provided for in the Convention of June 17th, 1925, relative to the International Trade in Arms (Articles 12, 20, 21, 22, 23, 24 and paragraphs 3, 4 and 5 of Section II of Annex II), with the necessary adaptations, it being understood that this general Convention will not place the ships (even of small tonnage) of any High Contracting Parties in a position different from that of the other High Contracting Parties.

It is also understood that, before or after the coming into force of this general Convention, the High Contracting Parties are entirely free to conclude between themselves, without, however, derogating from the principles laid down in the preceding paragraph, such special agreements as, by reason of their peculiar situation, might appear to be suitable in order to bring about as soon as possible the complete disappearance of the slave trade.

⁸⁴ Allain, *The Slavery Conventions* (n 43) 94.

⁸⁵ Fischer (n 49).

unequal power balance between the two groups is evident. Once forced labour no longer served the Great Powers, they sought to abolish slavery in their colonies, and it became a source of conflict between the colonisers and the colonised.⁸⁶ The reality was that slavery was still practiced in parts of the world such as the Middle East and on the African continent during this period. Allain comments that ‘The overriding ethos of the negotiations of the 1926 Slavery Convention is a continuation of the “civilising mission” of the nineteenth century’.⁸⁷ Indeed, the goals of the European ‘civilising mission’ are enshrined in the 1926 Slavery Convention, as illustrated by the reference to the Articles of the Convention on the International Trade in Arms in Article 3 of the 1926 Convention. The maritime zones in Article 12 of the Convention on the International Trade in Arms, to which Article 3 refers, are located around the African continent, while Article 21 of the same Treaty imposes obligations on native vessels only.

2.4.2 The Supplementary Slavery Convention 1956

By the 1950s it was clear that there was a need for a supplementary treaty to fill the gaps not addressed by the 1926 Slavery Convention. As representatives of UN members States congregated to deliberate on the content of a supplementary slavery treaty, the issue of whether a provision authorising the exercise of universal jurisdiction in respect of the slave trade at sea should be included in the treaty emerged.⁸⁸ The UK submitted a draft convention proposing that the slave trade should

⁸⁶ For example, the Belgian Administration in the Belgian Congo used forced labour for decades after the death of King Leopold II. See Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (2nd edn, Mariner 2002) 278-79.

⁸⁷ Allain, *The Slavery Conventions* (n 43) 6.

⁸⁸ FO 371/123806, dossier S2183/157: draft report of the UK Delegation to the UN Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery, para 4.

be treated the same as piracy.⁸⁹ The effect of this article was to allow universal jurisdiction apply to the slave trade as well as slave raiding.

The proposal was supported by some states,⁹⁰ but not all.⁹¹ Mr. Baroody of Saudi Arabia likened the exercise of the right of search, visit and seizure to a form of modern imperialism, an accusation that was vehemently opposed by the UK representative, Mr. Scott-Fox.⁹² Meanwhile, the Polish delegate, Mr. Juriewicz pointed out that slavery could be carried out by air as well as by sea.⁹³ It became apparent that some States preferred that the punishment of slave traders be left to the State of nationality, viewing it as issue of sovereignty.⁹⁴ As the negotiations progressed, the UK changed its approach,⁹⁵ due in part to the opposition of other States. Scott-Fox affirmed that, 'the United Kingdom delegation now believed that it was neither necessary nor desirable to assimilate the transport of slaves to piracy'.⁹⁶ The UK proposed a new article on the slave trade that did not include universal jurisdiction on the high seas in general, but only in the geographical locations asserted in existing treaties. The geographical locations were those laid out by Britain in bilateral and international treaties on the slave trade during the 19th century, and included areas once colonised that were now within the territorial seas of independent States.⁹⁷ In addition, the UK proposed that the priority for punishment be afforded

⁸⁹ UK Draft Supplementary Slavery Convention, Art 2 reprinted in Allain, *The Slavery Conventions* (n 43) 351. See also ECOSOC, 'Report of the *Ad hoc* Committee on Slavery', Second Session, UN Doc (4 May 1951) E/1988, E/AC.33/13, p 20.

⁹⁰ Soviet Union and Yugoslavia, as cited in Allain, *The Slavery Conventions* (n 43) 376, 378.

⁹¹ For example Portugal, Peru and other Latin American States, FO 371/123806, dossier S2183/154: memorandum from UK delegation in Geneva to Foreign Office, paras 2-3; Allain, *The Slavery Conventions* (n 43) 425.

⁹² *ibid*, para 4.

⁹³ As cited in Allain, *The Slavery Conventions* (n 43) 426.

⁹⁴ As cited in *ibid* 420.

⁹⁵ Draft brief (n 10) para 20.

⁹⁶ As cited in Allain, *The Slavery Conventions* (n 43) 361.

⁹⁷ FO 371/123801, dossier S2183/30: letter from the UK delegation to the Foreign Office, dated 1 February 1956, para 2.

to the State of nationality of the perpetrator, and thereafter to another State with jurisdiction over the offence, upon the agreement of the State of nationality of the perpetrator. Indeed, it was not only the UK that supported the move away from universality.⁹⁸ State sovereignty concerns impeded the assertion of a general right of search over all suspect slave vessels. Yet, it was acceptable to assert the application of the right in specific regions of the world as was authorised in past treaties. As such, the UK redrafted articles were interpreted as being militarily provocative in a problematic area of the world,⁹⁹ with some delegates arguing that the proposed draft Article 3 violated the provisions of the UN Charter.¹⁰⁰ Although the UK Foreign Office favored the inclusion of express reference to the Brussels Act,¹⁰¹ which had lapsed during the First World War, this was rejected by the majority of States,¹⁰² precisely because the maritime zones specified in the Brussels Act were considered to be out of date, and offended some states.¹⁰³

Other proposals were received.¹⁰⁴ At a meeting of the Drafting Committee, the French representative, Giraud, asserted an order of priority of jurisdiction akin to that of the subsidiary universal jurisdiction framework, whereby, 'the competent court was that of the State whose flag was flown by the capturing ship or aircraft, although it would include a permissive clause whereby that state could delegate such powers to the court of another State party to the convention'.¹⁰⁵ A working group produced a draft Article, which maintained the right of search and visit, but removed the right of seizure over vessels on the

⁹⁸ This was also supported by the Anti-Slavery Society, FO 371/123801, dossier S2183/7: response to telegram number 45 from Foreign Office to UK Delegation.

⁹⁹ Draft report of the UK Delegation to the UN (n 88) para 5.

¹⁰⁰ As cited in Allain, *The Slavery Conventions* (n 43) 400-01.

¹⁰¹ Response to telegram number 45 from Foreign Office (n 98) para 2.

¹⁰² Letter from the UK delegation (n 97) para 2.

¹⁰³ *ibid*; FO 371/123801, dossier S2183/19: telegram number 81 from UK delegation to Foreign Office, para 2. See also comments of the Greek delegate in Memorandum from UK delegation (n 91) para 2.

¹⁰⁴ Memorandum from UK delegation, *ibid* para 7.

¹⁰⁵ As cited in Allain, *The Slavery Conventions* (n 43) 376.

high seas.¹⁰⁶ The reference to the right being exercised by warships and military aircrafts was also removed,¹⁰⁷ and it stated that the prosecution rested with the flag State of the vessel suspected of being in the slave trade.¹⁰⁸ This Article was adopted by the Conference on 31 August 1956.¹⁰⁹

The negotiating history of the Supplementary Slavery Convention demonstrates that in 1956, well after State sponsored slavery had come to an end, States were still reluctant to include a provision on universal jurisdiction over the slave trade in an international treaty. There are a number of reasons for this. One factor that is likely to have contributed to this result is the publication of the content of the ILC draft Articles on the Regime of the High Seas, which did not include a provision permitting the exercise of universal jurisdiction over the slave trade at sea.¹¹⁰ Both the then UN Secretary General¹¹¹ and the UK Government¹¹² relied on the ILC provisions when arguing that the right of search in Article 3 of the Supplementary Slavery Convention should apply to a specific geographical location or

¹⁰⁶ Draft report of the UK Delegation to the UN (n 88) para 5.

¹⁰⁷ *ibid.*

¹⁰⁸ Memorandum from UK delegation (n 91) para 7.

¹⁰⁹ Today Article 3 reads: 1. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties. 2 (a) The States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose. (b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves. 3 The States Parties to this Convention shall exchange information in order to ensure the practical co-ordination of the measures taken by them in combating the slave trade and shall inform each other of every case of the slave trade, and of every attempt to commit this criminal offence, which comes to their notice.

¹¹⁰ The work of the ILC is highly persuasive, and is often used as a basis for future international treaties. For example, see next section.

¹¹¹ As cited in Allain, *The Slavery Conventions* (n 43) 354-55.

¹¹² Draft brief (n 10) paras 19-20.

to vessels of a certain size.¹¹³ The UK delegation believed that one of the reasons for the difficulty in securing a more substantial Article 3 was the large number of participants at the conference.¹¹⁴ Approximately 30 of the States parties were in what the UK Foreign Office termed the 'anti-Colonial/ under-developed camp'.¹¹⁵ The situation was made more complex with the participation of States in which slavery was active.¹¹⁶ States opposed the inclusion of universal jurisdiction in the Treaty for a variety of reasons based on national interest. Portugal was concerned that universal jurisdiction could be exercised by Indian warships against Portuguese shipping vessels off the coast of Goa and East India.¹¹⁷ In addition, the Suez Crisis was ongoing at the time, and this heightened suspicions of British motivations in promoting a slavery treaty containing a right of search and visit in that region of the world. Historically, the suppression of the slavery was viewed by the Great Powers as a way to better the lives of native peoples outside of Europe.¹¹⁸ It was against this background that allegations of modern imperialism were levelled at the Great Powers.¹¹⁹

According to Allain, the *travaux préparatoires* of the 1956 Supplementary Convention demonstrate '...the decolonisation process... opening multilateral diplomacy of the United Nations to new members

¹¹³ As cited in Allain, *The Slavery Conventions* (n 43) 354. In contrast, the USSR delegate did not agree that the Drafting Committee should follow ILC opinion, at 383-85.

¹¹⁴ Argentina, Australia, Belgium, Byelorussian SSR, Canada, Chile, China, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, Ethiopia, Federal Republic of Germany, France, Greece, Guatemala, Haiti, Hungary, India, Iraq, Israel, Italy, Liberia, Luxemburg, Mexico, Monaco, Morocco, Netherlands, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, El Salvador, San Marino, Spain, Sudan, Syria, Turkey, Ukrainian SSR, USSR, UK, US, Vietnam and Yugoslavia all participated in the treaty creation as well as a number of specialised agencies also participated, as well as interested observers from various countries. See FO 371/123806, dossier S2183/157.

¹¹⁵ *ibid.*

¹¹⁶ Allain, *The Slavery Conventions* (n 43) 7.

¹¹⁷ Memorandum from UK delegation (n 91) para 3.

¹¹⁸ Hersch Lauterpacht, *International Law*, vol 2, part 1 (CUP 1975) 103.

¹¹⁹ Allain, *The Slavery Conventions* (n 43) 418.

whose ideas and perspectives [were] different to those of the founding members of the club of nations'.¹²⁰ It may also be said that the lack of a provision providing universal jurisdiction over the slave trade in the 1956 treaty is evidence of the acceptance of the former Great Powers that the relationship with former colonies had changed, and was not automatically weighed in favour of the dominant side. However, not all of the Great Powers were interested in universal jurisdiction over the slave trade,¹²¹ while others disagreed with it.¹²² Ultimately, concerns of sovereignty of the flag State prevented the inclusion of universal jurisdiction in the 1956 Supplementary Slavery Convention. Considering the overlap between the slavery on the seas and maritime law, the issue of the slave trade was also dealt with in a number of UN sponsored treaties on the law of the sea where similar sentiments were echoed.

2.4.3 United Nations Convention on the High Seas 1958

The ILC Draft Articles on the regime of the high seas were used as a starting point for the first United Nations Conference on the Law of the Sea, which took place in Geneva in 1958.¹²³ The majority of the conference was concerned with issues related to State sovereignty such as territorial seas and the right of foreign vessels to navigate the territorial seas of another State.¹²⁴ Piracy and the slave trade were

¹²⁰ *ibid* 6 (insertion added).

¹²¹ The US delegation was more concerned that North Korea, Communist China or East Germany may accede to the treaty.

¹²² The Dutch delegation was under instruction not to assimilate the slave trade as piracy, see letter from Mervyn Brown (n 10).

¹²³ Ram P Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff

1982) 176. 54 of the 86 State participants were from the developing world, and a number of UN specialised agencies and Non-Governmental Organisations also participated. See also Arthur H Dean, 'The Geneva Conference on the Law of the Sea: What was accomplished' (1958) 52 *American Journal of International Law* 607.

¹²⁴ See Summary Records of the First Committee in United Nations Conferences on the Law of the Sea, First Conference (1958) <http://legal.un.org/diplomaticconferences/1958_los/>.

considered together, although it was evident that there was a lack of interest in the subjects. Some representatives considered the crimes of piracy and slave trading to be obsolete.¹²⁵ In contrast, the anti-slavery NGO, Société des Amis was concerned that the slave trade was flourishing.¹²⁶ The organisation proposed a plan for UN ships to exercise the right of search and visit over suspect slavers upon the seas.¹²⁷ Overall, there was little debate on whether or not the slave trade on the high seas should be treated as piracy.

As before, the ILC Draft Articles on the Regime of the High Seas significantly influenced the procedure and its provisions in respect of the slave trade were largely adopted.¹²⁸ ILC Article 46 concerning the Right of Visit was used as a basis for what later became Article 22 of the High Seas Convention. The ILC draft provision asserted the right of visit over suspect pirate and slave vessels 'while in the maritime zones treated as suspect in the international conventions for the abolition of the slave trade'.¹²⁹ In this regard, the representative of the United Arab Republic, Safwat, proposed that the sub-paragraph on the right of search over the slave trade in specific maritime zones be deleted, because it would lead to international disputes.¹³⁰ The ILC draft Article was originally adopted,¹³¹ but afterwards, the reference to geographical

¹²⁵ FO 371/133267: Telegram from UK Delegation to the Foreign Office detailing the 13th meeting of the Second Committee on 19 March 1958.

¹²⁶ FO 371/133264, dossier W 11/94: letter from J Duncan Wood to Sir Alec Randall, dated 3 March 1958.

¹²⁷ *ibid.*

¹²⁸ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2010) 152.

¹²⁹ See official summary records of the twenty-eighth meeting of the second committee at the first conference on the law of the sea in United Nations conferences on the law of the sea, vol 4 (UN Doc A/CONF.13/C.2/SR.26-30) 1958, p 90.

¹³⁰ *ibid* 80.

¹³¹ *ibid.*

locations was removed.¹³² The provision transformed into what is now Article 22 of the UN Convention on the High Seas. This reads:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Article 22 is certainly more progressive than the draft upon which it was based as it expands the location in which the right of search over the slave trade could be exercised to the high seas in general. However, there is no mention of the right of seizure in the Article. Article 13 obligates States parties to prevent the unlawful use of

¹³² Official summary record of the 11th plenary meeting, first conference on the law of the sea in united nations conferences on the law of the sea, vol 2, (1958) p 22.

their flag for the carrying out of the slave trade and to punish the offence.¹³³ Thus, it firmly leaves the responsibility for slave trade prosecutions in the hands of States themselves. In this way, more than 30 years after the 1926 Slavery Convention, States remained reluctant to extend universal jurisdiction over the slave trade committed on the high seas.

2.4.4 United Nations Convention on the Law of the Sea 1982

The UN Convention on the Law of the Sea 1982 was the outcome of the Third Conference on the Law of the Sea, which took place from 1973 to 1982. The conference was in response to (non-slave trade related) challenges encountered since the 1958 Convention,¹³⁴ and as such the slave trade was not given much consideration by State delegations. Article 110 of the Treaty largely reiterated Article 22 of the UN Convention on the High Seas.¹³⁵ Like the 1958 Convention before it, this Treaty provides for the right of visit over the slave trade, but is silent on the right of seizure or prosecution.

¹³³ This reads: 'Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free'.

¹³⁴ Toshifumi Tanaka, *The International Law of the Sea* (CUP 2012) 24-25.

¹³⁵ This reads: '1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;
(b) the ship is engaged in the slave trade;

...

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

3. These provisions apply mutatis mutandis to military aircraft.

4. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service'.

2.5 The application of the universality principle to slavery at sea in international law today

The right of search and visit (as distinct from the right of seizure) over vessels suspected of being involved in the slave trade, as provided for in Article 110 of the UN Convention on the Law of the Sea, is now classed as a principle of customary international law.¹³⁶ This means that:

‘... [A] warship will be justified in boarding a foreign ship on the high seas if there is reasonable grounds for suspecting that the ship is engaged in the slave trade. In such cases, the warship may verify the ship’s right to fly its flag and, if suspicion remains after documents have been checked, may proceed to a further examination on board the ship.’¹³⁷

However, Article 110 ‘...does not indicate what action may be taken if evidence of slave trading is discovered’.¹³⁸ Furthermore, the responsibility for punishment of those engaged in transportation of slaves by sea rests firmly in the hands of the flag State.¹³⁹ Thus, under conventional international law, the only steps which may be taken by the searching warship is to hand the offender(s) over to the flag State of the vessel being searched,¹⁴⁰ or to prosecute the offender(s) if the flag State consents.¹⁴¹ Another alternative would be to hand the offender(s) over to their State of nationality for prosecution, or the State of nationality of the victims, where relevant. In this respect, there is a difference in opinion as to whether the right to prosecute the slave trade on the high seas can be exercised by *any* State. In general, human

¹³⁶ Alexander Proelss, *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos 2017) 771; Tanaka (n 134) 161.

¹³⁷ E D Brown, *The International Law of the Sea*, vol 1 (Dartmouth Publishing Company 1994) 309-10.

¹³⁸ *ibid*, 309-10. See also Proelss (n 136) 731; Tanaka (n 134) 161.

¹³⁹ UN Convention on the High Seas, Art 13; UN Convention on the Law of the Sea, Art 99; RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 212; Brown, *ibid* 310.

¹⁴⁰ Churchill and Lowe, *ibid*; Brown, *ibid* 310.

¹⁴¹ Brown *ibid*; Proelss (n 136) 731.

rights lawyers conclude that the universal jurisdiction does apply to the slave trade¹⁴² while writers on the law of the sea come to the opposite conclusion.¹⁴³

It may be argued that the right of seizure over vessels suspected of being in the slave trade exists under international law. Strong support for this conclusion can be found if one relies of the analogy of the ICJ in the *Lotus* case.¹⁴⁴ However, the exercise of the customary based right must not conflict with a rule of international law.¹⁴⁵ Some States support the application of universal jurisdiction to slavery and the slave trade,¹⁴⁶ and indeed some have legislated for extraterritorial jurisdiction over slavery on the seas.¹⁴⁷ Although, it is questionable whether the customary right exists to the same extent as that which applies to genocide and crimes against humanity,¹⁴⁸ given that the original context to which it was first applied has ceased. Moreover, the exercise of universal jurisdiction over the Atlantic Slave Trade was not supported by extensive and uniform State practice, as are required components for the formation of customary international law.¹⁴⁹ As Douglas Guilfoyle notes, the argument that enforcement jurisdiction is possible where it is found in customary international law is

¹⁴² Slavery is included as a crime subject to universal jurisdiction in Stephen Macedo, *Princeton Principles on Universal Jurisdiction* (Princeton University Press 2001) 29. See also Kenneth Randall, 'Universal Jurisdiction under International Law' (1987-1988) 66 *Texas Law Review* 785.

¹⁴³ Tanaka (n 134) 161; Brown (n 137) 309-10; Churchill and Lowe (n 139) 212.

¹⁴⁴ See introduction.

¹⁴⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3; *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927).

¹⁴⁶ American Law Institute, 'Restatement (Third), The Foreign Relations Law of the United States', vol 2 (1987) s 404 as reprinted in Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2012) 1123.

¹⁴⁷ See UK Modern Slavery Act 2015.

¹⁴⁸ See chapters 3, 5, 7 and 8.

¹⁴⁹ *North Sea Continental Shelf, (Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3, para 74. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits* [1986] ICJ Rep 14, para 186.

convincing.¹⁵⁰ In contrast, it is clear that universal jurisdiction applies to slavery that constitutes a war crime or a crime against humanity, and this is accepted in the laws of some States.¹⁵¹

A State seeking to exercise universal jurisdiction over a vessel containing slaves on the high seas could also rely on the right under customary international law given that the ICJ lists slavery as an offence to which *erga omnes* obligations apply.¹⁵² This classification stems from the universal condemnation of the offence and the effect of the classification is that all States owe an obligation to each other to prosecute the offence when it occurs.¹⁵³ Of course, universal jurisdiction is not the only way in which a State may fulfill this duty. Moreover, it should also be noted that slavery is a *jus cogens* crime alongside piracy.¹⁵⁴ This means that the prohibition against slavery is a peremptory norm that cannot be deviated from via codification in an international treaty.¹⁵⁵ Although there is a nexus between *jus cogens* offences and the application of universal jurisdiction thereto,¹⁵⁶ it does not automatically follow that universal jurisdiction applies to such category of offences.¹⁵⁷

Moreover, it is arguable that the customary right to exercise universal jurisdiction over slavery on the seas could be utilised to

¹⁵⁰ Douglas Guilfoyle, 'The High Seas' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 220. Ratner and others have commented that the Slavery Convention of 1956, 'may require states to punish according to universal jurisdiction', see Steven R Ratner and others, *Accountability for Human rights Atrocities in International Law* (3rd edn, OUP 2009) 179.

¹⁵¹ See Chapters 4, 5, 7 and 8.

¹⁵² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, paras 34.

¹⁵³ *ibid*, para 33-34.

¹⁵⁴ Bassiouni (n 41) 777.

¹⁵⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 53.

¹⁵⁶ This is explored in chapter 7.

¹⁵⁷ For example, the right to a fair trial is also categorised as a *jus cogens* offence. Universal jurisdiction does not apply to a violation of fair trial rights that do not amount to violations of the laws and customs of the laws of war.

combat human trafficking on the high seas. Today more people are in slavery than during the Atlantic Slave Trade.¹⁵⁸ Transportation by sea is one way in which persons are trafficked across State borders for the purposes of sexual exploitation and forced labour, two of the contemporary forms of the Atlantic Slave Trade. However, it is clear that the exercise of universal jurisdiction over slavery at sea is a right and not an obligation on States.¹⁵⁹ Modern day trafficking by sea is largely carried out by organised criminal gangs who, like pirates, are non-State entities. Thus, if the trafficking were carried out in a stateless vessel on the high seas, the issue of a potential violation of sovereignty would not arise.

2.6 Conclusion

This chapter addressed the following research questions: *How did universal jurisdiction transpose from piracy to the slave trade?*; *Second, what was the rationale for the application of universal jurisdiction to the slave trade?* As this chapter demonstrated, the right to exercise universal jurisdiction over the slave trade exists in customary international law, rather than conventional international law. In answering the first research question, this chapter has illustrated the leading role played by Great Britain in seeking to bring the slave trade under the remit of universal jurisdiction. However, it must not be assumed that British abolition policy was based purely on humanitarian grounds.

It is difficult to identify the precise rationale for the application of universal jurisdiction to the slave trade, due to the parity of practice

¹⁵⁸ The ILO and others estimate that more than 40 million people were in slavery in 2016 <www.alliance87.org/2017ge/modernslavery#!section=0>.

¹⁵⁹ Member States of the Council of Europe are not obligated to exercise universal jurisdiction over human trafficking under Council of Europe Convention on Action against Trafficking in Human Beings and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011. See *J and others v Austria* App no 58216/12 (ECtHR, 17 January 2017).

and the lack of consideration on the matter in existing case law. Nevertheless, one notes that the humanitarian rationale certainly applies to the offence, given the inhumanity of the trade, both during the operation of the Atlantic Slave Trade and in its contemporary forms. The lack of flag State jurisdiction that applies to piracy does not always apply to slavery at sea. In some cases the slave vessel may be registered in a flag State, and in this scenario there is a nexus between the vessel and a State on the high seas. In contrast, a stateless slave vessel travelling on the high seas does not have such a nexus to a State. Thus, in the latter situation, a void of territorial jurisdiction arises. Yet, under conventional law, the right of seizure will not apply to the latter situation. It should also be noted that enforcement jurisdiction over stateless vessels travelling on the high seas is not provided for in the UN Convention on the Law of the Sea.¹⁶⁰

It is astounding that in 1982, more than 50 years after the 1926 Slavery Convention, States remained reluctant to extend a general right of seizure over their merchant vessels engaged in the slave trade at sea. In contrast, the rights of search, visit and seizure over international piracy were included in both conventions.¹⁶¹ Given that State supported slavery had come to an end by the 20th century, it is perplexing that States still remained reluctant to include the provision on universal jurisdiction over the slave trade in the 20th century. Throughout the treaty negotiations in the 20th century, States were reluctant to have foreign warships exercise universal jurisdiction over their merchant vessels. The *travaux préparatoires* to the examined international treaties illustrate there was considerable opposition to the proposition. The argument consistently cited is that of sovereignty and the potential abuse by States exercising the right. This situation can be explained in

¹⁶⁰ Convention on the Law of the Sea, Art 110; Proelss (n 136) 771-72. The right of search and visit (as distinct from the right of seizure) can be exercised over stateless vessels on the high seas. Enforcement jurisdiction in conventional international law only applies to piracy and unauthorized broadcasting. See Law of the Sea Convention, Arts 105 and 109.

¹⁶¹ See chapter 1.

part by the fact that the right impedes international commerce when exercised erroneously. This also demonstrates that where the exercise of universal jurisdiction affects another State, it is clear that humanitarian justification alone will not necessarily be sufficient to warrant the application of universal jurisdiction to an offence. Conversely, belligerent States can exercise the right of search, visit and seizure on the high seas during wartime.¹⁶² However, it is clear that a State wishing to exercise universal jurisdiction could do so by operating within the parameters of the *Lotus* principle.

The next significant breakthrough in the development of the universality principle occurred as a response to the atrocities carried out during the Second World War and this is the subject of chapter 3.

¹⁶² Moore (n 11) 886-914.

CHAPTER 3

VICTOR'S JUSTICE: THE DEVELOPMENT OF UNIVERSAL JURISDICTION OVER ACTS COMMITTED DURING INTERNATIONAL ARMED CONFLICT

3.1 Introduction

The atrocities committed during World War II were met with public outcry and condemnation, which required the Allies to come together and punish those responsible. Individuals were prosecuted for war crimes, crimes against humanity and crimes against peace¹ at the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo. Localised prosecutions also took place under the authority of the United Nations War Crimes Commission (UNWCC), which operated from 1943-48. The latter institution is the focus of this chapter as it permitted, for the first time, the exercise of universal jurisdiction over 'international crimes' committed during international armed conflicts (IACs).²

The purpose of this chapter is to analyse the development of universal jurisdiction over war crimes, crimes against humanity and genocide up until the conclusion of the UNWCC. This enquiry is carried out in order to determine how the universality principle transposed from the crime of piracy international crimes. The crime of genocide is included in this chapter, because it is an offence to which universal jurisdiction applies today. Although, it should be noted that genocide was classified as a crime against humanity until the adoption of United Nations General Assembly Resolution 96(I) 1946.³ The research questions for this chapter are: *How did universal jurisdiction transpose from piracy to serious violations of international law? Second, what was the rationale for this development?* Section 2 of this chapter begins by evaluating the application of

¹ Today, the offence of 'crimes against peace' is called the 'crime of aggression'.

² The term 'international crimes' was used by the Allies to describe the violence committed during the Second World War, George Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (1943) 37 *American Journal of International Law* 407, 407.

³ UNGA Res 96(I) (11 December 1946).

extraterritorial jurisdiction to war crimes before the Second World War, with an emphasis on the development of the application of universal jurisdiction to the offence. This is followed by an examination of the concepts of crimes against humanity and genocide before the creation of the UNWCC. Section 3.3 critiques the assertion that the power of the IMT and IMTFE originated from the pre-existing right of the Allies to exercise universal jurisdiction under international law. Section 4 of this chapter examines the significance of the UNWCC in the development of universal jurisdiction over war crimes, crimes against humanity, genocide. Other crimes to which universal jurisdiction was applied, for example, torture and the crime of aggression, are also discussed in this section. Finally, the conclusion brings together the arguments in this chapter.

3.2 The exercise of extraterritorial jurisdiction over war crimes before World War II

The use of extraterritorial jurisdiction to prosecute war crimes in domestic courts can be traced back centuries.⁴ During the Middle Ages, the Italian City States of Northern Italy operated a system of 'universal jurisdiction' that was applied to bandits, vagabonds and assassins who had committed criminal acts in other locations.⁵ The rationale was that the accused posed a threat to the population of the City State in which they were present.⁶ The term 'war crime' is accredited to Swiss jurist, Johann Caspar Bluntschli, who created the term in 1872,⁷ while Lassa Oppenheim first used the expression 'war criminal' in 1906.⁸ Prior to the Second World War, the punishment of war crimes was a right of

⁴ Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008) 33, citing *Henfeld's Case*, 11 F Cas 1099 (C C Pa 1793) and other sources.

⁵ Henri Donnedieu de Vabres, *Les principes modernes du droit penal international* (LGDJ diffuseur: Éditions Panthéon-Assas 2004) 135-36.

⁶ *ibid.*

⁷ Daniel Marc Segesser and Myrian Gessler, 'Raphael Lemkin and the international debate on the punishment of war crimes (1919-1948)' in Dominik J Schaller and Jürgen Zimmerer (eds), *The Origins of Genocide: Raphael Lemkin as a historian of mass violence* (Routledge 2009) 9.

⁸ Willard B Cowles, 'Universality of Jurisdiction Over War Crimes (1945) 33 (2) *California Law Review* 177, 181.

belligerent States, with prosecutions generally taking place in military tribunals.⁹ Although, whether or not war crimes could be tried in national courts was debated by academics.¹⁰ Notably, the non-binding 1880 Oxford Manual on the Laws of War on Land declared that, ‘the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are’.¹¹ Moreover, the passive personality principle applied to war crimes¹² and was included in the penal laws and military manuals of States.¹³ Penal provisions were included in treaties concerning the laws and customs of war, and importantly, the criminalisation of prohibited acts in national law was required in order for a prosecution to take place.¹⁴ However, in practice these provisions were not fulfilled, which contributed to more violations being committed.¹⁵ It followed that the majority of offences committed during World War I were unpunished.¹⁶

Before WW II, some States legislated for the protective personality principle.¹⁷ Austria, Hungary and Italy enacted legislation granting their criminal

⁹ The Treaty of Versailles (adopted 28 June 1919; signed by Germany 10 January 1920), Art 228; James W Garner, ‘Punishment of Offenders Against the Laws and Customs of War (1920) 14 *American Journal of International Law* 70, 77; Daniel Marc Segesser, ‘The International Debate on the Punishment of War Crimes During the Balkan Wars and the First World War’ (2006) 31 (4) *Peace & Change* 534.

¹⁰ Compare Garner, *ibid* with George A Finch, ‘Jurisdiction of Local Courts to Try Enemy Persons for War Crimes’ (1920) 14 *American Journal of International Law* 207.

¹¹ Art 84.

¹² Garner (n 9) 75-76; Treaty of Versailles, Art 229 (1). The jurisdiction of US Military Courts was always personality based, see Cowles (n 8) 204.

¹³ Garner, *ibid* 76.

¹⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906, entered into force 9 August 1907) 11 LNTS 440, Arts 27 and 28; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 303, Arts 28 and 29; Resolution of the Institute of International Law on *La sanction pénale à donner à la Convention de Genève du 22 août 1864* adopted at Cambridge 12 August 1895, Art 1.

¹⁵ *Final Record of the Diplomatic Conference of Geneva of 1949*, vol 2, section B (ICRC, Geneva) 85.

¹⁶ The British Military tried foreigners who had committed offences against British prisoners of war. These were examples of the passive personality principle. Trials also took place at Leipzig. See James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Publishing Group 1982).

¹⁷ For example, France, Garner (n 9) 78.

courts jurisdiction over foreigners who committed serious crimes abroad against all nationals so long as the accused had entered their territory.¹⁸ In such cases the territorial state had priority to prosecute the offence, because:

Such provisions proceed on the high moral basis that though the courts of the “locus delicti commissi” are the proper tribunals and have the prior right, criminals must not go unpunished for want of courts able and willing to try them.¹⁹

Thus, the rationale for this type of jurisdiction was that the crime must not go unpunished. This approach overlaps with the concept of universal repression referred to by Henri Donnedieu de Vabres, Raphael Lemkin and others.²⁰ What is more, the origin of the application of universal jurisdiction to war crimes is predicated on the presence of the accused in the forum State.

3.2.1 The concept of crimes against humanity before the operation of the United Nations War Crimes Commission

Although, Voltaire first penned the phrase, ‘crimes against humanity’ in the 19th century,²¹ the idea that certain acts could violate ‘humanity’ originates from 5th century Ancient Greek humanistic philosophy.²² The concept was expanded on in the works of Gentili, Grotius and others.²³ This evolved into the concept of humanitarianism, and was first codified in the subsection of the Preamble to the Hague Convention of 1899 (II) on the laws and customs of war on land, known as the ‘Martens Clause’.²⁴ Its purpose was to fill the protection gaps not yet codified

¹⁸ W E Beckett, ‘The Exercise of Criminal Jurisdiction over Foreigners’ (1925) 6 *British Yearbook of International Law* 44, 48-49.

¹⁹ *ibid* 49. The ‘locus delicti commissi’ is the place of commission of the crime.

²⁰ See section 2.3.

²¹ William Schabas, *Unimaginable Atrocities* (OUP 2012) 51-53. It should be noted that there is some disagreement concerning who first used the phrase.

²² MC Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Practice* (CUP 2011) 87.

²³ Ruti Teitel, *Humanity’s Law* (OUP 2011) 20-30.

²⁴ The provision reads, ‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire

in law and to set a limit to warfare.²⁵ However, it was not the intention of the drafters that the clause should create a separate set of offences from that already prohibited by the laws and customs of war.²⁶ The idea that violations of humanitarian norms could have legal ramifications was first recognised by the Great Powers in the early 20th century.²⁷ In May 1915, Britain, France and Russia issued a joint-declaration to the leaders of the Ottoman Empire rebuking the atrocities that were being committed against the Armenian people. The declaration condemned the ‘...new crimes of Turkey against humanity and civilization’ and warned that ‘...the allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres’.²⁸ This statement is the first evidence that individual criminal responsibility could apply to acts that would later be classified as crimes against humanity. Notwithstanding the heavy worded declaration, international prosecutions were not pursued,²⁹ due to concerns regarding the retrospective applications of laws.³⁰

3.2.2 The concept of genocide before the operation of the United Nations War Crimes Commission

Prior to the Second World War a group of European scholars professed the application of universal jurisdiction to serious offences.³¹ At the first Conference for the Unification of Penal Law in Warsaw in 1927, members formulated a

of the principles of international law, as they result from the usages established between civilized nations, from the *laws of humanity* and the requirements of the public conscience’ (emphasis added).

²⁵ Bassiouni (n 22) 87; Teitel (n 23) 26.

²⁶ Egon Schwelb, ‘Crimes Against Humanity’ (1946) 23 *British Yearbook of International Law* 178, 180.

²⁷ Bassiouni (n 22) 88-89.

²⁸ As cited in William Schabas, *Unimaginable Atrocities* (n 21) 6.

²⁹ Willis (n 16); Bassiouni (n 22) 88.

³⁰ William Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2012) 107.

³¹ Vespasian V Pella, *La Criminalité Collective des États et le Droit Pénal de l’Avenir* (Imprimerie de l’Etat 1926); de Vabres (n 5); Emil Stanislaw Rappaport, ‘Le problème de l’unification internationale du Droit Pénal’ (*Revue Pénitentiaire de Pologne* 1929).

specific list of offences deemed *delicta juris genitium* (crimes against the law of nations). These acts were the crimes to which ‘universal repression’ applied. The list included the transnational crimes of counterfeiting, trafficking of women and children, trafficking in obscene publications, trade in drugs, as well as, piracy, trade in slaves and terrorism.³² Some of the crimes were already the subject of *aut dedere aut judicare* (obligation to prosecute or extradite) provisions in international treaties in the early 20th century.³³ Such provisions dictate that the forum state can either prosecute the offender, who is present in their jurisdiction, or extradite the individual to another state for trial. The receiving state normally has a connection to the offence, via territoriality or the nationality.

At the fifth Conference for the Unification of Penal Law in Madrid in 1933, Polish jurist, Raphael Lemkin expanded this list of crimes to include ‘acts of barbarity’,³⁴ these were ‘attacks carried out against an individual as a member of a collectivity’.³⁵ Universal repression applied to these acts because, ‘Offenses of this type bring harm not only to human rights, but also and most especially they undermine the fundamental basis of the social order’.³⁶ Both deVabres and Lemkin asserted the exercise of universal repression in the context of the obligation to try or extradite, where universal jurisdiction could be exercised once the offender was in the custody of the forum State.³⁷ Hence, it cannot be said that *in absentia* trials were envisaged by early scholars writing on the matter. On the occasion of the fifth Conference for the Unification of Penal Law, Lemkin prepared an international treaty providing for universal repression over

³² Raphael Lemkin, ‘Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations’ (James Fussell tr, 5th Conference for the Unification of Penal Law, Madrid, October 1933) <www.preventgenocide.org/lemkin/madrid1933-english.htm>.

³³ International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371, Art 9; International Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936, entered into force 26 October 1939) 198 LNTS 299, Art 8; International Convention on the Prevention and Punishment of Terrorism 1937 (adopted 16 November 1937, did not enter into force), Art 10.

³⁴ Lemkin, ‘Acts Constituting a General (Transnational) Danger’ (n 32).

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ See section 2.3.

a specific set of crimes, as well as a draft law enabling States to incorporate the principle into national law, both of which were dismissed by State delegations.³⁸

For Lemkin the rationale for the application of universal repression to certain crimes was because the ‘...perpetrator is regarded as the enemy of the whole international community and in all States he will be pursued for crimes universally harmful to all the international community’.³⁹ Lemkin asserted that these acts violated the ‘...legal conscience of the civilized international community’.⁴⁰ The overlap between this rationale and the rationale for the exercise of universal jurisdiction over piracy is notable. Lemkin used the same labelling once reserved for pirates to describe offenders who committed acts he deemed to be *delicta juris gentium*. Significantly, Lemkin also implied that the authority to punish the offender applied to neutrals as well as to belligerents.⁴¹ This position was in contrast to the prevailing view that punishment of violations of the laws and customs of war was a right of belligerents. Lemkin introduced the word ‘genocide’ and advocated for its repression in his 1944 publication, *Axis Rule in Occupied Europe*.⁴² Here, he stated that universal jurisdiction should apply to genocide. He affirmed, ‘According to this principle the culprit should be liable to trial not only in the country in which he committed the crime, but also, in the event of his escape there from, in any other country in which he might have taken refuge’.⁴³ Like Grotius before him, Lemkin viewed universality as the opposite of the granting of asylum. Unfortunately, not all States supported the application of universal repression to genocide at the time.⁴⁴ Similarly, not all scholars agreed with the emerging concepts of international crimes and universal jurisdiction.⁴⁵ However, Lemkin’s work inspired the post war

³⁸ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 92.

³⁹ Lemkin, ‘Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations’ (n 32).

⁴⁰ *ibid.*

⁴¹ Lemkin, *Axis Rule in Occupied Europe* (n 38) 92.

⁴² *ibid.*

⁴³ *ibid.* 94.

⁴⁴ *ibid.*

⁴⁵ Schabas, *Unimaginable Atrocities* (n 21) 30-32.

prosecutions of international crimes at the IMT⁴⁶ and IMTFE and some of the UNWCC trials.⁴⁷

3.2.3 The prosecution of torture before the operation of the United Nations War Crimes Commission

The first prosecutions for torture took place at the Leipzig Trials, after the First World War.⁴⁸ The crime was not mentioned in the IMT and IMTFE Charters, however there are some references to torture in the IMT and IMTFE Judgments.⁴⁹ Torture was not treated as a stand-alone crime until 1975.⁵⁰

3.3 The International Military Tribunals

The IMT and IMTFE were established after the Second World War by the Allied powers, Britain, France, Russia and the United States to prosecute the most senior leaders in the Nazi and Japanese regimes. In 1945, the IMT was created under the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunals.⁵¹ In 1946, the Far Eastern Commission founded the IMTFE.⁵² Both

⁴⁶ Hilary Earl, 'Prosecuting Genocide before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945-1949' (2013) 15 *Journal of Genocide Research* 317. Genocide was included as a war crime, in count three of the IMT indictment prepared by US Prosecutor Robert Jackson. It was not included as crimes against humanity or as a separate specific crime. However, genocide was not mentioned in the IMT Judgment. Jackson purposely excluded genocide, as a separate offence, from the indictment for the IMT, because he was concerned that other victimised groups within the Allies' State borders would demand similar treatment. Instead Jackson chose to focus on offences connected to the crime of aggression. See *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 *American Journal of International Law* 172 (IMT Judgment); Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 4; Schabas, *ibid* 107-09;

⁴⁷ See section 3.4.3.

⁴⁸ William Schabas, 'The Crime of Torture and International Criminal Tribunals' (2006) 37 *Case Western Reserve Journal of International Law* 349, 349-50.

⁴⁹ IMT Judgment (n 46); Judgment of the International Military Tribunal for the Far East, 4 November 1948 <<http://werle.rewi.hu-berlin.de/tokio.pdf>> (IMTFE Judgment).

⁵⁰ See section 4.5.

⁵¹ (adopted and entered into force 8 August 1945) 82 UNTS 280 (London Agreement and IMT Charter).

tribunals prosecuted the international crimes of war crimes, crimes against humanity and crimes against peace connected to IACs.⁵³

The jurisdiction of the IMT and IMTFE was not based on universal jurisdiction. M Cherif Bassiouni noted that the IMT Judgment refers to the jurisdiction,⁵⁴ because part of it reads:

The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.⁵⁵

After the IMT was established, a memorandum submitted by the UN Secretary General noted that the IMT, '...had made use of a right belonging to any nation'.⁵⁶ These are significant statements given that the Allies were prosecuting foreigners for committing international crimes committed outside of their territorial jurisdiction. It is likely that these references were made in respect of the types of extraterritorial jurisdiction that could be exercised by belligerents in respect of war crimes prior to World War II. But ultimately, State practice of the exercise of universality over war crimes, crimes against humanity and genocide began with the trials of minor war criminals before national and military tribunals.

⁵² Special proclamation by the Supreme Commander for the Allied Powers at Tokyo 19 January 1946; Charter dated 19 January 1946, amended Charter dated 26 April 1946; Tribunal established 19 January 1946 <www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf> (IMTFE Charter).

⁵³ IMT Charter (n 51) Art 6; IMTFE Charter *ibid*, Art 5.

⁵⁴ Bassiouni (n 22) 285.

⁵⁵ IMT Judgment (n 51) 216; *ibid*.

⁵⁶ As cited in Bassiouni (n 22) 286.

3.4 The United Nations War Crimes Commission

The UNWCC is the name of the network of tribunals in which war criminals were tried for international crimes committed during WWII.⁵⁷ Its purpose was to try Germans and other enemy nationals who had committed offences against Allied nationals.⁵⁸ Although it was beset with difficulties from its inception,⁵⁹ some of the prosecutions under the UNWCC provide the first instances of the exercise of universal jurisdiction over war crimes, crimes against humanity and aggression.⁶⁰

The jurisdiction of the Military Tribunals in occupied zones first emanated from Ordinance No. 2,⁶¹ which was issued by the Supreme Commander of the Allied Forces.⁶² This authorised the occupying Allied Powers to punish offenders found in the occupied territory under their control. The language and concept of universal jurisdiction is evident throughout the operation of the UNWCC. As a US Memorandum submitted to the members of the

⁵⁷ Most trials took place in military tribunals. Three approaches adopted by the Allies in choosing a venue for the prosecutions. The first was to create a specific military tribunals, as the US and Britain did. The second was to refer the war crimes to existing military courts, as in the case of France. The third was to refer the offences to the national court, as Norway did. See *Law Reports of the Trials of War Criminals: Digest of Laws and Cases*, vol 15 (UNWCC, H M Stationary Office 1949) 28; Dan Plesch and Shanti Sattler, 'A New Paradigm of Customary Criminal Law: The UN War Crimes Commission of 1943-1948 and its Associated Courts and Tribunals' (2014) 25 *Criminal Law Forum* 17.

⁵⁸ The UNWCC was not concerned with high-ranking Nazi and Japanese Officials. Although see *Trial of Wilhelm List and Others (the Hostages Trial)* in *Law Reports of the Trials of War Criminals*, vol 8 (UNWCC, H M Stationary Office 1949) 34, 34.

⁵⁹ Ann Tusa and John Tusa, *The Nuremberg Trial* (BBC Books, 1995) 22-23; Paola Gaeta, 'Grave Breaches of the Geneva Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 617-18.

⁶⁰ The research in this chapter concerning the UNWCC cases is based on the data in the 15 volumes of the law reports that were published by H M Stationary Office, and the 15 volumes of trial reports published by the US Government. The latter collection reports US National Military Tribunals (NMTs) only. These combined reports detail 91 of the 2042 cases that were tried at the UNWCC. The term 'war criminal' is used by the UNWCC to include perpetrators of crimes against humanity.

⁶¹ Army Group Area of Control No. 2 (UNWCC Doc C.132) 28 June 1945. See *History of the United National War Crimes Commission* (UNWCC, H M Stationary Office, 1949) 461-62.

⁶² *History of the United National War Crimes Commission*, *ibid.*

UNWCC Enforcement Committee (tasked with creating the legal parameters of the UNWCC) noted:

After viewing the opinion of jurists and considering legal precedents, the view was given that the violation of the laws of war is a violation of the law of nations and is a matter of general interest and concern, so that all civilised belligerents have an interest in the punishment of such offences.⁶³

There are a series of points to be noted in respect of this statement. First, there are similarities between the phraseology used by early scholars writing on universal jurisdiction, in the sense that breaches of the laws of war constitute violations against the 'the law of nations' and that this results in all States having an interest in the prosecution. Second, the rationale for the prosecution stems from the nature of the offence, the response is the exercise of enforcement jurisdiction by any State over crimes committed by foreigners against foreigners. Third, the language and ethos of what are now termed '*erga omnes*' obligations is evident. It is declared that all States have an interest in prosecuting certain offences that violate the law of nations. One also notes the use of the word 'civilised' to differentiate between the victors of the war (the Allies) and enemy (Axis) states. However, it is clear that the right belongs to belligerent States,⁶⁴ and hence, it is in keeping with State practice of extraterritorial jurisdiction before the Second World War. Lastly, it is also significant that academic writing influenced the US position towards universality.⁶⁵

⁶³ *ibid* 451.

⁶⁴ Although, the US General Military Government Court at Dachau tried foreigners for committing war crimes against other foreigners before the US had entered the War. See the *Trial of Josef Remmele* and others, which are unreported in *Law Reports of the Trials of War Criminals*, vol 15 (UNWCC, H M Stationary Office 1949) 44. Here the US Court '...accepted the principle that, while the existence of a state of war is a necessary condition precedent to the existence of a "war crime", it is not a *sine qua non* of the jurisdiction of an independent state to try and to punish an offence against the laws and customs of war'.

⁶⁵ *History of the United National War Crimes Commission* (n 61) 451.

In 1945, Ordinance No. 2 was substituted by Control Council Law No. 10 (CCL),⁶⁶ the purpose of which 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...’⁶⁷ Article 2 (1) stated that four crimes were to be prosecuted by the Allies: war crimes, crimes against humanity, crimes against peace and membership of a hostile organisation. It further declared that the UNWCC had the jurisdiction to punish ‘any person without regard to nationality’,⁶⁸ but in practice this was not the case. The UNWCC did not have jurisdiction to try offences committed by Germans against other nationals or stateless persons.⁶⁹ In practice, Germans and other enemy nationals were prosecuted.⁷⁰ Article 3 of CCL recognised the power of the occupying authority to punish war criminals found (or detained) within its zone of occupation. As was stated by the US National Military Tribunal (NMT) in *The Trial of Hadamar*:

...[E]very independent State has, under International Law, 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.⁷¹

Thus, universal jurisdiction *in absentia* was not intended. However, not all commentators supported domestic prosecutions for war crimes.⁷²

⁶⁶ Control Council Law No 10, Berlin, 20 December 1945 <<http://avalon.law.yale.edu/imt/imt10.asp>>.

⁶⁷ *ibid*, Preamble.

⁶⁸ *ibid*, Art 2(2).

⁶⁹ These crimes were to be tried by Germany Courts, see *ibid*, Art 2 (1) (d).

⁷⁰ Japanese nationals were also prosecuted. See *Jaluit Atoll Case* in *Law Reports of the Trials of War Criminals*, vol 1 (UNWCC, H M Stationary Office 1947) 71. Italians, Bulgarians and Hungarians were also listed as suspects by the UNWCC, see *History of the United National War Crimes Commission* (n 61) 509.

⁷¹ *Law Reports of the Trials of War Criminals*, vol 1 (UNWCC, H M Stationary Office 1947) 46, 53 (emphasis added). See also *Hostages Trial* (n 58) 54.

⁷² For example see Manner (n 2).

The Allies were required to incorporate CCL into their national law.⁷³ Some Allies used military law to punish individuals; others used their national penal laws.⁷⁴ Each zone Commander regulated the offences to be tried and decided on the rules and procedures to be adopted in that zone.⁷⁵ As such, much autonomy was given to each Allied Power as to what crimes they punished and to what extent. This resulted in a lack of uniformity in the laws enacted, and in State practice. Not all Allies tried the offences listed in CCL.⁷⁶ At times, some States chose to base the criminal charges in international law.⁷⁷ Not all municipal law authorised the exercise of the principle of universality⁷⁸ and not all States practiced universality. Other types of extraterritorial jurisdiction were also relied on.⁷⁹

⁷³ The British Government enacted Royal Warrant of 14 June 1945, Army Order 81/45, with amendments. The US laws stemmed from a combination of Presidential Orders and General Orders, including the US issued Ordinance No 7, which established Military Tribunals to give effect to CCL. Norway enacted Law of 13 December 1946 (No 14) on the Punishment of Foreign War Criminals and other laws. France enacted Ordinance of 28 August 1944, concerning the suppression of war crimes, and other laws.

⁷⁴ Norway and France relied on national law to try individuals. In the Far Eastern theatre, the national law of the occupying power was used in the proceedings, see Bassiouni (n 22) 157-58. See also Lutz Oette, 'From calculated Cruelty to Casual Violence: The United Nations War Crimes Commission and the Prosecution of Torture and Ill-Treatment' (2004) 25 *Criminal Law Forum* 291, 296. See generally the legislation in the annexes to the 15 Law Reports published by the UNWCC.

⁷⁵ *History of the United National War Crimes Commission* (n 61) 462.

⁷⁶ For example, the British Military Tribunals did not try crimes against humanity and crimes against peace, see Royal Warrant dated 14th June 1945, Army Order 81/45, as amended.

⁷⁷ See *Trial of Thiele and Steinert* in *Law Reports of the Trials of War Criminals*, vol 3 (UNWCC, H M Stationary Office 1948) 56; *Trial of Bury and Hafner* in *Law Reports of the Trials of War Criminals*, vol 3 (UNWCC, H M Stationary Office 1948) 62; *Trial of Killinger and four others* in *Law Reports of the Trials of War Criminals*, in *Law Reports of the Trials of War Criminals*, vol 3 (UNWCC, H M Stationary Office 1948) 67. In these cases the charges were based on violations of the Hague Convention 1907 and the Geneva Convention of 1929.

⁷⁸ Norway's municipal law provided for the passive personality, territorial and protective principles, while France's municipal law authorised the passive personality principle, *Law Reports of the Trials of War Criminals*, vol 3 (UNWCC, H M Stationary Office 1948) annex I and II respectively.

⁷⁹ *ibid.* See also *Peleus Trial* in *Law Reports of the Trials of War Criminals*, vol 1 (UNWCC, H M Stationary Office 1947) 1; *Almelo Trial* in *Law Reports of the Trials of War Criminals*, vol 1 (UNWCC, H M Stationary Office 1947) 35; *Zylon-B Case* in *Law Reports of the Trials of War Criminals*, vol 1 (UNWCC, H M Stationary Office 1947) 93. The US NMT relied on the protective principle in *Hadamar* (n 71) although, the term 'protective principle' is not used in the case summary.

It was the severity of the offences that justified the exercise of universality by the Allies. In *United States of America v Otto Ohlendorf et al*, (*Einsatzgruppen Case*), Chief prosecutor, Benjamin Ferencz asserted the rationale for the utilisation of the jurisdiction.⁸⁰ Citing Willard B Cowles' 1945 article 'Universality of Jurisdiction Over War Crimes'⁸¹ as a source, he stated:

...These rights may be vindicated by any nation, alone or in concert with others. The nationality of the victim and the time and place of crime do not impugn this jurisdiction. We find this law both in opinions of the Permanent Court of International Justice and the practice of states in military offenses. The Permanent Court has held that states have legal power to determine any criminal matter as long as such legal action is not prohibited by international law. Where conduct menaces the universal social order, there can be and has been no prohibition on the right of courts to act. No law has ever prohibited the trial by any court of crimes such as we shall here disclose.

Piracy and brigandage were the forerunners of modern international crimes. International jurisprudence soon gave states the right to punish these violators regardless of the victim's nationality or the location of the crime. This applied in time of war or peace.⁸²

The rationale for universal jurisdiction used by Ferencz was based on the metaphysical concept of the heinous nature of the offences. Once the crime occurred, any State may punish the offender. What is more, it is notable that the decision was based on the lack of a rule under international law prohibiting such

⁸⁰ *United States of America v Otto Ohlendorf et al (Einsatzgruppen Case)* in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10*, vol 4 (US government printing Office 1946-1949) 3.

⁸¹ Cowles (n 8).

⁸² *Einsatzgruppen Case* (n 80) 47. See also Heller (n 46) 137. Heller notes that this same rationale for universal jurisdiction over crimes against humanity asserted by Alexander N Sack in his article 'War Criminals and the Defence of Act of State in International Crimes' (1945) 5 *Law Guild Review* 461.

action. Thus, the methodology was based on that employed by the Permanent Court of International Justice in the *Lotus Case*.⁸³

In *Hadamar*, the US NMT also addressed the rationale for the exercise of universal jurisdiction, where it carried out the prosecution on behalf of its Allies whose nationals were victims of the mass crimes.⁸⁴ Here, one notes the similarities in the language used to describe the amity element that was used as a rationale for the exercise of universal jurisdiction over piracy committed on the high seas. The language used to describe the offences committed by the Axis regime in terms of them violating the unwritten laws of human kind is also evident in the case law of the UNWCC.⁸⁵ In the *Justice Trial*, the laws that discriminated against Jews and gypsies in Germany, and their enforcement by the German Judiciary were described as ‘shocking the conscience of mankind’ making them ‘punishable here’.⁸⁶ A further rationale for the exercise of US enforcement jurisdiction in *Hadamar* was because of Germany’s *debellatio* status.⁸⁷ The position of Germany as a defeated State in the war meant that it was not in a position to objection to the exercise of universal jurisdiction.

The Allies insisted that the post war codification of laws constituted international rules that reflected pre-existing laws.⁸⁸ This assertion can be disputed, given that there was no practice of universal jurisdiction in respect of war crimes and crimes against humanity prior to the UNWCC. Lord Wright commented that the methodology of creating international law in the post war period was reflective of the 19th century practice of rule creation upon a declaration by the dominant powers.⁸⁹ The UNWCC, and indeed the IMT and IMTFE, operated under the fundamental belief that the armed conflict authorised the post conflict intervention in German affairs by the Allied Powers. They also

⁸³ *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927). See discussion in the thesis introduction.

⁸⁴ *Hadamar* (n 71) 53.

⁸⁵ *Hadamar*, *ibid* 53; *Hostages Trial* (n 58) 54. See also *Zylon B Case* (n 79) 103.

⁸⁶ *The Trial of Josef Altstotter and others (Justice Trial)* in *Law Reports of the Trials of War Criminals*, vol 6 (UNWCC, H M Stationary Office 1948) 1, 81 (emphasis in original).

⁸⁷ *Hadamar* (n 71) 53.

⁸⁸ *Heller* (n 46) 122-23.

⁸⁹ As cited in *ibid* 123.

maintained that because the international crimes were considered offences under the community of nations, this authorised subsequent punishment by other States. German domestic laws authorising crimes against humanity could not act as a barrier to Allied legal intervention.⁹⁰ The supremacy of international law over domestic law, and indeed the methodology for the formation of the Allied legal response, was acknowledged in the *High Command Case*, where it was stated:

International Law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations, which are binding upon them to an extent that they must be carried even if to do so violates a positive law or directive of state. But the limitation which International Common Law imposes on national sovereignty, or on individual obligations, is a limitation self-imposed or imposed by the composite thinking in the international community, for it is by such democratic processes that Common Law comes into being.⁹¹

The autonomy given to the each Allied Power resulted in some states exercising universal jurisdiction in respect of certain crimes and others not.⁹² For this reason each of the crimes under the jurisdiction of the UNWCC pertinent to this thesis is analysed separately. By its conclusion, in 1948 approximately 1600 trials were completed under the UNWCC. However, with the beginning of the Cold War many German war criminals were released from prison in order to win West German support.⁹³

⁹⁰ CCL, Art 2 (1)(c).

⁹¹ *Trial of The German High Command (High Command case)* in *Law Reports of the Trials of War Criminals*, vol 12 (UNWCC, H M Stationary Office 1949) 69.

⁹² The Netherlands did not enact universal jurisdiction, *Law Reports of the Trials of War Criminals: Digest of Laws and Cases*, vol 9 (UNWCC, H M Stationary Office 1948) annex.

⁹³ By 1951, 50% of all war criminals convicted under CCL who received a prison sentence had been released. In 1950, two clemency boards recommended 'wholesale clemency', see Bassiouni (n 22) 159.

3.4.1 The exercise of universality over war crimes at the United Nations War Crimes Commission

The first reported prosecutions of war crimes under universality took place at the UNWCC.⁹⁴ Out of the sample of cases examined, the *Hadamar Trial* before the US Military Commission in Wiesbaden is the earliest example. Here, the offences had been committed outside US territory, against Polish and Soviet nationals. The Tribunal cited multiple sources to justify US authority to try the crimes, one of these being ‘universality of jurisdiction’. Here universality was defined as follows:

...[E] very independent State has, under International Law, 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.⁹⁵

The first widely published use of the phrase ‘universality of jurisdiction over war crimes’ was asserted by US Judge Advocate General, Willard B Cowles in the *Californian Law Review*.⁹⁶ Here, Cowles included pirates, brigands and war criminals in the same category of criminal and affirmed:

...[I]t is clear that, under international law, every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or at the place where the

⁹⁴ See *Peless* (n 79); *Almelo* (n 79); *Hadamar* (n 71); *Zykon-B* (n 79); *Belsen Trial* in *Law Reports of the Trials of War Criminals*, vol 2 (UNWCC, H M Stationary Office 1947) 1; *Hostages Trial* (n 58); *Trial of Kesselring* in *Law Reports of the Trials of War Criminals* in *Law Reports of the Trials of War Criminals*, vol 8 (UNWCC, H M Stationary Office 1949) 9.

⁹⁵ *Hadamar*, *ibid* 53.

⁹⁶ Cowles (n 8). Universal jurisdiction over international crimes was also explored in Sack (n 82).

offence was committed.⁹⁷

Citing Beckett, Cowles affirmed that the rationale for universality was that ‘The unpunished war criminal is itself a menace to the social order’.⁹⁸

The writing of Cowles was also advantageous in the transposition of universality from piracy to war crimes, as is evidenced by the Tribunal judgments where universal jurisdiction was relied on. As was highlighted in this and the previous chapters, there was little prior State practice of the exercise of universal jurisdiction over war crimes. The crux of Cowles’ argument is based on the similarities between pirates and war criminals in the sense of both perpetrators being cut off from society after the commission of a heinous act. Cowles also argues that a void of jurisdiction arises in both instances, which means that there is a likelihood of the crimes being unpunished. The acts of enemy war criminals committed are unlikely to be tried in the enemy state for a variety of reasons. Just as the writings of Grotius, Gentili and others influenced the development of universal jurisdiction over piracy, Cowles’ article should not be underestimated in terms of its impact on the exercise of universality over war crimes committed in IACs. Indeed, the Tribunals adopted the terminology used by Cowles. This is further evidence of the pivotal role played by scholars in advancing the development of universal jurisdiction. Cowles’ article was further cited by Lord Wright, one of the chairmen of the UNWCC, in his description of the legal basis under which the UNWCC operated:

...[T]he right to punish war crimes is not confined to the State whose nationals have suffered or on whose territory the offence took place but is possessed by any independent State whatsoever, just as is the right to punish the offence of piracy. This doctrine, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victims or the place where the offence was committed...⁹⁹

⁹⁷ Cowles, *ibid* 218.

⁹⁸ *ibid* 217.

⁹⁹ *Law Reports of the Trials of War Criminals*, vol 15 (n 57) 26.

Lord Wright also recognised that a new post-conflict political regime may not be willing to prosecute the perpetrators, and thus the prosecution would not otherwise occur.¹⁰⁰ Hence, the impunity rationale was a deciding factor in the application of universal jurisdiction to war crimes committed in IACs.¹⁰¹

The rationale for the application of universality was further discussed in *The Hostages Trial* where it was affirmed that jurisdiction attached to war crimes by virtue of the commission of the act and the classification of a war crime as an international crime:

An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.¹⁰²

There are two items to be noted here. First, it is clear that the presence of the accused in the hands of the forum state is required, which was the practice of the UNWCC prosecutions. Second, it is clear that the right to exercise universality belongs to belligerents. However, the US NMT acknowledged that not all war crimes warranted universality, for example spying.¹⁰³

Significantly, the rationale for the exercise of universal jurisdiction was not enough to justify war crimes committed against the nationals of Axis States, because the post war concept of a war crime required that the acts be committed against the nationals of Allied States.¹⁰⁴ Hence, it is arguable that the jurisdiction

¹⁰⁰ *ibid* 54-55.

¹⁰¹ See also *Hadamard* (n 71) 53.

¹⁰² *Hostages Trial* (n 58) 54.

¹⁰³ *ibid* 54.

¹⁰⁴ See CCL, Art 3 (1) (d); *Belsen Case* (n 94) 150; *Hadamard* (n 71).

used at the UNWCC was akin to the protective principle, which was legislated for by some States before the end of the war. It is reported that the US NMT exercised universal jurisdiction against the nationals of neutral States, as there are records of the Tribunal prosecuting five Spanish nationals for war crimes.¹⁰⁵ These trials appear to be the first time that universality was used to try nationals of neutral states,¹⁰⁶ although, at the time, the neutrality status of Spain in the war was unclear.¹⁰⁷

3.4.2 The exercise of universal jurisdiction over crimes against humanity at the United Nations War Crimes Commission

When the work of the UNWCC was being formulated it was envisaged that only war crimes would be tried, however this position changed when the true extent of the atrocities committed during the War became apparent.¹⁰⁸ Hersch Lauterpacht first asserted the use of the term 'crimes against humanity' in a legal sense.¹⁰⁹ This led to the crime being defined for the first time, in Article 6(c) of the IMT Charter¹¹⁰ and in Article 5(c) of the IMT Charter for the Far East.¹¹¹ These definitions criminalised crimes against humanity committed during

¹⁰⁵ Rosa Ana Alija-Fernández, 'Justice for No-Land's Men? The United States Military Trials against Spanish Kapos in Mauthausen and Universal Jurisdiction' in Kevin Jon Heller and Gerry Simpson, (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 103.

¹⁰⁶ *ibid* 112.

¹⁰⁷ *ibid*.

¹⁰⁸ Schabas, *Unimaginable Atrocities* (n 21) 50-51.

¹⁰⁹ *ibid* 51, although the wording was previously used before then by Britain, France and Russia in the joint-declaration to the leaders of the Ottoman Empire.

¹¹⁰ This reads, 'CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated', IMT Charter (n 51) (emphasis added).

¹¹¹ This Art defined crimes against humanity as '...namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan', IMTFE Charter (n 52) (emphasis added).

wartime only.¹¹² Crimes against humanity were treated as an extension of war crimes at the IMTFE.¹¹³ Conversely, Article 2 (1)(c) of CCL severed the nexus between crimes against humanity and international war,¹¹⁴ because the instrument was viewed as domestic law that applied to post conflict Germany, rather than international law.¹¹⁵

The war nexus allowed for the ‘internationalisation’ of punishment, and allowed the Allies jurisdiction to punish the crime notwithstanding that the offences were committed outside of their territorial jurisdiction and were committed by foreigners against foreigners.¹¹⁶ If not for the IAC nexus, State sovereignty would have prohibited the Allied intervention in German affairs.¹¹⁷ Thus, the connection between the exercise of universal jurisdiction and war that was evident in its application to piracy and the slave trade is arguably present here. There was no prior practice of the exercise of universal jurisdiction over crimes not connected to war and this was addressed in the *Trial of Flick* before the US NMT:

So far as we are advised no one else has been prosecuted to date in any of these Courts, including I.M.T., for crimes committed before and wholly unconnected with the war. We can see no purpose nor mandate in the chartering legislation of this Tribunal requiring it to take jurisdiction of such cases.¹¹⁸

Many Allied Powers criminalised crimes against humanity in their

¹¹² The war nexus stemmed from the wording highlighted in italics in the two previous footnotes. The other crimes within IMT and IMTFE jurisdiction were aggression and war crimes, both of which were connected to IACs.

¹¹³ Schwelb (n 26) 215.

¹¹⁴ William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 48.

¹¹⁵ William Schabas, ‘The Contribution of the Eichmann Trial to International Law’ (2013) 26 *Leiden Journal of International Law* 667, 677.

¹¹⁶ Bassiouni (n 22) 33.

¹¹⁷ *ibid.*

¹¹⁸ *Trial of Flick* in *Law Reports of the Trials of War Criminals*, vol 9 (UNWCC, H M Stationary Office 1949) 1, 26.

legislation in order to give effect to the UNWCC mandate.¹¹⁹ However, the removal of the 'war nexus' from crimes against humanity in CCL was nullified by the legislation enacted by some States,¹²⁰ and in practice, the acts were tried so long as they were committed during the war period.¹²¹ What is more, not all Allies enacted legislation to punish crimes against humanity.¹²² In general, war crimes were considered to be crimes against humanity when committed on a systematic basis in line with State policy.¹²³ Indeed, Poland, which was very much a victim State of the war, was the only State to legislate for universality over crimes against humanity, albeit restricting its application to a period that coincided with the war.¹²⁴

Crimes against humanity were not as widely prosecuted under universality as war crimes were. The Allies were aware that the laws and customs established would apply to them also. As Richard Jackson stated, '...the record on which we will judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well'.¹²⁵ Of course, the nexus to IAC protected the Allies from potential liability for discriminatory human rights situation within their own

¹¹⁹ See US Ordinance No. 7 (US), Art 1; Decree of 13 June 1946 (Poland), Art 6; Extraordinary Penal Law Decree of 22 December 1943 (Netherlands), Art 27a; Ordinance No 36 (France), Art 1; Law of 24 October 1946 (China), Art 2 (3).

¹²⁰ For example, Australia punished crimes against humanity so long as they were simultaneously war crimes, see *Law Reports of the Trials of War Criminals: Digest of Laws and Cases*, vol 5 (UNWCC, H M Stationary Office 1948) 96. Canada prosecuted enacted legislation to try war crimes only, *Law Reports of the Trials of War Criminals: Digest of Laws and Cases*, vol 4 (UNWCC, H M Stationary Office 1948) annex 1.

¹²¹ For example, Poland punished international crimes committed between 1 September 1939 and 9 May 1945.

¹²² See British Royal Warrant, Australian Commonwealth of Australia War Crimes Act, 1945 and the Canadian Act respecting War Crimes of 31st August 1946 (10 George VI Chap. 73), see annexes in volumes 1, 4 and 5 of *Law Reports of the Trials of War Criminals* (UNWCC, H M Stationary Office). Not all Eastern European countries criminalised crimes against humanity in their national laws, Bassiouni (n 22) 158.

¹²³ Heller (n 46) 232.

¹²⁴ Poland appears to be the only State that expressly legislated for universal jurisdiction over crimes against humanity, see *Law Reports of the Trials of War Criminals*, vol 7 (UNWCC, H M Stationary Office 1948) annex. Although the US did not expressly legislate for universality over crimes against humanity, its NMTs exercised universality over the crime. In the sample of cases examined, it appears that Poland predominantly prosecuted offences that took place while it was under German occupation.

¹²⁵ Opening statement of Richard Jackson in *Trial of Major War Criminals before the International Military Tribunal, Nuremberg* vol 2 (1947) 98, 101.

borders.¹²⁶ In this respect, Jackson admitted that the US had ‘...regrettable circumstances at times in [its] own country in which minorities are unfairly treated’.¹²⁷ Britain, France and the Soviet Union had similar concerns within their territories.¹²⁸ As Antony Anghie and Bhupinder Chimni note, the war nexus was not removed from crimes against humanity until decolonisation was complete.¹²⁹ States were reluctant to exercise jurisdiction over crimes against humanity committed during peacetime in countries abroad, because their nationals, including State officials, would be open to the same punishment in foreign courts. At the time, crimes against humanity were State orchestrated crimes.¹³⁰ What is more, the lack of clear limitations on what constituted crimes against humanity at the time could lead to the intervention by other States in domestic matters.¹³¹

The autonomy exerted by Allies allowed them to exercise universality within limited circumstances that served their interests.¹³² From the information in the sample of cases analysed, only two States exercised universality in respect of crimes against humanity; these were China and the US.¹³³ In *Hadamar*, the US

¹²⁶ William A Schabas, *Introduction to the International Criminal Court* (5th edn, CUP 2017) 95.

¹²⁷ As cited in Schabas, *Unimaginable Atrocities* (n 21) 108 (insertion added).

¹²⁸ *ibid.*

¹²⁹ Antony Anghie and Bhupinder S Chimni, ‘Third World Approaches to International Law and Individual Responsibility in International Law’ (2004) 36 *Studies in Transnational Legal Policy* 185.

¹³⁰ Schwelb (n 26).

¹³¹ See *Flick* (n 118) 26.

¹³² It is notable that Britain chose to criminalise and prosecute those accused of war crimes, rather than crimes against humanity. No doubt, the jurisdiction of foreign courts over the treatment of native peoples in its overseas territories would have been a concern. Australia and Canada would also have had similar concerns in respect of indigenous people within their borders.

¹³³ In the sample of cases examined, the cases prosecuted by the US: *Hadamar* (n 71); *Justice Trial* (n 86); the *Trial of Erhard Milch* in *Law Reports of the Trials of War Criminals*, vol 7 (UNWCC, H M Stationary Office 1948) 27; *Hostages Trial* (n 58); *Flick* (n 118); the *Trial of Carl Krauch and twenty-two others (IG Farben Trial)* in *Law Reports of the Trials of War Criminals*, vol 10 (UNWCC, H M Stationary Office 1949) 1; *Trial of Alfred Felix Alwyn Krupp Von Bohlen Und Halbach and eleven others (Krupp I)* in *Law Reports of the Trials of War Criminals*, vol 10 (UNWCC, H M Stationary Office 1949) 69; the *High Command Trial* (n 91); *Trial of Ulrich Greifelt and others (Rusha Trial)* in *Law Reports of the Trials of War Criminals*, vol 13 (UNWCC, H M Stationary Office 1949) 1; *United States of America v KarZ Brandt, et al (Medical Case)* in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10*, vols 1 and 2

NMT was of the opinion that only crimes against humanity that were simultaneously war crimes could be prosecuted.¹³⁴ However, this approach was later amended.¹³⁵ With the exception of the *Ministries* and *IG Farben* Trials, the cases where universality was exercised over crimes against humanity were limited to prosecuting crimes against humanity committed during war.¹³⁶

Initially, universality over crimes against humanity was only exercised where the victims of the crime were Allied nationals. As was noted by the NMT when commenting on the *Hadamar* Trial, 'Crimes committed against Germans and other Axis nationals were outside the scope of the trial'.¹³⁷ However, as the case law of the US NMT progressed, the tribunal exercised universal jurisdiction in respect of crimes against humanity committed against Axis nationals also.¹³⁸ The authority for this move was considered in *Flick* where it was affirmed that it was at the discretion of the Occupying Power as to whether crimes committed by German nationals against German nationals should be punished in a German

(US Government Printing Office 1950); *Einsatzgruppen Case* (n 80); *Oswald Pohl et al in Law Reports of the Trials of War Criminals*, vol 5 (UNWCC, H M Stationary Office 1949) 195; *Ernst von Weizsaecker et al (Ministries Case)* in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10*, vol 12 (US Government Printing Office 1950). The trial prosecuted by the Chinese War Crimes Military Tribunal was the *Trial of Takashai Sakai* in *Law Reports of the Trials of War Criminals*, vol 14 (UNWCC, H M Stationary Office 1949) 1.

¹³⁴ *Hadamar* (n 71) 1241.

¹³⁵ Commenting on the US NMT, Heller notes that '...the definition of a crime against humanity adopted in *Einsatzgruppen*... strongly suggests that Tribunal II believed that universal jurisdiction justified the prosecution of such crimes even in the absence of a connection to war', see Heller (n 46) 137, 236.

¹³⁶ In the *Justice Trial* (n 86), *Flick* (n 118) and the *High Command Trial* (n 91) crimes against humanity committed between September 1939 and May 1945 were prosecuted. In *Hadamar* (n 71), crimes against humanity committed between 1 July 1944 and 1 April 1945 were tried. In *The Medical* (n 133), *Einsatzgruppen* (n 80) and *Pohl* (n 133) cases crimes against humanity committed between September 1939 and April 1945 were tried. In the *Ministries Case* (n 133), crimes against humanity committed between March 1938 and May 1945 against German national and other nationals were tried. These charges were dismissed by the NMT, see annex in Heller, *ibid*. The *Ministries Trial* took place from 4 November 1947 to 31 January 1951. Count I of the *IG Farben* Trial contained charges of crimes against humanity committed 'in the years preceeding 8 May 1945', while count II included charges of crimes against humanity committed 12 May 1938 and 8 May 1945, see (n 133) 3-4. It is notable that the *Ministries* and *IG Farben Trials* were decided later than the other trials, which may be the reason why the indictments were more progressive. The War period was September 1939 to September 1945.

¹³⁷ *Hadamar* (n 71) 53.

¹³⁸ See *Justice Trial* (n 86); the *Trial of Erhard Milch* (n 133); *Hostages Trial* (n 59); *IG Farben* (n 133) and the *Rusha Trial* (n 133).

Court within its zone of occupation. Here, it was stated that in the event that the Occupying Power did not authorise such a Court ‘...then these cases are [to be] tried only before non-German tribunals, such as these Military Tribunals’.¹³⁹ In the *Ministries* trial, the war nexus was removed from the indictment. Here, the charges for crimes against humanity committed against German nationals and other nationals between March 1938 and May 1945 were dismissed by the NMT.¹⁴⁰ Notwithstanding the inconsistencies in practice, the Allied Powers exercise of universal jurisdiction over crimes against humanity under the auspices of the UNWCC is the first example of the jurisdiction applying to the crimes against humanity, a move that was not supported by all scholars.¹⁴¹

3.4.3 The exercise of universal jurisdiction over genocide at the United Nations War Crimes Commission

The UNWCC identified genocide as a type of crime against humanity linked to war.¹⁴² Some tribunals punished genocide as a crime against humanity, while others did not.¹⁴³ The period of operation of the UNWCC coincided with the work of Raphael Lemkin and the UN General Assembly, where genocide was identified as an international crime in 1946.¹⁴⁴ Notwithstanding its limitations, the UNWCC furthered the application of universal jurisdiction over genocide, although this was not a conscious effort on the part of the Allied powers. Nevertheless, Lord Wright acknowledged the connection between genocide and universality. Citing Lemkin, he stated that genocide, ‘...becomes a *delictum iuris gentium* alongside

¹³⁹ The *Trial of Flick* (n 118) 52 (insertion added). This position was reaffirmed in the *Justice Trial* (n 86) 40.

¹⁴⁰ See annex in Heller (n 46).

¹⁴¹ Robert K Woetzel notes that Oppenheim Lauterpacht did not agree that crimes against humanity could be treated as international piracy. See Robert K Woetzel, *The Nuremberg Trials in International Law* (Steven & Sons 1962).

¹⁴² See commentary on the *Rusha Trial* (n 133) 41.

¹⁴³ The Polish and US Tribunals punished genocide as part of crimes against humanity committed during the war. The US prosecutor, Telford Taylor included the crime of persecution of the Jewish population in nearly all of his opening statements and in the 12 indictments at the US NMTs, see Heller (n 46) 4. See also, the charges in *Einsatzgruppen* (n 80).

¹⁴⁴ UNGA Res 96(I) (11 December 1946). Deliberations regarding the creation of an international convention on genocide began in 1946, Schabas, *Genocide in International Law* (n 114) 60.

offences such as piracy, trade in women and children, trade in slaves, the drug traffic, forgery of currency and the like'.¹⁴⁵ The US NMT's move away from the idea that crimes against humanity could only be committed during wartime meant that they were indirectly asserting universal jurisdiction over genocide committed during peacetime. However, it cannot be said that this was a concentrated effort of government policy. At the same time, it was in the interest of the US Military Tribunals to rely upon the newly established form of extraterritorial jurisdiction, because unlike the other Allies, the US joined the war after it had started. Therefore, the US tribunals required more creative judicial mechanisms to punish international crimes committed before the US entry into the war. Kevin Jon Heller notes that the impact of the US NMTs on genocide has been minor, because they treated genocide as a crime against humanity.¹⁴⁶

3.4.4 The exercise of universal jurisdiction over other crimes

Some States exercised universal jurisdiction over other crimes. Notably, the US and Chinese Military Tribunals exercised universal jurisdiction over crimes against peace.¹⁴⁷ Additionally, the CCL listed torture as a crime against humanity.¹⁴⁸ Moreover, the application of universal jurisdiction to war crimes and crimes against humanity meant that it obliquely applied to torture.¹⁴⁹ Universal jurisdiction was also used to prosecute individual's accused of being members of a criminal organisation.¹⁵⁰ Universal jurisdiction was also used by the US NMT to punish individuals in corporate entities who were involved in

¹⁴⁵ Commentary on *Rusha Trial* (n 133) 41.

¹⁴⁶ Heller (n 46) 388. See also Schabas' comments on the jurisdiction of the US NMTs in Schabas, 'The Contribution of the Eichmann Trial to International Law' (n 115) 680.

¹⁴⁷ See *IG Farben Trial* (n 133); *High Command Trial* (n 91). The trial prosecuted by the Chinese War Crimes Military Tribunal was the *Trial of Takashai Sakai* (n 133). The exercise of universal jurisdiction over crimes against peace is also affirmed by Lord Wright although no cases are cited in support of this affirmation. See *Law Reports of the Trials of War Criminals*, vol 15 (n 56) 27.

¹⁴⁸ CCL, Art 2 (c).

¹⁴⁹ See also Oette (n 74).

¹⁵⁰ See the Justice Trial (n 86); Flick (n 118); *IG Farben* and *Rusha* trials (n 133).

committing crimes against humanity and other international crimes.¹⁵¹

3.5 Conclusion

This chapter has demonstrated how universal jurisdiction transposed from international piracy to serious crimes under international law committed in IACs, in order to determine what the rationale for this was. It is argued that the UNWCC was the turning point at which universality transposed from the crime of piracy to international crimes and that IACs provided the gateway through which this was achieved. The UNWCC provides evidence of the first instances of the jurisdiction being exercised over war crimes, crimes against humanity, and to a lesser extent over genocide (then considered a crime against humanity), torture (as a war crime and crime against humanity) and other crimes. This chapter has also illustrated the continuation of the nexus between international crimes and universal jurisdiction, which is particularly identifiable in the UNWCC case law where the jurisdiction is expressly addressed.¹⁵²

The UNWCC was instrumental in instigating the transposition of universal jurisdiction from piracy to war crimes committed in IACs. This interchange was attained through applying a principle that was previously reserved for pirates, to enemy nationals. War criminals were included in the same category of delinquents as pirates, and were deemed to be enemies of mankind.¹⁵³ Importantly, the UNWCC provides the first examples of universal jurisdiction being applied to the acts of state officials. The language that applied to pirates now pertained to persons connected to a state. It is clear that the application of universality to war crimes was more widely accepted by the Allies than its application to other serious crimes under international law. In this context, the US played a leading role in advancing the application of the principle to crimes against humanity (and to a lesser extent, genocide), just as Britain had done in respect of piracy and the slave trade.¹⁵⁴

¹⁵¹ See *Flick*, *ibid*; *IG Farben*, *ibid*; *Krupp I* (n 133).

¹⁵² For example, *Hostages Trial* (n 58) 54.

¹⁵³ *Hadamard* (n 71); *Hostages Trial*, *ibid*.

¹⁵⁴ See chapters 1 and 2.

In terms of answering the second research question, there were a number of reasons for the exercise of universality under the UNWCC. The main reason for the prosecutions was because the crimes would otherwise go unpunished. This was a realistic concern given the post war situation in Germany in which there was void of indigenous authority as a result of its *debellatio* status. This is similar to the practical legal void that arose in the case of piracy on the high seas, because in both scenarios there is a void of automatic enforcement jurisdiction exercised by central power. Second, there was the belief that the crimes when committed were so heinous that they warranted punishment by *any* State. The crimes were universally recognised as being of a serious nature. This rationale is based on humanitarianism that strengthens the nexus between international crimes committed abroad and the forum State. Moreover, the public outcry across the world in respect of the atrocities being carried out during the war adds to the justification for the humanitarian based response. Thus, as in the case of the development of universality over piracy, the rationale can be categorised into two areas.

Framing the legal response in humanitarianism terms provides a link between the forum States and the extraterritorial offence. In exercising universal jurisdiction and prosecuting Axis nationals applied their laws to persons who they did not have a link to via nationality. This is an example of what Joseph R Gusfield described as 'disinterested indignation',¹⁵⁵ whereby norm upholders (in this case the Allies) rely on honourable justifications to authorise their legal response because they lack personal victimhood.¹⁵⁶ Of course, as Gusfield notes, there is symbolism in the norm upholders promulgating laws and declaring certain behaviour as illegal.¹⁵⁷ Declaring that war criminals were to be treated as pirates was an important classification because for first time since the Napoleonic Wars universal jurisdiction was exercised against persons operating

¹⁵⁵ On this theory see Joseph R Gusfield, 'On Legislating Morals: The Symbolic Process of Designating Deviance' (1968) 56 *California Law Review* 54, 54.

¹⁵⁶ *ibid.* It must be noted that many of the victims of the international crimes tried by the UNWCC were Allied nationals, such as prisoners of war. Thus, in some cases the forum State was acting under personal victimhood.

¹⁵⁷ *ibid* 57.

with State authority. This shift had the effect of including State action within the enforcement jurisdiction of foreign courts.

It was the IAC that provided the gateway through which the Allies could enforce the universality principle. As chapter 2 illustrated, under customary international law, the right of search, visit and seizure could only be asserted by foreign navy fleets when exercised by a belligerent State during wartime.¹⁵⁸ The IAC overcame the principle of equality of States that prohibited the involvement of one State with another State's sovereignty.¹⁵⁹ This point is further demonstrated by the fact that the Holocaust and offences committed outside of the armed conflict were outside of the jurisdiction of the UNWCC.¹⁶⁰ Indeed, further evidence for this assertion can be viewed if one contrasts the exercise of universal jurisdiction over war crimes under the UNWCC with the lack of support for the application of the principle to the slave trade during the treaty negotiations in 1926 and 1956, the difference being that universality did not apply to the slave trade during peacetime. Taking into account the nexus between universal jurisdiction and IAC, perhaps it is not surprising that the Allies allowed themselves to rely on the universality principle in the aftermath of WW II.

However, the authenticity of the humanitarian justifications for the exercise of universal jurisdiction must be challenged.¹⁶¹ Moreover, by relying on the nexus between universal jurisdiction and IAC, the Allies shielded themselves from being prosecuted for atrocities that were being committed within their territories. Moreover, restricting the application of universal jurisdiction to the nationals of Axis States meant that universal jurisdiction did not apply to the international crimes committed by the nationals of Allied States. Indeed, the definition of war crime was at the time reinforced their hegemonic authority.

¹⁵⁸ Section 2.2.1.

¹⁵⁹ *ibid.*

¹⁶⁰ See section 3.4; Tusa and Tusa (n 59).

¹⁶¹ In the days before the London Agreement was signed, two atomic bombs were dropped in Hiroshima and Nagasaki on the 6 and 9 of August 1945, which resulted in the deaths, and injuries of tens of thousands of civilians. See Antonio Cassese, *International Law* (2nd edn, OUP 2005) 39.

The atrocities perpetrated by the Axis States were labelled as deviant,¹⁶² which resulted in the codification of new penal norms. The Nazi crimes were described as ‘offences against the laws of nations’ in which all nations had an interest in prosecuting, while the crimes committed by Allied forces during the war went unpunished. The ignorance of the commission of international crimes by their own nationals calls into question the declaration of humanitarian motives for universal jurisdiction and suggests that they may be based on rhetoric.

The international comity element of the exercise of universal jurisdiction over piracy, highlighted in chapter 1, is also evident in the practice of universality under the UNWCC. Prosecution on behalf of a friendly victim State was another rationale for the jurisdiction,¹⁶³ which of course means that the protective principle was also being relied on. This camaraderie highlights the political underpinnings of prosecutions of international crimes under universal jurisdiction under the UNWCC. The restricted application of the universality principle and the subjectivity in the selection of UNWCC trials must be acknowledged. It should be noted that universal jurisdiction was not the sole basis on which trials were conducted.¹⁶⁴ This suggests that, at the time, universality was a subsidiary form of jurisdiction rather than the sole jurisdiction relied on. It must also be noted that during this time universal jurisdiction was not described in terms of an obligation on the part of the Allies. Hence, it can be inferred that the exercise of universal jurisdiction was a right and not an obligation of states.

Notwithstanding the limitations and blatant subjectivity of the UNWCC, the importance of the institution in terms of the progression of universal jurisdiction must not be underestimated. It set a principle that states may try foreigners linked to a state for serious crimes under international law committed abroad against foreigners. What is more, this principle remained after the

¹⁶² On the labelling of acts as ‘immoral’ see Gusfield (n 155) 54.

¹⁶³ For example *Hadamar* (n 71).

¹⁶⁴ See section 3.4.

UNWCC operation came to an end.¹⁶⁵ The application of universal jurisdiction to serious crimes under international law continued after the UNWCC wound down and was codified in international treaties in respect of certain acts. These developments are examined in the next chapter.

¹⁶⁵ See *In re Rohrig, Brunner, and Heinze*, Special Criminal Court, Amsterdam, 24 December 1949 reprinted in (1950) 17 *International Law Reports* 393. The case law of the UNWCC was later cited by the ICTR, Heller (n 46) 388.

CHAPTER 4
THE APPLICATION OF UNIVERSAL JURISDICTION TO SERIOUS CRIMES
UNDER INTERNATIONAL LAW IN INTERNATIONAL TREATIES

4.1 Introduction

After the Second World War, universal jurisdiction transposed from international piracy to other serious crimes under international law through its codification in a number of international treaties. This chapter analyses how universal jurisdiction transposed from piracy to grave breaches of the Geneva Conventions & Additional Protocol I,¹ apartheid,² torture,³ enforced disappearances⁴ and certain war crimes against cultural heritage⁵ in conventional international law. The research question for this chapter is: *What is the rationale for the application of universal jurisdiction to crimes to which it applies?* In order to answer this question, States' opinions on the inclusion of provisions allowing for the application of universality to serious crimes under

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I), Art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II), Art 50; Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III), Art 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV), Art 146; Protocol Additional 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 1978) 1125 UNTS 3 (Additional Protocol I; AP I), Art 85.

² International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention), Art 5.

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1987, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT), Arts 5(2), 7.

⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entry into force 23 December 2010) 2716 UNTS 3 (Convention on Enforced Disappearance; CED), Arts 5, 9(2), 11(1).

⁵ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) in 38 (1999) *International Legal Materials* 769 (Second Protocol to the Hague Convention), Art 17(1).

international law in the context of the creation of international treaties are examined. This task is carried out to extract the reasons asserted by proponents and opponents of the principle as to why it should be codified in law.⁶ Notwithstanding that a provision providing for the exercise of universal jurisdiction over genocide was purposefully excluded from the 1948 Genocide Convention,⁷ the deliberation on the matter is included in the chapter because it is pertinent to the history of the development of universal jurisdiction.

Section two of this chapter analyses the debates that took place at the UN General Assembly (UNGA) at the end of the 1940s concerning the application of the principle to the crime of genocide. An analysis of the history of the codification of universal jurisdiction in the grave breaches regime of the four Geneva Conventions of 1949 and the first Additional Protocol of 1977 are examined in section 3. The contentious deliberations that took place at the UN in the context of the codification of the application of universal jurisdiction to the crime of apartheid are analysed in section 4. Given that universal criminal jurisdiction over torture as provided for in UNCAT was influenced by the application of universal civil jurisdiction to the crime in the case of *Filartiga v Pena Irala*,⁸ both advancements are addressed in section 5. Section 6 examines the Articles of the CED that provide for the jurisdiction. Section 7 focuses on the limited universal jurisdiction provided in the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict 1999. Section 8 discusses the potential codification of universal jurisdiction over crimes against humanity before the conclusion sums up this chapter.

⁶ In an effort to condense the drafting history of the Conventions, each section summarises the arguments cited in opposition and in support of the inclusion of a provision on universality in the respective treaty.

⁷ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

⁸ *Filartiga v Pena Irala* (1980) 630 F 2d 876 Court of Appeals, Second Circuit (United States).

4.2 The debates at the United Nations concerning the application of universal jurisdiction to genocide during the creation of the Genocide Convention

Efforts to codify universal jurisdiction over genocide began at the UNGA with the formation of the 1946 UNGA resolution on 'The Crime of Genocide', which declared genocide to be a distinct 'crime under international law' and affirmed that steps were to be made to create an international treaty.⁹ Notwithstanding that it did not provide an express provision allowing for universality, it applied the language of international crimes to the crime.¹⁰ Raphael Lemkin, who drafted an earlier version of the Convention, believed that the declaration of genocide as an international crime in the resolution translated to the application of universal repression thereto.¹¹ In 1946, Saudi Arabia proposed a draft convention on genocide that included a provision on universal jurisdiction.¹² The aim of the Convention was to prevent and punish genocide and two main drafts were formulated during the course of intense deliberation,¹³ before the Convention was adopted.¹⁴ It is important to note that debate concerning the inclusion of universality in the Treaty was centered on it being exercised by the custodial state. Out of the two main drafts, the Secretariat version was the only one to include a provision expressly authorising the exercise of universal jurisdiction over genocide, which is hardly surprising considering that it was prepared by Lemkin, Vespasian Pella and Henri Donnedieu de Vabres, three proponents of universal repression. Utilising the same language previously reserved for piracy,

⁹ UNGA Res 96(I) (11 December 1946), para 1 and 4.

¹⁰ Genocide was described as being of 'international concern' and the commission of genocide violated a 'moral law', *ibid*, Preamble.

¹¹ Raphael Lemkin, 'Genocide as a Crime in International Law' (1947) 41 *American Journal of International Law* 145, 150. See however, William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 57.

¹² (26 November 1946) UN Doc. A/C.6/86, Art 4.

¹³ The first of these, ECOSOC 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc. E/447 (Secretariat draft), was prepared under the auspices of the UN Secretary General. The second main draft, ECOSOC, 'Report of the Committee and Draft Convention drawn up by the Committee' (24 May 1948) UN Doc. E/794 (Ad hoc Committee draft), was composed by an ECOSOC Ad Hoc Committee. Both of these documents include commentary on the provisions.

¹⁴ A final draft was agreed on by the Sixth Committee of the General Assembly, which was then adopted by the UNGA on 9 December 1948.

this draft reaffirmed genocide as an international crime.¹⁵ Draft Article 7 on 'universal enforcement of municipal criminal law' read:

The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

Similar to the early writings on universal repression and the practice of the UNWCC, the proposed provision viewed the exercise of universal jurisdiction over genocide as being based on the presence of the suspect in the territory of the forum state.¹⁶ In the event of there being a lack of willingness of the forum State to prosecute the offender, the offender could be extradited to another State (with a nexus to the offence) for trial.¹⁷ In such instances, the custodial state would be 'released of their duty to bring the offender before their own courts'.¹⁸ Thus, it was envisaged that genocide would be prosecuted under what is now known as the framework of *aut dedere aut judicare* (the obligation to try or extradite).¹⁹ However, the primary responsibility was to effect the prosecution.²⁰ The experts believed that national courts were the appropriate forum to repress genocide, but that an international tribunal would be more suitable to punish very serious cases, and a draft convention for an international criminal court with jurisdiction to punish genocide was attached to the Secretariat draft.²¹ Importantly, they believed that if universal repression was not applied to genocide the objective of the Convention would be lost.²²

Overall, the proposal to codify universal jurisdiction over genocide was met with more opposition than support. This resulted in the removal of the

¹⁵ Secretariat draft (n 13) Preamble.

¹⁶ Schabas notes that a Secretariat memo seemed to propose *in absentia* trials as an option. See Schabas, *Genocide in International Law* (n 11) 411.

¹⁷ Secretariat draft (n 13), Art 8 and commentary at p 39.

¹⁸ *ibid*, commentary.

¹⁹ See sections 2.3 and 3.2.2.

²⁰ Secretariat draft (n 13) commentary at p 39.

²¹ *ibid*, commentary at p 19.

²² *ibid*, commentary at p 18.

proposal from the draft Convention at the Ad Hoc Committee stage, with France, the US and the Soviet Union all rejecting the idea.²³ Later, the Iranian delegate submitted a proposal for universal jurisdiction to be included in the Treaty at the Sixth Committee stage,²⁴ but this too was rejected.²⁵ States that objected to universality complained that it went against the traditional forms of jurisdiction.²⁶

The political implications that could result from the exercise of universal jurisdiction over genocide was one of the reasons cited in opposition to the inclusion of universality in the Convention.²⁷ It was also argued that such action would violate the principle of State sovereignty in the UN Charter,²⁸ and that the jurisdiction could be abused.²⁹ The Belgian Government was strongly opposed to draft Articles 7 and 8 of the Secretariat Draft, and believed that jurisdiction over its nationals was an essential attribute of state sovereignty.³⁰ One State suggested that the custodial State should be able to punish the accused so long as the territorial state consented,³¹ thus maintaining the state sovereignty of the territorial state. The nature of genocide as a State crime was another justification for opposition to the inclusion of a universal jurisdiction provision in the Treaty,³² in this respect, one State was concerned about the exercise of universal

²³ Ad Hoc Committee draft (n 13) 33.

²⁴ This proposed the addition of the following paragraph, 'They may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition', as cited in Schabas, *Genocide in International Law* (n 11) 413.

²⁵ Sixth Committee of the General Assembly, Summary records of 100th meeting (11 November 1948) UN Doc. A/C.6/SR.100, 406.

²⁶ For example, Ad Hoc Committee, summary record of 8th meeting (13 April 1948) UN Doc. E/AC.25/SR.8; *ibid*, 402 (UK).

²⁷ Ad Hoc Committee draft (n 13) 32.

²⁸ (27 September 1947) UN Doc. A/401 (Venezuela, commenting on the Secretariat draft). See also UN Doc. A/C.6/SR.100 (n 25) 403 (USSR, commenting on Iranian amendment).

²⁹ UN Doc. A/401, *ibid* (US); (22 April 1948) UN Doc. E/623/Add.3 (Netherlands, commenting on the Secretariat draft).

³⁰ Belgian Diplomatic Archives, File 1372/VIII, batch no. PII 1947-48: Examen du projet de Convention sur la Prévention et la Répression du génocide établi par le secrétariat Général des Nations Unies, p 5.

³¹ Pieter N Drost, *The Crime of State: Genocide* (A W Sythoff 1959) 27.

³² UN Doc. A/C.6/SR.100 (n 25) 398 (Egypt, commenting on Iranian amendment).

jurisdiction over heads of State.³³ In response to this argument, the Iranian delegate stated that he was open to the proposition that its amendment could exclude rulers.³⁴ Indeed, some State's delegates disputed the existence of a nexus between the commission of international crimes and universal jurisdiction.³⁵ Another concern was that the system of universal repression would mean that non-party States would come under the jurisdiction of the States parties.³⁶ The Norwegian Government believed that draft Article 7 of the Secretariat draft should not interfere with restrictions that already existed in the domestic law of States in respect of the prosecutor's decision to try a suspect.³⁷ Ultimately, sovereignty concerns lay at the heart of opposition to the insertion of a provision of universal jurisdiction in the treaty.

Conversely, the primary reason cited by States for the inclusion of a provision providing for universality in the Convention was to prevent impunity.³⁸ The Iranian Delegate differentiated between 'primary universal punishment' and 'subsidiary universal punishment'.³⁹ The former being applicable to piracy, where the offender was tried by the State that arrested him, irrespective of an extradition request from the territorial State. The latter operated under the obligation to try or extradite framework where the custodial State could only prosecute the offence when other States were unwilling.⁴⁰ The Iranian delegate noted:

It would therefore be of great value if the principle of subsidiary universal punishment were embodied in the draft convention, particularly for cases where the offender took refuge in a country other than that in which he had committed the offence and where his extradition was not requested,

³³ *ibid* 397 (Afghanistan)(commenting on Iranian amendment).

³⁴ *ibid* 406.

³⁵ UN Doc. E/AC.25/SR.8 (n 26)(France); UN Doc. A/C.6/SR.100 (n 25) p 398 (Egypt, commenting on Iranian amendment).

³⁶ UN Doc. A/401 (n 28) (US, commenting on the Secretariat draft). For more on this argument in the context of the creation of the Rome Statute, see section 6.4.2.

³⁷ (22 April 1948) UN Doc. E/623/Add.2. (Secretariat draft stage).

³⁸ Ad hoc Committee draft (13), commentary at p 32.

³⁹ UN Doc. A/C.6/SR.100 (n 25) 394-95.

⁴⁰ *ibid*.

or where extradition was impossible for reasons of *force majeure*, or, finally, where the offender did not belong to the category of criminal leaders whose offences were serious enough to justify the intervention of an international court of law.⁴¹

There are similarities in this reasoning and in the rationale asserted by Lemkin⁴² and others in the early twentieth century. Notably, it is clear that the universal repression proposed by Iran in its draft was not intended to be a duty.⁴³ The Iranian delegate disagreed that the system of universal repression would lead to international tensions between States, because the territorial State had the option to request the extradition of the offender for trial.⁴⁴ Thus, the primary right of prosecution of the territorial State would be preserved. Some delegates noted the improbability of the territorial State exercising its enforcement jurisdiction.⁴⁵

Some statements made in the course of the deliberations are worth noting for the purpose of this thesis. Firstly, some States recognised that universal repression already applied to some crimes. The Brazilian delegate, Amado, observed that the argument of universal repression going against the traditional forms of jurisdiction was inaccurate because extraterritorial jurisdiction had existed since the Middle Ages.⁴⁶ Mr. Perozo of Venezuela stated that his country had already enacted laws on universal jurisdiction in respect of trafficking of women and children, obscene publications and narcotic drugs.⁴⁷ Second, supporters of universality argued it was a natural consequence of genocide being labelled an international crime,⁴⁸ alongside counterfeiting of currency, traffic in

⁴¹ *ibid*, 395.

⁴² William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 *Leiden Journal of International Law* 667, 690.

⁴³ *ibid*.

⁴⁴ UN Doc. A/C.6/SR.100 (n 25) 396.

⁴⁵ *ibid* (China and Venezuela, commenting on the Iranian amendment).

⁴⁶ UN Doc. A/C.6/SR.100 (n 25) 401 (commenting on Iranian amendment). This comment may have been referring to in the form of universality that operated in the Northern Italian city States in the Middle Ages.

⁴⁷ UN Doc. E/AC.25/SR.8 (n 26).

⁴⁸ Ad hoc Committee draft (n 13), commentary at p 32; (9 November 1948) UN Doc. A/C.6/SR.97, 367 (Haiti).

women and children.⁴⁹ Thus, the nexus between international crimes and universal jurisdiction was recognised by some delegates. In supporting draft Article 7 of the Secretariat draft, Siam stated, ‘...if it is to be held that genocide is an international crime, it should be the “duty” of every State to punish the offender irrespective of his nationality or the place where the offence has been committed’.⁵⁰ Relying on the methodology in the *Lotus* principle, the Greek delegate noted that there was nothing to prevent States from exercising universality over genocide.⁵¹

Ultimately, the Ad Hoc Committee removed the reference to universal repression because it believed that it ‘...would violate the sovereign rights of a State by permitting a foreign State to punish acts committed outside of its territory or by foreigners’.⁵² At the time, genocide was carried out under State direction or complicity. States were concerned that the inclusion of universal jurisdiction in the Convention would lead to heads of State being prosecuted in foreign courts.⁵³ Following a proposal by Sweden, a declaration allowing for the exercise of the passive personality principle was adopted.⁵⁴ At the Sixth Committee stage, draft Article 7 was renumbered Article 6, the final text of which granted jurisdiction for the punishment of genocide to the territorial State and to an international penal tribunal. Article 5 of the Convention obligates the States parties to criminalise genocide and to provide effective penalties in domestic legislation. The latter provision also applies to extradition legislation and to measures taken to prevent the crime.⁵⁵ One shortcoming noted by Nehemiah Robinson is the failure of the States parties to acknowledge that a number of States can be implicated in the same instance of genocide.⁵⁶ Overall, it is a

⁴⁹ Ad hoc Committee draft, commentary, *ibid.*

⁵⁰ UN Doc. E/623/Add.4 (Secretariat draft stage).

⁵¹ UN Doc. A/C.6/SR.100 (n 25) 405.

⁵² Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) 31.

⁵³ *ibid* 31-32.

⁵⁴ Sixth Committee, Summary records of 134th meeting (9 November 1948) (2 December 1948) UN Doc. A/C.6/SR. 134, 716.

⁵⁵ Schabas, *Genocide in International Law* (n 11) 403.

⁵⁶ Robinson (n 52) 83. To illustrate this point, in 2011, two men were tried in Germany for ordering the commission of war crimes in the Democratic Republic of Congo. The crimes were ordered while the men were in Germany, see Patrick Wegner, ‘Universal

wonder that States managed to ratify and implement the Genocide Convention, given that it included a reference to jurisdiction being granted to an international penal tribunal where none existed.⁵⁷ For this reason, the Article posed problems for the Belgium and the UK.⁵⁸

There are similarities between the arguments posed in opposition to the inclusion of universal jurisdiction in the 1948 Genocide Convention and the inclusion of the principle in the 1956 Supplementary Slavery Convention and the 1958 UN Convention on the High Seas. In 1926 and 1956, States opposing the inclusion of universality in the respective treaties believed that the right would be abused. Similarly, concerns over potential breaches to State sovereignty and possible violations of the UN Charter were also raised in 1948. Indeed, the concerns raised by the States parties to the application of universal jurisdiction to genocide are the same anxieties raised in respect of the principle in recent times.⁵⁹

The point also must be raised that in 1948, States agreed that genocide could be committed during peacetime as well as during war.⁶⁰ At the time, the Great Powers such as the UK and US had concerns in respect of ethnic and racial groups within their territories.⁶¹ Before the creation of the Genocide Convention,

Jurisdiction in Germany: The FDLR Trial in Stuttgart' (Justice in Conflict, 27 December 2011) <<https://justiceinconflict.org/2011/12/27/universal-jurisdiction-in-germany-the-fdlr-trial-in-stuttgart/>>. The accused was convicted and the sentence is under appeal.

⁵⁷ Genocide Convention, Art 6.

⁵⁸ See chapters 8; UK National Archives file HO 45/25308.

⁵⁹ Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589; Henry A Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80(4) *Foreign Affairs* 86; George P Fletcher, 'Against Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 580.

⁶⁰ Genocide Convention, Art 1.

⁶¹ For example, in 1948, in the US, African Americans were being denied basic human rights, and public lynchings were still being carried out in some US States. As noted by the UK delegation during the negotiation of the Genocide Convention, '[T]he United States who are clearly afraid of accusations which may be made against them as a government in respect of the treatment of the negro and Red Indian populations of the United States', see HO45/25308, bundle 950025/15: telegram no 535 from UK delegation to the Foreign Office, dated 25 November 1948, p 4. See also Aoife Duffy,

genocide was connected to crimes against humanity committed during war,⁶² but after 1948 this was no longer the case. Hence, if universality was included in the Convention, there was a likelihood of States parties' statesmen being subject to foreign prosecutions for genocide committed during peacetime. Yet, in the immediate years prior to the creation of the Genocide Convention, the Great Powers were exercising universality over war crimes (and to a lesser extent crimes against humanity and genocide) under the operation of the UNWCC. What is more, a minority of States exercised universal jurisdiction over the latter crime, while those that did treated it as a crime against humanity connected to IACs.⁶³ The reluctance of States to apply universal jurisdiction to offences connected to war can be evidenced by States recognising its application to grave breaches of the Geneva Conventions one year after the Genocide Convention was adopted.⁶⁴ In effect, maintaining a link between universal jurisdiction and international crimes committed during IAC prevented the 'internationalisation' of punishment by other States.

There were of course other reasons for the exclusion of an express provision on universal jurisdiction in the Genocide Convention. Compared to war crimes, genocide and its punishment was a recent legal concept, notwithstanding the fact that genocide had been committed long before the formation of a definition in 1948. The Sixth Committee was concerned that the inclusion of universal jurisdiction in the Convention might lead to the proposal of genocide being tried before an international penal tribunal being abandoned.⁶⁵ A further apprehension was that the inclusion of universal repression in the text would discourage ratification of some States.⁶⁶

The link between certain offences and universal repression was formally recognised by a number of UN bodies. In 1950, the International Law

'Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure' (2015) 33 *Law and History Review* 489.

⁶² See chapter 3.

⁶³ *ibid.*

⁶⁴ See next section.

⁶⁵ Robinson (n 52) 32.

⁶⁶ Drost (n 31) 66.

Commission (ILC) included genocide in its list of crimes ‘that may come under the proposed system of universal repression’ and would come under the jurisdiction of a future international penal tribunal.⁶⁷ Thereafter, in 1951, the International Court of Justice (ICJ) found that it was the intention of the parties to the Genocide Convention that the treaty was ‘universal in scope’.⁶⁸ Here, the Court affirmed:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes, which are the *raison d’être* of the convention.⁶⁹

This is the language of *erga omnes* obligations. The ICJ in the Barcelona Traction Case affirmed the nature of such duty,⁷⁰ where, it was stated:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole,... [which by] their very nature ... are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁷¹

Speaking on which offences come within this framework, the ICJ affirmed:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of *genocide*... Some of the corresponding rights of protection have entered into the body of general

⁶⁷ ILC, ‘Question of International Criminal Jurisdiction’ (1950) UN Doc. A/CN.4/15, 13-14.

⁶⁸ *Reservations to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

⁶⁹ *ibid.*

⁷⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, paras 33–34.

⁷¹ *ibid.*, para 33 (insertion added).

international law... others are conferred by international instruments of a universal or quasi-universal character.⁷²

4.3 The application of universal jurisdiction to grave breaches of the Geneva Conventions 1949

After the post war prosecutions at the UNWCC, there was considerable momentum for the unification of national legislation prohibiting war crimes.⁷³ However, this was not supported by all States, in particular the UK and the US.⁷⁴ As was illustrated in chapter 3, US and UK nationals were not subject to the jurisdiction of the UNWCC. As Paola Gaeta comments:

...[T]hese Powers wanted to keep exclusive criminal jurisdiction over individuals accused of having committed war crimes against their own nationals (or the nationals of their allies)... After all, war crimes trials that were unfolding at the time were proving to be “effective”,... in terms of the articulation of favourable political and historical narratives of the war by the victorious states.⁷⁵

Initially, the International Committee of the Red Cross (ICRC) did not promote the idea of unifying national laws on the laws of war,⁷⁶ but then, after intervention by Jean Pictet, it changed its position.⁷⁷ In 1946 and 1947, the ICRC convened a conference of experts in Geneva to examine the topic of common penal sanctions to penalise war crimes.⁷⁸ The resulting draft was submitted to the 17th International Conference of the Red Cross in Stockholm in August 1948 and read:

⁷² *ibid*, para 34 (emphasis added).

⁷³ Jean Pictet, *Commentary on the Geneva Conventions of 1949*, GC I (ICRC, Geneva, 1952) 357.

⁷⁴ Paola Gaeta, ‘Grave Breaches of the Geneva Conventions’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 617.

⁷⁵ *ibid*, 617.

⁷⁶ Jean Pictet (n 73) 358; *ibid*, 616.

⁷⁷ Gaeta, *ibid* 616-19.

⁷⁸ Pictet (n 73) 358.

The Contracting Parties shall be under the obligation tu [sic] search for persons charged with breaches of the present Convention, whatever their nationality. They shall further, in accordance with their national legislation or with the Conventions for the repression of acts considered as war crimes, refer them for trial to their own courts, or hand them over for judgment to another Contracting Party.⁷⁹

There were no reservations placed by States on this provision.

Again in December 1948, four government experts met in Geneva, under the auspices of the ICRC, to further examine the issue. The experts opined that violations of the proposed Geneva Conventions should not go unpunished.⁸⁰ The draft Articles formulated by the group differentiated between breaches of the Geneva Conventions and what they termed 'grave violations'. Moreover, the draft included what appears to be the first reference of repression of 'grave breaches'.

Article 2 read:

... [G]rave breaches o [sic] the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognized by them. Grave breaches shall include in particular those which cause death, great human suffering, or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person, or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party

⁷⁹ A copy of the text is available in 'Working Document drawn up for the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims: Draft Convention for the Relief of the Wounded and Sick in Armed Forces in the Field' Art 40 at p 24-25.

⁸⁰ Pictet (n 73) 359.

does not bring before its own tribunals.⁸¹

The draft provision provided for ‘universality of jurisdiction’ over grave breaches.⁸² There are a number of notable features in the draft Article. First, it included a new category of war crimes termed ‘grave violations’ or ‘grave breaches’, the punishment for which was specific. These acts were to be considered ‘crimes against the law of nations’, which is an obvious reference to the universality principle applying to the offences. This provides further evidence in respect of the nexus between crimes against the law of nations and universal jurisdiction. Second, there were two ways in which the grave violations could be punished, either by the national courts of the contracting parties or by ‘international jurisdiction’ recognised by the contracting parties. The reference to ‘international jurisdiction’ during this time referred to the creation of an international criminal court.⁸³ Lastly, extradition was an element of the regime. It is notable that the experts adopted the *aut dedere aut judicare* framework in order to provide for universal jurisdiction. As was mooted during the Genocide Convention deliberations, the justification for this proposal was because it was hoped that ‘...such offences will not be left unpunished...’⁸⁴ The inclusion of the extradition element was to ‘...help to make their repression general’.⁸⁵

In April 1949, State representatives convened at a Diplomatic Conference in Geneva to further codify the laws and customs of war. Four Conventions were proposed and as part of the negotiations, a Joint Committee was established to discuss the draft common provisions. From this Joint Committee, a Special Committee was formed to examine the common penal sanctions in the four conventions. The draft Article prepared by the four government experts for the

⁸¹ Reprinted in *ibid* 359.

⁸² *ibid*.

⁸³ This is the meaning given to the phrase in the materials examined at the Belgian Diplomatic Archives and the UK National Archives. At the time, the establishment of a permanent international criminal court was being considered by a group of experts drafting the Genocide Convention from 1947-48. The matter was also addressed by the ILC in the 1950s.

⁸⁴ Pictet (n 73) 359.

⁸⁵ *ibid* 360.

ICRC was used as the starting point for the common penal provision.⁸⁶ The ICRC draft was replaced by a joint amendment submitted by Australia, Belgium, Brazil, US, France, Italy, Norway, Netherlands, UK and Switzerland that was produced after 'much pain and labour'.⁸⁷ This new draft was introduced by Captain Martinus Willem Mouton of the Netherlands, and read:

The High Contracting Parties, insofar as this Convention cannot be otherwise implemented, undertake to enact in accordance with their respective Constitutions, legislation to provide effective penalties for persons committing or ordering to be committed any of the grave breaches defined in the following Article.

Each Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed any of the above mentioned grave breaches and shall, regardless of their nationality, bring before its own courts all persons committing or ordering to be committed such grave breaches, or if it prefers, and provided that a *prima facie* case has been made out by another High Contracting Party concerned, hand them over for trial to such Contracting Party.

Each High Contracting Party shall take measures necessary for the repression of all acts contrary to the provisions of the present Convention other than the above-mentioned grave breaches.⁸⁸

As Captain Mouton commented, 'The absence of such [effective penal] provisions resulted in many violations in the Second World War...'⁸⁹ Hence, the purpose of the joint amendment was to deter such crimes from being committed. The authors were cognisant that States already had various forms of legislation in place to penalise breaches of the existing conventions on the laws of war. As was stated, 'The inclusion of grave breaches which have to be penalized,

⁸⁶ Fourth Report drawn up by the Special Committee of the Joint Committee, 12 July 1949 in *Final Report of the Diplomatic Conference of Geneva of 1949*, vol 2, section B (ICRC, Geneva) 114.

⁸⁷ *ibid* 115.

⁸⁸ Reprinted Pictet (n 73) 360.

⁸⁹ Fourth Report drawn up by the Special Committee (n 86) 114 (insertion added).

guarantees a certain amount of uniformity in the national laws, which is very desirable when tribunals are also dealing with accused of other nationalities'.⁹⁰ Hence, the unification of penal laws was a further reason for the inclusion of universality in the grave breaches regime. Yet, the purpose was not to create international penal law.⁹¹ The word 'war crimes' was proposed in respect of grave breaches, but this was rejected because it was believed that the wording should be reserved for violations of the Hague Conventions.⁹²

Some other changes were proposed and adopted by the Special Committee in respect of the draft Article.⁹³ There was little commentary by delegates concerning the paragraph on the repression of non-grave breaches, and it was adopted.⁹⁴ After some further amendments, the Joint Committee adopted the Article as a whole,⁹⁵ and the common penal provision was adopted by the plenary conference on 1st August 1949,⁹⁶ before the Four Geneva Conventions were adopted as a whole. Today, the common penal provision to the Four Geneva Conventions reads:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under 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

⁹⁰ *ibid* 115.

⁹¹ *ibid*.

⁹² Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 *Journal of International Criminal Justice* 657, 675.

⁹³ 31st meeting of the Special Committee of the Joint Committee, 27th June 1949 in *Final Report of the Diplomatic Conference of Geneva of 1949* (n 86) 87-88.

⁹⁴ *ibid* 88.

⁹⁵ 11th meeting of the Joint Committee, 19th July 1949 in *Final Report of the Diplomatic Conference of Geneva of 1949* (n 86) 33.

⁹⁶ 22nd meeting of the plenary session, 1 August 1949 in *Final Report of the Diplomatic Conference of Geneva of 1949* (n 86) 364.

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.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.⁹⁷

The codification of this common penal provision was an important advancement in the history of universal jurisdiction for many reasons. The scope of the provision is far-reaching. For the first time in an international treaty concerning the laws and customs of war, States parties were obligated to exercise universal jurisdiction over suspected perpetrators present in their territory. Notably, it is the presence of the accused in the territory of the High Contracting Party (HCP) that activates the obligation. Moreover, the duty extends to searching for the suspect, once the authorities in the custodial State are aware of that presence.⁹⁸ In addition, HCPs were obligated to enact 'special legislation'⁹⁹ criminalising grave breaches in their national law.¹⁰⁰ Lastly, and significantly, the exercise of universality was an obligation that applied to belligerent and neutral HCPs as opposed to it being a right of belligerents, as it was under the UNWCC.¹⁰¹

There are a number of features that must be highlighted in this debate. First, in 1956, as noted, States parties were very much opposed to the application of the universality principle to the slave trade committed on the high seas. In contrast, in 1949, States agreed to the application of universal jurisdiction to a specific category of war crimes. This further demonstrates the tendency of States during this period to codification universal jurisdiction in

⁹⁷ Geneva Convention I, Art 49; Geneva Convention II, Art 50; Geneva Convention III, Art 129; Geneva Convention IV, Art 146 (emphasis added).

⁹⁸ Pictet (n 73) 365-66.

⁹⁹ *ibid*, 362. See also Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, CUP 2016) 333.

¹⁰⁰ Pictet, *ibid*; Solis, *ibid*. See however, Gaeta (n 74) 621-24.

¹⁰¹ See chapter 3.

respect of offences committed during IACs. This conveniently prevented the application of universal jurisdiction to serious human rights abuses that were being committed within State borders during peacetime. A further reason for this distinction between the codification of universality over grave breaches and not over the slave trade may also be because the *aut dedere aut judicare* framework was proposed in respect of the former offence. This proposal required that the accused be in the territory of the forum State in order for a prosecution to occur. In the case of the debates on the application of universal jurisdiction to the slave trade, the forum State engaged the right of visit over a vessel registered in another State, which was akin to embarking on the other State's territory. In contrast, the prosecution requirement in the Geneva Conventions was activated by the voluntary presence of the accused in the territory of the HCP.

Second, importantly, the *travaux préparatoires* to the Geneva Conventions demonstrate that in 1949 no State was surprised by the notion of prosecuting non-nationals for certain violations committed abroad. Third, all States had an interest in the prosecution of the war crimes, because the nationals of *all* states were potential victims of grave breaches. Hence, reciprocity was a factor in the functioning of the framework.¹⁰² Lastly, States officially acknowledged that universal jurisdiction did not apply to non-grave breaches. However, the last paragraph of the common penal provision makes it clear that HCPs are under a duty to take measures to suppress all other violations of the Geneva Conventions that do not constitute grave breaches. The inclusion of the word 'suppression' '...was intended to signify that all necessary measures would be taken to prevent a recurrence of acts contrary to the Convention...'¹⁰³

¹⁰² Indeed, this is still an element of the functioning of international humanitarian law (IHL) today. See Shahrar Nasrolahi, *Reciprocity in International Law: Its Impact and Function* (Routledge 2015) 58-63. New Zealand concluded that it would be pointless for it to change its domestic laws in respect of grave breaches where other Commonwealth countries had not done so. See FO369/46/36, bundle K3/2: letter from Foss Shanahan (for Secretary of External Affairs), dated 21 December 1950, p 4, para 14.

¹⁰³ Fourth Report drawn up by the Special Committee of the Joint Committee (n 86) 133.

Similar concerns about the exercise of universality that were raised during the creation of the Genocide Convention were also broached. The New Zealand Department of External Affairs expressed concern that hostile States might seek the extradition of its nationals to stand trial in foreign courts,¹⁰⁴ describing universal jurisdiction as a 'regrettable departure from existing practice'.¹⁰⁵ In addition, it noted the difficulty in obtaining evidence in another State.¹⁰⁶ Despite these concerns, some State officials were cognisant of the significance of the common penal provisions and this is reflected a reluctance to place reservations on the common provision.¹⁰⁷ Meanwhile, the Canadian authorities were aware of the possibility of perpetrators fleeing the place of the crime and seeking asylum abroad,¹⁰⁸ which of course was an issue after WWII. However, there was misunderstanding on the part of some States as to the extent of the obligation in the common penal provision. The Canadian Government informed the UK Dominion Office and Commonwealth Office that it did not require new legislation to cover grave breaches, because its ordinary criminal law would suffice.¹⁰⁹ It was of the opinion of the New Zealand Government that the extradition reference in the common penal provision was 'permissive and not mandatory'.¹¹⁰

It can be argued that the codification of universal jurisdiction as part of the grave breaches regime was a retrogressive move. During the UNWCC universality applied to war crimes generally, rather than a specific type of violation of the laws and customs of war. Conversely, for the first time, the exercise of universal jurisdiction over war crimes was not a right of belligerents,

¹⁰⁴ D035/3361: letter from Foss Shanahan (for Secretary of External Affairs), dated 21 December 1950, para 10.

¹⁰⁵ *ibid*, para 8.

¹⁰⁶ *ibid*, para 10.

¹⁰⁷ New Zealand and the UK were two such states. See D035/3361: letter from AR Swinnerton to CG Kemball, dated 2 January 1951.

¹⁰⁸ D035/3361: draft letter from AR Swinnerton to CG Kemball dated 14 December 1950, p 3.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid* p 2. As later commented by the Department of External Affairs of New Zealand, 'Contracting states have not only the right, but also the duty, to punish persons committing certain acts which would be generally recognized as violations of the laws and customs of war...States may not plead defects in their own legislation as an excuse for failure to take such action. See letter from Foss Shanahan (n 104) p 1, para 3.

but an obligation of all HCPs, which later crystallised into a rule of customary international humanitarian law.¹¹¹ However, it cannot be said that universal jurisdiction applied to war crimes committed in a non-international armed conflicts (NIACs) at this point in history. As was the situation in respect of the exercise of universality under the UNWCC, there were nationality restrictions on the codification of universal jurisdiction in the Four Geneva Conventions. The Four Conventions stated that grave breaches had to be committed against persons or property protected by the Conventions.¹¹² These legal concepts are linked to IACs,¹¹³ and at the time necessitated that the nationality of the perpetrator and the victim were different.¹¹⁴

Some features of the legislation implemented in HCPs are worth noting. First, the idea that prosecutions should only take place when the victim State is an ally of the forum State was an element of the Australian legislation.¹¹⁵ It is arguable that this aspect of the legislation is a continuation of the amity requirement that was an element of war crimes prosecutions that took place at the UNWCC.¹¹⁶ Crucially, this element was not expressly included in the grave breaches regime, which is to be welcomed. Second, some States allocated the responsibility for deciding whether a prosecution should go ahead to their executive organ. This was achieved in legislation that required the consent of the attorney general or public prosecutor for a prosecution to be conducted.¹¹⁷ This demonstrates that some of the current debates regarding restrictions on universal jurisdiction legislation are not new.¹¹⁸ Conversely, the domestic

¹¹¹ Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (CUP 2005) 604-10.

¹¹² Protected persons and property are defined in Geneva Convention I, Art, 13; Geneva Convention II, Art 13; Geneva Convention III, Art 4; Geneva Convention IV, Art 4. See also AP I, Arts 8, 44 and 45.

¹¹³ *ibid*; Gaeta (n 74) 643.

¹¹⁴ *ibid*.

¹¹⁵ Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 86.

¹¹⁶ See chapter 3. See also chapter 1 in respect of the amity requirement as it relates to international piracy.

¹¹⁷ Geneva Convention Act 1957, s 7(6) (Australia); Geneva Conventions Act 1985, s 3(4) (Canada); Geneva Conventions Act 1962, s 3(3) (Ireland); Geneva Conventions Act 1957, s 1(3) (UK).

¹¹⁸ See chapter 7.

legislation in some countries went further than the parameters of the Geneva Conventions. The Netherlands enacted legislation, which provided for universal jurisdiction over 'violations of the laws and customs of war' in Articles 3(1) and 8(1) of the Crimes in Wartime Act (*Wet Oorlogsstrafrecht*) 1952.¹¹⁹ However, in practical terms, by the late 1960s most States had not complied with the obligation to enact effective penal legislation and the system of universal jurisdiction was not applied.¹²⁰

4.3.1 Additional Protocols to the Geneva Conventions and the application of universal jurisdiction

In the 1970s, States once again convened a Diplomatic Conference with the purpose of further codifying the laws and customs of war. The two Additional Protocols (APs) to the Geneva Conventions were based on a drafts formulated by the ICRC.¹²¹ Grave breaches were included in Articles 11 (4) and 85 of AP I of the first AP to the Geneva Conventions in 1977 (relating to armed conflicts of an international character).¹²² Grave breaches were declared to be war crimes in Article 85(5) of API. During the deliberations there was strong opposition to this provision for fear of confusing IHL with national criminal law.¹²³ Articles 11 (4) and 85 of API add to the list of conduct classed as grave breaches. In particular, Article 11 provides a new categorisation of persons against whom grave breaches must not be committed, protecting persons deprived of their liberty that are in the hands of an adverse power.¹²⁴ Article 85 includes certain actions traditionally viewed as being part of the conduct of hostilities known as 'Hague Law' as grave breaches,¹²⁵ despite concerns expressed during the

¹¹⁹ Reydams (n 115) 167.

¹²⁰ Sandoz (n 92) 675 (footnotes omitted).

¹²¹ CJ4/2113: letter to Secretary of State and others from AP Wilson, 8 December 1977, p 1, para 3.

¹²² Protocol Additional 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 1978) 1125 UNTS 3 (Additional Protocol I; AP I).

¹²³ Sandoz (n 92) 676.

¹²⁴ Claude Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff Publishers 1987) 153.

¹²⁵ *ibid* 993; Sandoz (n 92) 676.

negotiations.¹²⁶ It is significant that States agreed to expand universal jurisdiction to the conduct of hostilities, as until then, universal jurisdiction had only been used to try offences traditionally referred to as ‘Geneva Law’. Of course the reciprocity principle that underpins the operation of IHL meant that this situation would benefit all HCPs.

There were two objectives in the drafting of Article 74, which later became Article 85: (1) to include a method of repression in respect of Protocol breaches and (2) to define acts of grave breaches committed against the new category of protected persons and objects.¹²⁷ The final provisions were based on compromise, as some delegates were concerned that some breaches were excluded.¹²⁸ As Claude Pilloud and others note, ‘The system of repression in the [Four Geneva] Conventions is not to be replaced, but reinforced and developed by this Section (Articles 95-91), so that it will in future apply to the repression of breaches of both’.¹²⁹ A further rationale for the inclusion of universal jurisdiction in AP I was to prevent any ‘loopholes’.¹³⁰ The list of grave breaches is exhaustive, but that this situation does not mean that other breaches, ‘...cannot also be subjected to universal jurisdiction by reason of customary or treaty law’.¹³¹ Nor did this prevent HCPs from criminalising acts that are not considered grave breaches, but that such crimes would only be ‘...punishable if committed by members of their own armed forces’.¹³² In this regard, one notes that the legislation enacted in some countries such as Belgium and Spain went further than the scope specified in the APs.¹³³ Some other features of the grave breaches regime in AP I are of note. As in the case of the four original treaties, the phrase ‘High Contracting Parties’ in respect of repression of the breaches of AP I

¹²⁶ Pilloud and others, *ibid* 993.

¹²⁷ *ibid* 991. The concept of a protected person was expanded on in AP I, Arts 8, 44 and 45, see Gaeta (n 74) 643.

¹²⁸ *ibid*.

¹²⁹ *ibid* 992 (insertion added).

¹³⁰ *ibid* 975.

¹³¹ *ibid* 976.

¹³² *ibid* 976.

¹³³ See chapter 8; Maximo Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational prosecution of International Crimes’ (2011) 105 *American Journal of International Law* 1, 32-41.

includes neutral states and States not party to the conflict.¹³⁴ Moreover, criminal liability for grave breaches includes certain ancillary offences.¹³⁵ Lastly, for an act to be considered a grave breach, it needs to be a willful act or omission.¹³⁶

The grave breaches regime was not included in the Second Additional Protocol (APII) relating to armed conflicts of a non-international character.¹³⁷ The majority of States opposed universal jurisdiction applying to acts committed in NIACs for fear that such action would breach State sovereignty.¹³⁸ It is clear from the discussions on AP I that the majority of States did not want grave breaches to include acts committed against persons detained by an adverse power with which they shared nationality.¹³⁹ Here, one recalls the nationality restrictions that were codified in respect of grave breaches of the Geneva Conventions. It was asserted that war crimes could not be committed in NIACs, because such offences would constitute crimes against humanity.¹⁴⁰ On this point, commentators have noted that the two offences are clearly distinguishable by their respective elements of crimes.¹⁴¹ Ultimately, States believed it was their responsibility to repress violations carried out by their own nationals.¹⁴² The possibility of universal jurisdiction applying to offences committed between a State's nationals was a barrier to expanding universal jurisdiction to war crimes in NIACs.¹⁴³ The non-application of universal jurisdiction to acts committed between nationals of the same HCP was not purposefully set up to limit liability for certain acts, but 'because of a concern to preserve the sovereignty of

¹³⁴ Pilloud and others (n 124) 975.

¹³⁵ *ibid* 979.

¹³⁶ *ibid*, 159.

¹³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS609 (Additional Protocol II; AP II).

¹³⁸ Sandoz (n 92) 676.

¹³⁹ Pilloud and others (n 124) 160.

¹⁴⁰ Sandoz (n 92) 677.

¹⁴¹ Pilloud and others (n 124) 160.

¹⁴² *ibid*.

¹⁴³ In addition, a proposal to include AP I, Art 75 (on fundamental guarantees) within the scope of the grave breaches regime was rejected, because this would mean that universal jurisdiction would apply to acts committed between persons of the same nationality. See Claude Pilloud and others (n 124) 992.

States'.¹⁴⁴ However, the resulting outcome meant that '...only the State is responsible in all circumstances for the repression of breaches, no matter how grave, committed by one of its nationals upon another'.¹⁴⁵

Thus, the grave breaches regime was not included in AP II, leaving '...intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict'.¹⁴⁶ This situation is not surprising given the tracing of the application of universal jurisdiction over the crimes previously examined. As the outcome of the APs demonstrate, the 'internationalisation' of prosecutions did not apply to matters that occurred within the context of a civil war. It is also worth noting that at this point in history the legal concept of a crime against humanity still included the 'war nexus'. This points to the significance of customary international law in the development of universal jurisdiction over offences committed within state borders, which is explored in chapters 5 and 7.

4.4 The International Convention on the Suppression and Punishment of the Crime of Apartheid and universal jurisdiction

From 1968 onwards, the UN General Assembly (UNGA) declared apartheid to be a crime against humanity.¹⁴⁷ This accumulated in the adoption of the Apartheid Convention on 30 November 1973.¹⁴⁸ The Convention is significant in that it provided for the application of the universality principle to the crime. Article 5 reads:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the

¹⁴⁴ *ibid* 160.

¹⁴⁵ *ibid*.

¹⁴⁶ *ibid* 1396-97. Art 6(1) of AP II acknowledges that States have a right to punish crimes committed during civil war.

¹⁴⁷ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 26 November 1968, entry into force 11 November 1970) 754 UNTS 73, Art 1 (b); UNGA Res 2922 (XXVII) (15 November 1972), para 2.

¹⁴⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention).

Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

Article 4 of the Treaty obligates States parties to take certain legal measures to prevent and punish apartheid. In line with prior State practice, any State party can activate enforcement jurisdiction as long as the accused is present its territory.¹⁴⁹

The rationale for the inclusion of universal jurisdiction in the Treaty was because it was implausible that the targeted States (Namibia, Rhodesia and South Africa) would accede to the Convention.¹⁵⁰ Thus, subjecting these apartheid regimes to universal jurisdiction would achieve the objective of the Convention. Commenting on the discriminatory regime in South Africa, the USSR delegate maintained that the obligation to prevent and punish apartheid was binding on that State because '*apartheid* was recognised as a crime against humanity in international law'.¹⁵¹ In this regard, it is interesting to note the continuation of the link between the commission of an international crime, and universal jurisdiction as a judicial response. Moreover, the representative of the German Democratic Republic noted that the Article, '...made it possible for a group of states to do jointly what each of them could do individually'.¹⁵² Yet, this extension of the Nuremberg precedent to the crime of apartheid was not supported by the UK, US, the Netherlands or other States who had exercised the universality principle in the immediate post war period.

The negotiating history of the Convention sheds much light on the subjectivity of the application of universality to crimes against humanity, and illustrates that State support for the principle is dependent on national interest

¹⁴⁹ At the Treaty negotiations, the Australian delegate interpreted the Article as authorising universal jurisdiction *in absentia* over the crime of apartheid, see Roger S Clark, 'Apartheid' in M Cherif Bassiouni (ed), *International Criminal Law*, vol 1 (2nd edn, Transnational Publishers 1999) 654.

¹⁵⁰ Southern Africa was expressly vilified in the Convention provisions, see Apartheid Convention, Art 2.

¹⁵¹ As cited in Clark (n 149) 655 (emphasis in original).

¹⁵² As cited in *ibid* 654.

concerns.¹⁵³ The US delegate disagreed that apartheid was a crime against humanity,¹⁵⁴ and instead affirmed that universality only applied to, 'crimes such as piracy, air piracy and war crimes'.¹⁵⁵ One notes that the latter two offences were of concern to the US Government at the time. The British delegate went so far as to propose the formation of a declaration stipulating that if any of its citizens were subjected to the provisions of the Convention, there would be political consequences and encouraged other States to do the same.¹⁵⁶ As Reydam's points out, the real concern of Britain was that South African officials with dual British nationality would be subject to the jurisdiction.¹⁵⁷ The legal provisions of the Treaty, in particular the inclusion of the universality principle, were the primary reason cited for the abstentions of Western States during the vote.¹⁵⁸ The subjectivity of Western states is further evidenced by the fact that the definition of apartheid provided in Article 2 of the Treaty included many of the discriminatory practices inflicted upon Jewish and other persons on account of their religion by the German authorities, which previously gave rise to the Nuremberg precedent.

Upon its entry into force, European States continued to oppose the Apartheid Convention. The European Economic Community (EEC) reiterated its concerns with the Treaty and noted:

The broad extension of international jurisdiction under this convention, extending even to cases where there is no significant contact between the offence and the forum state, and when the offender is not a member of the forum state, makes it impossible for our governments to accept this as

¹⁵³ See comments of Belgium, Canada, New Zealand, Turkey, UK and US in *ibid*, 655, 657.

¹⁵⁴ As cited in *ibid* 655.

¹⁵⁵ As cited in *ibid*.

¹⁵⁶ Belgian Diplomatic Archives Dossier 18854/V.

¹⁵⁷ Reydam's (n 115) 60.

¹⁵⁸ Clark (n 149) 653-59.

being consistent with the basic norms of fairness, due process and notice so essential in criminal law.¹⁵⁹

There are many reasons why the Western States opposed universal jurisdiction in the Apartheid Convention. First, a Treaty allowing universal jurisdiction to apply to a type of crimes against humanity in peacetime meant that situations faced by minorities within their own borders would be subject to the enforcement jurisdiction of foreign courts. In this regard, apartheid was listed as a grave breach of the Geneva Conventions in Article 85(4)(c) AP I. Second, it should be noted that the Convention was drafted in the middle of the Cold War and States' positions towards the Treaty reflected Cold War divisions. The Convention was led by the USSR at the UN General Assembly and Western States were fearful that the USSR and its supporters could exercise universality against their nationals and the nationals of allies.¹⁶⁰ Third, apartheid is a State orchestrated crime committed within the internal boundaries of a State. Thus, it is not surprising that Western States would not want other States interfering in matters that occur within their territories, during peacetime. Maintaining the link between crimes against humanity and IACs ensured that retrospective laws prohibiting crimes against humanity could not apply to the crime committed against colonial peoples.¹⁶¹ Apartheid and racial discrimination were inherently linked to the colonial conquest, where race was used as a means of subjugating indigenous peoples.¹⁶²

¹⁵⁹ These comments were made at the 31st session of the UN General Assembly, Dossier 18854/V: Draft explanation of vote by the delegation of the Netherlands on behalf of the nine.

¹⁶⁰ One notes that the Soviet Union was opposed to universality during the negotiation of the Genocide Convention, see Reydams (n 115) 60.

¹⁶¹ Western States favoured the connection between crimes against humanity and IACs. See Antony Anghie and Bhupinder S Chimni, 'Third World Approaches to International Law and Individual Responsibility in International Law' (2004) 36 *Studies in Transnational Legal Policy* 196.

¹⁶² Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996).

Despite the codification of universal jurisdiction over apartheid, there is no practice of States exercising universal jurisdiction over the crime.¹⁶³ Moreover, due to its specific context, it would be difficult to apply the Apartheid Convention beyond the situations at which it was aimed.¹⁶⁴ However, the classification of racial discrimination as an offence to which *erga omnes* obligations apply¹⁶⁵ means that States could exercise universal jurisdiction over apartheid in customary international law. This is because universal jurisdiction is one way in which States can fulfill their *erga omnes* obligations under international law.¹⁶⁶ The drafting history of the universal jurisdiction provision and the commentary by States thereafter demonstrate the power of dominant (mostly Western) States in the constructing universal jurisdiction norms,¹⁶⁷ and dictating the crimes to which they apply. Here one notes that notwithstanding the classification of apartheid as a crime against humanity in the Apartheid Convention, the International Law Commission 1996 Draft Code of Crimes Against the Peace and Security of Mankind did not include the crime in its list of acts constituting crimes against humanity.¹⁶⁸ It was, however, included as a war crime in AP I.¹⁶⁹ Today apartheid is listed as a crime against humanity in the Rome Statute of the International Criminal Court (Rome Statute).¹⁷⁰

¹⁶³ Steven R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human rights Atrocities in International Law* (3rd edn, OUP 2009) 127. See also John Duggard, 'Introductory Note on Convention on the Suppression and Punishment of the Crime of Apartheid' UN Audiovisual Library of International Law <<http://legal.un.org/avl/ha/cspca/cspca.html>>.

¹⁶⁴ Ratner, Abrams and Bischoff, *ibid* 128.

¹⁶⁵ *Barcelona Traction* (n 70) para 34.

¹⁶⁶ See section 4.2.

¹⁶⁷ On this see Aisling O' Sullivan, *Universal Jurisdiction in International Criminal Law* (Routledge 2017).

¹⁶⁸ Ratner, Abrams and Bischoff (n 163) 127.

¹⁶⁹ AP I, Art 85(4)(c).

¹⁷⁰ Rome Statute, Art 7(1)(j).

4.5 Universal jurisdiction over torture before the UN Convention Against Torture

In the 1970s, the UNGA approached the crime of torture as a crime distinct from war crimes and crimes against humanity.¹⁷¹ This was, in part, in response to the military regimes in South America that inflicted torture on a widespread scale against their own populations. The treatment of torture as an autonomous crime culminated in the adoption of the Declaration on the Protection of All Persons from Being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 9 December 1975.¹⁷² The Declaration did not provide for a provision on universal jurisdiction, as the responsibility for punishment was firmly left in the hands of the 'State concerned'.¹⁷³

The first steps towards the application of universal jurisdiction to torture as a stand-alone crime occurred in the form of a civil action for damages in a US Court in *Filartiga v Pena Irala*.¹⁷⁴ This complaint was made under the Alien Tort Statute, a 1789 law that provides for universal civil jurisdiction in respect of a 'violation of the law of nations', irrespective of the place of commission.¹⁷⁵ Notwithstanding that the case concerned universal civil jurisdiction, the judgment in *Filartiga* is significant. The rationale for the exercise of universal civil jurisdiction was that torture constituted a crime against the law of nations, condemned by the international community. Justice Kaufman noted, '...we hold that deliberate torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights, regardless

¹⁷¹ Hans Danelius and Herman Burgers, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers 1988).

¹⁷² UNGA Res 3452(XXX) (9 December 1975).

¹⁷³ *ibid* Arts 8-9. See also Art 10.

¹⁷⁴ *Filartiga v Pena Irala* (n 8). In March 1976, Joelito Filartiga was tortured to death by the police authorities in Paraguay. The family of the deceased sought damages against Americo Norberto Pena-Irala, the Paraguayan Inspector General of Police in Asuncion at the time of the crime. Both Pena Irala and the victim's family were living in the US when the case was initiated.

¹⁷⁵ In 2013, the US Supreme Court has held that the presumption against extraterritoriality that applies to US laws generally now applies to this statute. See *Kiobel v Royal Dutch Petroleum Co* (2013) 569 US 1.

of the nationality of the parties'.¹⁷⁶ What is more, in its *amicus curiae* submission to the Court of Appeal, the US Government affirmed that it was the universal denouncement of torture that justified the application of civil universal jurisdiction to the offence.¹⁷⁷ This is, ultimately, the language of *erga omnes* obligations. In addition, the continuation of the link between an offence being labelled as an offence against the law of nations or an international crime, and the application of universal jurisdiction thereto is also evident. In *Filartiga*, the Court equated piracy with torture, with both crimes being categorised as 'offenses [sic] against the law of nations'.¹⁷⁸ In a famous declaration, Judge Kaufman affirmed, '... the torturer has become like the pirate and slave trader before him *hostis humanis generis*, an enemy of all mankind'.¹⁷⁹ The judgment is particularly significant, because for the first time universal jurisdiction was applied to serious human rights abuses committed outside of IACs. Thus, the IAC requirement for the 'internationalisation' of punishment in the form of universality was removed.

The need of the forum State to maintain public order in its territory was another rationale cited by the Court.¹⁸⁰ The US memorandum asserted a further rationale for the exercise of universal civil jurisdiction. It believed that because torture was criminalised in Paraguay as well as in the US this '...significantly reduces the likelihood that court enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement'.¹⁸¹ Thus, the non-objection of the territorial State or State of nationality was another ground allowing for jurisdiction. Indeed, the US was also of the opinion that 'considerations of comity' or good relations between the

¹⁷⁶ *Filartiga* (n 8) p 2.

¹⁷⁷ 'United States: Memorandum for the United States submitted to the Court of Appeals for the Second Circuit in *Filartiga v Pena-Irala*' (1980) 19 *International Legal Materials* 585, 604.

¹⁷⁸ *Filartiga* (n 8).

¹⁷⁹ *ibid* p 19. This language is borrowed from Lord Coke in *King v Marsh* where pirates were first referred to as enemies of mankind, see section 1.3.

¹⁸⁰ *Filartiga* (n 8) p 12.

¹⁸¹ US Government Memorandum (n 177) 605.

two States need not be addressed, because torture was prohibited in Paraguay.¹⁸²

The judgment in *Filartiga* is a significant milestone in the development of universal jurisdiction. Here, it was clear that universal civil jurisdiction applied to torture as an offence distinct from war crimes or crimes against humanity. What is more, the decision was decided before universal jurisdiction over torture was codified in UNCAT, although the preparatory work for the Convention was underway at the time.¹⁸³ There was no prior State practice to support the application of universal jurisdiction to the offence.¹⁸⁴ This situation provides further support for the proposition that *opinio juris* is more authoritative than State practice in the development of international rules concerning human rights protections.¹⁸⁵ It must also be noted that the outcome of this judgment is in line with the US foreign policy towards universal jurisdiction at the time.¹⁸⁶ The government would have been aware of the possibility of the application of universal jurisdiction to torture as proposed in the draft conventions on torture submitted to the UN Human Rights Commission.¹⁸⁷ It is likely that the pro-universality sentiments expressed by the Carter Administration during the UNCAT Working Group sessions influenced the US Court's decision. It is also likely that had the case occurred during the term of a different Administration the outcome would not have been the same.¹⁸⁸ This begs the question whether a

¹⁸² *ibid.*

¹⁸³ See next section.

¹⁸⁴ Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, Oxford University Press 2009) 187. See however, Michael Ratner, 'The Lord's Decision in *III*', in Reed Brody and Michael Ratner (eds), *The Pinochet Papers* (Kluwer Law International 2000) 46.

¹⁸⁵ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 88. For more on this point see section 5.2.

¹⁸⁶ The government at the time, the Carter Administration, was supportive of universal jurisdiction in the UN Convention Against Torture, see next section.

¹⁸⁷ The discussions on the application of universal jurisdiction over torture took place at the UNGA from early 1978. The US *amicus curiae* brief was served at the Court of Appeal on 29 May 1980.

¹⁸⁸ For examples the views of the second Bush and Trump Administrations are at odds with the position of the Carter Administration. See Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane 2008); Matthew Weaver and Spencer Ackerman, 'Trump claims torture works but experts warn of its "potentially existential" costs' *The Guardian* (London, 26 January 2017) <www.theguardian.com/us

court's exercise of universal jurisdiction is transformed by the views of the executive organ of power.

4.5.1 The application of universal jurisdiction to torture in the UN Convention Against Torture

Work on a UN Convention prohibiting torture began at the UNGA in December 1977 on the initiative of Sweden.¹⁸⁹ Two draft conventions were tabled, one by the International Association of Penal Law (IAPL),¹⁹⁰ and another by Sweden.¹⁹¹ Universal jurisdiction over torture was proposed in both drafts.¹⁹² However, not all States supported the proposition.¹⁹³ Article 1 of the IAPL draft Convention affirmed, 'Torture is a crime under international law'. The effect of which was that '...any State may have jurisdiction to try a person accused of torture, wherever the alleged crime took place and whatever the nationality of the accused'.¹⁹⁴

The Swedish draft was chosen as the basis for deliberations and between 1980-1984, a working group discussed and developed the provisions of the draft convention. All members of the UN Commission on Human Rights were invited to participate in the process, but in practice between 20-30, mostly

[news/2017/jan/26/donald-trump-torture-absolutely-works-says-us-president-in-first-television-interview](https://www.bbc.com/news/2017/jan/26/donald-trump-torture-absolutely-works-says-us-president-in-first-television-interview)>.

¹⁸⁹ Danelius and Burgers (n 171) 31.

¹⁹⁰ IAPL, Draft Convention for the Prevention and Suppression of Torture (15 January 1978) UN Doc. E/CN.4/NGO/213 (IAPL draft Convention).

¹⁹¹ Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Sweden (18 January 1978) UN Doc. E/CN.4/1285 (first Swedish draft Convention).

¹⁹² IAPL Draft Convention (n 190) Arts 1 and 9 and first Swedish draft Convention, *ibid* Art 8(2). The first Swedish draft Convention addressed cruel, inhuman or degrading treatment or punishment, although universality was proposed only in respect of torture.

¹⁹³ See comments of Evans Luard MP (Foreign and Commonwealth Office) on Article 1 of the IAPL draft torture convention in FCO 58/1437: letter from Evan Luard (MP and FCO) to Niall MacDermot (International Commission of Jurists), dated 13 February 1978, p 1; See description of comments of the Dutch and Irish delegates in CJ4/2080: letter from Evans to FH Keens (Home Office) and others on report of meeting of experts in Strasbourg 27,28 June 1978, annex IV article by article comments, p 7.

¹⁹⁴ CJ4/2079: letter from Michael L Saunders (Attorney General's Chambers) to H Dunnachie (UN Department of Foreign Office) (Attorney General Chamber's) dated 18 October 1977, p 1.

Western, States and observers participated.¹⁹⁵ Article 5(2) of the revised Swedish draft¹⁹⁶ proposed:

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

Part one of the Article provided for the territorial, active and passive personality principles. The Article was inspired by a number of transnational international treaties.¹⁹⁷ Article 7 of the revised Swedish draft provided for the obligation to try or extradite.

The rationale for the inclusion of universal jurisdiction in the Swedish drafts was to make the Convention 'as effective as possible', because the territorial, active and passive personality principles would not be enough to ensure the prosecution of torture.¹⁹⁸ Not all States support the inclusion of the obligation to try or extradite in the Treaty, thus it was proposed that the duty to prosecute be dependent on an extradition request having been received and not

¹⁹⁵ These States were: Australia, France, United Kingdom, Switzerland, Sweden, Argentina, Brazil, Soviet Union, India, Senegal, Uruguay, Yugoslavia, Byelorussia, The German Democratic Republic and the Ukraine. Amnesty International and the International Commission of Jurists also participated. See Danelius and Burgers (n 171) 31-32.

¹⁹⁶ Revised text of the substantive parts of the Draft Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment, submitted by Sweden (19 February 1979) UN Doc. E/CN 4/WG 1/WP 1 (revised Swedish draft Convention).

¹⁹⁷ These were the Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973. As cited in ECOSOC, 'Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (6 March 1981) UN Doc. E/CN 4/L 1576, para 25 (working group report 1981). See also comments by US and Canada in letter from Evans to FH Keens (n 193) p 4, para 13.

¹⁹⁸ Danelius and Burgers (n 171) 35-36.

executed by the forum State.¹⁹⁹ However, it was pointed out that this would leave ‘...a loophole in the Convention, thereby creating potential safe havens for torturers’.²⁰⁰ It was intended that ‘...no offender would have the opportunity to escape the consequences of his acts of torture’.²⁰¹ Thus, the rationale for the inclusion of universal jurisdiction under the obligation to try or extradite mechanism was to prevent impunity for torture. As noted by two State delegates in the deliberations, Hans Danelius (former Swedish Under-Secretary for Legal and Consular Affairs) and Herman Burgers (member of the Dutch delegation):

The principle is that the torturer shall not find a safe-haven where he is out of reach of the criminal jurisdiction of any State, but the State where he is found shall have a choice between punishing the offender itself or extraditing him to another State which will punish him (*aut dedere aut punire*).²⁰²

In line with its opinion in *Filartiga*, the US delegate commented that like piracy, torture was an ‘offence against the law of nations’.²⁰³ In response to Argentina’s objections, the US delegate reasoned that universal jurisdiction was aimed at situations where torture was carried out by a State as policy, and subsequently not prosecuted by that State.²⁰⁴ Conversely, the UK believed that universal jurisdiction over torture was not practicable, stating that it applied only to crimes of a ‘more obvious international character’, such as airplane hijacking and attacks against international protected persons.²⁰⁵

The draft torture convention was also discussed by a group of experts who gathered at the Council of Europe, and some of the comments made there

¹⁹⁹ ECOSOC, ‘Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (5 March 1980) UN Doc. E/CN.4/L.1367, paras 50-51 (working group report 1980); Working Group Report 1981 (n 197) para 25.

²⁰⁰ Working group report 1980, *ibid*, para 51.

²⁰¹ *ibid*, para 61.

²⁰² Danelius and Burgers (n 171) 36. See also working group report 1980, *ibid*, para 51.

²⁰³ As cited in Danelius and Burgers, *ibid* 58.

²⁰⁴ As described in *ibid* 78.

²⁰⁵ As described in *ibid* 58.

are pertinent to this analysis. Significantly, the obligation to extradite or prosecute model received the support of powerful States.²⁰⁶ Moreover, it was clear that it was the intention of the majority that the obligation to prosecute was not subordinate to the receipt and rejection of an extradition request.²⁰⁷ The Norwegian and Swiss experts noted that the scheme proposed in terms of the obligation to try or extradite in the draft Torture Convention did not go as far as that provided in the Geneva Conventions,²⁰⁸ concerning the searching for the accused, and this point garnered much attention.²⁰⁹ In response, the Danish expert ‘...considered that this obligation was implicit in the draft Convention’.²¹⁰ The UK expressed its concern regarding the application of the search requirement to torture committed in peacetime.²¹¹ Here, it is notable that the obligation to try or extradite provided for in the Geneva Conventions was used as a benchmark for the prosecutorial arrangement in the draft torture Convention. Sovereignty concerns remained an issue for States. In respect of the obligation to prosecute, the UK preferred that the obligation be modified to include a requirement to bring the alleged torture to the attention of the prosecutorial authorities in the forum State, rather than equate to an obligation to prosecute in all circumstances.²¹²

At the UNGA, the Articles of the draft Convention were renumbered and in 1984 and universal jurisdiction over torture was codified in the UN Convention Against Torture under the *aut dedere aut judicare* framework. Today, Article 7(1) of the Convention reads:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the

²⁰⁶ The Canadian and US delegations agreed with the UK point of view that an extradite or prosecute approach should be taken. See letter from Evans to FH Keens (n 193) p 4, para 13.

²⁰⁷ FC058/3026: Ad hoc Committee of Experts to Exchange Views on the Draft Convention Against torture, dated 28 January 1982, p 6, para 26.

²⁰⁸ Letter from Evans to FH Keens (n 193), annex IV article-by-article comments, pp 8-9.

²⁰⁹ *ibid* p 5, para 16.

²¹⁰ *ibid*, annex IV article-by-article comments, p 9.

²¹¹ *ibid*, pp 5-6, para. 16. See also section 9.6.

²¹² *ibid*, pp 5-6, para 16. See also comments by the UK and Denmark.

cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.²¹³

When faced with the presence of an alleged suspect in its territory, that State is obligated to exercise universal jurisdiction where it does not extradite the suspect to another State. It is clear from the deliberations that this obligation is not conditional on the receipt of an extradition request,²¹⁴ as was later reaffirmed by the ICJ.²¹⁵ In order to make the obligation to try or extradite effective, States parties are obligated to incorporate the active, passive, territorial,²¹⁶ and universality principles into their national legal system in respect of the offence. Article 5(2) of the UN Convention Against Torture reads:

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

As soon as the alleged torturer is known to be present on the territory of the State party, the State is obligated to take the accused into custody.²¹⁷ The only condition for the exercise of universal jurisdiction is the presence of the accused in the territory of the forum State.²¹⁸ A high standard of evidence is required to prosecute and convict the accused, otherwise, ‘...even the strongest

²¹³ UNCAT, Art 4 reads: 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

²¹⁴ See also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 360-61; Danelius and Burgers (n 171) 133.

²¹⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 94.

²¹⁶ UNCAT, Art 5(1).

²¹⁷ UNCAT, Art 6(1).

²¹⁸ This is clear from the wording of Art 7(1). See also Nowak and McArthur (n 214) 318. This also applies to areas under military occupation, or areas under *de jure* or *de facto* control.

obligation under international law to prosecute a suspected torturer [will] not help'.²¹⁹ Presence is described as the:

...[T]ime when criminal proceedings are instituted against the accused under the ground of universal jurisdiction and/ or the time when certain measures are taken against the accused, such as arrest, pre-trial detention or similar legal measures aimed at ensuring his or her presence in accordance with Article 6(1).²²⁰

Thus, it is questionable whether *in absentia* trials are authorised under the Convention. As was later noted by the ICJ, 'These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven'.²²¹ This framework is the at the core of the Convention's purpose,²²² which along with Article 5 has been characterised by the UN Committee Against Torture as 'the cornerstone' of UNCAT.²²³

The obligation to prosecute the suspect and the alternative requirement to extradite them to another State do not carry the same weight.²²⁴ The obligation to prosecute is an international obligation on States, which, if breached, engages State responsibility.²²⁵ As Manfred Nowak and Elizabeth McArthur have commented, '...the *strongest obligation to avoid a safe haven for perpetrators of torture by bringing them to justice before their domestic courts*

²¹⁹ Nowak and McArthur, *ibid* 361 (insertion added). This is required under UNCAT, Art 7(2).

²²⁰ Nowak and McArthur, *ibid* 318-19.

²²¹ *Questions relating to the Obligation to Prosecute or Extradite* (n 215) para 91.

²²² *Regina v Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet* UKHL, 24 March 1999 reprinted in (1999) 38 *International Legal Materials* 581 (*ex parte Pinochet*) 590; Reed Brody, 'The Case of Augusto Pinochet' in Reed Brody and Michael Ratner (eds), *The Pinochet Papers* (Kluwer Law International 2000) 14; Letter from Evans to FH Keens (n 193) p 4, para 13.

²²³ *Suleymane Guengueng et al v Senegal* (Communication No. 181/2001) para 3.2. During the deliberations, Art 5 of UNCAT was considered by Sweden to be the 'cornerstone' of the Convention, see Danelius and Burgers (n 171) 58.

²²⁴ *Questions relating to the Obligation to Prosecute or Extradite* (n 215) para 95.

²²⁵ *ibid*.

applies to the forum State'.²²⁶ It has been held that a lack of State funds cannot be used as a justification for failure to act in accordance with the obligation to prosecute or extradite.²²⁷ Extradition is an option given to State Parties²²⁸ that arises where an extradition request is received.²²⁹ There is no order of priority regarding which State the accused should be extradited to, i.e. the territorial State, State of nationality etc.²³⁰ However, extradition may only be possible where the request emanates from one of the States mentioned in Article 5 (1).²³¹ Frivolous extradition requests designed to shield the accused from prosecution in the custodial State must not be granted.²³² At the time of writing, the Committee Against Torture has found one violation of Article 5(2); this was against Senegal in respect of the Hissene Habré litigation.²³³

Perhaps the most important aspect of this Treaty for the purposes of this research is that States chose to codify universal jurisdiction over torture committed during peacetime. This is particularly significant given that under human rights law, torture is a State orchestrated crime as defined in Article 1 of UNCAT.²³⁴ Critically, for the first time the obligation to try or extradite was integrated into a human rights treaty.²³⁵ The reasons for this progression are many. First, as Nowak and McArthur point out, at the time the prospect of the creation of an international criminal court to prosecute the crime was doubtful.²³⁶ Perhaps States felt that a strong prosecutorial regime was a suitable substitute. Second, the support for universal jurisdiction from the US Carter

²²⁶ Nowak and McArthur (n 214) 345 (emphasis in original).

²²⁷ *Questions relating to the Obligation to Prosecute or Extradite* (n 215) para 112.

²²⁸ *ibid*, para 95.

²²⁹ Nowak and McArthur (n 214) 360.

²³⁰ UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2007) UN Doc. A/HRC/4/33, para 44.

²³¹ *ibid*.

²³² *ibid*.

²³³ Nowak and McArthur (n 214) 289 citing *Suleymane Guengueng et al v Senegal* (n 229).

²³⁴ Nowak and McArthur, *ibid* 316. Michael Ratner asserts that there was evidence of universal jurisdiction over torture prior to UNCAT, citing *Filartiga* and an earlier edition of Rodley and Pollard, see Ratner (n 184) 46.

²³⁵ Report of the Special Rapporteur 2007 (n 230) para 41.

²³⁶ Nowak and McArthur (n 214) 316.

Administration was another influential factor.²³⁷ The change in US foreign policy regarding its stance towards universality, from one of opposition during the negotiation of the Apartheid Convention in 1973 (under a previous Administration), to one of support during the negotiations of the Torture Convention, is notable. Third, the dedicated diplomacy of Hans Danelius and Herman Burgers, the former being the Chairman-Rapporteur of the Working Group, under whose leadership universal jurisdiction was included in the Treaty, was another important factor.²³⁸

UNCAT provides an example of the persuasive impact of international treaties on domestic law. In Australia, universal jurisdiction over torture was incorporated into its domestic legal system under the principle of *aut dedere aut judicare*,²³⁹ notwithstanding that Australia was against the principle of *aut dedere aut judicare* being included in the Treaty. What is more, UNCAT influenced other international organisations to adopt treaties specifically on torture,²⁴⁰ some of which also contain a provision on universal jurisdiction under the obligation to try or extradite mechanism.²⁴¹

4.6 Universal jurisdiction under the International Convention for the Protection of All Persons from Enforced Disappearance

The crime of enforced disappearance emanated from the Nazi 'Night and Fog' decree, under which persons were arrested and transferred to Germany at night.²⁴² Today the offence is defined in Article 2 of the CED.²⁴³ Prior to the

²³⁷ *ibid.*

²³⁸ *ibid.*

²³⁹ Crimes (Torture) Act 1988 (Australia), s. 7(a). It is also significant that the Australian law provided that in the event of a prosecution, the written consent of the Attorney General was required, see s 8(1).

²⁴⁰ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS 126.

²⁴¹ Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No. 67, Arts 12 and 14.

²⁴² Rodley and Pollard (n 184) 329.

²⁴³ CED, Art 2 defines enforced disappearance as '...the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of

adoption of the CED in 2006, the problem of disappearances was addressed somewhat in Article 147 of the Fourth Geneva Convention,²⁴⁴ and by the International Criminal Tribunal for Yugoslavia, where it was treated as an act that constituted a crime against humanity and a war crime.²⁴⁵ In 2006, an international human rights treaty specifically on enforced disappearances was created at the UN, the aim of the Convention was to prevent and ‘...combat impunity for the crime of enforced disappearance’.²⁴⁶ The Convention provides for the exercise of universal jurisdiction over the offence, notably, this was not the first time that the principle was codified in respect of enforced disappearance in an international instrument.²⁴⁷ However, it was an important milestone because it was the first time that the principle was applied to the crime as a distinct offence²⁴⁸ and as a crime against humanity²⁴⁹ in a universal human rights treaty.

Universal jurisdiction is provided over enforced disappearances within the framework of the obligation to try or extradite. Article 11(1) of CED reads:

The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law’.

²⁴⁴ Rodley and Pollard (n 184) 329-30, see also pp 342, 362.

²⁴⁵ *ibid* 363.

²⁴⁶ CED, preamble, para 6.

²⁴⁷ See UN Declaration on the Protection of All Persons from Enforced Disappearance UNGA Res 47/133 (18 December 1992) UN Doc A/RES/47/133, Art 14 and of the Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entry into force 28 March 1996) OAS, Arts 4 and 6.

²⁴⁸ CED, Art 9(2).

²⁴⁹ CED, Art 5. The crime of enforced disappearances was included as a crimes against humanity in the Rome Statute, Art. 7(1)(i).

This approach was consciously selected for inclusion in the Treaty.²⁵⁰ During the deliberations, it was termed 'quasi-universal jurisdiction', whereby the presence of the accused in the territory of the forum State was required for the exercise of universal jurisdiction.²⁵¹ In other words, the exercise of universality within the framework of the obligation to try or extradite was the only type of universal jurisdiction on the agenda. This type of universal jurisdiction was in line with the previous practice of the codification of universality as illustrated in this chapter. Between the competing obligations concerning prosecution and extradition, the primary duty is that of prosecution, with extradition being secondary,²⁵² as in the case of UNCAT. However, the preference of States was for the prosecution of the crime to rest with the State(s) concerned.²⁵³ Notwithstanding this, the parties to the CED are subject to mandatory universal jurisdiction when an accused person is present in their territory, as the obligation to try or extradite operates the same way as UNCAT.²⁵⁴

A number of reasons were asserted for the inclusion of the universal principle in the Treaty. It was intended that a similar framework to that of UNCAT should be enshrined in the Convention because torture was often part of the offence of enforced disappearance.²⁵⁵ In addition, it was recognised that the countries in which enforced disappearances occur are generally unable and unwilling to prosecute the crime.²⁵⁶ The 'safe haven' rationale was also cited as a

²⁵⁰ Manfred Nowak proposed the idea in the early drafting stage. See Lisa Ott, *Enforced Disappearance in International Law* (Intersentia 2011) 222.

²⁵¹ ECOSOC, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (12 February 2003) UN Doc. E/CN.4/2003/71, para 57 (2003 working group report); ECOSOC, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (23 February 2004) UN Doc. E/CN.4/2004/59, para 82 (2004 working group report).

²⁵² Ott (n 250) 223.

²⁵³ 2003 working group report (n 251) para 59.

²⁵⁴ Rodley and Pollard (n 184) 365.

²⁵⁵ 2003 working group report (n 251) para 58; ECOSOC, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (10 March 2005) UN Doc. E/CN.4/2005/66, para 52 (2005 working group report).

²⁵⁶ Ott (n 250) 222.

justification, as was noted, ‘...the principle of *aut dedere aut judicare* was raised, the idea being to eliminate access to sanctuaries for the perpetrators of enforced disappearances’.²⁵⁷ The reason for the inclusion of the *aut dedere aut judicare* principle was to prevent any loopholes in respect of punishment in the crime.²⁵⁸ As was stated by the chairman of the working group, ‘The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective’.²⁵⁹

The codification of universal jurisdiction over enforced disappearances is significant because the Treaty obligations apply to both internal and international armed conflict.²⁶⁰ However, the obligations in respect of universal jurisdiction may only apply when the crime is carried out by a State entity, as per the definition of the offence.²⁶¹ The same obligations do not apply if non-State actors who are unaffiliated with a State carry out the crime. In this regard, it is significant that States codified universal jurisdiction over enforced disappearances when carried out by State officials only. The deliberations that led to the creation of the CED show a complete transition away from arguments of State sovereignty that were cited in respect of the inclusion of universal jurisdiction in previous treaties. Yet, the Convention has not been widely ratified.²⁶² In addition, not many States have enacted universal jurisdiction over enforced disappearances into their domestic legislation,²⁶³ which demonstrates that the advancements made at an international level concerning universal jurisdiction may not always filter down to a national level.

²⁵⁷ 2003 working group report (n 251) para 65; Ott (n 250) 229.

²⁵⁸ 2003 working group report, *ibid*, para 61.

²⁵⁹ *ibid*.

²⁶⁰ Andrew Clapham, ‘The Geneva Conventions in Context’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 710.

²⁶¹ CED, Art 2, see n 243.

²⁶² As of 17 October 2017 there are 97 signatories and 57 States parties to the Convention.

²⁶³ Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances (28 December 2010) UN Doc. A/HRC/16/48/Add.3, paras 60-61.

4.7 Universal jurisdiction under the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict 1999

In 1999, universal jurisdiction over certain war crimes committed in NIACs was enshrined Second Protocol to the 1954 Hague Convention. As in the case of UNCAT and CED the jurisdiction was framed in terms of the obligation to try or extradite. Article 17(1) reads:

The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law'.²⁶⁴

The offences to which it applies are specific to cultural property violations,²⁶⁵ some of which overlap with grave breaches of the Geneva Conventions.²⁶⁶ However, the codification of universal jurisdiction in this Protocol is to be treated with caution because the obligation to try or extradite does not appear to be as binding as that provided under the penal provisions of the grave breaches regime.²⁶⁷ That States parties agreed to apply universal jurisdiction to certain war crimes committed in NIACs is a significant advancement in the development of universal jurisdiction. However, the Protocol is limited, as enforcement jurisdiction does not extend to the nationals of non-party States.²⁶⁸

²⁶⁴ See also Art 16(1)(c).

²⁶⁵ Second Protocol to the 1954 Hague Convention, Art 15.

²⁶⁶ Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 *European Journal of International Law* 203, 211-12. States parties are not obligated to exercise universality in respect of the offences listed in Art 15(1)(d)-(e).

²⁶⁷ Frulli, *ibid* 212.

²⁶⁸ Second Protocol to the 1954 Hague Convention, Art 16(2).

4.8 The possible codification of universal jurisdiction in a future international treaty concerning crimes against humanity

It looks increasingly likely that States will create an international treaty on the prevention and punishment of crimes against humanity. Since 2014, the ILC has included the topic of 'Crimes Against Humanity' in its programme of work.²⁶⁹ For the purposes of this research it is notable that universal jurisdiction in the form of the obligation to try or extradite framework has been provisionally adopted by the ILC in its draft Articles.²⁷⁰ This is what the ILC terms 'the Hague formula' with the inspiration emanating from a variety of international treaties that contain the mechanism.²⁷¹ The approach was chosen in order to close the gaps in the 'existing conventional regime'.²⁷² This is a positive development given the proven impact of the work of the ILC on future international treaties.²⁷³ Aside from the action of the ILC, a collective of eminent scholars, 'The Crimes Against Humanity Initiative' (The Initiative), proposed the creation of an international treaty on crimes against humanity, and has created a draft convention,²⁷⁴ the Preamble of which recalls that '...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, including crimes against humanity'.²⁷⁵ Humanitarian concerns²⁷⁶ and the necessity to prevent impunity are evident throughout the draft Convention.²⁷⁷

²⁶⁹ The work of the ILC on the topic continues, 'Summaries of the Work of the International Law Commission: Crimes Against Humanity' <http://legal.un.org/ilc/summaries/7_7.shtml>.

²⁷⁰ ILC, 'Report of the International Law Commission on the Work of its 69th Session (1 May- 2 June and 3 July- 4 August 2017) UN Doc. A/CN.4/704, pp 155-56; ILC, 'Report of the International Law Commission on the Work of its 68th Session (2 May- 10 June and 4 July-12 August 2016) UN Doc. A/71/10, p 266, 273.

²⁷¹ *ibid* pp 273-74.

²⁷² ILC, 'Second report on crimes against humanity' (21 January 2016) UN Doc. A/CN.4/690, para 166.

²⁷³ See chapters 1 and 2.

²⁷⁴ Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011). See 'Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity' in appendix (Proposed Convention on Crimes Against Humanity).

²⁷⁵ Proposed Convention *ibid*, Preamble para 9.

²⁷⁶ *ibid*, Preamble para 13.

²⁷⁷ *ibid*, Preamble para 6.

In keeping with practice, the universal jurisdiction provided for in the draft Convention operates on the basis of the obligation to try or extradite.²⁷⁸ Article 9(2) of the CED and Article 5(2) of UNCAT were the inspiration for the framework adopted.²⁷⁹ The *aut dedere aut judicare* mechanism was purposefully selected by the Initiative because it was believed that States would be reluctant to ratify a treaty on crimes against humanity, which included a provision on universal jurisdiction in express terms.²⁸⁰ It is clear that a treaty specifically concerning crimes against humanity is urgently required. Only 54 per cent of UN Member States have national laws criminalising the international crime.²⁸¹ Furthermore, many States have not legislated for universal jurisdiction in respect of crimes against humanity.²⁸² Belgium and Spain are examples of two States that, in the past, legislated for universal jurisdiction over crimes against humanity, notwithstanding the lack of an international treaty to that effect.²⁸³ However, the scope of the legislation in both jurisdictions was significantly reduced following the objection of States whose nationals were the subject of proceedings under the laws.²⁸⁴ A binding international treaty on crimes against humanity including a provision on universality would provide an impetus for States to enact legislation to that effect. Thus, it is argued that States would be more likely to exercise universality over crimes against humanity.

4.9 Conclusion

This chapter answered the following question: *What is the rationale for the application of universal jurisdiction to crimes to which it applies?* The chapter focused on how universal jurisdiction transposed from international piracy to grave breaches of the Geneva Conventions and AP I, the crime of apartheid,

²⁷⁸ *ibid* Art 9. This includes provision for extradition of the suspect to the ICC in Art 9(2).

²⁷⁹ *ibid*, explanatory note on Art 10.

²⁸⁰ Crimes Against Humanity Initiative, *Final Report of the April Expert's Meeting* (Saint Louis Missouri, 12-15 April 2009) para 23 <<http://law.wustl.edu/crimesagainsthumanity/documents/aprilfinalreport.pdf>.

²⁸¹ As cited in Sean D Murphy, Special Rapporteur, First Report on Crimes Against Humanity (17 February 2015) UN Doc. A/CN.4/680, para 58.

²⁸² As cited in *ibid*, para 61.

²⁸³ See chapter 8; Langer (n 133) 26-41.

²⁸⁴ *ibid*.

torture, certain war crimes related to cultural heritage and enforced disappearances via international treaties. As the provisions of these international treaties demonstrate, it is clear that the exercise of universal jurisdiction is envisaged in terms of the *aut dedere aut judicare* framework. Thus, it can also be said that this framework is preferential to States. As with the practice of universal jurisdiction at the UNWCC, presence of the accused in the territory of the forum State is a fundamental part of the exercise of universal jurisdiction in these Treaties. Indeed, it must also be noted that presence is also important for the protection of the rights of the accused. As such it can be argued that universal jurisdiction *in absentia* is outside the scope of these treaties. The history of the codification of universal jurisdiction in international conventions is checked. In comparison with the other crimes over which the ICC may presently exercise *ratione materiae* [subject matter] jurisdiction, crimes against humanity remains the only crime that is not the subject of a specific international treaty. This is due to political State interests.²⁸⁵

The primary rationale for the application of universal jurisdiction to these serious crimes under international law is based on humanitarianism. In nearly all instances, the creation of the international treaties, along with their provisions on universality was in response to a particular set of events in which human rights were violated on a large scale. In all circumstances, the abuses were condemned by a significant number of States. The Geneva Conventions were created in the aftermath of WW II, the Apartheid Convention was in response to the apartheid that was indoctrinated in Southern African countries. Similarly, UNCAT and CED were a response to systematic crimes inflicted on peoples by their governments in South American States. This phenomenon is reflected in the legislation providing for universal jurisdiction in some States.²⁸⁶

²⁸⁵ MC Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Practice* (CUP 2011) 3.

²⁸⁶ Some States restricted the exercise of universal jurisdiction to the Second World War. In the UK, see the War Crimes Act 1991. Australia, France and Israel are other examples, see Ratner, Abrams and Bischoff (n 163) 54-55.

Malaise among the international community that these offences would not be punished was a further rationale for the codification of universal jurisdiction. Permitting the exercise of universal jurisdiction over a crime reduced the likelihood of the offence being unpunished. This is principally important because a new post conflict political regime may not be willing to punish offenders of war crimes and was one of the reasons cited by the UNWCC²⁸⁷ and by the four government experts who prepared the ICRC draft penal sanctions provisions for Geneva Conventions.²⁸⁸ Moreover, a prosecution is unlikely to manifest where the international crime is committed by an armed group with State support, or by the State itself. This is particularly true where an amnesty has been granted to an armed group in the provisions of a peace treaty.²⁸⁹ This position is evident in the deliberations of Treaties that allow for the principle and is especially evident in the context of UNCAT, where it is referred to as the 'no safe haven' approach.²⁹⁰ Indeed, a further rationale for the inclusion of universal jurisdiction over torture in the UNCAT and CED was to make the Convention as effective as possible. Another rationale for the codification of universal jurisdiction over apartheid was because the purpose of the Treaty was to target specific States that were unlikely to accede to the Convention. Thus, enforcement jurisdiction could, in theory, be exercised over the nationals of non-party States.

In respect of grave breaches of the Geneva Conventions, deterrence of the commission of future offences was an additional rationale for the development of universality over this type of war crime.²⁹¹ Public safety and public order within the forum State was another rationale for universality over torture. However, this justification is dubious given that under UNCAT torture must be committed by a public official. It is unlikely that the torturer who has fled the

²⁸⁷ *Law Reports of the Trials of War Criminals: Digest of Laws and Cases*, vol 15 (UNWCC, H M Stationary Office, 1949) 54-55.

²⁸⁸ See section 4.3.

²⁸⁹ Similarly, it is unlikely that victorious non-State actors will be punished for genocide in the territorial State, William A Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002-2003) 26 *Fordham International Law Journal* 907, 918.

²⁹⁰ See section 4.5.1.

²⁹¹ See section 4.3.

territorial State will recommit the offence particularly given that it is normally committed for political reasons. Hence it is likely that this rationale is based on metaphysical moral concerns.

It must also be highlighted that the universal jurisdiction framed in the Geneva Conventions and AP I, UNCAT, the Second Protocol to the Hague Convention and CED is an obligation. This is a significant development in the history of universal jurisdiction. As noted in chapter 3, the exercise of universal jurisdiction was a right and not an obligation. What is more, the principle provided for in these Treaties is not a subsidiary form of enforcement jurisdiction, as it was under the UNWCC operation. Of course for the obligation to be engaged, the forum State must have incorporated the universality principle into its domestic law. Indeed, here one notes that the unification of national laws penalising war crimes was one of the reasons for the inclusion of the legislation requirement in the grave breaches regime.²⁹²

This chapter has also addressed the reasons cited in opposition to the codification of universal jurisdiction in international treaties. The main reason is that it violates State sovereignty. This aspect was also viewed in the context of the Slavery Treaties in chapter 2, while chapter 3 illustrated that States were willing to concede sovereignty once punishment was internationalisation by the existence of an international armed conflict. On the one hand, it is significant that the nexus between certain offences committed in international war and universal jurisdiction was removed by the creation of UNCAT. As chapter 3 illustrated, the war nexus protected the interests of powerful States, because it shielded their nationals and the nationals of their Allies from being subject to universal jurisdiction. On the other hand, it is notable that torture was prohibited internationally when the Great Powers no longer used it systematically. This also occurred at a time when there was increased participation of nations from the Global South at international forums. Indeed, the application of international law to NIACs coincides with the decolonisation

²⁹² See section 4.3.

period.²⁹³ What is more, as is the general rule concerning international treaties, the provisions of UNCAT may not be applied retrospectively.²⁹⁴ As Anghie and Chimni have commented, the war nexus was removed fully from crimes against humanity in the post-colonial era. They note:

... many atrocities committed by colonial powers against colonized peoples were generally not the subject of concern for international law, and it was only when European peoples were subject to the tragedy of the Holocaust that a concern for atrocities committed within a state emerged.²⁹⁵

The next chapter analyses how universal jurisdiction was utilised in practice prior to the creation of the Rome Statute on account of the treaty provisions examined in this chapter and also under customary international law.

²⁹³ Anghie and Chimni (n 161) 185-210.

²⁹⁴ See *ex parte Pinochet* (n 222). See also section 5.4.3.

²⁹⁵ Anghie and Chimni (n 161) 195.

CHAPTER 5
THE EXERCISE OF UNIVERSAL JURISDICTION OVER SERIOUS
CRIMES UNDER INTERNATIONAL LAW BEFORE THE CREATION OF
THE ROME STATUTE

5.1 Introduction

After the UNWCC came to an end, State practice concerning universal jurisdiction was sparse. In the 1990s, this position changed following the tragic armed conflicts that occurred in the Balkans and in Rwanda. The decade was a time when a strong will to prosecute alleged perpetrators of international crimes prevailed among the international community. The purpose of this chapter is to analyse the exercise of universal jurisdiction over serious crimes under international law before the creation of the Rome Statute in 1998. The two research questions for this chapter are: *How did universal jurisdiction transpose from piracy to other serious crimes under international law? Second, what is the rationale for the application of universal jurisdiction to crimes to which it applies?* The first major example of a State utilising the principle outside of the UNWCC was the *Attorney General of Israel v Eichmann* litigation.¹ Section 2 of this chapter examines the rationale for the exercise of universal jurisdiction in this instance. Section 3 explores the relevant developments that occurred in the context of the creation and workings of the international penal tribunals that were created in the 1990s. This is followed by section 4, which details the case law in the 1990s, before the creation of the Rome Statute. This section is divided into four subsections that focus on genocide, crimes against humanity, war crimes and torture respectively. The obstacles

¹ *Attorney General of the Government of Israel v. Eichmann*, Israel Supreme Court 1962 published in (1968) 36 *International Law Reports* 277; *Attorney General of the Government of Israel v Eichmann*, District Court of Jerusalem 1961 (1968) 36 *International Law Reports* 59 (*Attorney General v Eichmann; Eichmann*).

and issues apparent in the case law from 1948-98 are analysed in section 5. Finally, section 6 concludes this chapter.

5.2 The advancement of universal jurisdiction over serious crimes under international law in the Eichmann litigation

The practice of universal jurisdiction over genocide, crimes against humanity and war crimes advanced significantly in the Israeli case of *Attorney General v Eichmann*. Here, Adolf Eichmann, a high-ranking Nazi official, accused of ‘implementing the final solution of the Jewish question’,² was charged with committing crimes against the Jewish people,³ crimes against humanity,⁴ war crimes,⁵ and membership of a hostile organisation.⁶ Along with others, Eichmann deported Jewish and other peoples to concentration camps as part of the Nazi operation. The defendant was tried in Israel under the Nazis and Nazi Collaborators (Punishment) Law 5710-1950, a statute that remains in force today. The trial was not without its controversy. Eichmann was living in Argentina under a fake identity when he was kidnapped by the Israeli secret service and brought to Israel for trial. He was convicted at the District Court in Jerusalem and appealed unsuccessfully to the Israeli Supreme Court. As well as universal jurisdiction, the Court also relied on the passive and protective personality principles.⁷ The judgment is significant for many reasons, notably for its affirmation that the principle of universal jurisdiction applies to genocide, crimes against humanity and war crimes committed in IACs. The Supreme Court affirmed the jurisdiction as a power ‘...vested in every state regardless of the fact that the offence was committed outside its territory by a

² *Eichmann*, Supreme Court judgment (n 1) para 2.

³ Nazis and Nazi Collaborators (Punishment) Law 1950, s 1(a)(1). This offence that was similar to the definition of genocide in the 1948 Convention, see William Schabas, *Genocide in International Law* (2nd edn, CUP 2009) 426.

⁴ *ibid*, s 1(a)(2).

⁵ *ibid*, s 1(a)(3).

⁶ *ibid*, s 3.

⁷ *Eichmann*, Supreme Court judgment (n 1) para 12.

person who did not belong to it...'.⁸ It is noteworthy that the Court classified the application of universal jurisdiction as a 'power' rather than a duty, thus keeping in line with the practice of the UNWCC. Critically, the right to exercise the principle was rooted in customary international law. The District Court found that the offences Eichmann was charged with were 'crimes under the law of all civilised nations' at the time of their commission.⁹

The rationale for the exercise of universality was based in humanitarianism. It was the nature of the crime that warranted universal jurisdiction as the response. The Supreme Court declared that it was, '...the particular universal character of these crimes that vests in each state the power to try and punish anyone who assisted in their commission'.¹⁰ Notably, the Courts relied heavily on the nexus between a crime under international law and universality. Speaking on the nature of such crimes, the Supreme Court stated:

They constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate universal moral values and humanitarian principles which are at the root of the systems of criminal law adopted by civilized nations.¹¹

Such language is reminiscent of that utilised in the content of the UNWCC, as well as the concept of *erga omnes* obligations.¹² Other crimes included in this category were piracy *jus gentium* and the slave trade.¹³

⁸ *ibid.*

⁹ *Eichmann*, District Court judgment (n 1) para 7; *ibid* para 10.

¹⁰ *Eichmann*, Supreme Court judgment, *ibid* para 10.

¹¹ *ibid*, para 11.

¹² See section 2.5 and chapter 3.

¹³ *Eichmann*, Supreme Court judgment (n 1) para 11.

The discussion on the application of the universality principle to genocide is of particular note. *Eichmann* was the first reported judgment concerning the 1948 Genocide Convention.¹⁴ The Supreme Court reaffirmed that genocide was an international crime.¹⁵ Eichmann argued that Article 6 of the Genocide Convention restricted jurisdiction to punish genocide to the territorial State or to an international penal tribunal. This argument was rejected by the District Court and Supreme Court who relied on the ICJ finding that genocide was of a ‘universal character’ and reflective of principles that exist outside of treaty law.¹⁶ Citing the declaration of the Sixth Committee authorising the exercise of the passive personality principle in respect of the Article¹⁷ and the writings of by Pieter N Drost and Nehemiah Robinson, the District Court declared:

Had Article 6 meant to provide that those accused of genocide shall be tried only by “a competent court of the country in whose territory the crime was committed” (or by an “international court” which has not been constituted), then that article would have foiled the very object of the Convention “to prevent genocide and inflict punishment therefore”.¹⁸

The case law of the UNWCC and academic commentary were cited in support of the exercise of universality.¹⁹ The Israeli Supreme Court affirmed:

¹⁴ William Schabas, ‘The Contribution of the Eichmann Trial to International Law’ (2013) 26 *Leiden Journal of International Law* 667, 667.

¹⁵ *Eichmann*, Supreme Court judgment (n 1) para 11.

¹⁶ *Eichmann*, District Court judgment (n 1) para 21; *ibid.*

¹⁷ See section 4.2.

¹⁸ *Eichmann*, District Court judgment (n 1) para 23.

¹⁹ *Eichmann*, Supreme Court judgment (n 1) para 11. Lauterpacht, Baxter and Cowles were cited in support of the power of universal jurisdiction, see para 12.

This obligation [in Article 6 of the Genocide Convention], however, has nothing to do with the universal power vested in every state to prosecute for crimes of this type committed in the past—a power which is based on customary international law.²⁰

Thus, it believed that the exclusion of a provision providing for universality in the Genocide Convention was a separate matter to the right of States to exercise universality over the crime under customary international law. Notwithstanding that this interpretation is questioned by one eminent scholar,²¹ it has been relied on in subsequent case law.²²

Significantly, the Supreme Court acknowledged that the power to enforce universal criminal jurisdiction was not unlimited. It noted that the accused should be in the custody of the State exercising the right.²³ The Court also spoke of what is now termed ‘subsidiary universal jurisdiction’ where the right of prosecution first lays with the territorial State or State of nationality, and thereafter with the custodial State.²⁴ The Court also noted that in the instant case no country, including the territorial State, had complained to Israel about the conduct of the trial.²⁵

The judgments of the Israeli Supreme and District Courts are a pivotal development in the history of universal jurisdiction. Today, *Eichmann* is cited in support of the existence of the right of States to

²⁰ *ibid* para 12.

²¹ Schabas, ‘The Contribution of the Eichmann Trial to International Law’ (n 14) 690.

²² See next section.

²³ *Eichmann*, Supreme Court judgment (n 1) para 12.

²⁴ *ibid* para 12. Under the circumstances of the case, West Germany declined to prosecute Eichmann.

²⁵ *ibid*. Argentina was aggrieved at the violation of sovereignty in the context of Eichmann’s abduction and the matter was addressed by the UNSC.

exercise universality over international crimes.²⁶ What is more, the case is an example of a non-belligerent State exercising the right as the State of Israel did not exist at the time of the atrocities, although, the population of Israel was profoundly affected by the atrocities committed before and during WWII. Thus, the exercise of universal jurisdiction by Israel was in the interest of that State. This case recognised the right of States to exercise universal jurisdiction over genocide, war crimes and crimes against humanity under customary international law. This is particularly important in the context of crimes against humanity because the universality principle is not codified in international law in respect of the offence.

The approach taken by the Israeli Court is not without criticism. First of all, the prosecution took place, notwithstanding that the forum State did not exist at the time the crimes were committed. Moreover, it was irrelevant that there was little or no State practice with regard to the jurisdiction prior to the prosecution. As Robert Woetzel noted in 1962, 'There seems to be little basis in customary international law and the practice of States for the assumption of the Israeli Tribunal that crimes against humanity involving genocide can be tried under the universal principle of jurisdiction'.²⁷ The judgment was not well received by all scholars writing at the time who questioned its conformity with international law.²⁸ Specifically, the application of universality to crimes against humanity was not recognised by all scholars because it interfered with State sovereignty.²⁹ In respect of the of *nullum crimen sine lege* argument asserted by the defendant, the

²⁶ *Regina v Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet* UKHL, 24 March 1999 reprinted in (1999) 38 *International Legal Materials* 581 (*ex parte Pinochet*) paras 590, 647.

²⁷ Robert K Woetzel, *The Nuremberg Trials in International Law* (Steven & Sons 1962) 262. See also comments by Lord Phillips of Worth Matravers in *ex Parte Pinochet*, *ibid* 660.

²⁸ V E Treves, 'Judicial Aspects of the Eichmann Case' (1963) 47 *Minnesota Law Review* 557, 592; J E S Fawcett, 'The Eichmann Case' (1962) 27 *British Yearbook of International Law* 181; Woetzel *ibid*.

²⁹ As cited in Woetzel, *ibid* 65.

Court reasoned that Eichmann could be tried under the 1950 Act, because the crimes committed (war crimes, crimes against humanity and genocide) 'always borne [sic] the stamp of international crimes, banned by international law and entailing individual criminal liability'.³⁰ However, it is questionable whether the crime of genocide was a crime in customary international law at the time of the commission, given that the crime was not formally defined until 1946. Furthermore, the circumstances that led to Eichmann's presence in Israel, notably that a fundamental rule of international law was violated in order for Israel to subsequently exercise a principle of customary international law, received much criticism.

The judgment and the circumstances that led to it are certainly exceptional. Ultimately, the Israeli Courts were acting on the basis of the *Lotus* principle,³¹ in that there was no international rule prohibiting them from exercising extraterritorial jurisdiction. Commenting on the judgment 60 years later, William Schabas notes:

The legal reasoning was flimsy, defying clear evidence of the views of states, and yet it was almost immediately accepted as a precedent in international law. This is an astonishing feature of the development of the law of nations... An eloquent decision in a deserving case issued by three judges in an ancient, obscure language was enough to reverse this.³²

No doubt the tragic circumstances that led to the prosecution were a factor in the lack of opposition from other States as to the exercise of the jurisdiction. The judgment supports the proposition that *opinio juris* is more decisive than State practice as evidence of a humanitarian

³⁰ *Eichmann*, Supreme Court judgment (n 1) para 10.

³¹ See thesis introduction.

³² Schabas, 'The Contribution of the Eichmann Trial to International Law' (n 14) 692.

customary norm.³³ It was the violent nature of the offences that triggered the entitlement of a foreign court to try the offender. At the same time, this humanitarian narrative illustrates the subjectivity evident in support for universality and other humanitarian based norms. This is illustrated by the discontentment expressed by Israel when its nationals are subject to the exercise of universality in foreign courts in more recent times.³⁴ What is more, Israel is a State that is consistently accused of committing international crimes to which universality apply.³⁵ This demonstrates the politicalisation of prosecution under universal jurisdiction that was evident in previous chapters.

The reasoning in *Eichmann* demonstrates the value of customary international law in the development of the universality principle outside of the confinements of treaty law. The significance of the decision can be viewed in subsequent case law. The first such case was *Matter of Extradition of John Demjanjuk*, where US Courts addressed the rationale for the exercise of universality.³⁶ The case concerned the extradition of Demjanjuk from the US to Israel to stand trial for international crimes, specifically crimes against humanity and war crimes, committed during WWII. Here, as in *Eichmann*, a US District Court viewed universal jurisdiction as a power, based in the common law of nations, affirming that it ‘...stems from the sovereign character of each independent State, not from the State’s relationship or act’.³⁷ The

³³ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 88. For more on this point see section 4.5.

³⁴ See chapters 7 and 8.

³⁵ UN Independent Commission of Inquiry on the 2014 Gaza Conflict, ‘Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1’ (24 June 2015) UN Doc. A/HRC/29/52; UN Human Rights Council, ‘Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict’ (25 September 2009) UN Doc. A/HRC/12/48.

³⁶ *Matter of Extradition of John Demjanjuk*, 612 F Supp 544 (DC Ohio 1985) (District Court judgment); *Demjanjuk v Petrovsky*, 776 F 2d 571 (1985) (Appeal judgment).

³⁷ *Demjanjuk*, District Court judgment, *ibid* 556.

enforcement jurisdiction was viewed by the Court as a right that is part of the exercise of State sovereignty. A US Court of Appeal concluded that extradition to Israel was possible because the offences committed were 'offences against the law of nations' that the forum State would be punishing on behalf of all nations.³⁸ Thus, the nexus between international crimes and universal jurisdiction is also part of the *ratio decidendi*.

5.3 Relevant developments at the international criminal tribunals

Aside from the progress analysed in chapter 4, in respect of the *Filartiga* judgment and international treaties, the next substantial advancement for the exercise of universal jurisdiction took place in the 1990s as part of the international response to the horrific events that occurred during the breakdown of the former Yugoslavia and the genocide in Rwanda. In 1993, the international penal tribunal referred to in Article 6 of the Genocide Convention came to fruition, albeit with a limited geographical scope, with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁹ This was followed by the creation of the International Criminal Tribunal for Rwanda (ICTR) by the UN Security Council, acting under Chapter VII of the UN Charter, in 1994.⁴⁰ Both the ICTY and ICTR 'internationalised' the prosecution of genocide, war crimes and crimes against humanity committed within State boundaries, allowing the international community to collectively intervene and prosecute the international crimes committed during the conflicts.⁴¹ UN Member States were

³⁸ *Demjanjuk*, Appeal judgment (n 36) 583.

³⁹ The UN Security Council (UNSC) established the ICTY under UNSC Res 808 (22 February 1993) UN Doc. S/RES/808.

⁴⁰ The UN Security Council established the ICTR under UNSC Res 955 (8 November 1994) UN Doc. S/RES/955.

⁴¹ ICTY Statute, Arts 2-5; ICTR Statute, Arts 2-4.

obligated to co-operate with the Tribunals⁴² and their national courts were granted concurrent jurisdiction to try offences within the jurisdiction of the Tribunals.⁴³ Neither tribunal operated on the basis of universality.⁴⁴ Although, Luc Reydams described Article 8 of the ICTR Statute as ‘... implicit recognition of universal jurisdiction over the crimes’.⁴⁵ Primacy over prosecutions was reserved for both Tribunals, with both institutions retaining the power to seek the surrender of suspects.⁴⁶ During their lifetime, the ICTY and the ICTR tried State officials and members of armed groups for international crimes.⁴⁷

Universal jurisdiction in respect of genocide and crimes against humanity was acknowledged by UN entities. The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) (that was adopted in advance of the commencement of the work of the ICTY) recognised the application of the principle to genocide and crimes against humanity. It was the opinion of the Expert Group that ‘Under both crimes against humanity and the Genocide Convention, such prohibited acts are subject to universal jurisdiction’.⁴⁸ This is a notable statement given that the

⁴² ICTY Statute, Art 29; ICTR Statute, Art 28. The ICTR Statute obliged States to take ‘...any measures necessary under their domestic law to implement the provisions...’ of the ICTR Statute, UN Doc S/RES/955 (n 40) para 2.

⁴³ ICTY Statute, Art 9(1); ICTR Statute, Art 8(1).

⁴⁴ ICTY Statute, Art 1; ICTR Statute, Art 1.

⁴⁵ Luc Reydams, ‘Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice’ (1996) 4 *European Journal of Crime Criminal Law & Criminal Justice* 18, 32.

⁴⁶ ICTY Statute, Art 9(2); ICTR Statute, Art 8(2). See for example, the German case of *Public Prosecutor v Tadić*, Bundesgerichtshof (examining magistrate), 13 February 1994. Here the accused was transferred from Germany to the ICTY following a request.

⁴⁷ See *Milošević Case* (Indictments) ICTY-02-54; *Karadžić Case* (Judgment) ICTY-95-5/18 (24 March 2016); *Popović Case* (Appeal Judgment) ICTY-05-88 (30 January 2015); *Kambanda Case* (Appeal Judgment) ICTR-97-23 (19 October 2000); *Bizimungu et al* (Judgment) ICTR-99-50 (30 September 2011); *Bagosora et al* (Appeal Judgment) ICTR-98-41 (14 December 2011); *Rutaganda* (Appeal Judgment) ICTR-96-3 (26 May 2003); *Akayesu* (Appeal Judgment) ICTR-96-4 (1 June 2001).

⁴⁸ Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (27 May 1994) UN Doc. S/1994/674, para 107.

exercise of universal jurisdiction in respect of these crimes is not codified in an international treaty. However, it is clear that the Commission shared the view of the Israeli Courts in the *Eichmann* litigation that Article 6 of the Genocide Convention does not preclude the exercise of universal jurisdiction in respect of the crime.⁴⁹ What is more, the Commission believed that the Genocide Convention was part of *jus cogens*.⁵⁰ The Commission affirmed 'genocide is a punishable international crime'.⁵¹ Thus, continuing the international crime-universal repression narrative, which was later recognised by the ICTY Appeals Chamber in *Prosecutor v Tadić* (jurisdictional decision case).⁵² Here the Tribunal stated, '...one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes...' ⁵³ Moreover, the ILC included universal jurisdiction over genocide, crimes against humanity and war crimes based on the presence of the accused in the forum State in its Draft Code of Crimes against the Peace and Security of Mankind 1996.⁵⁴

UN Member States were required to enact legislation in their domestic law to give effect to the ICTY and ICTR statute provisions. In turn, a number of States incorporated extraterritorial jurisdiction, including universality, into domestic law, which led to an increase in prosecutions for genocide, crimes against humanity and war crimes committed abroad by foreigners. However, during the 1990s practice of

⁴⁹ See section 5.2. See also Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) 84-85.

⁵⁰ Final Report of the Commission of Experts (n 48). Prior to the work of the Commission, this fact was recognised by the American Law Institute in its Third Restatement of the Foreign Relations Law of the United States, s404. The Restatement is highly persuasive on the decisions of national courts. See for example the Australian case *Polyukhovitch v The Commonwealth* (1991) 172 CLR 501, para 33.

⁵¹ Final Report of the Commission of Experts, *ibid* para 91.

⁵² *Tadić* (Jurisdiction, Appeal Judgment) IT-94-1 (2 October 1995) para 62.

⁵³ *ibid*.

⁵⁴ ILC 'Report of the International Law Commission on the Work of Its 48th Session', (6 May-26 July 1996) UN Doc. A/51/10, p 28.

domestic prosecutions of international crimes was not uniform.⁵⁵ Notwithstanding this, a number of points can be highlighted in the case law for the purposes of answering the research questions.

5.4 The rationale for the exercise of universality over genocide

One of the main reasons cited for the exercise of universality over genocide before the creation of the Rome Statute was that the crime would go unpunished. In the German case of *Tadić*, the examining magistrate noted that it would be unjust to allow the accused live freely in Germany,⁵⁶ where he had sought asylum. Thus, one can see the reliance of the rationale asserted by Grotius for the application of universality.⁵⁷ Impunity was also cited as a rationale for the exercise of universal jurisdiction in *Public Prosecutor v Jorgić*, where a German Court reasoned that universal jurisdiction was necessary because there was a significant likelihood of the territorial State not punishing the crime.⁵⁸ In the German trials prosecuting genocide during this period, the framework adopted was that of *aut dedere aut judicare* where the offender was required to be present in the State.⁵⁹

Significantly, in *Jorgić*, the German Constitutional Court relied on *jus cogens* and *erga omnes* obligations in its decision.⁶⁰ Here, the

⁵⁵ Axel Marschik, 'The Politics of prosecution: European National Approaches to War Crimes' in Timothy L H McCormack and Gerry J Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997) 99-101.

⁵⁶ As cited in case note on *Public Prosecutor v Tadić* in Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 151. The defendant was also accused of violating the Geneva Conventions.

⁵⁷ See section 1.3.

⁵⁸ *Public Prosecutor v Jorgić*, Oberstes Landesgericht Düsseldorf, 26 September 1997 (Appeal judgment); Bundesgerichtshof (Federal Supreme Court), 30 April 1999, case note in Reydam, *Universal Jurisdiction*, *ibid* 152-55, 153. Case note of Federal Supreme Court judgment by Sascha Rolf Lüder and Gregor Schotten in (1999) *2 Yearbook of International Humanitarian Law* 366-69.

⁵⁹ *Prosecutor v Tadić* in Reydam (n 56) 149-151; *Public Prosecutor v Jorgić*, *ibid*.

⁶⁰ As cited in Reydam, *Universal Jurisdiction*, *ibid* 153-54.

plaintiff argued that Germany did not have jurisdiction to try him for genocide under the Genocide Convention nor under customary international law.⁶¹ The Court held that genocide was a *jus cogens* norm and the obligation to prevent and punish genocide in Article 1 of the Genocide Convention included the right of States to exercise universality in order to meet the duties under the Convention.⁶² However, the Court noted that there was no obligation to exercise universal jurisdiction.⁶³ In coming to its conclusion, the German Court affirmed that ‘The universality principle applies to certain acts that endanger the legal interest of the international community of States’.⁶⁴ The Court affirmed:

Genocide, the gravest violation of human rights, is the classic example of the universality principle, whose function is precisely to close all loopholes in the prosecution of crimes against the fundamental legal interests of the community of States.⁶⁵

Interestingly, a further reason for the exercise of universal jurisdiction was the limited capacity of the ICTY.⁶⁶ The Court interpreted the reference to ‘national courts’ in Article 9(1) of the ICTY Statute (on concurrent jurisdiction) as not restricting prosecution to the territorial State, stating this was the opinion of the Prosecutor and the Trial Chambers.⁶⁷ In July 1994, an Austrian Court found that Austria could exercise universality in respect of genocide under the Genocide Convention so long as extradition to the territorial State was not

⁶¹ As cited in *ibid* 153.

⁶² As cited in *ibid* 154.

⁶³ As cited in *ibid*.

⁶⁴ As cited in *ibid*.

⁶⁵ As cited in *ibid*.

⁶⁶ *Prosecutor v Jorgić* (Federal Supreme Court judgment) in Reydams (n 56) 153.

⁶⁷ *ibid*. In this case the ICTY did not seek to take over the proceedings.

possible.⁶⁸ Thus, subsidiary universal jurisdiction was preferred. The territorial State, Bosnia, was in the midst of war and an international criminal court did not yet exist. Hence the possibility of prosecution was unlikely.

5.4.1 The rationale for the exercise of universality over crimes against humanity

The non-existence of an international treaty authorising universality in respect of the crimes against humanity has not prevented States from exercising universality over the crimes. Humanitarian concerns feature in the rationale for the exercise of universal jurisdiction over the international crime prior to the creation of the Rome Statute.⁶⁹ In the 1991 Australian case of *Polyukhovitch v The Commonwealth*, the Court acknowledged universal jurisdiction as a judicial response to atrocity. Here, Justice Brennan stated:

[T]he two questions—whether a crime exists and the scope of jurisdiction to prosecute—are inextricably linked. An international crime is constituted, precisely, where conduct is identified which offends all humanity, not only those in a particular locality; the nature of the conduct creates the need for international accountability. Where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail. This is particularly true of crimes against humanity since they comprise, by definition, conduct abhorrent to all the world.⁷⁰

⁶⁸ *Public Prosecutor v Cvjetković Landesgericht, Salzburg*, 31 May 1995 (trial judgment); *Oberste Gerichtshof*, 13 July 1994 (Supreme Court judgment) as cited in Reydam's, *Universal Jurisdiction* (n 56) 99-101.

⁶⁹ *Matter of Extradition of John Demjanjuk* (n 36); *Polyukhovitch v The Commonwealth* (n 50). See also *R v Finta* [1994] 1 S C R 701 (Canada).

⁷⁰ *Polyukhovitch v The Commonwealth*, *ibid* para 34.

The atrociousness of the offence warrants a legal response from *any* State. This is a continuation of the rationale for universal jurisdiction asserted in the case law of the UNWCC and in the *Eichmann* and *Demjanjuk* litigation. Similarly, in the *R v Finta*, it was stated that ‘...those persons indicted for having committed crimes against humanity or war crimes stand charged with committing offences so grave that they shock the conscience of all right-thinking people’.⁷¹ This idea of public consciousness as a legal threshold is ultimately based on humanitarianism.⁷² Another reason for the exercise of universality over crimes against humanity during this period was that it was a sovereign right of the forum State.⁷³

5.4.2 The rationale for the exercise of universality over war crimes

Following the creation of the two *ad hoc* tribunals, many States that had not already done so incorporated the grave breaches regime into their national legal system.⁷⁴ Some States had already incorporated universal jurisdiction over grave breaches of the Geneva Conventions.⁷⁵ Notably, in some cases the national legislation went further than that required under the Geneva Conventions. Here, one notes that the Swiss code pénal militaire, Articles 9(1) and 109(1) allows for universal jurisdiction over violations of the laws and customs of war.⁷⁶ Moreover, not all legislation required the presence of the accused for a

⁷¹ *R v Finta* (n 69) 812.

⁷² On this concept see Ruti Teitel, *Humanity's Law* (OUP 2011); Anne Peters, ‘Humanity as the Λ and Ω of Sovereignty’ (2009) 20 *European Journal of International Law* 513.

⁷³ *Polyukhovitch* (n 50) para 33; *Demjanjuk* (n 36).

⁷⁴ See generally country studies in Reydams, *Universal Jurisdiction* (n 56).

⁷⁵ Geneva Conventions Act 1957, Part II, s 7 (1) (Australia); Geneva Conventions Act (Revised in 1985) (Canada), s 3 (2); Wet Oorlogsstrafrecht [Crimes in Wartime Act] 1952, Arts 3(1) and 8(1) (The Netherlands).

⁷⁶ See Reydams, *Universal Jurisdiction* (n 56) 195. In Belgium, see Law of 16 June 1993 relative to the repression of the Grave Breaches of the International Geneva Conventions of 12 August 1949 and Additional Protocols I and II of 8 June 1977. See also Wet Oorlogsstrafrecht 1952, *ibid*.

prosecution to occur.⁷⁷ Conversely, not all States incorporated universal jurisdiction into their domestic law in respect of grave breaches.⁷⁸ However, the incorporation of the grave breaches regime into domestic law did not necessarily result in prosecutions.⁷⁹

During the period 1948-98, it was mostly Western States that prosecuted war criminals present in their jurisdiction. The first domestic prosecution of grave breaches of the Geneva Conventions committed by a foreigner abroad against other foreigners took place in Denmark in 1994, in *Prosecutor v Refik Sarić*.⁸⁰ Here, the defendant was tried and convicted under the *Straffeloven* (Danish Penal Code) and Articles 129-130 and Articles 146-147 of the Third and Fourth Geneva Conventions respectively. The prosecution was ‘...the fulfilment of an obligation under the Geneva Convention’.⁸¹ The accused was voluntarily present in Danish territory and had significant links to the State.⁸² If not tried, he would have lived freely in the State, which demonstrates the rationale for universality proposed by Lemkin, de Vabres⁸³ and others. Moreover, the case is an example of the effectiveness of the grave

⁷⁷ See Geneva Conventions Act (Revised in 1985) (Canada), s 3(2), which allowed for the exercise of universal jurisdiction in respect of grave breaches when the offender is not present in Canada, subject to executive consent in s 3(4).

⁷⁸ France has not yet implemented the Geneva Conventions, see Reydams, *Universal Jurisdiction* (n 56) 140. The US has not incorporated universality over grave breaches into its domestic law, see Reydams at 214, although it has criminalised grave breaches and certain violations prohibited under common Article 3 of the Geneva Conventions, War Crimes Act of 1996, 18 U S C A, s 2441(c)(1) (2006).

⁷⁹ There were no proceedings under the Geneva Conventions Act (Revised in 1985) in Canada, see Reydams, *Universal Jurisdiction* (n 56) 121.

⁸⁰ *Prosecutor v Refik Sarić*, Østre Landsret, 25 November 1994 (Trial judgment); Højesteret, 15 August 1995 (Appeals judgment). Case note in Reydams, *Universal Jurisdiction* (n 56) 128-29. Sarić was a national of Bosnia-Herzegovina who sought asylum in Denmark. While in Denmark Bosnian refugees alerted the authorities that Sarić had committed violent acts while working as a guard in the Croatian prison camp of Dretelj in Bosnia. The Danish Ministry of Foreign Affairs categorised the war in Yugoslavia as an IAC.

⁸¹ As cited in Reydams, *ibid* 129.

⁸² As cited in *ibid*.

⁸³ As cited in *ibid*.

breaches regime. Subsequent trials took place in Germany,⁸⁴ the Netherlands,⁸⁵ Switzerland.⁸⁶ Notwithstanding the importance of the exercise of universality over war crimes before the creation of the Rome Statute, it must be remembered that the prosecutions were in respect of war crimes committed in international armed conflict.⁸⁷

5.4.3 The rationale for the exercise of universality over torture

There were a number of developments during the 1990s that re-affirmed the application of universal jurisdiction to torture.⁸⁸ The case law of the ICTY and the ICTR made a series of important decisions regarding the status of torture in customary international law.⁸⁹ In *Prosecutor v Furundžija*, the ICTY held that the prohibition against torture was customary international law because UNCAT was ratified by so many states.⁹⁰ In addition, the ICTY Trial Chamber declared torture to be a *jus cogens* crime, stating:

...[I]t would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.⁹¹

⁸⁴ *Prosecutor v Tadić* (n 46); *Public Prosecutor v Djajić*, Bayerisches Oberstes Landesgericht, 23 May 1997; *Public Prosecutor v Jorgić* (n 58).

⁸⁵ *Public Prosecutor v Knesevic*, 1 December 1995 (examining magistrate).

⁸⁶ *Military Prosecutor v Gabrez*, Tribunal Militaire, Division 1, Lausanne, 18 April 1997.

⁸⁷ For the exercise of universal jurisdiction over war crimes in non-international armed conflict from the 1990s onwards see chapter 7.

⁸⁸ During this period, universal jurisdiction was exercised to prosecute torture under UNCAT and also as a crime against humanity.

⁸⁹ *Furundžija Case* (Judgment) ICTY-95-17/1 (10 December 1998). See also *Delalić Case* (Judgment) ICTY-96-21 (16 November 1998).

⁹⁰ *Furundžija*, *ibid* paras 144, 153.

⁹¹ *ibid* para 156. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 99.

The connection that is made between a *jus cogens* offence and the obligation to try or extradite is of note. The Tribunal continued:

Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.⁹²

The similarities between this interpretation and that adopted in *Demjanjuk* and *Eichmann* are evident. Thus, the rationale for the application of universal jurisdiction under the obligation to try or extradite was because of the universal condemnation of the crime of torture.

The brutal regime inflicted on the people of Chile during the 17-year rule by General Augusto Pinochet was the focus of a series of universal jurisdiction cases in Europe in the 1990s, so much so that this has been termed 'the Pinochet Effect'.⁹³ Some of the cases stemmed from the provisions of UNCAT,⁹⁴ while others were based on customary

⁹² *Furundžija* (n 89) para 156.

⁹³ In addition to the famous House of Lords case, *ex parte Pinochet* (n 26), there were simultaneous efforts to prosecute Pinochet in Belgium, France, Switzerland, Sweden, Germany and Italy. See Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2004) 118.

⁹⁴ Order of the Criminal Chamber of the Spanish *Audiencia Nacional* affirming Spain's Jurisdiction to Prosecute Augusto Pinochet, 5 November 1998, available in Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain*, (Kluwer Law International 2000) 95-107; *Chili Komitee Nederland v Pinochet*, Public Prosecutor of Amsterdam, 6 June 1994 and Court of Appeal of Amsterdam, 4 January 1995.

international law.⁹⁵ The cases are significant because they led to future precedents in international law.⁹⁶ At the time domestic prosecution was not possible due to a grant of immunity.⁹⁷

In the Belgian case of *Aguilar v Pinochet*, the plaintiffs could not rely on UNCAT because Belgium had not ratified the Treaty at that time,⁹⁸ and torture was treated as a crime against humanity. Notwithstanding that Belgium had yet to incorporate universality over crimes against humanity, the investigating magistrate, Judge Damien Vandermeersch, examined whether or not Belgium had jurisdiction to try Pinochet for crimes against humanity including torture and enforced disappearances under customary international law.⁹⁹ In this respect, the investigating magistrate may have been influenced by the definition of crimes against humanity included in the Rome Statute, which was created prior to this decision. Judge Vandermeersch found that Belgium had jurisdiction to try the offences, because they were also 'ordinary' crimes such as murder and assault and so he had jurisdiction to proceed with the investigation.¹⁰⁰ The Belgian investigating magistrate viewed universality as a right of States.¹⁰¹ The rationale asserted by Judge Vandermeersch was that States could exercise this right in order to prevent impunity for international crimes. He affirmed, 'The struggle against impunity of persons responsible for crimes under

⁹⁵ *Aguilar v Pinochet*, Tribunal of First Instance of Brussels, (examining magistrate) order of 6 November 1998. Case note in Reydams, *Universal Jurisdiction* (n 56) 112-116; case note by Laurence Weerts and Anne Weyembergh in (1999) 2 *Yearbook of International Humanitarian Law* 335-340; case note by Luc Reydams (1999) 93 *American Journal of International Law* 700-703.

⁹⁶ Richard J Wilson, 'The Spanish Proceedings' in Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain*, (Kluwer Law International, 2000) 23; Roht-Arriaza (n 93).

⁹⁷ This was later removed by the Chilean Supreme Court in 2000, see Roht-Arriaza, *ibid* 78-79.

⁹⁸ Belgium ratified UNCAT in 1999.

⁹⁹ Weerts and Weyembergh (n 95) 337.

¹⁰⁰ *ibid* 338.

¹⁰¹ Cited in Reydams, case note in *American Journal of International Law* (n 95) 702.

international law, is therefore, a responsibility of all states'.¹⁰² In fact, the Judge firmly based this rationale on the responsibility of States based on a common notion of humanity. He stated, '...the prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* on our domestic legal order'.¹⁰³ The Judge also affirmed *aut dedere aut judicare* as a means of preventing impunity.¹⁰⁴

The Spanish case of *Unión Progresista de Fiscales de España et al v Pinochet* appears to be the first instance of the exercise of universality over torture.¹⁰⁵ Here, the *Audiencia Nacional* (National Court) held that Spain had jurisdiction over acts of torture committed abroad by foreigners¹⁰⁶ under Article 23(4) Ley Orgánica del Poder Judicial (Organic Law of the Judicial Power), which authorised Spanish Courts jurisdiction over certain crimes committed by Spanish nationals or foreigners abroad.¹⁰⁷ Pinochet and others were accused of having committed genocide, terrorism and torture.¹⁰⁸ The *Audiencia* found that it was able to exercise universal jurisdiction over torture under Article 23(4)(g) because it allowed Spanish Courts to exercise universal jurisdiction in respect of offences that Spain was obligated to prosecute

¹⁰² Cited in *ibid* 702.

¹⁰³ Cited in *ibid*.

¹⁰⁴ Cited in *ibid*.

¹⁰⁵ Order of the Criminal Chamber in Brody and Ratner (n 94) 95-107. This case concerned an action by the State Prosecutor opposing a decision to pursue the investigation against Augusto Pinochet. The case dealt with arguments for and against Spain's exercise of enforcement jurisdiction over the serious crimes committed in Chile during the Pinochet regime.

¹⁰⁶ The *Audiencia Nacional* deals with matters concerning more than one province such as treason, high jacking piracy. It also deals with serious crimes such as drug smuggling and money laundering, see Roht-Arriaza (n 93) 3.

¹⁰⁷ The crimes mentioned in the law were genocide, terrorism sea or air piracy, counterfeiting, offences in connection with prostitution and corruption of minors and incompetents, drug trafficking or any other offence that Spain is obligated to prosecute by an international treaty.

¹⁰⁸ At the time the definition of genocide in Spanish law differed from the definition in the 1948 Genocide Convention. It included genocide committed against a social group. See María Del Carmen Márquez Carrasco and Joaquín Alcaide Fernández, 'In Re Pinochet' (1999) 93 *American Journal of International Law* 693.

under an international treaty.¹⁰⁹ It followed that Spanish Courts had jurisdiction to try the offence under Article 5(2) of UNCAT.¹¹⁰ The decision of the *Audiencia* resulted in an extradition request from Spain to the UK Government for the suspect to be surrendered to Spain for trial. At the time, Pinochet was in the UK receiving medical treatment.

This finding that a forum State may exercise universal jurisdiction in respect of a suspect who is not present in its territory must be challenged. First, it goes against the previous norms and practice concerning universal jurisdiction. Moreover, Articles 5(2) and 7 of UNCAT require that the accused person be present in the State exercising universal jurisdiction over torture.¹¹¹ The Court reasoned that the presence of Pinochet was not required because the universal jurisdiction in Article 23(4) of the *Ley Orgánica* was a part of the procedural law rather than an element of substantive law. The consequence of this determination was that the provision could be applied retrospectively to acts that preceded the creation of the law. The suspect's presence was sought for the trial. Ultimately, the reasoning in this judgment was based on an interpretation of the domestic law that authorised universality in Spain. However, in the decision, it was suggested that universal jurisdiction in customary international law could have been relied on directly without it having been legislated for. The *Audiencia* found that non-criminalisation of a particular rule in domestic law 'does not stand in the way of a State party establishing such a category of jurisdiction for an offence that has a major impact worldwide, that affects the international community directly, all of humanity, as is made clear in the Convention itself...'¹¹² This also demonstrates the humanitarian motives that justified the prosecution. The *Audiencia* also relied on the argument that the

¹⁰⁹ Order of the Criminal Chamber in Brody and Ratner (n 94) 105.

¹¹⁰ *ibid* 105.

¹¹¹ Reydams, *Universal Jurisdiction* (n 56) 187-88; see section 4.5.1.

¹¹² Order of the Criminal Chamber in Brody and Ratner (n 94) 98.

exercise of universality in respect of the said crimes was a sovereign right of Spain.¹¹³

Pursuant to the extradition request the UK received from Spain, the House of Lords examined whether the UK could extradite former head of State, Augusto Pinochet to Spain to stand trial for torture committed in Chile during his regime.¹¹⁴ The Lords adopted a different position to that of the previous Pinochet prosecutions examined. Unlike the *Audiencia Nacional*, it believed universal jurisdiction was part of the substantive law, and thus, the principle of legality was an integral part of the *ratio decidendi*.¹¹⁵ The Lords based their decision on the domestic law incorporating UNCAT into the UK legal system and whether or not the domestic law was in place at the time the offences were committed in Chile.¹¹⁶ The presiding Judge, Lord Browne-Wilkinson, did not believe that crimes committed by Pinochet before 29 September 1988, the date when Section 134 of the Criminal Justice Act 1988 came into force, were punishable in the UK.¹¹⁷ Thus, crimes committed before 29 September 1988 were not extraditable offences.¹¹⁸ Ultimately, the Court found that Pinochet could be extradited to Spain to stand trial for offences committed after this date. Given that this reasoning was based on positive law restrictions, it is unlikely that the same outcome would have been reached had universal jurisdiction over torture in customary international law been under scrutiny.¹¹⁹ Thus, it is clear that compared to the approach taken by the Spanish and Belgian courts, the House of

¹¹³ This was in response to the Prosecutor's argument that if exercised, Spain would be violating the principle of the sovereign equality of States in international law under Article 2(1) of the UN Charter. See *ibid* 107.

¹¹⁴ *Ex Parte Pinochet* (n 26). The two questions before the House of Lords were (1) Whether the acts alleged were extradition crimes and (2) Whether Pinochet, enjoyed immunity from jurisdiction. Universal jurisdiction was addressed *obiter dictum*.

¹¹⁵ Wilson (n 96) 26.

¹¹⁶ The legislation in question was the Criminal Justice Act 1988, s 134.

¹¹⁷ *Ex Parte Pinochet* (n 26) 582.

¹¹⁸ *ibid* 588.

¹¹⁹ Michael Ratner, 'The Lord's Decision in *III*', in Reed Brody and Michael Ratner (eds.), *The Pinochet Papers* (Kluwer Law International 2000) 34.

Lords took a conservative approach in their interpretation of universality.

Notwithstanding the limitations in the Lords' reasoning, the Lords categorised torture as a *jus cogens* offence.¹²⁰ In addition, they recognised the nexus between *jus cogens* crimes, and the *erga omnes* obligations.¹²¹ They rejected the argument put forward by the Chilean government that the declaration of torture as a *jus cogens* offence does not result in universality. Lord Browne-Wilkinson acknowledged that local courts of all States have jurisdiction to prosecute torture, and in such instances, '...the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went'.¹²² In interpreting Article 5 of UNCAT, the Judge believed that universal jurisdiction was subsidiary to the other forms of jurisdiction.¹²³

The House of Lords cited a series of rationales with regard to the exercise of universal jurisdiction. First, that impunity would otherwise result was one reason for its utilisation. Lord Browne-Wilkinson acknowledged:

... [A] totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed.¹²⁴

Second, the House of Lords supported the rationale for the inclusion of universal jurisdiction in UNCAT, namely that no country become a safe

¹²⁰ *Ex Parte Pinochet* (n 26).

¹²¹ *ibid.*

¹²² *ibid* 590.

¹²³ *ibid* 591.

¹²⁴ *ibid* 590. At the time there were no attempts to prosecute Pinochet in the territorial State.

haven for torturers.¹²⁵ In his separate opinion, Lord Millett, reasoned that it was ‘...the scale and international character of the atrocities...’ that ‘...fully justified the application of the doctrine of universal jurisdiction’.¹²⁶ Yet, he disagreed that universal jurisdiction applied to isolated acts of torture,¹²⁷ a finding which is arguably incompatible with the provisions of UNCAT,¹²⁸ but is in line with the concept of an international crime.¹²⁹

Elements of the separate opinion of Lord Millett are worth highlighting. First, he was the only Lord that to assert that jurisdiction stemmed from customary international law.¹³⁰ In contrast to the dualist position adopted by the House of Lords, Lord Millett believed that customary international law was part of the common law. This is not an altogether alien concept considering the two are formed through practice and conscientious decision-making.¹³¹ He commented that, ‘There is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad’,¹³² thus, adopting the rationale for the exercise of extraterritorial jurisdiction in *Lotus*.¹³³ Second, he recognised the comparison between torturers and pirates, believing that ‘...the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984’.¹³⁴ Notwithstanding the importance of the Pinochet

¹²⁵ *ibid.* See also, separate opinion of Lord Goff of Chieveley at 600.

¹²⁶ *ibid* 648.

¹²⁷ *ibid* 649.

¹²⁸ See section 4.5.1. UNCAT is silent on the scale of torture to which universal jurisdiction applies which.

¹²⁹ Roger O’Keefe, *International Criminal Law* (OUP 2015) 47-84.

¹³⁰ *ex Parte Pinochet* (n 26) 649-50.

¹³¹ This was also asserted in *Filartiga v Pena Irala* (1980) 630 F 2d 876 Court of Appeals, Second Circuit (United States).

¹³² *Ex Parte Pinochet* (n 26) 648.

¹³³ See thesis introduction.

¹³⁴ *ibid* 650.

litigation explored in this section, not all national courts agreed that Pinochet could be prosecuted in their jurisdiction.¹³⁵

A number of aspects must be highlighted in the context of the chapter analysis. First, it is clear that the majority opinion is that the exercise of universal jurisdiction is envisaged in terms of the *aut dedere aut judicare* framework, it is recalled that this was the mechanism adopted in the codification of universal jurisdiction in international treaties examined in chapter 4. This is where the forum State either prosecutes or extradites a suspect *present* in its territory where the accused is alleged to have committed the international crime abroad.¹³⁶ What is more, the importance of presence seems to overlook the means by which the accused's presence is acquired.¹³⁷ Within this framework it is clear that the territorial State or State of nationality of the accused person or victim have priority to try the offence. This was acknowledged in *R v Finta*,¹³⁸ where the High Court of Ontario stated:

[W]ith respect to certain types of international crimes a country has the right to prosecute an offender irrespective of the fact that the offence was not committed on its territory. The condition precedent to the exercise of jurisdiction with respect to such international crimes is that the accused person must be found within the territory of the country asserting jurisdiction.¹³⁹

Most States require the presence of the accused for trial. As such it can be argued that universal jurisdiction *in absentia* was not permitted. It is

¹³⁵ *Lee Urzua v Pinochet*, Opinion of Director of Public Prosecution of 3 December 1998, case no. 555/98 (Denmark); *Chili Komitee Nederland v Pinochet* (n 94).

¹³⁶ The Pinochet litigation in Spain is a questionable exception to this assertion, see above.

¹³⁷ The UN Charter was breached in order to require the presence of Eichmann in Israel.

¹³⁸ *R v Finta* (n 69).

¹³⁹ *ibid* 106

a concurrent jurisdiction that ensures the crime does not go unpunished. This in turn feeds into the impunity rationale for the exercise of the jurisdiction.

Second, it is often the case that the accused is voluntarily present in the territory of the forum State. Here, the exercise of universality over these offences is the opposite of granting asylum or allowing them to live freely in another jurisdiction after fleeing the territorial State.¹⁴⁰ In this respect the link between asylum and universal jurisdiction must be acknowledged.¹⁴¹ This rationale for the exercise of universal jurisdiction demonstrates the coming to fruition of the universality envisaged by Grotius and others many centuries ago. In fact this was one of the reasons for the *aut dedere aut judicare* model that operated in the Northern Italian city States during the Middle Ages.¹⁴²

Third, it is clear that there is a lack of uniformity in the sources of the universality principle cited by national courts and magistrates. National courts will rely on universal jurisdiction as provided in their domestic law or they will rely directly on customary international law. Common law States largely adopt the former approach, while civil law jurisdictions largely assume the latter. This can be illustrated by the *ratio decidendi* of the House of Lords in *ex Parte Pinochet* and by the Examining Magistrate in the *Aguilar v Pinochet* litigation. The former ruled out reliance on customary international law as a source of universal jurisdiction, while the latter institution came to the opposite conclusion. The reason for the variance could be the dualist approach to

¹⁴⁰ *Polyukhovitch v The Commonwealth* (48); *R v Finta*, *ibid*; *Dupaquier et al. v Munyeshyaka*, Tribunal de Grande Instance de Privas (examining magistrate), 9 January 1996; Cour d'Appel de Nimes, 20 March 1996; Cour de Cassation (chambre criminelle), 6 January 1998.

¹⁴¹ This was recognised by the UN General Assembly in its declaration on the Principles of international cooperation on the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, UN General Assembly Resolution 3074 (XXVIII) 1973.

¹⁴² Henri Donnedieu de Vabres, *Les principes modernes du droit penal international* (1928) LGDJ diffuseur: Éditions Panthéon-Assas 2004) 135-36.

international law typically adopted by common law jurisdictions, where the legislation is required to enforce an international legal norm.¹⁴³ In contrast, civil law jurisdictions are more historically favourable to the monist tradition towards international law.¹⁴⁴

To sum up this subsection, the 1990s was a significant period of development for universal jurisdiction over torture, during which it was put into sporadic practice. More often than not this was based on UNCAT itself.¹⁴⁵ In particular, Belgian and Spanish Courts and investigating judges took the perspective that the presence of the accused was not required in the forum State. The Pinochet case, where European courts decided that universal jurisdiction could be exercised over torture, are significant because they verified the application of universal criminal jurisdiction to offences committed outside of an IAC.

5.5 Obstacles and issues

Other elements of the case law during this period are worth noting. First, it should be borne in mind that the number of cases tried under the universality principle during this period was minute. What is more, the number of genocide and crimes against humanity trials at a national level was particularly low. One justification for this might be because there is no international treaty authorising the application of universal jurisdiction to genocide and crimes against humanity, which means that customary international law would have to be relied on. In this respect, not all States are open to reliance on customary rules.¹⁴⁶ Not all attempts at prosecuting international crimes in domestic courts were

¹⁴³ Dinah Shelton (ed), *International Law and Domestic and Domestic Legal Systems: incorporation, transformation and persuasion* (OUP 2011).

¹⁴⁴ *ibid.* Nowadays many States adopt an amalgamation of monism or dualism.

¹⁴⁵ *Chili Komitee Nederland v Pinochet*, *ibid*; *Lee Urzua v Pinochet*, *ibid*; Order of the Criminal Chamber in Brody and Ratner (n 94); *ex Parte Pinochet* (n 26).

¹⁴⁶ Shelton (n 143). This is particularly true of common law countries.

successful.¹⁴⁷ The identity of the accused person had to be specified in order for proceedings to proceed.¹⁴⁸ Moreover, the special intent required for a genocide conviction was an additional obstruction to genocide prosecutions.¹⁴⁹ Other barriers to the exercise of universal jurisdiction over genocide have included the absence of a provision incorporating universal jurisdiction into domestic law.¹⁵⁰ In *Public Prosecutor v Jorgić* the Court noted that a prerequisite of a 'legitimate link' between the extraterritorial offence and the German State was necessary,¹⁵¹ which was criticised as placing restrictions on universal jurisdiction over genocide.¹⁵² However, the government did not support this requirement.¹⁵³ In *Public Prosecutor v Cvjetković*, it was important that the acts committed were prohibited in the territorial State at the time of their commission.¹⁵⁴ Executive discretion as to the decision whether a prosecution goes ahead was also a feature of the legislation in some states.¹⁵⁵

¹⁴⁷ In *X v SB and DB Bundesgerichtshof*, 11 December 1998, the German Federal Supreme Court. See case note in Reydams, *Universal Jurisdiction* (n 56) 151-52.

¹⁴⁸ See French case of *Javor et al v X*, Cour de Cassation (chamber criminelle), 26 March 1994. Here, the Cour de Cassation stated that the presence of the victims in France is not enough to carry out the prosecution. This is an unusual finding given the practice of *in absentia* trials in French law. Both Klaus Barbie and Paul Touvier were tried *in absentia* in France for crimes committed during the Second World War, see Marschik (n 55) 82-87.

¹⁴⁹ In *Public Prosecutor v Djajić* (n 84). However, the plaintiff was prosecuted for grave breaches of the Geneva Convention, see case note by Christoph J M Safferling in (1998) 92 *American Journal of International Law* 528.

¹⁵⁰ See *Javor et al v X* (n 148). However, the Magistrate had competence to investigate torture and grave breaches.

¹⁵¹ Reydams, *Universal Jurisdiction* (n 56) 150, 152. In *Jorgić*, the accused was a long term German resident. In *Prosecutor v Tadić* (n 46), the accused was voluntarily present in Germany for a period of months amounted to a suitable nexus between Germany and the extraterritorial offence.

¹⁵² Lüder and Schotten (n 58) 367-69.

¹⁵³ Reydams, *Universal Jurisdiction* (n 56) 145.

¹⁵⁴ Marschik (n 55) 80.

¹⁵⁵ Geneva Conventions Act 1957, Part II, s 7 (6;) (Australia); Geneva Conventions Act (Revised in 1985) (Canada), s 3(4); Geneva Conventions Act 1962 (as amended), s 3(3) (Ireland). This obstacle is elaborated on in chapter 7 and in the thesis conclusion.

These cases demonstrate that before the creation of the Rome Statute some States exercised universal jurisdiction over international crimes. What is more, they persisted despite the lack of an express provision on this in conventional international law and were not grounded on an obligation in international law.¹⁵⁶ In most instances the domestic forums were located in Europe. In all of the cases cited above, it was in the interest of the authorities in the forum State to take steps to prosecute the accused person as they were faced with the presence of the accused in their territory. In many cases, the accused was already voluntarily present in the territory of the forum State.¹⁵⁷ In addition, the State of nationality of the accused person did not protest the prosecution.¹⁵⁸ Moreover, there was often a link between the forum State and the extraterritorial crime.¹⁵⁹ In some cases the link was the dual nationality of the accused person, or their residency in the forum State prior to the commission of the crime.¹⁶⁰ In other cases the accused had sought asylum in the forum State.¹⁶¹ In the later instance the forum States were in part fulfilling their obligations under Article 1F of the 1951 Refugee Convention not to apply the Convention provisions to suspect war criminals.¹⁶² Finally, it is notable that where a conflict has taken place (international or non-international) and mass outcry ensues it will increase the likelihood of post conflict punishment in other States. Many of the cases of extraterritorial prosecutions of

¹⁵⁶ It cannot be said that there was an obligation on States in customary international law to exercise universal jurisdiction over genocide during the 1990s, see Marschik (n 55) 101.

¹⁵⁷ *Prosecutor v Tadić* (n 46); *Prosecutor v Refik Sarić* (n 80); *Public Prosecutor v Jorgić* (n 58); *Public Prosecutor v Knesevic* (n 85); *Military Prosecutor v Gabrez* (n 86).

¹⁵⁸ This was noted by the ICRC in its 2005 study on customary international law, see, Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (CUP 2005) 605.

¹⁵⁹ For this reason Marschik suggests that politics plays a part in the trial, see Marschik (n 55) 99-101.

¹⁶⁰ *Public Prosecutor v Djajić* (n 84); *Public Prosecutor v Jorgić* (n 58).

¹⁶¹ *Prosecutor v Tadić* (n 46); *Military Prosecutor v Gabrez* (n 86); *Prosecutor v Refik Sarić* (n 80); *Public Prosecutor v Knesevic* (n 85).

¹⁶² Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

serious crimes under international law occurred after the atrocities that were committed in the former Yugoslavia and Chile.

5.6 Conclusion

This chapter answered the following questions: *How did universal jurisdiction transpose from piracy to other serious crimes under international law?; and, what was the rationale for this?* The focus of this chapter was the exercise of universal jurisdiction in the period from after the UNWCC until the creation of the Rome Statute in 1998. Importantly, this chapter demonstrates the removal of the link between universal jurisdiction and serious crimes under international law committed in practice. As affirmed in *Eichmann*, universal jurisdiction attaches to the act itself, by virtue of the severity of the act. This line of thinking was previously viewed in the case law of the UNWCC. As before, the reasoning asserted for the exercise of universal jurisdiction over serious crimes under international law was based on a humanitarian rationale. Another important aspect of the *Eichmann* jurisprudence is that universal jurisdiction was utilised as a main source of jurisdiction rather than a subsidiary basis for a prosecution. In addition, this chapter demonstrates that the reasoning in *Eichmann* had a large impact on succeeding cases.

A further rationale for universal jurisdiction is because if universality is not exercised, the crime may go unpunished. This is principally important because a new post-conflict political regime may not be willing or able to punish offenders of war crimes, as was the situation in respect of the international crimes committed in the Balkans. It is arguable that this is a continuation of the void of jurisdiction rationale that arose in the context of piracy prosecutions, and that justified the application of universality to the crime. A further practical rationale cited is the limited capacity of international penal

tribunals.¹⁶³ That the exercise of universal jurisdiction is a sovereign right of States was another justification cited for reliance on the principle. This is quite ironic, given that the previous chapter demonstrated that sovereignty is the main reason cited in opposition to the jurisdiction.

It follows that this chapter demonstrates that the exercise of universality over genocide and crimes against humanity is a right of States based in customary international law.¹⁶⁴ This right exists independent of an international treaty. As Luc Reydams has noted, ‘...[I]n *Polyukhovitch* the government and the High Court recognized that the *right* to exercise universal jurisdiction over crimes under (customary) international law exists independently from a treaty’.¹⁶⁵ However not all jurisdictions have taken this approach to the exercise of universality over crimes against humanity.¹⁶⁶ It is clear that States that exercise universal jurisdiction as a right based in customary international law are relying on the methodology in the *Lotus Case*, where the Permanent Court of International Justice affirmed that States have the right to exercise extraterritorial jurisdiction as far as there is no rule in international law which forbids the action.¹⁶⁷ This progression illustrates the importance of customary international law

¹⁶³ *Public Prosecutor v Jorgić* (n 58).

¹⁶⁴ *Polyukhovitch* (n 50) para 35. See also Willard B Cowles, ‘Universality of Jurisdiction Over War Crimes (1945) 33 (2) *California Law Review* 177, 217. See also, Payam Akhavan, The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty Based Obligation to prosecute’ in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) 29.

¹⁶⁵ Reydams, *Universal Jurisdiction* (n 56) 91. See also comments of the German Federal Supreme Court in *Jorgić* (n 58) 153.

¹⁶⁶ There are a number of French cases in which trials were not pursued owing to a lack of jurisdiction, based on a strict dualist interpretation of international law. See *Javor v X* and *Dupaquier et al v Munyeshyaka* in Reydams, *Universal Jurisdiction* (n 56) 136-141. French law at the time, the exercise of universal jurisdiction over crimes against humanity was limited to the crime committed during the Second World War.

¹⁶⁷ *Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10. See thesis introduction.

in the application of universal jurisdiction to serious crimes under international law, where it is not provided for in conventional international law. Reliance on academic sources to support the exercise of universality is also evident in *Eichmann* and subsequent case law. That customary international law cannot be relied on in common law jurisdictions is further evidence in support of the need for a treaty on crimes against humanity providing for universal jurisdiction under the same manner as UNCAT and CED. Such jurisdictions would be encouraged to incorporate universality in respect of universal jurisdiction as a right based in customary international law. In respect of the crime of genocide, it is clear that the jurisdiction provided for in Article 6 of the Convention does not impede the application of universal jurisdiction thereto. A further rationale for the exercise of universality over genocide was because the international penal tribunal to which enforcement jurisdiction was granted in Article 6 of the Genocide Convention did not yet exist. What is more, it is clear that national courts relying on the utilisation of the principle have interpreted this Article as not prohibiting the exercise of universal jurisdiction, the reason being that the aims of the Genocide Convention would not otherwise be met.

A further feature of the exercise of universality over genocide, war crimes and crimes against humanity before the creation of the Rome Statute is the non-objection of the territorial State. This feature maintains international relations between the forum State and the territorial State. It can be argued that this is similar to the 'amity' feature of piracy prosecutions from the 17th century onwards, where the forum State punished the piratical act in its courts because the victim State was an ally of the forum State. What is more, this is similar to the protective principle of extraterritorial jurisdiction, whereby the forum State carries out the prosecution on behalf of another State. This chapter also demonstrates that armed conflicts that are 'internationalised' by the UNSC are less likely to receive complaints

from other States. This provides further evidence in support of the contention that the non-objection of the State of nationality of the accused person is also an element of the successful exercise of universality over international crimes.¹⁶⁸ Here, the alignment of national interests between that of the forum State and the State of nationality of the accused or victim, is another reason asserted for the exercise of universality. In reality, a State is more likely to prosecute the offender when such action is in its interest.

In July 1998, the landscape of international criminal justice changed significantly with the adoption of the Rome Statute. The next chapter examines the reasons why universal jurisdiction was not included as a jurisdictional basis for the ICC to operate under. In addition, it examines where universal jurisdiction fits into the ICC framework thereafter.

¹⁶⁸ On this point in respect of the exercise of universality over war crimes committed in NIACs see Henckaerts and Doswald-Beck (n 158). Interestingly, the amity argument was also relied on in the *Filartiga* case, see section 4.5.

CHAPTER 6

UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT

6.1 Introduction

On 17 July 1998, 120 States agreed to create a permanent international penal tribunal, the idea for which was first mooted by Gustave Moynier one hundred years previous.¹ Since its adoption at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference),² the Rome Statute of the International Criminal Court (Rome Statute) has heavily influenced the operation of international criminal justice. Prior to its adoption a uniform framework for the prosecution of international crimes was lacking in international law,³ as the earlier chapters demonstrate. Article 5 of the Rome Statute lists the ‘core crimes’ or the crimes over which the ICC can exercise jurisdiction. These are genocide,⁴ crimes against humanity,⁵ war crimes⁶ and the crime of aggression.⁷ Jurisdiction over the latter crime has yet to be activated.⁸ The Rome

¹ Christopher Hall, ‘The First Proposal for a Permanent International Criminal Court’ (1998) 80 *International Review of the Red Cross* 59.

² William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 22-27.

³ This is noted by Jann K Kleffner in *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008).

⁴ Rome Statute, Art 5(a), Art 6.

⁵ Rome Statute, Art. 5(b), Art. 7.

⁶ Rome Statute, Art 5(c), Art. 8.

⁷ Rome Statute, Art 5(d). Art. 8*bis* (1) defines aggression as ‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. The specific acts and conduct that constitute the crime are listed in Art. 8*bis* (2).

⁸ For this chapter the term ‘core crimes’ will refer to the crimes over which the ICC may presently exercise jurisdiction, unless stated otherwise. Jurisdiction over the crime of aggression will be initiated once 30 States parties accept the amendments to the Rome Statute agreed at the first Review Conference in Kampala in 2010. Preparations to activate the jurisdiction are currently underway. Dapo Akande, ‘The ICC Assembly of States Parties Prepares to

Statute does not obligate States parties to incorporate universal jurisdiction over the core crimes, nor can the ICC exercise enforcement jurisdiction over all persons regardless of where the crime is committed, without the consent of the UNSC.⁹ Thus, the ICC may not exercise universal jurisdiction, although it does (in theory) have universal reach.¹⁰

Notwithstanding this, many of the justifications for reliance on universal jurisdiction underpin the purpose and goals of the ICC. The humanitarian concerns that underscore the goals of the ICC are described in the reference to the ‘conscience of humanity’,¹¹ while impunity concerns are evident in paragraph 4 of the Preamble, which affirms that ‘...serious crimes of concern... must not go unpunished’. Paragraph 5 of the Preamble declares that the States parties to the Rome Statute are ‘Determined to put an end to impunity for the perpetrators of these crimes...’.¹² The Rome Statute places a series of obligations on States parties. These obligations include the criminalisation of the core crimes in their national legislation. As such, the Rome Statute has profoundly changed the prosecution of genocide, crimes against humanity and war crimes at a national level for States parties; including the exercise of universal jurisdiction over these crimes.

However, for all its significance, the ICC is a subsidiary organ for the prosecution of international crimes.¹³ As was established prior to

Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction’ (EJIL: *Talk!*, 26 June 2017) <www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/>.

⁹ See section 6.2.

¹⁰ MC Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers 2003) 504.

¹¹ Rome Statute, Preamble, para 2.

¹² This paragraph also refers to determination to prevent of such crimes.

¹³ Louise Arbour, ‘Will the ICC have an impact on Universal Jurisdiction’ (2003) 1 *Journal of International Criminal Justice*, 585, 585.

the Rome Statute, the primary responsibility for the prosecution of international crimes lies with *States*.¹⁴ According to 'the principle of complementarity' in the Rome Statute, the Court may only intervene in a situation when a State with jurisdiction over the offence is unable or unwilling to try the offence.¹⁵ Hence, the territorial principle and the forms of extra territorial jurisdiction remain important in the punishment of the ICC core crimes. Moreover, given the nexus between their commission and State involvement, extraterritorial jurisdiction, particularly universal jurisdiction, remains an important tool in the prosecution of international crimes. Thus, the success of the ICC will be demonstrated by its lack of operation, as States exercise their cardinal right to prosecute international crimes. As noted by the first Prosecutor of the ICC, 'The establishment of an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC, would indeed be a major success for the Court and the international community as a whole'.¹⁶

In preparation for the next chapter, which analyses the rationale for the exercise of universal jurisdiction since the creation of the Rome Statute, we must first examine how universal jurisdiction fits into the international criminal justice system since the shift in 1998. Specifically, this chapter addresses the relationship between universal jurisdiction and the ICC. This chapter first outlines the jurisdictional framework of the Rome Statute in section 2. It then details the operation of the principle of complementarity in the context of how universal jurisdiction relates to the principle in section 3. Section four of this chapter examines the drafting history of the Rome Statute, focusing on

¹⁴ Rome Statute, Preamble, para 6.

¹⁵ See section 6.3.

¹⁶ Office of the Prosecutor, 'Informal expert paper: The principle of complementarity in practice' (2003) ICC-01/04-01/07-1008-AnxA, para 2; John T Holmes, 'Complementarity: National Courts Versus the ICC', in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002) 667; Arbour (n 13).

the debate as to whether the Court should be able to exercise jurisdiction over all persons irrespective of the place of commission of the crime. Section five evaluates the relationship between universal jurisdiction and the ICC, before section six concludes.

6.2. The jurisdiction of the International Criminal Court

The ICC operates under a strict jurisdictional framework. Article 5(1) of the Rome Statute limits the Court's jurisdiction to '...the most serious crimes of concern to the international community as a whole'.¹⁷ Its jurisdiction *ratione temporis* (temporal jurisdiction) is limited to ICC core crimes committed after the entry into force of the Rome Statute.¹⁸ Crimes must be committed by persons over the age of 18.¹⁹ According to the 'preconditions to the exercise of jurisdiction', the Court can exert jurisdiction over any of the crimes committed in the territory of a State party or where the crime is committed by a national of a State party.²⁰ Where a State accedes to the Rome Statute, the ICC has jurisdiction over the territory and nationals of that State party after the date of accession.²¹ Thus, ordinarily, the ICC operates under the territorial and nationality principles of jurisdiction, however, there are exceptions in some circumstances.

Despite the concerns raised during the Rome Conference in

¹⁷ Michael A Newton asserts that this Article creates a separate criterion that is distinct from the complementarity regime. See Michael A Newton, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the ICC' (2001) 167 *Military Law Review*, 20, 38-39.

¹⁸ Rome Statute, Art 11(1).

¹⁹ Rome Statute, Art 26. The elements of crimes must be present for a conviction. For more on this see Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: the case for a unified approach* (Bloomsbury 2013); Knut Dörmann, Louise Doswald-Beck and Robert Kolb, *Elements of war crimes under the Rome Statute of the International Criminal Court: sources and commentary* (CUP 2002).

²⁰ Rome Statute, Art 12(2)(a) and Art. 12 (2)(b). Territory includes a vessel or airplane registered in a State party.

²¹ Rome Statute, Art 11(2).

respect of ICC jurisdiction over the nationals of non-party States,²² there are three ways in which the ICC can exercise jurisdiction over such persons. The first is when the crime is committed by the national(s) of a non-party State on the territory of a State party.²³ The second scenario is when a non-party State makes a declaration authorising the Court to exercise jurisdiction in respect of 'the crime in question' without becoming a State party.²⁴ This allows the ICC Prosecutor to investigate crimes committed in the territory of that State and crimes committed by its nationals. Third, nationals of non-party States may also be subject to the ICC jurisdiction under one of the 'trigger mechanisms' of jurisdiction, where the UNSC, acting under Chapter VII of the United Nations Charter, refers a situation in a non-party State to the ICC Prosecutor for investigation.²⁵ Such a referral has the effect of extending the provisions of the Rome Statute to that non-party territory.²⁶ Relying on the UNSC, which is 'essentially a political body',²⁷ to decide on which non-party States should be subject to ICC jurisdiction protects the interest of its 5 Permanent Members States and their allies. Thus, the importance of the exercise of universal jurisdiction in the post-Rome Statute international criminal justice system is apparent.

States parties can refer a situation to the ICC under Article 13(a)

²² See section 6.4.2.

²³ At the time of writing, the ICC Office of the Prosecutor (OTP) was carrying out a preliminary examination into the alleged torture, cruel treatment, outrages upon personal dignity committed by US officials in Afghanistan. See Office of the Prosecutor, 'Report on Preliminary Examination Activities 2016' (14 November 2016) ICC-CPI-20161114-PR1252, paras 211-14, 219-25, 230. The US is not party to the Rome Statute, while Afghanistan is.

²⁴ Rome Statute, Art 12(3). In respect of the OTP on-going investigation in Côte d'Ivoire at the time of writing, the jurisdiction was originally based on a declaration under Art 12(3), Côte d'Ivoire subsequently ratified the Rome Statute. In respect of the situations currently in the preliminary investigation stage, Palestine and Ukraine's jurisdiction is based under such a declaration.

²⁵ Rome Statute, Art 13(b). To date, this has been done in respect of Sudan and Libya, see UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 and UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 respectively.

²⁶ William Schabas, *An Introduction to the International Criminal Court* (5th edn, CUP 2017) 150-51.

²⁷ *ibid* 137.

of the Rome Statute.²⁸ In such instances, the referral need not relate to a situation within the territory of the State party making the referral,²⁹ nor does the State party need to have a 'direct interest' in the situation.³⁰ However, in practice, most State party referrals have been 'self-referrals'.³¹ States parties may not select the incidents committed on its territory that the ICC Prosecutor investigates.³² Additionally, the ICC Prosecutor may initiate proceedings *proprio motu* (of her own accord) under Article 13(c) of the Rome Statute, in accordance with Article 15.³³ The State party referrals and ICC Prosecutor initiation trigger mechanisms are limited to the acts committed on the territory of a State party or by the nationals of States parties.³⁴

When the Prosecutor opens an investigation *proprio motu* or decides to investigate crimes as a result of party referral, the Prosecutor must 'notify all States parties and those States which... would normally

²⁸ Concerning the situations at investigation stage, the situations in the Central African Republic I and II, Democratic Republic of the Congo, Mali and Uganda were State-referrals. Concerning the situations in the preliminary examination stage, Gabon and the Comoros were state-referrals.

²⁹ William A Schabas and Giulia Pecorella 'Article 13: Exercise of jurisdiction' in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck, Hart, Nomos 2016) 696; Antonio Marchesi and Eleni Chaitidou, 'Article 14: Referral of a situation by a State Party' in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck, Hart, Nomos 2016) 707; Daniel D Ntanda Nsereko, 'Article 18: Preliminary rulings regarding admissibility' in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck, Hart, Nomos 2016) 837.

³⁰ Marchesi and Chaitidou, *ibid* 708.

³¹ *ibid* 707-15; Schabas, *The International Criminal Court* (n 2) 383-90.

³² *Mbarushimana Case* (Decision on the Defence Challenge to the Jurisdiction of the Court) ICC-01/04-01/10-451 (26 October 2011) para 27; Schabas, *ibid* 388-89; Schabas and Pecorella (n 29) 696.

³³ In respect of the situations under investigation, the investigations into alleged crimes committed in Côte d'Ivoire, Georgia and Kenya were initiated under the Prosecutor acting *proprio motu*. In respect of situations at the preliminary investigation stage, the Prosecutor has opening these *proprio motu* in respect of Burundi, Afghanistan, Colombia, Guinea, Nigeria and Iraq/UK.

³⁴ Self-referrals have occurred in the situations concerning the Central African Republic I and II, the Democratic Republic of the Congo, Mali and Uganda. These are in the investigation stage. In respect of situations in the preliminary examination stage, Gabon and Comoros were self-referrals.

exercise jurisdiction over the crimes concerned' that she is doing so.³⁵ The inclusion of the word 'normally' in Article 18 (1) has been interpreted as referring to the State of nationality and the territorial and custodial State(s),³⁶ in respect of non-party States.³⁷ Thus, non-party States wishing to exercise universal jurisdiction over the offence where the offender is present in their territory may not necessarily be notified. One of the purposes of the provision is to respect the primary responsibility of States to investigate the crimes over which the Court has jurisdiction.³⁸ What is more, Article 18(1) taken as a whole acts as a check on the power of the ICC prosecutor.³⁹ States with jurisdiction over the offence have one month to notify the Prosecutor that they have investigated or are investigating the alleged offences.⁴⁰ Where a case has been deferred to a national court under the principle of complementarity, the Prosecutor may review this development.⁴¹ Thus, the Court and the Prosecutor must respect the right of States to try international crimes under the complementarity regime, notwithstanding the fact that a State may have learned about the crime from the Prosecutor herself.⁴²

6.3 The principle of complementarity

The principle of complementarity is contained in paragraph 10 of the Preamble to the Rome Statute as well as in Article 1 and Article 17 of the Statute's substantive provisions. In addition, preambular paragraph 6 has been interpreted as reaffirming the complementary status of the

³⁵ Rome Statute, Art 18 (1); Nsereko, 'Article 18' (n 29) 840.

³⁶ Schabas, *The International Criminal Court* (n 2) 478.

³⁷ The inclusion of the word 'and' in this sentence denotes two parts to the requirement, firstly, that *all* States parties be notified and second, and non-party States that would 'normally' exercise jurisdiction over the offence(s). See *ibid* 840.

³⁸ Nsereko, 'Article 18' (n 29) 836.

³⁹ *ibid* 837.

⁴⁰ Rome Statute, Art 18(2).

⁴¹ Rome Statute, Art 18 (3).

⁴² Newton (n 17) 55.

Court.⁴³ Complementarity is part of the admissibility criteria that must be satisfied at the preliminary investigation stage for a prosecution to occur.⁴⁴ Article 17(1)(a) affirms that a case will be inadmissible when a State with jurisdiction over the offence is in the process of investigating or prosecuting the offence, unless it is unable or unwilling to genuinely do so.⁴⁵ It is the duty of the ICC to determine whether a case is inadmissible,⁴⁶ and there is a presumption that a case is admissible unless the criteria in Article 17 are met.⁴⁷ In practice, where a State with jurisdiction over the offence is inactive, the Court will not proceed with an analysis under Article 17.⁴⁸ The burden is on the Prosecutor to contest a State's position that it is able and willing to genuinely investigate and prosecute the case.⁴⁹ Although it is not specified in the Rome Statute, the ICC Prosecutor will carry out a preliminary admissibility ruling at the situation stage in respect of UNSC referrals.⁵⁰

In carrying out the unwillingness evaluation the Court shall 'have regard to the principles of due process recognized by international law'.⁵¹ Here, the Court must consider whether the legal proceedings were initiated in order to shield the accused from legitimate legal action,⁵² whether there has been unjustified delay in the

⁴³ Schabas, *The International Criminal Court* (n 2) 47.

⁴⁴ Schabas, *An Introduction to the International Criminal Court* (n 26) 169-88.

⁴⁵ See also Art 17(1)(b). The word 'genuinely' applies to both the ability assessment and the willingness assessment, Holmes (n 16) 674-75.

⁴⁶ Rome Statute, Art 17.

⁴⁷ Schabas, *An Introduction to the International Criminal Court* (n 26) 175.

⁴⁸ *Germain Katanga and Mathieu Ngudjolo Chui* (Appeal judgment) ICC-01/04-01/07 OA 8 (25 September 2009) para 78; *ibid* 174-75;

⁴⁹ See *Katanga*, *ibid* and (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case) ICC-01/04-01/07 OA 8 (16 June 2009) paras 76-81; *Prosecutor v Thomas Lubanga Dyilo* (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006) ICC-01/04-01/06 (24 February 2006) paras 30-40; Holmes (n 16) 674.

⁵⁰ Informal expert paper (n 16) para 68; Schabas, *An Introduction to the International Criminal Court* (n 26) 169. The Prosecutor performed an admissibility assessment in the situations referred to it by the Security Council concerning Darfur.

⁵¹ Rome Statute, Art 17(2).

⁵² Rome Statute, Art 17(2)(a).

legal proceedings,⁵³ and whether or not the proceedings are independent and impartial.⁵⁴ In assessing the question of ability, the ICC will assess the standard of the national judicial system.⁵⁵ A State may be unable to investigate or prosecute a crime due to an ongoing-armed conflict.⁵⁶ This list of considerations in Article 17 to be taken into account in determining whether a State is unwilling or unable to try an offence is non exhaustive.⁵⁷ The initiation of a domestic investigation allows States to retain their right to prosecute the offence.⁵⁸

A further aspect of the admissibility criteria is that the crime must be of a certain gravity to be tried by the Court.⁵⁹ That the Court concentrates its limited resources on the gravest offences means that offences of a lesser magnitude will not be punished by the Court, and thus, may go unpunished if not prosecuted at a domestic level. This is justification for the continued exercise of universal jurisdiction in the post-Rome Statute international criminal justice system. However, there is little doubt that the ICC is better placed than a national court to prosecute highly politicised large-scale offences.⁶⁰ The admissibility criteria have been criticised for being too high a burden for the Prosecutor to discharge.⁶¹ At the same time, the enforcement of the criteria by the Court and by the Prosecutor has been criticised as subjective.⁶² The unchecked power of the Court and the Prosecutor has

⁵³ Rome Statute, Art 17(2).

⁵⁴ Rome Statute, Art 17(2).

⁵⁵ Rome Statute, Art 17(3).

⁵⁶ Holmes (n 16) 673.

⁵⁷ Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 3) 248.

⁵⁸ *ibid.*

⁵⁹ Rome Statute, Art 17 (2) (d). The gravity requirement is reaffirmed in respect of war crimes in Art 8(1) of the Rome Statute and in the Preamble, see Schabas, *An Introduction to the International Criminal Court* (n 26) 182-88. Ray Murphy, 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal Law Forum* 281.

⁶⁰ Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship' (2009) 12 *New Criminal Law Review* 498, 502.

⁶¹ Holmes (n 16) 675.

⁶² Newton (n 17) 54.

also been denounced.⁶³ In practice, the transfer of a domestic trial to the ICC would be controversial. Ultimately, the complementarity regime was included in the Statute to protect against unnecessary intervention by the Court in domestic proceedings.⁶⁴ Irrespective of the trigger mechanism that refers the situation to the Prosecutor, a positive admissibility finding by the Court can be challenged by the accused person, a State or by victims.⁶⁵ This challenge must be done before the beginning of the trial, unless it concerns the prior prosecution of the accused.⁶⁶ The Court also has the ability to determine admissibility 'on its own motion'.⁶⁷ There is a concern that the complementarity regime could lead to a formalised selection process by the ICC.⁶⁸ Conversely, there is further disquiet regarding States overlooking their primary responsibility to try international crimes and instead looking to the ICC to fulfill this role.⁶⁹

6.4 The debate concerning universal jurisdiction and the drafting of the Rome Statute

The future jurisdiction of the ICC was a controversial issue at the meeting of delegates at the Rome Conference.⁷⁰ Central to the discussion was whether or not State consent should be required in order for ICC jurisdiction to be triggered.⁷¹ The question arose as to

⁶³ *ibid* 20-73, 63-66.

⁶⁴ Holmes (n 16) 675.

⁶⁵ Rome Statute, Arts 19 (2) and 19 (3); *ibid* 683.

⁶⁶ Rome Statute, Art 19 (4).

⁶⁷ Rome Statute, Art 19 (1).

⁶⁸ Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the two Principles Intermesh?' (2006) 88 *International Review of the Red Cross* 375, 390.

⁶⁹ Schabas, *The International Criminal Court* (n 2) 45. See also section 8.4.1.

⁷⁰ Philippe Kirsch and Darryl Robinson, 'Reaching Agreement at the Rome Conference' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002) 83.

⁷¹ Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002) 596.

whether it would be pertinent for the ICC to exercise universal jurisdiction over the core crimes and States were divided on the issue. A provision allowing the ICC to exercise this type of jurisdiction would allow it to try nationals of all nations irrespective of the place of commission of the crime, regardless of whether the territorial State or State of nationality consented.⁷²

6.4.1 Arguments cited in support of the inclusion of universal jurisdiction in the Rome Statute at the Rome Conference

The German delegation led the proposition that universal jurisdiction should be included in the Rome Statute, asserting that all States were entitled to exercise this right in international law.⁷³ Thus, no State consent (from a State Party or non-party State) would be required for the ICC to exercise jurisdiction.⁷⁴ Its delegate noted:

Under current international law, **all States may exercise universal criminal jurisdiction** concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every State can exercise its own national criminal jurisdiction, regardless of whether the custodial State, the territorial State or any other State has consented to the exercise of such jurisdiction beforehand.⁷⁵

⁷² Kirsch and Robinson (n 70) 70.

⁷³ (16 June 1998) UN Doc. A/CONF.183/SR.3, para 42. All documents cited from the Rome Conference can be found in Summary records of the plenary meetings and of the meetings of the Committee of the Whole in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, vol 2 (15 June-17 July 1998) UN Doc. A/CONF.183/13.

⁷⁴ Kaul, 'Preconditions to the Exercise of Jurisdiction' (n 71) 587.

⁷⁵ 'The Jurisdiction of the International Criminal Court: An informal discussion paper submitted by Germany, Preparatory Committee on the Establishment of

Although, the statement referred to ‘extensive practice’⁷⁶ of the exercise of universality ‘regardless of whether the custodial State’, one may question the extensive State practice of the exercise of universal jurisdiction in situations where the accused person was not already in the custody of the forum State. It is notable that the German delegation asserted that universal jurisdiction could be exercised by any State over war crimes, crimes against humanity and genocide, but not in respect of aggression. In this regard, it is interesting to note the differentiation between the three core crimes over which initial subject matter jurisdiction was granted, and aggression at this early stage. What is more, this further evidences the non-application of universality to the crime of aggression.

A further reason asserted by the German delegation was that States were capable of transferring their individual rights to an international penal court.⁷⁷ The post World War II Allies used this justification when creating the International Military Tribunals at Nuremburg and Tokyo, where the Allies transferred individual rights to international military tribunals, and in doing so did together what they were entitled to do separately.⁷⁸ If the post WWII Allies were able to establish an international penal tribunal with the power to try international crimes, so too could the delegates at the Rome Conference.⁷⁹ The same rationale asserted for the exercise of universal jurisdiction on a national level prior to the creation of the Rome Statute was used as a justification for its inclusion in the Rome Statute. The German delegation rightly contended that relying on the referral of a situation by the UNSC would result in impunity for the core crimes in

an International Criminal Court 16 March-3 April 1998’ (23 March 1998) UN Doc. A/AC.249/1998/DP.2, p 2 (emphasis in original, footnotes omitted).

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ See section 3.3.

⁷⁹ Kaul, ‘Preconditions to the Exercise of Jurisdiction’ (n 71) 591.

instances where the UN body failed to refer the situation to the ICC.⁸⁰

Thus, the German delegate, Hans-Peter Kaul, reasoned:

[T]he legitimate exercise of universal jurisdiction, would also eliminate the real loopholes which otherwise would exist for individuals who had committed such heinous crimes as genocide, crimes against humanity or war crimes.⁸¹

It was proposed that States should be allowed to consent ICC jurisdiction on an ad hoc basis. In response, Kaul submitted it would be highly unlikely that State officials who orchestrate atrocities against their fellow citizens would sign up to such jurisdiction.⁸² As such, there was a high likelihood of the crime not being punished. As William Schabas and Giulia Pecorella have commented:

The view central to [the German] proposal was that to limit the potential of the ICC by requiring some form of State consent beyond ratification would detract from the effectiveness of the Court and even the rationale and philosophical underpinnings of it.⁸³

The German proposal was supported by the majority of State delegations at the Rome Conference, most of whom composed the 'like-minded group', a contingent of States with similar views concerning the

⁸⁰ See statement of Hans-Peter Kaul in (19 June 1998) UN Doc. A/CONF.183/C.1/SR.7, para 49. This situation has since become a reality, see Richard Dicker, 'The International Criminal Court and Double Standards of International Justice' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 6-11.

⁸¹ Statement of Kaul, *ibid.*

⁸² *ibid.*, para 50.

⁸³ Schabas and Pecorella (n 29) 676. Germany also referred to its proposal as 'the German version of automatic jurisdiction' because it operated on the basis that the ICC could operate without State consent upon ratification by that State.

content of the Rome Statute.⁸⁴ This group believed that, ‘There should be equal jurisdiction over the most serious crimes of concern for the international community as a whole regardless of the nationality of the perpetrator’.⁸⁵ Statements in support of universal jurisdiction being included in the Rome Statute were made by Albania,⁸⁶ Armenia,⁸⁷ Belgium,⁸⁸ Bosnia and Herzegovina,⁸⁹ Burundi,⁹⁰ Cameroon,⁹¹ the Republic of Congo,⁹² Costa Rica,⁹³ Djibouti,⁹⁴ Ecuador,⁹⁵ Guinea⁹⁶ Jordan,⁹⁷ Luxembourg,⁹⁸ Malta,⁹⁹ Mexico,¹⁰⁰ the Netherlands,¹⁰¹ New Zealand,¹⁰² Portugal,¹⁰³ Romania,¹⁰⁴ Sierra Leone,¹⁰⁵ Tanzania,¹⁰⁶ Thailand,¹⁰⁷ Trinidad and Tobago,¹⁰⁸ Venezuela¹⁰⁹ and Tanzania.¹¹⁰ As such, universal jurisdiction received support from across a range of geographical regions including the members of the European Union and many States from the Global South. Non-Governmental Organisations

⁸⁴ At the time of the Rome Conference, the like-minded contingent consisted of more than 60 States. Schabas, *An Introduction to the International Criminal Court* (n 26) 18-19.

⁸⁵ Kaul, ‘Preconditions to the Exercise of Jurisdiction’ (n 71) 586.

⁸⁶ (16 June 1998) UN Doc. A/CONF.183/SR.4, para 12.

⁸⁷ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.31, para 23.

⁸⁸ (17 June 1998) UN Doc. A/CONF.183/SR.6, para 4.

⁸⁹ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.31, para 25.

⁹⁰ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.30, para 36.

⁹¹ *ibid*, para 79.

⁹² (9 July 1998) UN Doc. A/CONF.183/C.1/SR.31, para 16.

⁹³ (16 June 1998) UN Doc. A/CONF.183/SR.3, para 76.

⁹⁴ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.30, para 110.

⁹⁵ (18 June 1998) UN Doc. A/CONF.183/SR.8, para 62.

⁹⁶ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 110.

⁹⁷ (19 June 1998) Un Doc. A/CONF.183/C.1/SR.8, para 6.

⁹⁸ (17 June 1998) UN Doc. A/CONF.183/SR.6, para 69.

⁹⁹ (18 June 1998) UN Doc. A/CONF.183/SR.8, para 14.

¹⁰⁰ (18 June 1998) UN Doc. A/CONF.183/C.1/SR.6, para 85.

¹⁰¹ (9 July 1998) UN Doc. A/CONF.183/SR.29, para 87.

¹⁰² (22 June 1998) UN Doc. A/CONF.183/C.1/SR.9, para 8.

¹⁰³ (13 July 1998) UN Doc. A/CONF.183/C.1/SR.35, para 73.

¹⁰⁴ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 143.

¹⁰⁵ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 60.

¹⁰⁶ *ibid*, para 175.

¹⁰⁷ (16 June 1998) UN Doc. A/CONF.183/C.1/SR.2, para 64.

¹⁰⁸ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 23.

¹⁰⁹ (19 June 1998) UN Doc. A/CONF.183/C.1/SR.8, para 67.

¹¹⁰ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 175.

(NGOs) also supported the German proposal on universal jurisdiction.¹¹¹

There were other reasons asserted by States as to why universality should be included in the Rome Statute. The Luxembourg delegation noted that, 'The Court must have universal jurisdiction and be able to act impartially and effectively in international and national conflicts whenever national legal systems were not available or unwilling to prosecute'.¹¹² Moreover, Bosnia and Herzegovina recognised that including universal jurisdiction in the Statute would make it more credible.¹¹³

A similar proposal concerning jurisdiction was submitted by South Korea,¹¹⁴ which also preferred the automatic jurisdiction of the Court.¹¹⁵ This proposal offered a broad jurisdictional basis whereby either the territorial State, the State of nationality of the accused, the State of nationality of the victim or the custodial State would have to consent to the exercise of ICC jurisdiction.¹¹⁶ The South Korean proposal was the most popular proposal concerning jurisdiction¹¹⁷ because it was based on traditional, and indeed less controversial, forms of jurisdiction in international law.¹¹⁸ Nonetheless, the proposal was opposed by a group of States.¹¹⁹ On the other hand, the UK proposed that both the custodial State and the territorial State should

¹¹¹ International Committee of the Red Cross, see (16 June 1998) UN Doc. A/CONF.183/SR.4, para 70; Amnesty International, A/CONF.183/SR.3, para 123; Human Rights Watch, the International Commission of Jurists, Lawyers Committee for Human Rights and the NGO Coalition for an International Criminal Court, see Kaul, 'Preconditions to the Exercise of Jurisdiction' (n 71) 598.

¹¹² (17 June 1998) UN Doc. A/CONF.183/SR.6, para 69.

¹¹³ (18 June 1998) UN Doc. A/CONF.183/SR.8, para 18.

¹¹⁴ (18 June 1998) UN Doc. A/CONF.183/C.1/L.6.

¹¹⁵ Nicolaos Strapatsas, 'Universal Jurisdiction and the International Criminal Court' (2002) 29 *Manitoba Law Journal* 1, 17.

¹¹⁶ (18 June 1998) UN Doc. A/CONF.183/C.1/L.6.

¹¹⁷ Kirsch and Robinson (n 70) 83.

¹¹⁸ Kaul 'Preconditions to the Exercise of Jurisdiction' (n 71) 600.

¹¹⁹ *ibid.*

consent to the exercise of ICC jurisdiction in respect of a particular matter.¹²⁰

6.4.2 Arguments cited against the inclusion of universal jurisdiction in the Rome Statute at the Rome Conference

Conversely, a small group of military powers strongly opposed the inclusion of universal jurisdiction in the Rome Statute. This group included Egypt,¹²¹ India,¹²² Israel,¹²³ Turkey¹²⁴ and the United States.¹²⁵ The Head of the US Delegation, David Scheffer, asserted that ‘The principle of universal jurisdiction was not accepted in the practice of most governments and, if adopted for the Statute, would erode the fundamental principles of treaty law’.¹²⁶ In other words, if the ICC could exercise universal jurisdiction, State Party consent would not be required because the nationals of non-party States would be subject to the terms of the Treaty, which would violate of Article 34 of the Vienna Convention on the Law of Treaties. Similar sentiments were echoed by the Indian delegation.¹²⁷ This assertion was the main argument cited in opposition to the inclusion of universal jurisdiction in the Rome Statute. The US was anxious that its nationals might be subject to frivolous litigation by a Court it did not recognise, given its ‘policeman’ status in the world.¹²⁸ The opinions against the inclusion of universal jurisdiction in the Rome Statute were ultimately based on the conflict between the exercise of extraterritorial jurisdiction and State sovereignty.¹²⁹

¹²⁰ (25 March 1998) UN Doc. A/AC.249/WG.3/DP.1.

¹²¹ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.30, para 87.

¹²² (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 97.

¹²³ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.30, para 92.

¹²⁴ (22 June 1998) UN Doc. A/CONF.183/C.1/SR.9, para 44.

¹²⁵ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 42-43.

¹²⁶ *ibid*, para 42.

¹²⁷ (17 July 1998) UN Doc. A/CONF.183/SR.9, para 15. See also comments by UK delegation, (22 June 1998) UN Doc. A/CONF.183/C.1/SR.9, para 23.

¹²⁸ Kaul ‘Preconditions to the Exercise of Jurisdiction’ (n 71) 601.

¹²⁹ Kaul, *ibid* 584-86.

It was further argued that many States would refrain from becoming parties to the Statute if it included universal jurisdiction. According to Scheffer, 'If the principle of universal jurisdiction were [sic] adopted, many governments would never sign the treaty and the United States would have to actively oppose the Court'.¹³⁰ The irony here is that universal jurisdiction was not included in the Rome Statute, and the US continues to be a non-party State. Conversely, the German delegation reminded the Conference that crimes against humanity were already the object of *erga omnes* obligations in customary international law, thus, '...even third-party States not directly concerned with such crimes have a legal interest in bringing the offenders to justice'.¹³¹

6.4.3 Commentary on the debate concerning universal jurisdiction at the Rome Conference

On 17 July 1998, the Rome Statute was adopted with 120 States voting in favour of the Treaty, 7 States voting against it, and 21 abstaining. The significance of this collective decision should not be underestimated. The disagreement as to the scope of Article 12 on jurisdiction was the reason that the vote was called,¹³² and after the vote, some States cited Article 12 as their reason for voting against the Statute.¹³³ Universal jurisdiction was also cited as a ground for voting against the Treaty as a whole. The US stated it voted against the Rome Statute because it '... did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the Treaty to non-parties, their nationals or officials, or to acts committed on their territories'.¹³⁴ The Chinese delegation also cited universal jurisdiction as a justification for its vote against the Statute.¹³⁵ These

¹³⁰ (9 July 1998) UN Doc. A/CONF.183/C.1/SR.29, para 42.

¹³¹ (23 March 1998) UN Doc. A/AC.249/1998/DP.2, p 2.

¹³² Kaul 'Preconditions to the Exercise of Jurisdiction' (n 71) 584.

¹³³ Schabas, *The International Criminal Court* (n 2) 283. This group included China and India.

¹³⁴ (17 July 1998) UN Doc. A/A/CONF.183/SR.9, para 28.

¹³⁵ *ibid*, para 37.

are ambiguous justifications for voting against the Rome Statute, given that universal jurisdiction was excluded from it. What is more, they also illustrated a certain level of misunderstanding of the content of the Rome Statute. What makes these statements even more questionable is that during the negotiations, the US and China secured themselves a primary role in the referral of situations in the territory of non-party States to the ICC. Such a decision by the Permanent Members includes the application of the provisions of the Rome Statute to the nationals of non-party States.

Notwithstanding the fact that the majority of States supported its inclusion, universal jurisdiction was not included in the Rome Statute.¹³⁶ The reasons asserted by States as to why universal jurisdiction should be excluded from the Rome Statute during the negotiation of Article 12 demonstrate States' subjectivity in supporting the universality principle. The opposition to universality was led by the US, whose primary concern was that its nationals would be subject to the jurisdiction of the Court without its consent.¹³⁷ This was a complete turn around from previous US policy towards universal jurisdiction. It should be recalled that the US supported the inclusion of universal jurisdiction in UNCAT.¹³⁸ Indeed, US support for universality was one of the reasons why it was codified in that Treaty.¹³⁹ This further adds to the proposition that State support for universal jurisdiction will depend on the views of the incumbent government. At the time of the creation of the Rome Statute, torturous practice was not an element of US governmental policy.¹⁴⁰ Similarly during the operation of the UNWCC, the US exercised universal jurisdiction over war crimes and crimes

¹³⁶ Schabas, *The International Criminal Court* (n 2) 283.

¹³⁷ Proposal Submitted by the United States of America, UN Doc. A/A/CONF.183/C.1/L.70.

¹³⁸ See section 4.5.1.

¹³⁹ *ibid.*

¹⁴⁰ This policy changed significantly after 11 September 2001, see Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane 2008).

against humanity, and under limited circumstances genocide.¹⁴¹ At the Rome Conference, the humanitarian and impunity concerns that form the rationale for universal jurisdiction no longer aligned with the interests of the US, as they had done at the time of the creation of UNCAT and in the aftermath of the Second World War. Of course, in the aftermath of the WW II, US nationals were not subject to the Allied prosecution of international crimes committed during the War. If universal jurisdiction had been included in the Rome Statute, the ICC would have jurisdiction over international crimes committed by US nationals anywhere in the world. It is unlikely that US nationals would be subject to ICC jurisdiction given that US consent would be required to activate the UNSC trigger mechanism. In addition, the conclusion of 'status of forces agreements' between the US and host countries, in which it is militarily active, precludes the surrender of any US national to the ICC.¹⁴² Notwithstanding this, the existence of US military operations in the territory of some States parties means that the actions of US nationals are within the jurisdiction of the ICC.¹⁴³

It was contended that universal jurisdiction should be excluded as a basis under which the ICC can exercise jurisdiction because it would result in the nationals of non-party States being subject to the Rome Statute. However, the current trigger mechanism of the UN Security Council referral means that the Rome Statute will bind the nationals of non-party States when Article 13(b) is utilised. This provision also violates Article 34 of the Vienna Convention on the Law of Treaties by subjecting such nationals to the terms of the Rome

¹⁴¹ See chapter 4.

¹⁴² Such agreements normally include a clause to this effect. See International Security Advisory Board, 'Report on Status of Forces Agreements' (US Department of State, 16 January 2015) available at <www.state.gov/documents/organization/236456.pdf>.

¹⁴³ The OTP is currently carrying out a preliminary examination into the alleged torture, cruel treatment, outrages upon personal dignity committed by US officials in Afghanistan. See Office of the Prosecutor, 'Report on Preliminary Examination Activities 2016' (n 23), paras 211-14, 219-25, 230.

Statute without the consent of their State.¹⁴⁴ Of course, the only difference is that non-party States who are either Permanent Members of the UN Security Council¹⁴⁵ or allies thereof, can rest assured that core crimes committed in their territories or by their nationals in the territory of non-party States will remain outside the reach of the ICC, due to the veto power of the P5 Members. The result is a two-tiered system of international justice, whereby the nationals of certain States who have committed ‘unimaginable atrocities’ remain immune from ICC jurisdiction. The failure of the Security Council to adequately deal with the alleged commission of international crimes, including the use of chemical weapons against civilians, in the on-going conflict in Syria is a case in point. In theory, the ICC has jurisdictional reach over all territories via the UN Security Council trigger mechanism.¹⁴⁶ However, the politics that underpin the operation of the UN Security Council mean that this does not always manifest.

It has been noted that Article 12 is not as restrictive as it could have been.¹⁴⁷ There are some positive aspects concerning the exclusion of the universality principle from the Rome Statute. Its omission from Article 12 has contributed to the large number of ratifications by States, in addition to the speedy entry into force of the Treaty.¹⁴⁸ As Robert Cryer and Olympia Bekou note, ‘To have given the ICC the power to run before it could walk, by granting it universal jurisdiction, could have tilted the balance for and against the ICC unfavourably’.¹⁴⁹ In other

¹⁴⁴ Rod Rastan, ‘Jurisdiction’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015).

¹⁴⁵ China, Russia and the US are not parties to the Rome Statute. Russia signed the treaty on 13 September 2000, however it has not yet ratified the Treaty. The US signed the Treaty on 31 December 2000, but has not yet ratified the Treaty.

¹⁴⁶ Kaul, (n 71) 601.

¹⁴⁷ Schabas and Pecorella (n 29) 675.

¹⁴⁸ Schabas, *The International Criminal Court* (n 2) 283; Ryngaert, ‘The International Criminal Court and Universal Jurisdiction’ (n 60) 503; Strapatsas (n 115) 17.

¹⁴⁹ Olympia Bekou and Robert Cryer, ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’ (2007) 56 *International Comparative Law Quarterly* 49, 55.

words, States would have had less of an incentive to cooperate with the Court had it been empowered with automatic jurisdiction.¹⁵⁰ For now, one can only speculate what the effect of including universal jurisdiction in the Rome Statute would have been. However, one can be certain that its inclusion would have posed problems from an evidentiary and practicality perspective, as it is likely that non-party States would not cooperate with the Court.¹⁵¹ Although, this is not to say that all States parties cooperate with the OTP.¹⁵² Importantly, providing the Court with universal jurisdiction would have afforded the ICC increased powers. However, the admissibility criteria (in particular the unwilling and unable considerations) would still have to be met for an ICC prosecution. As William Schabas and Giulia Pecorella note, ‘...the universal principle would not have diverted national criminal courts of their primary role in prosecution of listed crimes’.¹⁵³

At the same time, the omission of universal jurisdiction from the Rome Statute creates a loophole in the current international criminal justice system. As Hans-Peter Kaul has commented, ‘the most serious deficit of Article 12 itself is the omission of the custodial State in the list of nations that could provide a jurisdictional link to the ICC’.¹⁵⁴ Such a provision would have had a strong deterrent and preventative effect.¹⁵⁵ As it currently stands, a jurisdictional gap exists in the event of the UN Security Council not referring a situation in a non-party State to the Prosecutor and when the OTP does not initiate an investigation *proprio motu* in respect of the same situation.¹⁵⁶ The Security Council has failed

¹⁵⁰ Bekou and Cryer, *ibid* 67; Schabas and Pecorella (n 29) 689.

¹⁵¹ Bekou and Cryer, *ibid* 66. The current lack of cooperation of Sudan in respect of the two arrest warrants issued by Pre-Trial Chamber I concerning the arrest of President Omar Al-Bashir are case in point.

¹⁵² See Report on Preliminary Examination Activities 2016 (n 23) para 226 in respect of Afghanistan.

¹⁵³ Schabas and Pecorella (n 29) 677.

¹⁵⁴ Kaul ‘Preconditions to the Exercise of Jurisdiction’ (n 70) 613.

¹⁵⁵ *ibid*.

¹⁵⁶ A tragic case in point is the Syrian war that commenced in 2011 and is ongoing at the time of writing. UN bodies and reputable human rights NGOs have documented the commission of international crimes in the Syrian

to refer the situation in Syria to the ICC,¹⁵⁷ among other reasons due to the Assad regime's political ties to Russia, and the use of the veto power by two permanent members of the UN Security Council. The OTP would have jurisdiction to initiate an investigation into crimes committed in Syria by nationals of States parties.¹⁵⁸ To circumvent this jurisdictional void, some scholars have suggested that custodial universal jurisdiction be included in the Statute. Here, the Court would have jurisdiction over any individual suspected of having committed an international crime who is present in a State party to the Rome Statute.¹⁵⁹ As Cedric Ryngaert notes, 'This would ensure that states parties to the Rome Statute do not become safe havens for perpetrators of heinous crimes.'¹⁶⁰ Custodial universal jurisdiction is in line with the practice of universal jurisdiction, which is frequently exercised over accused persons who are present in the forum State's jurisdiction.¹⁶¹ Additionally, this form of jurisdiction would increase the likelihood of the ICC achieving its aims set out in the Preamble to the Rome Statute. As Ruth Wedgwood notes, '...the final text [of the Rome Statute] gives undue shelter to the very civil war conflicts that were the moral impetus for the negotiation of a Rome treaty'.¹⁶²

territory. See reports of the Independent International Commission of Inquiry on the Syrian Arab Republic <www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>.

¹⁵⁷ Dicker (n 80); Joshua D Bauers, 'Syria, Rebels, and Chemical Weapons: A Demonstration of the Ineffectiveness of the International Criminal Court' (2014) 15 *Rutgers Journal of Law and Religion* 328; Hovhannes Nikoghosyan 'Government failure, atrocity crimes and the role of the International Criminal Court: why not Syria, but Libya' (2015) 19 *The International Journal of Human Rights* 1240; Ian Black, 'Russia and China veto UN move to refer Syria to international criminal court' (*The Guardian*, London 22 May 2014).

¹⁵⁸ In this regard see OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS' (8 April 2015) <www.icc-cpi.int/legalAidConsultations?name=otp-stat-08-04-2015-1>.

¹⁵⁹ Bekou and Cryer (n 149) 58-60.

¹⁶⁰ Ryngaert, 'The International Criminal Court and Universal Jurisdiction' (n 60) 501.

¹⁶¹ See chapters 5 and 7.

¹⁶² Ruth Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *European Journal of International Law* 93, 101 (insertion added).

6.5 The Relationship between universal jurisdiction and the International Criminal Court

The exercise of the universality principle is one way in which States can fulfill their primary responsibility to prosecute serious crimes under international law. Where the admissibility criteria is met by *any* State with concurrent jurisdiction over the offence, the principle of complementarity dictates that the ICC *must* defer the prosecution to that State.¹⁶³ This scenario includes when a third State (a State other than the territorial State or the State of nationality) is willing and able to genuinely prosecute the core crime.¹⁶⁴ This includes non-party States exercising universal jurisdiction over the international crime. This is inferred from the broad language of Article 17(1)(a) and (b) which affirm that ‘a case will be inadmissible’ where it is or has been investigated or prosecuted ‘by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’.¹⁶⁵ Moreover, the OTP also holds this opinion.¹⁶⁶ As Cedric Ryngaert comments:

...[W]hile there is no evidence of an express intention of drafters to have bystander states exercising universal jurisdiction covered by Article 17, there is no evidence either of an express intention to exclude bystander states from the scope of application of Article 17. In fact, the text of Article 17 is clear: the ICC should defer to any state that has jurisdiction over a case, irrespective of the legal basis on which this jurisdiction rests.¹⁶⁷

¹⁶³ Ryngaert, ‘The International Criminal Court and Universal Jurisdiction’ (n 60) 504-05.

¹⁶⁴ Informal expert paper (n 16) para 63.

¹⁶⁵ Emphasis added.

¹⁶⁶ Informal expert paper (n 16) para 63.

¹⁶⁷ Ryngaert, ‘The International Criminal Court and Universal Jurisdiction’ (n 60) 504-05 (footnotes omitted). The term ‘bystander state’ refers to third party non-party States.

The Rome Statute does not specify an order of priority for situations where a number of States have concurrent jurisdiction over a core crime.¹⁶⁸ However, scholars agree that the territorial State should have priority to prosecute the offence.¹⁶⁹ This manner of operation has been termed ‘subsidiary universal jurisdiction’ or ‘horizontal complementarity’, whereby the State with the weaker nexus to the offence gives way to a State with a stronger jurisdictional nexus to the offence.¹⁷⁰ The latter term denotes the exercise of universal jurisdiction between States parties to the Rome Statute without the involvement of the ICC where universality is exercised only where a State with a closer nexus to the crime is genuinely unable or unwilling to try the offence.¹⁷¹ Some States have adopted the horizontal complementarity approach in their legislation.¹⁷² Similarly, when a conflict of jurisdiction arises, the interests of victims regarding access to justice and participation in the legal process are factors that should also be taken into account.¹⁷³ In respect of the States parties, Mark Chadwick argues that in signing up to the Rome Statute, States have agreed to complementarity operating at an inter-state level.¹⁷⁴

¹⁶⁸ Kleffner, *Complementarity in the Rome Statute* (n 3) 278.

¹⁶⁹ *ibid* 278; Laura Burens, ‘Universal Jurisdiction Meets Complementarity: An Approach Towards a Desirable Future Codification of Horizontal Complementarity between Member States of the International Criminal Court’ (2016) 27 *Criminal Law Forum* 75; Jo Stigen, ‘The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction’ in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher 2010).

¹⁷⁰ Kleffner, *ibid* 280-81; Burens, *ibid*; Stigen *ibid*.

¹⁷¹ Burens, *ibid*.

¹⁷² Reydams notes that s 12 of the Canadian Crimes Against humanity and War Crimes Act 2000 is almost verbatim of Art 17(2) of the Rome Statute, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 124. According to Stigen, the German and Belgian law on universal jurisdiction also operates in this manner, see Stigen (n 169) 147.

¹⁷³ Kleffner, *Complementarity in the Rome Statute* (n 3) 285.

¹⁷⁴ Mark Chadwick, ‘Modern Developments in Universal Jurisdiction’ (2009) 9 *International Criminal Law Review* 359, 390.

Moreover, *any* State may exercise extraterritorial jurisdiction over an offence, even where the territorial State defers jurisdiction to the ICC. The OTP has noted:

It goes without saying that a State's acknowledgement that it is not investigating or prosecuting does not affect the primacy of any other State that wishes to investigate or prosecute. Thus, for example, even if a territorial State agreed to non-exercise of jurisdiction over certain crimes in favour of ICC prosecution, other States would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, universal jurisdiction) and admissibility could accordingly be challenged by such States or by the accused. It will therefore be prudent to consult with interested States before forming such arrangements.¹⁷⁵

The relationship between the ICC and a State exercising universal jurisdiction can be a positive one, with the ICC actively supporting States exercising universal jurisdiction in respect of the ICC core crimes.¹⁷⁶ The OTP notes:

Under the complementarity principle, a genuine investigation by such third States would preclude the ICC from exercising jurisdiction, provided they are indeed able to secure the surrender of offenders and obtain access to evidence.¹⁷⁷

¹⁷⁵ Informal expert paper (n 16) para 63. Not all scholars agree, see Kleffner, *Complementarity in the Rome Statute* (n 3) 282-83.

¹⁷⁶ Ryngaert, 'The International Criminal Court and Universal Jurisdiction' (n 60) 508.

¹⁷⁷ Informal expert paper (n 16) para 75.

Indeed, the ICC Prosecutor may actively encourage non-territorial States to prosecute the accused, particularly if the accused is present in their territory or where it has access to evidence and witnesses.¹⁷⁸

The exercise of universal jurisdiction by States in respect of matters in which the UNSC is engaged in is less certain. It is not known whether a UNSC referral prevents States, whether States parties or not, from exercising universal jurisdiction in respect of that situation. Similarly, it is not known whether the effect of a deferral of an investigation by the UN Security Council, acting under Chapter VII of the UN Charter, prohibits States from exercising universal jurisdiction over the matter.¹⁷⁹ The fact that the Prosecutor deemed it necessary to proceed with an admissibility examination in the situation referred to it concerning Darfur,¹⁸⁰ suggests that States, whether or not parties to the Rome Statute, are entitled to effect their right to exercise universal jurisdiction in respect of UNSC referrals.¹⁸¹ If the scenario occurred where a State was investigating or prosecuting a core crime committed in the context of a situation referred by the Security Council to the ICC, it would acutely test the strength of the complementarity regime, particularly as the primary responsibility for the prosecution of international crimes rests with national courts.¹⁸²

Nevertheless, some scholars argue that the Rome Statute creates obligations on States parties to exercise universal jurisdiction over the

¹⁷⁸ *ibid*, para 76.

¹⁷⁹ Strapatsas (n 115) 18.

¹⁸⁰ Informal expert paper (n 16) para 68.

¹⁸¹ In the case of Sudan, the government affirmed it was taking steps to investigate the international crimes. Anne-Marie Slaughter and William Burke-White, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006) 47 *Harvard Journal of International Law* 327, 342.

¹⁸² Croatia has included in its legislation on universal jurisdiction that it may not exercise universal jurisdiction when the ICC or another State is prosecuting the offence. Report of the Secretary-General on the Scope and Application of Universal Jurisdiction (1 July 2015) UN Doc. A/70/125, para 46.

core crimes.¹⁸³ What is more, some States parties have interpreted the Rome Statute as obligating them to exercise universal jurisdiction in respect of these offences. The Netherlands argues that the Rome Statute creates obligations on States parties in respect of universal jurisdiction.¹⁸⁴ It is arguable that support for this position can be found in the statements made by the US and China, in the immediate aftermath of the vote on the Rome Statute, citing universal jurisdiction as a reason for voting against the Rome Statute. Conversely, there are States that completely disagree with this contention, such as Belgium, the Republic of the Congo, France and Spain.¹⁸⁵ It is difficult to come to the conclusion that the Rome Statute obligates States parties to exercise universal jurisdiction over the core crimes. In the words of William Schabas, 'the *Rome Statute* is neutral on the exercise of universal jurisdiction, although it does not of course prohibit the use of universal jurisdiction'.¹⁸⁶

A more persuasive line of argument is that the Rome Statute obligates States parties to prosecute international crimes, including the ICC core crimes.¹⁸⁷ A number of indicators point to this conclusion. First, paragraph 6 of the Preamble recalls '...the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. The word 'duty' has clear connotations of denoting the existence of obligations in international law. What is more, this paragraph clearly refers to *all* States and not only to States parties. Prior to the creation of the Rome Statute this duty applied only in respect of grave breaches of the Geneva Conventions and torture, under the respective international treaties. Yet, this preambular paragraph

¹⁸³ Xavier Philippe believes that universal jurisdiction can be found in paragraph 6 of the Preamble to the Rome Statute, see Philippe (n 68) 376. See also Jann K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86.

¹⁸⁴ Kleffner, *ibid* 108.

¹⁸⁵ *ibid*.

¹⁸⁶ Schabas, *The International Criminal Court* (n 2) 47.

¹⁸⁷ Kleffner, *Complementarity in the Rome Statute* (n 3) 235.

refers to the more general term of ‘international crimes’, a definition for which has yet to be agreed.¹⁸⁸ Notably, the drafters chose the word ‘duty’ over less strenuous language such as ‘responsibility’ or ‘task’.¹⁸⁹ Thus, it can be inferred that the intention here was to reflect the obligation to investigation and prosecution of international crimes generally.¹⁹⁰ However, the paragraph cannot create such an obligation for non-party States that have not agreed to the Rome Statute, under Article 34 of the Vienna Convention on the Law of Treaties. Second, it would not be feasible for States to devise an international criminal tribunal to try certain international crimes that was complementary to their enforcement jurisdiction, where the States themselves are exempt from investigating or prosecuting the same crimes.¹⁹¹ Paragraph 6 has also been interpreted as referring to the obligation to cooperate in respect of the prosecution of transnational crimes.¹⁹² Indeed, Roger S Clark has described the paragraph as ‘a sort of Martens clause’,¹⁹³ in the sense that it acknowledges the responsibility of *all States* to try international crimes whether or not they are party to the Rome Statute.

Of course all of these arguments are based on an interpretation of the Preamble of the Rome Statute as having legal authority. Jann K Kleffner argues that it would be classed as a ‘common understanding’ of the States parties, according to Article 31(3)(b) of the Vienna

¹⁸⁸ Paola Gaeta, ‘Grave Breaches of the Geneva Conventions’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 738.

¹⁸⁹ As cited in Kleffner, *Complementarity in the Rome Statute* (n 3) 242.

¹⁹⁰ Jann K Kleffner believes that preambular paragraph 6 and Article 17 of the Rome Statute contain an obligation to investigate and prosecute international crimes, but that it is only binding on States parties, *ibid* 251.

¹⁹¹ Kleffner, *Complementarity in the Rome Statute* (n 3) 237-54. Claus Kreß believes that paragraph 6 affirms an obligation on States to prosecute the international crimes, and that the norm has crystallised in international law, Claus Kreß, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’ (2000) 30 *Israel Yearbook of Human Rights* 103.

¹⁹² Otto Triffterer, Morten Bergsmo and Kai Ambos, ‘Preamble’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd edn, CH Beck, Hart, Nomos, 2016) 1, 11.

¹⁹³ As cited in *ibid*.

Convention on the Law of Treaties.¹⁹⁴ In contrast, Otto Triffterer and others believe 'the legal significance of the Preamble is limited', but that it must be taken into account when interpreting the provisions of the Statute.¹⁹⁵ What is more, the Preamble must be considered when amendments or reviews occur, as specified in Articles 121-23 of the Rome Statute.¹⁹⁶ Ultimately, the moral and political significance of paragraph 6 of the Preamble will depend on the behaviour of the States parties themselves.¹⁹⁷ Some scholars have mooted the idea that custodial universal jurisdiction should be included in the Rome Statute and considered by the Assembly of States parties at a future Review Conference.¹⁹⁸ This proposal asserts that universal jurisdiction can be exercised by the State in which the accused person is present or resident, and thus includes the prosecution of nationals of non-party States who meet the criteria. At the same time, there are many arguments against the inclusion of universality in the Statute, among these are practical considerations such as the fact that the Court is already overburdened and lacks adequate resources. It would also pose difficulties in accessing evidence in non-party territories, and it would deter States from signing up to the Statute.¹⁹⁹ What is more, non-party States would have been under no international obligation to cooperate with the Court.²⁰⁰

¹⁹⁴ Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (n 183) 92-93; Schabas, *The International Criminal Court* (n 2) 32.

¹⁹⁵ Triffterer, Bergsmo and Ambos (n 192) 4.

¹⁹⁶ *ibid* 5.

¹⁹⁷ *ibid*.

¹⁹⁸ Burens (n 169) 78.

¹⁹⁹ Ryngaert, 'The International Criminal Court and Universal Jurisdiction' (n 60) 502.

²⁰⁰ Schabas and Pecorella (n 29) 677.

6.6 Conclusion

The relationship between universal jurisdiction and the ICC is complex.²⁰¹ The purpose of this chapter is to illustrate how universal jurisdiction fits into the international criminal justice system since the creation of Rome Statute in 1998, and to analyse the debate at the Rome Conference on whether or not the ICC should operate on the basis of universal jurisdiction. Notwithstanding the conscious exclusion of universal jurisdiction from the Rome Statute, this chapter demonstrates the continued importance of universal jurisdiction in international criminal law today. On the whole, there are positive aspects of the exclusion of the universality principle from the Rome Statute. If one looks to the drafting of the Rome Statute, it cannot be said that the Statute creates any obligations *per se* on States parties in respect of universal jurisdiction. However, paragraphs 4 and 6 of the Preamble can be interpreted as making reference to the prior and continued existence of universal jurisdiction. A teleological interpretation of the Preamble and clauses of the Rome Statute infers a respect for the continued exercise of universality by States. States' obligations in respect of universal jurisdiction in international treaties prior to the Rome Statute, such as under the Geneva Conventions, UNCAT and CED remain intact.

The drafting history of Article 12 of the Rome Statute illustrates that the main concern of States regarding universal jurisdiction was the prospect of non-party States being subject to a Treaty to which they had not agreed. This is a flawed argument, because the nationals of non-party States are already subject to universal jurisdiction on a national level (leaving aside the gap between the law and practice of universal jurisdiction). What is more, the previous chapters have demonstrated that universal jurisdiction can only be exercised successfully in certain

²⁰¹ Philippe (n 68) 396; Ryngaert, 'The International Criminal Court and Universal Jurisdiction' (n 60) 498.

circumstances, including when the territorial State or State of nationality do not object to the investigation and prosecution. This gives the State of nationality much discretion in the prosecution of an offence. What is more, the foreign litigation may encourage the State of nationality to prosecute the matter domestically. In this sense, universal jurisdiction has the potential to empower the territorial State or State of nationality to take ownership of an effective remedy.²⁰² The current UN Security Council trigger mechanism has a similar effect on the nationals of non-party States as universal jurisdiction in terms of a resulting prosecution. The only difference is that the source of ICC jurisdiction stems from the power of the UN Security Council. The other side of this scenario is that the Permanent Members of the UN Security Council decide what non-party States' nationals are subjected to the jurisdictional reach of the ICC. Thus, this lends itself to the argument that the international criminal justice project is positioned in favour of the interests of (predominantly Western) strategically powerful States. That said, the Rome Conference negotiations denote a shift in the power politics that traditionally dictate international relations and the development international law.

It is also worth noting how the drafting history of the Rome Statute illustrates the ongoing connection between international crimes and universal jurisdiction. This nexus has been a part of the discourse on universal jurisdiction since its inception, as previous chapters demonstrated. In addition, the leading role Germany played at the Rome Conference in seeking to include universal jurisdiction in the Rome Statute is reminiscent of the function played by Britain in relation to the Slavery Conventions at the League of Nations and the UN, and

²⁰² A domestic prosecution took place in Guatemala after an attempt to try General Ríos Montt in Spain under universal jurisdiction. See Naomi Roht-Arriaza, 'Guatemala Genocide Case' (2006) 100 *American Journal of International Law* 207, 212. This also occurred in respect of the attempts to prosecute General Augusto Pinochet.

indeed the role played by Sweden and the US in the context of the creation of UNCAT.²⁰³

Perhaps the current complementarity framework offers the ideal situation because it reaffirms the right of *all States* to exercise universal jurisdiction over international crimes. The inability of the UNSC to deal with situations in non-party States means that, in theory, universal jurisdiction can be utilised to try the nationals of non-party States. Thus, the principle plays an important part in the international criminal justice system today. In this regard, it is worth highlighting that investigations into alleged international crimes committed in Syria are ongoing in France, Germany the Netherlands and Norway.²⁰⁴ Thus, it is important that States incorporate universal jurisdiction in respect of the ICC core crimes into their domestic law. Non-party States and States parties are subject to the pre-existing obligations concerning universality that existed prior to the Rome Statute. At the time of writing, there are 123 States parties to the Rome Statute, and there are 138 signatories. It should be noted that a consequence of States parties adhering to their obligations under the Rome Statute is the incorporation of universal jurisdiction into their domestic system and subsequent exercise thereof over the ICC core crimes. Indeed, as Anne-Marie Slaughter and William Burke-White have argued, '[t]he future of international law is domestic'.²⁰⁵ Finally, it is up to individual States as to how they criminalise the core crimes in domestic law and whether they enact and exercise universal jurisdiction over such offences²⁰⁶

²⁰³ See chapters 2 and 4.

²⁰⁴ Trial and others, *Make Way for Justice #2* (2016) <<https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/>>; Tomas Escritt, 'Middle East refugees help Europe prosecute war crimes' (Reuters, The Hague, 27 May 2016) <www.reuters.com/article/us-mideast-crisis-warcrimes/middle-east-refugees-help-europe-prosecute-war-crimes-idUSKCN0YI0WW>.

²⁰⁵ Slaughter and Burke-White (n 181) 327-52.

²⁰⁶ Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (n 183) 90.

since the creation of the Rome Statute, and it is to this that we now turn.

CHAPTER 7

THE EXERCISE OF UNIVERSAL JURISDICTION SINCE THE CREATION OF THE ROME STATUTE

7.1 Introduction

The impunity culture, which was prevalent in the international community, as described in chapters five and six, gained momentum after the signing of the Rome Statute. As required, States parties incorporated the Rome Statute into their legal systems. Notwithstanding that States parties to the Rome Statute are not obligated to incorporate universal jurisdiction into their domestic systems, many States parties enacted legislation allowing for the exercise of universal jurisdiction.¹ Since then, there have been many investigations and prosecutions initiated on the basis of the principle.² As such, the period since the late 1990s has seen a number of significant developments in respect of the exercise of universal jurisdiction over serious crimes under international law, not all of which have been positive. Section two of this chapter examines the rationale for reliance on the principle since the creation of the Rome Statute. The third

¹ See UN Secretary General Reports on the Scope and Application of Universal Jurisdiction from 2010-2015. See also International Criminal Court Act 2002 (Australia); Crimes Against Humanity and War Crimes Act 2000, s. 6(1) (Canada); International Crimes Act 2003 (Netherlands).

² See for example, *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 30 October 2014, Constitutional Court of South Africa (*Zimbabwe Torture Docket Case*); *Menchú Tum et al v Montt et al*, Audiencia Nacional, 13 December 2000; Tribunal Supremo, 25 February 2003; Tribunal Constitucional, 26 September 2005 (*Guatemala Genocide Case*, Spain); *Wijngaarde et al v Bouterse*, District Court of Amsterdam, interlocutory order, 3 March 2000 and 20 November 2000. (The Dutch Supreme court overturned the decision on 18 September 2001). For information on more recent cases see the website of Trial International <<https://trialinternational.org/latest/cases/>>. A recent study on universal jurisdiction cases counted 1051 completed and pending cases under universal jurisdiction for the period 1961 to June 2010. See Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1, 7-8.

section discusses the observations derived from analysis of State practice in modern times. Section four emphasises the obstacles and issues that are evident in State practice today. In particular, it focuses on forum States that require a nexus to the extraterritorial offence via nationality and the role of the executive in consenting to the initiation of an investigation or prosecution commencing. Finally, section 5 concludes the chapter.

7.2 The rationale for the exercise of universal jurisdiction after the creation of the Rome Statute

The rationale cited for the exercise of universal jurisdiction post 1998 is fundamentally based on humanitarian norms that were previously relied on. This narrative stems from a belief that there is a world community whose values have been violated by the commission of the act. It follows that *any* State is entitled to prosecute the offence, because the international community universally condemns the act.³ This concept was summed up in the *Guatemala Genocide Case*, where the Spanish Constitutional Court stated that the commission of the offence, ‘...transcend[s] the harm to the specific victims and affect the international community as a whole. Therefore, prosecution and punishment are not only a shared commitment, but a shared interest of

³ In Germany, see *Völkerstrafgesetzbuch* (Code of Crimes Against International Law 2002). In Belgium, see *La loi du 10 février 1999 relative à la répression des violations grave du droit international humanitaire* (Act of 10 February 1999 concerning the punishment of Grave Breaches of International Humanitarian Law) before it was repealed. In Spain, see *Ley Orgánica del Poder Judicial* 6/1985 (Organic Law of the Judicial Power), Art 23(4) before it was amended. *Aguilar v Pinochet* Tribunal of First Instance of Brussels, (examining magistrate) order of 6 November 1998. In Senegal, see Jugement rendu par la Chambre Africaine Extraordinaire d'Assises d'Appel dans l'affaire ministère public contre Hissein Habré <www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/653-document-jugement-complet-et-r%C3%A9sum%C3%A9-du-verdict.html>. See also *Zimbabwe Torture Docket Case*, *ibid*; *Guatemala Genocide Case*, *ibid*; *Wijngaarde et al v Bouterse*, *ibid*.

all states'.⁴ It is the act that warrants universal jurisdiction as a response. In the *Zimbabwe Torture Docket Case*, the Constitutional Court of South Africa declared that States were obliged, '... where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations'.⁵ This further illustrates the nexus between international crimes and universal jurisdiction. Indeed, even a State that has not legislated for the universality principle, Lebanon, acknowledges this rationale for the principle.⁶ This approach is evident in the legal systems of Croatia⁷ and Colombia,⁸ as well as in the laws of Belarus,⁹ Dominican Republic,¹⁰ El-Salvador,¹¹ Panama,¹² and Paraguay.¹³ Moreover, this reality is reflected in the language used to describe suspects. Citing *Filartiga*, the Constitutional Court of South Africa affirmed, 'As a result of the absolute ban on torture, "the torturer has become, like the pirate or the slave trader before him, *hostis humani generis*, an enemy of all [hu]mankind"'.¹⁴ Thus, the narrative of a world community composed of allies that oppose enemies, who commit crimes is evident in modern times.

Another rationale cited for the exercise of universal jurisdiction is that the offence must not go unpunished. This is the 'no safe-haven' approach, and is particularly prevalent where the accused is present in

⁴ As cited in Naomi Roht-Arriaza, case note on the *Guatemala Genocide Case* in (2006) 100 *American Journal of International Law* 207, 211 (insertion added).

⁵ *Zimbabwe Torture Docket case* (n 2) para 40.

⁶ UNSG, 'Report on the Scope and Application of Universal Jurisdiction' (20 June 2011) UN Doc. A/66/93 (UNSG Report 2011) para 147.

⁷ UNSG, 'Report on the Scope and Application of Universal Jurisdiction' (1 July 2015) UN Doc. A/70/125 (UNSG Report 2015) para 15.

⁸ UNSG Report 2011 (n 6) para 14.

⁹ UNSG Report 2015 (n 7) para 75.

¹⁰ UNSG, 'Report on the Scope and Application of Universal Jurisdiction' (16 August 2011) UN Doc. A/66/93/Add.1 (Addendum to UNSG Report 2011) p 2.

¹¹ UNSG, 'Report on the Scope and Application of Universal Jurisdiction' (23 July 2014) UN Doc. A/69/174 (UNSG Report 2014) para 10.

¹² UNSG, 'Report on the Scope and Application of Universal Jurisdiction' (28 June 2012) UN Doc. A/67/116 (UNSG Report 2012) para 18.

¹³ UNSG Report 2014 (n 11) para 16.

¹⁴ *Zimbabwe Torture Docket case* (n 2) para 36 (footnotes omitted).

the forum State and if the forum State does not initiate the prosecution the accused will otherwise live freely in that country.¹⁵ In the Dutch *Bouterse Case*, the District Court of Amsterdam stated, 'Because it cannot be expected that Bouterse will be prosecuted elsewhere any time soon, the plaintiffs have turned to the most appropriate authority'.¹⁶ Indeed, this rationale is supported by other States¹⁷ and the European Union,¹⁸ and is a return to the original justification for the application of universality that was asserted by Grotius when writing on the topic in the 17th century.

In such circumstances, the forum State is relying on universal jurisdiction under the *aut dedere aut judicare* framework. Thus, in a sense, the original rationale for universal jurisdiction has come full circle. *Aut dedere aut judicare* is often relied on where there is no extradition treaty in place between the forum State and the territorial State/ State of nationality.¹⁹ Where no other State seeks the extradition of the accused, they will live freely in the forum State. In such situations, the forum State is exercising subsidiary or conditional universality. States prefer this type of universal jurisdiction, as it grants the territorial State or State of nationality preference for prosecution.²⁰ In some cases, it may not be possible for the accused to be extradited to the territorial State or the State of nationality. In this regard, The International Federation of Human Rights and Redress assert that national

¹⁵ *Public Prosecutor v Higaniro et al*, Assize Court of Brussels, 8 June 2001. This line of thinking is also evident in the New Zealand legislation implementing the Rome Statute.

¹⁶ *Wijngaarde et al v Bouterse*, District Court (n 2) case note in Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 173, 174.

¹⁷ Dominican Republic, see Addendum to UNSG Report 2011 (n 10) p 3; Paraguay, see UNSG Report 2014 (n 11) para 89; El-Salvador, see UNSG Report 2014 (n 11) para 34; Panama also believes this is the rationale for universal jurisdiction in respect of grave breaches, see UNSG Report 2012 (n 12) paras 38-39.

¹⁸ UNSG Report 2015 (n 7) para 48.

¹⁹ This was the case in *Higaniro et al* (n 15).

²⁰ See chapter 4.

authorities should operate in the same manner as the ICC does when it examines the principle of complementarity.²¹

The prevention of vigilante behavior in the forum State is another rationale asserted for reliance on the principle, which arises when both the suspect and victim(s) are present in the forum State.²² This is a very real problem for States that have welcomed refugees fleeing war, and persons from opposing groups subsequent live in the same community in the forum State. Indeed, some European cases were initiated on the basis of information received from refugee communities themselves.²³ Finally, the deterrent and preventative rationale for the exercise of universal jurisdiction under UNCAT was identified by the International Court of Justice (ICJ) in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*.²⁴ In addition to the rationale cited for the utilisation of universal jurisdiction, there are features of the practice that should be noted, some of which were evident in the State practice prior to the adoption of the Rome Statute.²⁵

²¹ International Federation of Human Rights and Redress, 'Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union' (1 December 2010) <www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf>.

²² Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008) 32. The EU also cited this rationale for the exercise of universality, see UNSG Report 2015 (n 7) para 48.

²³ For example *Prosecutor v Samuel Ndashyikirwa and others*, Cour d'assises de l'arrondissement administratif de Bruxelles-Capitale (29 June 2005); In Austria, see *The Syrian Case in TRIAL and others*, 'Making Way for Justice #3' (2017) 8 <<https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/>>. In Switzerland, see *Military Prosecutor v Niyonteze* Tribunal Militaire, Division 2, Lausanne, 30 April 1999, Tribunal Militaire d'appel 1A, Geneva, 26 May 2000; Tribunal Militaire de cassation, 27 April 2001. This was also a feature of some cases prior to the adoption of the Rome Statute. See *Public Prosecutor v Knesevic*, 1 December 1995 (examining magistrate); Supreme Court of the Netherlands, 11 November 1997.

²⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 75.

²⁵ See section 5.5.

In the majority of circumstances, it is the voluntary presence of the accused in the forum State that activates the investigation and prosecution. Not only is this the practice in many States,²⁶ but also in some cases it is required by law.²⁷ In Denmark, it is practice to exercise universal jurisdiction in respect of persons present in the territory.²⁸ What is more, part of the reasoning for the lack of jurisdiction finding by the French Cour de Cassation in *Javor v X* was because the accused was not present, as was required under national legislation.²⁹ However, not all States adopt this approach. In the past, Belgian and Spanish Courts and investigating judges were of the opinion that the presence of the accused was not required in the forum State.³⁰ When States, such as Belgium and Spain, exercised universal jurisdiction under this basis against past or incumbent head of State, it resulted in a deterioration in relations with other States.³¹ Ultimately, the damage to international relations led to restrictions being imposed on the universal jurisdiction

²⁶ *R v Munyaneza*, 2009 QCCS 2201, 22 May 2009 (Canada); *Public Prosecutor v Sokolovic*, Oberstes Landesgericht Düsseldorf, 29 November 1999; Syrian case in Austria (n 23); *Public Prosecutor v Higanro et al* (n 15); *Prosecutor v Samuel Ndashyikirwa and others* (n 23); *Lee Urzua et al v Pinochet*, opinion of the Director of Public prosecution of 3 December 1998, case no. 555/98 (Denmark); In Finland, see 'The Iraqi Twin Brother case' and 'The Salman Ammar Case' in 'Making Way for Justice #3' (n 23) 13-14. In France see the Simbikangwa case, the Mohamed brothers case and Octavien Ngonzi and Tito Baratura case in 'Making Way for Justice #3' (n 23) 17-21; *X v SB and DB Bundesgerichtshof*, 11 December 1998 the German Federal Supreme Court; *Chili Komitee Nederland v Pinochet*, Public Prosecutor of Amsterdam, 6 June 1994 and Court of Appeal of Amsterdam, 4 January 1995; *Wijnngaarde et al v Bouterse* (n 2); *Military Prosecutor v Niyonteze* (n 23).

²⁷ Belgium, Spain, Germany and France operate their universality rules in this way, see Extraterritorial Jurisdiction in the European Union (n 21) 3. See also the Dutch International Crimes Act 2003, which is triggered by the presence of the accused in the Netherlands.

²⁸ Extraterritorial Jurisdiction in the European Union, *ibid*.

²⁹ Paola Gaeta, 'Grave Breaches of the Geneva Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 629. This case was an attempted prosecution of grave breaches.

³⁰ See chapter 8. In Spain, see *Guatemalan Genocide Case* (n 2); *Unión Progresitsa de Fiscales de España et al v Pinochet*, Order of the Criminal Chamber of the Spanish *Audiencia Nacional* affirming Spain's Jurisdiction to Prosecute Augusto Pinochet, 5 November 1998, available in Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain*, (Kluwer Law International 2000) 95.

³¹ See chapter 8. In respect of Spain, see Langer (n 2) 32-41.

laws in both States.³² Conversely, where the presence requirement is entrenched in the legal system, Redress and FIDH view it as a restriction on the exercise of universal jurisdiction.³³ However, as this research has demonstrated, presence of the accused in the forum State is a fundamental part of the development of universal jurisdiction over the crimes to which it applies. In addition, it may also be argued that the forum State is less likely to run into difficulties with other States where the offender is present in their State and they are not exercising universal jurisdiction *in absentia*. Furthermore, the presence of the accused in the forum State is better in order to preserve the fair trial rights of the accused.

At this juncture, it should be pointed out there are a number of common features in respect of the practice of universal jurisdiction over serious crimes under international law. First, there is often a link between the forum State and the extraterritorial crime. In some cases, the link was the dual nationality or residency of the accused person in the forum State.³⁴ Second, often, the accused is present in the forum State because they are seeking asylum.³⁵ Hence, the relationship between asylum and prosecutions under the universality principle must be acknowledged. It follows that universal jurisdiction is integrated into the asylum policies of some States.³⁶ As such, the forum States are

³² *ibid.*

³³ Extraterritorial Jurisdiction in the European Union (n 21) 23. The stage at which the accused must be present will vary from jurisdiction to jurisdiction. For example, in Finland, the accused must be present from the beginning of the investigation. In France, the accused must be present at the beginning of the investigation, but not during the trial.

³⁴ In *Higanro et al* (n 15) where some of the defendants had previously lived in Belgium. See also chapter 5.

³⁵ In Finland see 'The Iraqi Twin Brother case' (n 26). In Sweden, see 'Mouhannas Droubi Case' in 'Making Way for Justice #3' (n 23) 50-51.

³⁶ Denmark exercises universal jurisdiction under this mechanism, see International Federation of Human Rights and Redress, 'Universal Jurisdiction in the European Union: Country Studies' 8 <www.redress.org/downloads/conferences/country%20studies.pdf>. In Canada, see Crimes Against Humanity and War Crimes Act 2000. All the instances of universal jurisdiction mentioned the 2010 Redress and FIDH

fulfilling their obligations under Article 1F of the 1951 Refugee Convention by denying the accused the right to claim asylum. Thirdly, and importantly, in most instances, the territorial State or State of nationality did not object to the investigation and or prosecution.³⁷ Where no such objection is rendered, the territorial State or State of nationality is unlikely to complain that its sovereignty has been breached, as previous chapters illustrated, the most commonly reason cited in opposition to universality is that of State sovereignty.

The nexus between the application of universal jurisdiction to certain *jus cogens* offences has been acknowledged in the legislation³⁸ and case law of some States.³⁹ This is unsurprising, given the humanitarian motivations for the exercise of universal jurisdiction. However, it should be noted that universal jurisdiction does not apply to all *jus cogens* offences.⁴⁰ It is also worth noting that States that incorporated universal jurisdiction over genocide,⁴¹ crimes against humanity and war crimes other than grave breaches of the Geneva Conventions have gone further than the obligations specified in the Genocide Convention and the Geneva Conventions respectively. In respect of crimes against humanity and war crimes committed in

Report involved the presence of an individual in the state, see 'Extraterritorial Jurisdiction in the European Union' (n 21) 204.

³⁷ On this point in respect of the exercise of universality over war crimes in NIACs see Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (ICRC, CUP 2005) 605.

³⁸ The code penal Suisse, title 12bis specifically refers to the *jus cogens* character of genocide and its effects *erga omnes*, Interestingly, the justification for the introduction of legislation Swiss federal Council is by virtue of 'the imperative character (*jus cogens*) of the prohibition of genocide and its effect *erga omnes*'. See Luc Reydamas, *Universal Jurisdiction* (n 16) 195 (emphasis in original).

³⁹ In the Guatemala Genocide Case (n 2) reference was made to the *jus cogens* in Art 6 of the Genocide Convention. See also *Aguilar Diaz v Pinochet* (n 2); In *R v Munyaneza* (n 26) the judgment refers to genocide being one of the 'peremptory rules of customary international law'.

⁴⁰ For example, violations of fair trial rights that do not amount to a grave breach of the Geneva Conventions.

⁴¹ For example see code pénal Suisse, title 12 *bis*, which allows for universal jurisdiction over genocide.

NIACs⁴² this law is particularly significant given that there is no international treaty imposing obligations of universal jurisdiction over these crimes. It is also notable that 'low rank' officials are more likely to be punished under the principle of universality, rather than 'high rank' officials. Moreover, the exercise of universal jurisdiction against lower level ranked State officials is less likely to interfere with relations between the forum State and the State of nationality of the accused. However, the problem with the utilisation of universal jurisdiction in this manner is that it restricts the scope of the principle and prevents the fulfillment of its impunity purpose.

The utilisation of universal jurisdiction has resulted in the nationals of certain States being immune from prosecution, while those from other countries are not. This situation occurs irrespective of the official status of the accused.⁴³ It is this discrepancy that has led to the exercise of universal jurisdiction being labelled as being a form of neo-colonialism.⁴⁴ This situation has arisen because strategically powerful States are more effective in complaining when their nationals are subject to universal jurisdiction proceedings. As Redress and FIDH have commented:

This has, in some cases, resulted in politically strong countries managing to avoid universal jurisdiction prosecutions relating to their officials, contributing to the perception that universal jurisdiction is not truly universal, and is a mere political tool used by strong states against weaker ones.⁴⁵

⁴² See below.

⁴³ Compare the prosecution of Hissène Habré in Senegal to the attempted prosecution of former US President George H W Bush, former US Secretary of Defence Dick Cheney in Belgium.

⁴⁴ Council of the European Union, 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (Brussels, 16 April 2009, 8672/1/09 REV 1) para 37.

⁴⁵ 'Extraterritorial Jurisdiction in the European Union' (n 21) 27.

One must not be immune to the association between humanitarian notions of justice and imperialism.⁴⁶ This is particularly evident in the lack of uniform application of the humanitarian rationale in universal jurisdiction State practice. Of course, this issue is part of the wider biases in favour of strategically powerful States that are part of international relations. As Laura Nader has commented:

In national and transnational contexts of power, the ambiguities embraced by words like justice, injustice, or human rights are often there for a purpose—the masking of imperial intent or power disparities that some might call recycled indirect rule.⁴⁷

7.3 The influence of the Rome Statute on the exercise of universal jurisdiction

The exercise of universal jurisdiction is one way in which States parties may fulfill their primary responsibility to prosecute international crimes under the principle of complementarity. As TRIAL and others recently noted, ‘close to 150 of the 197 UN member States provide for universal jurisdiction for at least one of the four recognised international crimes, meaning war crimes, crimes against humanity, genocide and torture’.⁴⁸ Indeed, several States have ‘understood the system for suppressing ICC crimes established by the Rome Statute as allowing for, or indeed demanding, the establishment of universal jurisdiction in their ICC implementing legislation in various forms’.⁴⁹ The German legislation incorporating the Rome Statute, the Code of Crimes Against International Law affirms ‘Germany is always able to

⁴⁶ Laura Nader, ‘The Words We Use: Justice, Human Rights, and the Sense of Injustice’ in Kamari Maxine Clarke and Mark Goodale (eds) *Mirrors of Justice: Law and Power in the Post-Cold War Era* (CUP 2010) 316.

⁴⁷ *ibid*, 316.

⁴⁸ Trial and others, *Make Way for Justice* (2015) <www.fidh.org/en/issues/international-justice/universal-jurisdiction/make-way-for-justice-universal-jurisdiction-in-2014-scrutinized-by>.

⁴⁹ Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 22) 276.

prosecute crimes within the jurisdiction of the ICC'.⁵⁰ Notably, this phenomenon is not unique to Western States, as Ghana has legislated for universal jurisdiction in respect of a range of crimes.⁵¹ Indeed, even a State that had not previously legislated for universal jurisdiction in respect of grave breaches of the Geneva Conventions, Italy, subsequently did so.⁵² Thus, the 'top-down' impact of the Rome Statute in acting as an impetus for States in legislating for universal jurisdiction is evident. Moreover, in some cases the legislation incorporating the Rome Statute into domestic law is the law under which the accused is prosecuted. In the Canadian case of *R v Munyaneza*, the judge commented 'One of the avowed purposes of the Act is to fight against the impunity of war criminals...'⁵³

Indeed, in some countries, the law incorporating the Rome Statute goes further than the obligations on States parties. In the *Zimbabwe Torture Docket* case, the Constitutional Court of South Africa held that the South African Police Service (SAPS) was obligated to investigate crimes against humanity, including torture, committed by Zimbabweans against Zimbabweans in Zimbabwe. This is particularly significant, firstly, because the Rome Statute does not obligate States parties to exercise jurisdiction over core crimes committed by nationals of non-party States in the territory of a non-party State. Notwithstanding the recent efforts of the South African Government to withdraw from the Rome Statute,⁵⁴ this litigation demonstrates the exercise of universal jurisdiction can have further reach than the

⁵⁰ As cited in Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86-113, 89.

⁵¹ UNSG Report 2012 (n 12) paras 14-15.

⁵² Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 22) 42.

⁵³ *R v Munyaneza* (n 26) para 66. See also *Zimbabwe Torture Docket Case* (n 2).

⁵⁴ William Schabas, *An Introduction to the International Criminal Court* (5th edn, CUP 2017) 42-44; Jason Burke, 'South African judge blocks attempt to withdraw from ICC' (The Guardian, 22 February 2017) <www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court>.

jurisdiction of the ICC itself. This case also illustrates the positive impact that the Rome Statute can have on national courts of a State party in fighting impunity for human rights abuses carried out in the territory of a non-party State. In this particular instance, there was little possibility of Zimbabwe being referred to the OTP by the UNSC.⁵⁵

7.4 Recognition of the application of universal jurisdiction to ‘new offences’

States are exercising universal jurisdiction over offences that were not previously subjected the principle. Universal jurisdiction is now being exercised over another set of offences: war crimes committed in NIACs,⁵⁶ extra-judicial killings⁵⁷ and enforced disappearances.⁵⁸ However, it should be noted that universal jurisdiction was exercised in respect of the latter offence, both prior and after the creation of the Rome Statute.⁵⁹

⁵⁵ Oddly enough, the situation in Zimbabwe has remained immune from the gaze of the ICC. Zimbabwe is a signatory but not a party to the Rome Statute. The UNSC has not referred the situation in Zimbabwe to the ICC Prosecutor under Chapter VII of the UN Charter.

⁵⁶ *R v Zardad*, case number T22037676, judgment 7 April 2004, Central Criminal Court (Old Bailey); *Regina v Faryadi Sarwar Zardad*, No: 200505339/D3 Court of Appeal Criminal Division, 7 February 2007 [2007] EWCA Crim 279 2007 WL 26118; *R v Munyaneza* (n 26); *Public Prosecutor v Bernard Ntuyahaga*, cour de cassation, 12 December 2007, Cour d’assises de Bruxelles, 5 July 2007; *Prosecutor v Samuel Ndashyikirwa* (n 23). Indeed, this was a feature of the exercise of universal jurisdiction prior to the adoption of the Rome Statute. In Switzerland, see *Military Prosecutor v Gabrez*, Tribunal Militaire, Division 1, Lausanne, 18 April 1997. See also *Military Prosecutor v Niyonteze*, (n 23). In Belgium, see *Public Prosecutor v Higaniro et al* (n 15). In the Netherlands, see *Public Prosecutor v Knesevic* (n 23). In Germany, see *Public Prosecutor v Djajic*, Bavarian Supreme Regional Court, 23 May 1997. See also Henckaerts and Doswald-Beck (n 37) 604–05.

⁵⁷ In Argentina, see the *Franco Dictatorship Case* in ‘Make way for Justice #3’ (n 23). See also Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009) 358.

⁵⁸ Of course universal jurisdiction applies to the latter crime in the UN Treaty. Rodney and Pollard note that to the extent that enforced disappearances overlap with torture and with extra legal killing, they will receive the same treatment. See Rodley and Pollard, *ibid*.

⁵⁹ *Guatemalan Genocide Case* (n 2). See also French prosecution of Alfredo Astiz. In the US case of *Xuncax et al v Gramajo*, 886 F Supp. 162 (D Mass., 1995)

7.4.1 The application of the universality principle to war crimes committed in non-international armed conflicts

The application of universal jurisdiction to war crimes in NIACs is reflected in the legislation and practice of some States.⁶⁰ Importantly, this is particularly significant given that there are few international treaties providing for the exercise of universal jurisdiction over violations of the laws and customs of war committed in NIACs.⁶¹ As explained in Chapter 4, the only types of offences to which universal jurisdiction applies in conventional international humanitarian law are grave breaches of the Geneva Conventions and AP I and certain offences in respect of war crimes against cultural property. The ICTY Appeals Chamber has described the ‘mandatory enforcement mechanism’ of the grave breaches regime as a ‘duty and a right of all Contracting States’.⁶² Grave breaches cannot be committed in internal armed conflict because central to this type of war crime is that the act is committed against persons or property protected by the Geneva Conventions, a concept of which is firmly linked to IACs.⁶³ Similarly, it is difficult to expostulate that customary international law provides a basis for grave breaches committed in NIACs.⁶⁴ However, the ICTY Appeals Chamber removed the textual interpretation that the nationality of the perpetrator and the nationality of the victim must be different, in the commission of grave

enforced disappearances were found to be a tort committed against the law of nations. See Rodley and Pollard, *ibid* 366.

⁶⁰ Crimes Against Human and War Crimes Act (Canada). See also country studies of Germany, Netherlands and Switzerland in Reydams, *Universal Jurisdiction* (n 16) 195. See also Eve La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008) 227-35, 243-56.

⁶¹ See chapter 4.

⁶² *Prosecutor v Duško Tadić* (Decision on the defence motion for interlocutory appeal in jurisdiction) case number IT-94-1, judgment 2 October 1995, para 80.

⁶³ See sections 4.3 and 4.3.1.

⁶⁴ Gaeta (n 29) 643.

breaches, when it ruled that the protected persons requirement of grave breaches included persons of opposing allegiance and loyalty.⁶⁵

However, powerful military States are transitioning toward the idea that grave breaches can be committed during NIACs,⁶⁶ although this does not equate to an automatic application of universal jurisdiction thereto.⁶⁷ A more convincing argument is that acts that constitute grave breaches are also serious violations of the laws and customs of war can be tried as war crimes under the universality principle. Paola Gaeta comments that ‘...most of the acts that constitute grave breaches of the Geneva Conventions would likewise be punishable in the context of NIACs as serious violations of Common Article 3, or as war crimes’.⁶⁸ But, not all commentators agree.⁶⁹ It can be argued that States have the right to exercise universal jurisdiction over serious violations of the laws and customs of war that are not grave breaches to the extent that it does not conflict with a rule of international law.⁷⁰

In the *Tadić* (jurisdictional decision) case, the ICTY Appeal Chamber noted that the gap between the rules governing NIACs and the rules governing IACs is narrowing.⁷¹ Some States now prefer a central offences of ‘war crimes’ rather than a series of separate types of war crimes.⁷² This blurring of the distinction between types of war crimes

⁶⁵ *Prosecutor v Duško Tadić* (Appeal Chamber judgment) case number IT-94-1, judgment 15 July 1999, paras 164-171.

⁶⁶ See Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of the Prosecutor v Duško Tadić, 17 July 1995, p 35; UK Military Manual; *Prosecutor v Tadić* (jurisdictional decision case) (n 62) para 127.

⁶⁷ *Tadić* (jurisdictional decision) case, *ibid*; Gaeta (n 29).

⁶⁸ Gaeta, *ibid* 642.

⁶⁹ Gary D Solis, *The Law of Armed Conflict* (2nd edn, CUP 2016) 335.

⁷⁰ See section 7.5.

⁷¹ *Tadić* (jurisdictional decision) case (n 62) para 127. See also *Celebici Camp Case* (Judgment) IT-96-21-A (20 February 2001) para 127.

⁷² D Momtaz, ‘War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court’ (1999) 2 *Yearbook of International Humanitarian Law* 190.

can also be seen in the recent ICC Trial Chamber VI decision of *Prosecutor v Bosco Ntaganda* where it decided that the classification of rape as a *jus cogens* peremptory norm meant that ‘such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status’.⁷³ It is arguable that one potential consequence may be that universal jurisdiction can apply to offences committed by one member of an armed force against another, due to the fact that the ICC decided that such acts could be classified as a war crime rather than a matter for domestic criminal law. Moreover, it demonstrates the potential influence of the ICC on the future development of universal jurisdiction. Some States are applying the universality principle to other types of war crimes, where this is not provided for in international conventional law. Belgium and The Netherlands are examples of States that have exercised universal jurisdiction over violations of common Article 3 in NIACs.⁷⁴ In respect of the latter State, Eve La Haye comments that ‘The [Dutch] court seems to have taken the view that by the end of the 1970s there was a right in international law (stemming from the Geneva Conventions), or at least the absence of a prohibition, to extend universal jurisdiction over war crimes committed in internal armed

⁷³ *Ntaganda Case* (Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06 (4 January 2017) para 52, see generally 51-53. In this case the legal status under question related to whether the victims of the violence were actively participating in hostilities. The Chamber highlighted that the act must have been committed in the context of the armed conflict for it to be classified as a *jus cogens* offence at para 52. The repercussions of the decision remain to be seen, see Yvonne Mc Dermott Rees, ‘ICC extends war crimes of rape and sexual slavery to victims from same armed forces’ (PhD studies in human rights, 5 January 2017) <<http://humanrightsdoctorate.blogspot.ie/2017/01/icc-extends-war-crimes-of-rape-and.html>>.

⁷⁴ See section 8.4-8.5. *Darko K*, Supreme Court of the Netherlands, 11 November 1997, criminal division, No. 3717 Besch (decision on appeal in cassation against a decision of the court of appeal of Arnhem military division of 19 March 1997). This case was before the creation of the Rome Statute, recounted in La Haye (n 60) 251.

conflicts'.⁷⁵ This actuality may be a symptom of the character of modern armed conflict.

7.4.2 The application of the universality principle to enforced disappearances and extrajudicial killing

That the effect on families whose loved one has disappeared can amount to mental torture was recognised by Judge Bartle in the *Pinochet* proceedings before the House of Lords.⁷⁶ As Reed Brody noted, '... this was probably the first time a national court affirmed that the practice of "disappearance" can be a form of torture for the loved ones of the disappeared'.⁷⁷ Hence, it may not be so surprising that UNCAT was the inspiration for the inclusion of *aut dedere aut judicare* in the CED.⁷⁸ Notwithstanding the advancements made in terms of the application of universal jurisdiction to 'new offences', the increase in prosecutions since the 1990s has also illustrated that there have been some set backs in the progression of cases under the principle.

7.5 Obstacles and issues

It is apparent that many obstacles and issues arise in the investigation and prosecution of serious crimes under international law using universal jurisdiction. There are instances of States not prosecuting individuals when they are present on the territory of the forum State.⁷⁹

⁷⁵ La Haye, *ibid* 252 (insertion added). Speaking on the prosecution of war crimes committed in Afghanistan in the internal armed conflict 1978-82. Here, two Afghan asylum seekers were tried and convicted of torture as a war crime during the conflict.

⁷⁶ Extradition judgment in Bow Street Magistrates Court, *The Kingdom of Spain v Augusto Pinochet Ungarte*, 8 October 1999 in Reed Brody, 'The Case of Augusto Pinochet' in Brody and Ratner (n 30) 16.

⁷⁷ Brody, *ibid* 18.

⁷⁸ See section 4.6.

⁷⁹ *Al-Duri Case*, reported in 'Case report to the Public Prosecutor of Vienna concerning Izzat Ibrahim Khalil Al Doori submitted by Peter Pilz', 13 August 1999; see case note on Al-Duri case in Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 297-78. See also *Chili Komitee Nederland v Pinochet* (n 26); *Bouterse*

Moreover, judicial interpretation can restrict investigations and prosecutions under universal jurisdiction. In some cases this is obvious; for example when international law is interpreted in a way that cloaks their real concerns.⁸⁰ In addition, inconsistency of decisions at a national level within a State suggests that judges are not immune to political considerations.⁸¹ In the *Zimbabwe Torture Docket case*, the Constitutional Court of South Africa affirmed that three restrictions to be applied to universal jurisdiction cases were: (1) there should be a 'bona fide connection between the subject-matter and the source of the jurisdiction' (2) the exercise of universal jurisdiction should not interfere in the 'domestic or territorial jurisdiction' of other States and (3) that "elements of accommodation, mutuality, and proportionality should be applied".⁸²

The restrictions on the exercise of universal jurisdiction over serious crimes under international law are well documented,⁸³ and are

Case (n 2); Nowak and McArthur at 256; UNHCR, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (15 January 2007) UN Doc. A/HRC/4/33.

⁸⁰ Redress and FIDH note how a decision not to investigate Donald Rumsfeld while on a private visit to Paris was justified on immunity grounds. Notwithstanding that he was no longer in office. See 'Extraterritorial Jurisdiction in the European Union' (n 21) 37.

⁸¹ See French case of *Javor et al v X*, Cour de Cassation (chamber criminelle), 26 March 1994. Here, the Cour de Cassation stated that the presence of the victims in France is not enough to carry out the prosecution. This is an unusual finding given the practice of *in absentia* trials in French law. Both Klaus Barbie and Paul Touvier were tried *in absentia* in France for crimes committed during the Second World War, see Axel Marschik, 'The Politics of prosecution: European National Approaches to War Crimes' in Timothy L H McCormack and Gerry J Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997) 82-87. See also Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014); *Al-Duri Case* in Nowak and McArthur (n 79) 297-78; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (n 79) para 42.

⁸² *Zimbabwe Torture Docket Case* (n 2) para 28. The judgment examines the 'connecting factors' that must be present for South Africa's Courts to exercise universal jurisdiction. Further conditions are examined at para 61-74.

⁸³ Extraterritorial Jurisdiction in the European Union' (n 21); 'Universal Jurisdiction in the European Union (n 36); Amnesty International, 'No Safe Haven' series.

merely summarised here. Some of these are codified in the domestic law of States, while others are generated by the judiciary. It should be noted that not all of these are recent phenomena. They include: (1) States legislating for a connection to the extraterritorial offence, via the nationality and/or residency of the accused. (2) Leaving the decision as to whether an investigation or prosecution occurs to the executive. (3) The failure of national legislators to incorporate universal jurisdiction into domestic law.⁸⁴ (4) Judicial decisions prohibiting the retrospective application of laws providing for universal jurisdiction.⁸⁵ (5) Where the forum State necessitates that the offence is criminalised in both its legal system and in the territorial State at the time it was carried out (double criminality).⁸⁶ (6) The requirement of the forum State that there be a minimum sentence attached to the crime in the territorial State. (7) The prerequisite that there be a nexus between the forum State and the extraterritorial crime.⁸⁷ (8) Lastly, immunity granted to heads of States is also a barrier to litigation under the universality principle.⁸⁸ Ultimately, these impediments have a negative impact on the application of universal jurisdiction to serious crimes under international law. As Redress and FIDH describe:

⁸⁴ In addition, a 2010 Redress report on the extraterritorial jurisdiction legislation in the EU member States and in Norway and Switzerland noted that a number of European States had not enacted extraterritorial jurisdiction in respect of torture. See 'Extraterritorial Jurisdiction in the European Union' (n 21) 3. Indeed, none of the European States have enacted universal jurisdiction over enforced disappearances, see table 3, p 22. The lack of incorporation of universality into domestic law of States parties has also been criticised by the UN Committee Against Torture, see Nowak and McArthur (n 79) 274-81.

⁸⁵ 'Extraterritorial Jurisdiction in the European Union' (n 21) 4. This is particularly evident for civil law systems. See *Bouterse Case* (n 2). Spain operates its universality laws with this requirement, see the 'Boko Haram' in TRIAL and others, 'Make Way for Justice #2 (2016) 40 <www.fidh.org/IMG/pdf/ujar_2016.pdf>. Here a Spanish nun was among 25 people killed in the Nigerian town of Ganye on 22 March 2013.

⁸⁶ This aspect is a feature of extradition law. See 'Extraterritorial Jurisdiction in the European Union' (n 21) 32.

⁸⁷ In the *Zimbabwe Torture Docket Case* (n 2) para 28. Some, European States require a link between the extraterritorial crime and the forum State. 'Extraterritorial Jurisdiction in the European Union', *ibid* 23. For example, Belgium and Spain at p 3.

⁸⁸ 'Extraterritorial Jurisdiction in the European Union', *ibid* 4.

Other practical and systemic obstacles to justice exist, ranging from the lack of clear criteria for an investigation of crimes under international law as well as the lack of political will and at times poor technical skills to undertake the practical steps required for investigations and prosecutions.⁸⁹

The first two aspects will be discussed as they are important in the context of the case study.

7.5.1 The requirement that the accused be a national and/ or resident of the forum State

A procedural regulation that hinders the reliance on universal jurisdiction is the pre-condition that the accused person(s) or victim(s) have a nexus to the forum State via their residency or nationality. In some States this can be acquired after the commission of the crime.⁹⁰ However, the problem here is that this form of jurisdiction is not universality, but is in fact more akin to the nationality principle or the active personality principle, which is where the State of nationality of the accused person tries the offence. The nature of the universality principle operates on the basis that the crime has been committed abroad by a foreigner against a foreigner. It follows that placing a nationality or residency requirement on the accused alters the extraterritorial jurisdiction relied on. More importantly, if this procedural restriction continues to be relied on by a large number of States, it may alter the nature of universal jurisdiction in customary international law.

⁸⁹ *ibid.*

⁹⁰ The Canadian universal jurisdiction asserted in the Crimes Against Humanity and War Crimes Act operates in this manner. See *R v Munyaneza* (n 26) para 65.

7.5.2 Prosecutorial discretion as a restriction to the exercise of universal jurisdiction

The obstacle that has the most profound effect on whether the forum State exercises universal jurisdiction is when the decision as to whether or not the prosecution goes ahead rests with a central authority linked to the executive. Normally, the public prosecutor or attorney general in the State carries out this role.⁹¹ More often than not, such a figure is linked to the executive of the State,⁹² although the proximity of the public prosecutor to the executive will vary from State to State, with the

⁹¹ For the sake of simplicity, the term ‘public prosecutor’ or prosecutor’ is used to denote this governmental function.

⁹² In Canada, the written consent of the Attorney General is required for the commencement of proceedings under universal jurisdiction, see Crimes Against Humanity and War Crimes Act 2000, s 9(3). In Cuba, prosecution can only be conducted at the request of the Minister for Justice, see UNSG Report 2015 (n 7) para 19. The Danish exercise of universal jurisdiction is dependent on the authority of the Minister for Justice, see Reydams, *Universal Jurisdiction* (n 16) 127. Prosecutorial discretion is also part of the German laws of universal jurisdiction, see *Strafprozeßordnung* (code of penal procedure), s 153f. In Hungary, proceedings must be initiated by the prosecutor general, see UNSG, ‘Report on the Scope and Application of Universal Jurisdiction (26 June 2013) A/69/113, para 23. In Ireland, s 9(2) of the International Criminal Court Act 2006 states that persons accused of committing an ICC offence cannot be tried without the authority of the public prosecutor, and public prosecutor’s consent is required for any activity other than the accused being remanded in custody or granted bail. In Israel, the consent of the Attorney General is required for the prosecution of a crime under universal jurisdiction, see Reydams, *Universal Jurisdiction* (n 16) 159. In Lithuania, the consent or request of the Ministry of Foreign Affairs is required, see UNSG Report 2011 (n 6) para 69. Trinidad and Tobago has interpreted the Rome Statute to grant what Kleffner describes as ‘unfettered prosecutorial discretion to [its] Attorney General’, see Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 22) 236. In the Netherlands, the public prosecutor can only prosecute criminal offences, see Reydams, *Universal Jurisdiction* (n 16) 169. Government consent is required under Swedish law, see UNSG Report 2012 (n 12) para 21. During the discussion on the scope and application of universal jurisdiction at the UN General Assembly, Paraguay mentioned the role of the prosecutor would be included in its draft law on universal jurisdiction, see UNSG Report 2014 (n 11) para 19. Interestingly, Azerbaijan requires the consent of its prosecutor for a universal jurisdiction trial against an Azerbaijani national, see UNSG Report 2011 (n 6) para 64. For a detailed list of the level of prosecutorial and executive discretion in the EU Member State countries and Norway and Switzerland international crime investigations and prosecutions see table 4 of ‘Extraterritorial Jurisdiction in the European Union’ (n 21). The level of discretion and the stage at which discretion is called upon varies from State to State.

prosecutor being directed by government in some countries.⁹³ Such discretion significantly impacts the commencement of an investigation under the universality principle. Notwithstanding that domestic prosecutors are still required to be impartial and independent, when it comes to prosecuting international crimes this is not always the case.⁹⁴ As Jann K Kleffner notes this power ‘...can be (ab)used in order to abstain from bringing charges or to enforce the prohibition of the core crimes selectively’.⁹⁵ It must be emphasised that this is not a ‘new’ aspect of the exercise of the universality principle as other chapters demonstrate.⁹⁶ However, what is new is the move away from permitting private parties to initiate proceedings under this jurisdiction. In recent years, States that traditionally allowed this mechanism to operate in their legal system have amended their legislation to give increased control to the executive.⁹⁷ On the one hand, this is unsurprising as the regulation of any State’s foreign relations has traditionally been a function of the executive in most States and it is clear that universal jurisdiction will impede the foreign relations of a

⁹³ DD Ntanda Nsereko, ‘Prosecutorial Discretion before National Courts and International Tribunals’ (2005) 3 *Journal of International Criminal Justice* 124, 124. On the variety between the EU member States and Norway and Switzerland see ‘Extraterritorial Jurisdiction in the European Union’, *ibid.*

⁹⁴ Luc Côté, ‘Independence and Impartiality’ in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (OUP 2012) 319, 324.

⁹⁵ Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 22) 50.

⁹⁶ This has traditionally been the case in the Canadian prosecutions of war crimes and crimes against humanity. This has traditionally been the case in Australia, where, since 1957, the consent of the Attorney General has been required in respect of the prosecution of grave breaches of the Geneva Conventions, see the Geneva Convention Act 1957, s 7(6). This Statute was repealed following the enactment of the legislation implementing the Rome Statute in 2002. At this juncture, it is worth noting that the freedom to control the decision of their State prosecutor was a concern of some States during the creation of UNCAT.

⁹⁷ See chapters 8. See also Langer (n 2) 32-41.

State.⁹⁸ In contrast, the same level of prosecutorial discretion is absent from national criminal law concerning non-international crimes.⁹⁹

7.6 Conclusion

The rationale for the exercise of universal jurisdiction today is based largely on the humanitarian justifications that have traditionally been associated with the principle. However, it is evident that restrictions are increasingly being placed on its exercise, which are procedural and judicial in nature. Moreover, it is notable that these obstacles coincide with the increase in cases being initiated under the principle. All of these obstacles have a negative effect on the use of universal jurisdiction in practice. The result is that perpetrators of ‘unimaginable atrocities that deeply shock the conscience of humanity’¹⁰⁰ operate with impunity and then travel freely to other territories. What is more, where universal jurisdiction is an obligation stemming from an international treaty, questions arise as to whether the forum State exercising the principle on a restrictive basis is meeting its obligations under the respective treaty. As Robert Cryer comments, ‘When there is a duty to prosecute international crimes, implementing those crimes into the domestic legal order with narrower definitions than those in international law is a violation of that duty...’.¹⁰¹ It is paramount that States implement legislation that fully respects the scope of the obligation to try or extradite provided for in international treaties.

⁹⁸ *Zimbabwe Torture Docket case* (n 2) para 74 (footnotes omitted). See also case studies in Langer (n 2).

⁹⁹ Ray Murphy, ‘Gravity Issues and the International Criminal Court’ (2006) 17 *Criminal Law Forum* 281-315, 293. This is because, they are often a subordinate organ to the State and ‘have to answer to the executive branch of the government’, see Côté (n 94) 323. Côté cites the ECtHR case of *Medvedyev v France*, App no 3394/03, 10 July 2008. He also cites *Schiesser v Switzerland*, App no 7710/76 4 Dec 1979, paras 29-30. See also Redress and the International Federation for Human Rights, ‘Extraterritorial Jurisdiction in the European Union’ (n 21) 27.

¹⁰⁰ Rome Statute, Preamble para 2.

¹⁰¹ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP, 2005) 118-19.

Given that it is often the case that such legislation is the basis on which prosecutions take place.¹⁰² If the obligation to try or extradite that exists in international treaties is to be fulfilled,¹⁰³ the custodial State must have legislated for the prosecution of accused persons irrespective of their nationality.

The imposition of such restrictions calls into question the humanitarian rationale for States relying on the principle. Basing a legal rule on humanitarian norms is troublesome because, although honorable, it is uncertain and difficult to define. As Joseph Gusfield notes, '[s]ince definitions of ... crime are variable, the quality and content of moral indignation and legal prohibition are never fixed'.¹⁰⁴ What is more, it is difficult to define humanitarian norms common to a variety of cultures, and this is particularly evident in respect of crimes against humanity.¹⁰⁵ In the past, the 'humanity' component of crimes against humanity has been the reason why States have objected to the crime.¹⁰⁶ The disagreement among States in the context of the application of universal jurisdiction to apartheid is another case in point.¹⁰⁷ What is more, it is the procedural and restrictive conditions on universality that lead to a lack of uniformity in the utilisation on the principle. It is the selective application of universal jurisdiction that

¹⁰² *Chili Komitee Nederland v Pinochet* (n 26); *Lee Urzua v Pinochet* (26); *Unión Progresista de Fiscales de España et al v Pinochet* (n 30); *Fédération Internationale des Ligues des Droits de l'Homme et al v Ould Dah*, Cour d'Appel de Montpellier (examining mafistrate), 25 May 2001; *Wijngaarde et al v Bouterse* (n 2).

¹⁰³ See chapter 4.

¹⁰⁴ Joseph R Gusfield, 'On Legislating Morals: The Symbolic Process of Designating Deviance' (1968) 56 *California Law Review* 54, 54.

¹⁰⁵ Darryl Robinson describes the hesitancy of Arab States to agree to the definition of crimes against humanity proposed at the Rome Conference for fear that they would be liable for a range of discriminatory measure against women in their jurisdiction. See Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43.

¹⁰⁶ The reference to 'laws of humanity' in the 1919 Report of the Commission on the Responsibilities of the Author of War and on Enforcement of Penalties for Violations of the Laws and Customs of War was one reason why the United States chose not to sign the Report.

¹⁰⁷ See chapter 4.

leads one to believe that the operation of the principle is biased in favour of the interests of strategically powerful States. In the past, the war nexus protected the interests of powerful States from being subject to universal jurisdiction themselves. Many of the Allies had issues within their own borders that they sought to exclude from the criminal jurisdiction of other States. It is notable that the war nexus was removed fully from crimes against humanity in the post-colonial era.¹⁰⁸ Moreover, apartheid was criminalised in the Rome Statute when it no longer affected the national interests of the Western States. In the same vein, torture was prohibited internationally when the Great Powers no longer used it systematically. Examining this trajectory, it can be convincingly argued that States that have placed restrictions on the principle in their jurisdiction will rely on non-conditional universality when it suits their national interest. However, the problems with restrictions of universal jurisdiction are that they offer a legal pretext for inaction on foreign policy grounds.

In terms of the future development of universal jurisdiction, the influence of the Rome Statute should not be underestimated. It is arguable that the enactment of universal jurisdiction over the ICC core crimes and the subsequent State practice could lead to the crystallisation of the rule in customary international law. This assertion is particularly important in the context of war crimes in NIACs. As other chapters have demonstrated, customary international law is significant in advancing the jurisdictional framework allowing for heinous human rights abuses to be tried in foreign courts.¹⁰⁹ It may be too early to definitively declare that a rule authorising the application of universal jurisdiction to war crimes in NIACs or extra judicial killing exists. However, it is clear that at present, States are entitled to exercise extraterritorial jurisdiction within the boundaries of international law,

¹⁰⁸ Antony Anghie and Bhupinder S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in International Law' (2004) 36 *Studies in Transnational Legal Policy* 185.

¹⁰⁹ See chapters 4 and 5.

as was affirmed by the PCIJ in *Lotus*.¹¹⁰ The forum State may exercise universal jurisdiction as long as there is no rule prohibiting its action in international law.¹¹¹ However, the *Arrest Warrant* case illustrated that where a right is based in customary law and conflicts with a treaty rule, the latter will supersede the former in respect of the exercise of universal jurisdiction.¹¹² The exercise of universal jurisdiction over war crimes committed in NIACs raises questions of a potential violation of the principles of non-intervention and sovereignty. What is more, as the earlier chapters demonstrate, the principle of State sovereignty over internal affairs is consistently cited in opposition to the exercise of universality. On the other hand, as this thesis illustrates, armed conflict has traditionally provided a gateway for States to exercise universal jurisdiction in respect of international crimes, over which they would not otherwise have jurisdiction. In this regard, one notes that the exercise of universal jurisdiction over war crimes in NIACs is more likely to proceed where the State of nationality does not object.¹¹³

One commentator has noted that the outcome of the Rome Conference makes the ICC a structurally weaker entity than it could have been.¹¹⁴ However, in the long term, the effect of the *opinio juris* and State practice of a large and powerful group of States may have the effect of the crystallisation of a new norm of customary international law to which non-party States would be bound unless they persistently object to the new rule. What is more, signatory non-party States must act in accordance with the provisions of the Rome Statute, as per Article

¹¹⁰ *Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10. See thesis introduction.

¹¹¹ This was the point made by the Dutch Court in the Afghani case. See La Haye (n 60) 252. See also introduction.

¹¹² For more on this see sections 8.5 and 8.6.

¹¹³ Indeed, the same can be said in relation to the application of universal jurisdiction to the other offences.

¹¹⁴ Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002) 613.

18 of the Vienna Convention on the Law of Treaties.¹¹⁵ Thus, the capacity of the Rome Statute to create new rules that apply to non-party States should not be underestimated. Conversely, given the fact that universal jurisdiction is already an obligation in some international treaties, and still remains under-utilised, it is difficult to say whether its inclusion in the Rome Statute would have made a difference or led to an increase in prosecutions. Time will tell whether the Rome Statute acts as an incentive for States parties to exercise universality over the ICC core crimes.

One could argue that the application of universal jurisdiction to non-State actors (NSAs) is the logical progression of universality given that part of the rationale for universal jurisdiction over piracy was because pirates were private individuals not linked to a State. Traditionally, States have been reluctant to grant rights and obligations to NSAs, for fear of NSAs furthering their status in international law.¹¹⁶ At the same time, a NSA who commits genocide against a certain portion of the population would be likely to harbour future governance ambitions in the territory where the genocide is committed. Moreover, it is likely that he/she would wish to form at least a part of the State in the future.¹¹⁷ It could also be argued that this transposition of universal jurisdiction from State affiliated *génocidaires* to non-State affiliated

¹¹⁵ This reads: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'.

¹¹⁶ Yaël Ronen, 'Human Rights Obligations of Territorial Non State Actors' (2013) 46 *Cornell International Law Journal* 21, 24. More recently, measures have been taken to encourage armed groups to comply with international law, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 286-99.

¹¹⁷ NSAs who succeed in forming a State are responsible for the wrongful acts committed while they were a NSA, see Clapham, *ibid* 285. See also International Law Commission's Draft Articles on State Responsibility, Art. 10.

perpetrators of genocide or crimes against humanity is part of the reason that today universal jurisdiction is, in fact, accepted by States. In effect, it takes the emphasis off State sponsored international crimes. This is supported by the fact that in the cases cited only one senior member of State has been punished for international crimes.¹¹⁸

Keeping in mind the findings in this and preceding chapters, the next chapter analyses the trajectory of universality over serious crimes under international law in Belgium. The Belgian experience of legislating for, and exercising universality provides ample space for analysis of how the jurisdiction operates in the wider context of international relations.

¹¹⁸ See Hisséne Habré litigation (n 3).

CHAPTER 8

BELGIUM

8.1 Introduction

Belgium is an example of a State that accepted the principle of universality over international crimes and then rejected it in favour of a restrictive nexus requirement. As far back as the late 19th century, Belgium legislated for extraterritorial jurisdiction in respect of offences against the security of the State.¹ In the 20th century, Belgium supported the prosecution of international crimes by an international criminal court² or national tribunals. During in the 1990s, Belgium was not immune from the prevailing pro-international justice/ anti-impunity culture, and adopted one of the most expansive pieces of universal jurisdiction legislation ever enacted by a State. This Belgian case study demonstrates that small, less powerful States can exercise universal jurisdiction effectively within particular contexts that support national interest.

The purpose of this chapter is to answer the question: *Is the exercise of universal jurisdiction today in line with the original rationale for the principle?* This question is examined in the context of the evolution of universal jurisdiction in Belgium. Section two examines the Belgian opinion of universal jurisdiction towards piracy and the slave trade. The Belgian legislation criminalising war crimes, genocide and crimes against humanity was not uniform until 1999. For this reason, section three examines the treatment of universality in respect of genocide, war crimes and crimes against humanity and torture from the end of the 19th century until the enactment of the *Loi relative à la*

¹ La loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale, Monituer belge, 25 avril 1878, p 1265.

² The Belgian Government supported the idea of an international criminal court when it was mooted in the 1950s. 13.726/III: Sixieme Commission Séance, dated 17 November 1952. Belgium supported the creation of the ICC during the Rome Conference, see section 8.4.

repression des violations graves du droit international humanitaire (Law of 10 February 1999 on the punishment of Grave Breaches of International Humanitarian Law).³ Section four analyses the position of Belgium in respect of the inclusion of universality in the Rome Statute, before examining the codification of universality over the three core crimes over which the ICC currently exercises jurisdiction. Section five assesses the extensive case law on universality that has come before the Belgian courts. Finally, section six concludes this case study and answers the research question.

8.2 Belgium and the application of universal jurisdiction to piracy and slavery

Belgium participated in the deliberations to create the 1926 Slavery Convention at the League of Nations,⁴ and the Supplementary Slavery Convention 1956 at the United Nations.⁵ Commenting on the British Draft Slavery Convention at the League of Nations in 1925, the Belgian delegate was concerned that the operation of the right of search and visit would lead to abuse.⁶ Although, he was more concerned that Belgium would be placed in a difficult situation regarding its practices in the Belgian Congo due to a proposed provision prohibiting forced labour.⁷ Thus, national interest was at the forefront of Belgian considerations. During the 1956 deliberations on the Supplementary Slavery Convention, the Belgian delegate, Mr. Somerhausen, acknowledged that the right of search and visit already applied to

³ *Moniteur belge*, 23 March 1999, 9286-87.

⁴ Susan Miers, 'Slavery and the Slave Trade as international Issues 1890-1939' (1998) 19 (2) *Slavery and Abolition* 16, 25-26.

⁵ Jean Allain, *The Slavery Conventions: The Trauvaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff 2008).

⁶ Dossier 10.752/II: letter Minister for Foreign Affairs, E Vandervelde, dated 22 September 1925.

⁷ *ibid.* The Belgian Administration in the Belgian Congo used on forced labour for decades after the death of King Leopold II. Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (2nd edn, Mariner 2002) 278-79.

piracy.⁸ In addition, he supported the application of the right to the slave trade on the high seas and favoured the imposition of penalties in instances of misuse.⁹ Thus, it can be said that Belgium approved of the application of universality to piracy and the slave trade.

8.3 Belgium and the application of universal jurisdiction to genocide, war crimes and crimes against humanity before the 1999 Law

Belgium exercised extraterritorial jurisdiction over war crimes in the aftermath of the First World War, when German soldiers were tried before Belgian courts.¹⁰ These trials were held *in absentia*.¹¹ Belgian practice of exercising enforcement jurisdiction on the basis of extraterritorial jurisdiction advanced significantly through the State's participation in the UNWCC.

8.3.1 Belgium and the United Nations War Crimes Commission

Before the Second World War came to an end, the exiled Belgian Government began to form its post war prosecution policy in London.¹² The laws adopted by other members of the UNWCC significantly influenced the Belgian implementing legislation.¹³ Belgian military tribunals were empowered to exercise universal jurisdiction in respect of specifically listed war crimes committed between 9 May 1940 and 1

⁸ As cited in Allain (n 5) 422-23.

⁹ Allain, *ibid* 423, 428.

¹⁰ Nico Wouters, 'The persecution of Jews before the Belgian courts (1944-1951)' in Rudi Van Doorslaer (ed), *Willing Belgium* (Final report of a survey conducted by the Research and Documentation on War and Contemporary Society commissioned of the federal government at the request of the Belgian Senate, 2004-2007) 776.

¹¹ M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 657-58.

¹² Wouters (n 10) 772.

¹³ Comments by Dan Plesch at 'Reinforcing International Criminal Justice: Building on the Work of the 1943-48 UN War Crimes Commission' (SOAS, 19 November 2014).

June 1945, so long as the offences also violated the Belgian penal code. Article 2 of the *la loi du 20 juin 1947 relatif à la compétence des juridictions militaires en matière de crimes de guerre* (Law of 20 June 1947 on the jurisdiction of military tribunals in respect of war crimes) stated:

Crimes falling within the jurisdiction of the Belgian Criminal Code committed in violation of the laws and customs of war between 9th May, 1940 and 1st June, 1945, by persons who, at the time of the commission of the offence, were in the enemy forces or the forces allied to those of the enemy of whatever standing, but especially in the capacity of a functionary in the judicial and administrative services, in the military or auxiliary services as an agent or inspector of an organisation, or a member of a formation of any sort whatever, who is charged by such persons with a mission of any nature at all, shall be tried by military tribunals in accordance with the provisions of this present law and those which are not contrary to the Code of Military Penal Procedure.¹⁴

The Military Tribunals had jurisdiction over military personnel and civilians who committed war crimes.¹⁵ The requirement that the accused be an enemy national meant that war crimes committed by Allied forces against foreigners abroad were excluded under the law. As one commentator notes 'It was the implicit objective of the law that only foreign nationals (mainly Germans) would be tried'.¹⁶ Thus, the exercise of universal jurisdiction by Belgium in the post war period was specific to that context that it favoured its international relations as was the practice of the States who participated in the UNWCC.¹⁷

¹⁴ *Moniteur Belge*, 26 June 1947, 177-78.

¹⁵ *History of the United National War Crimes Commission* (UNWCC, H M Stationary Office, 1949) 471.

¹⁶ Wouters (n 10) 822.

¹⁷ See chapter 3.

Enforcement jurisdiction could be exercised where, 'the accused [was] found in enemy territory or if his extradition can be obtained'.¹⁸ Hence, in keeping with the UNWCC practice of universality over international crimes, the presence of the accused was necessary. The Law of 20 June 1947 also provided for the passive personality principle, and was later amended to include jurisdiction over war crimes committed against Belgian residents.¹⁹ The active personality principle was also included in the law.²⁰ The Law of 20 June 1947 could be applied retrospectively, as its content mostly consisted of powers and procedures, however, international law created after the time limit in the legislation, 9 May 1940 to 1 June, could not be applied.²¹ In practice, 523 German nationals were extradited to Belgium for trial, most of whom were extradited from British Occupied areas.²² Of these 103 were sent for trial. However, by 1956 all those convicted had been released from prison.²³ No records of war crimes trials concerning Belgium were received by the UNWCC for publication.²⁴ Prosecuting German war criminals was overshadowed by the priority of addressing Belgian collaboration with the Nazi regime in occupied Belgium.²⁵

¹⁸ Law of 20 June 1947 (insertion added).

¹⁹ Law of 2 April 1948, as mentioned in 1372/VIII, batch no. PII 0477: Sénat de Belgique, Avis du Conseil d'État, p 3.

²⁰ Decree of 5 August 1943, Arts 1 and 3, as amended by an Act of Parliament of 30 April 1947 in *Law Reports of the Trials of War Criminals*, vol 15 (UNWCC, H M Stationary Office, 1949) 204. Belgian legislators used the phrase 'exceptional jurisdiction' to refer to extraterritoriality.

²¹ Wouters (n 10) 824.

²² Pieter Lagrou, 'Poor Little Belgium? Belgian Trials of German War Criminals, 1944-1951' in Liora Israel and Guillaume Mouralis (eds), *Dealing with Wars and Dictatorships* (Springer 2014) 123.

²³ *ibid.*

²⁴ *Law Reports of the Trials of War Criminals*, vol 15 (n 20) 203. For this reason, the writer's access to information on the cases is based on secondary sources, Lagrou, *ibid* 123-43 and Rudi Van Doorslaer (ed), *Willing Belgium* (Final report of a survey conducted by the Research and Documentation on War and Contemporary Society commissioned of the federal government at the request of the Belgian Senate, 2004-2007).

²⁵ Lagrou, *ibid*; Wouters (n 10).

Notwithstanding the limitations, the Belgian practice under the UNWCC is significant because it is an example of a victim (and at one time neutral) State of the Second World War incorporating universal jurisdiction over war crimes into its domestic legal system. As chapter three illustrated, during this period, universality was largely formulated and exercised by belligerent States.²⁶ The rationale for the law was to conform to the UNWCC objectives. The Belgian Government was concerned that offences committed during the Second World War would go unpunished and expressed its disquiet that war criminals fleeing Germany and the German occupied territories would not be punished for their crimes.²⁷ In the post war decades, the Belgian Government continued to support the codification of international law and the repression of international crimes.²⁸

8.3.2 Belgium and the application of universal jurisdiction to war crimes after the United Nations War Crimes Commission

At the Diplomatic Conference to create the Geneva Conventions, Belgium was one of the states to submit the joint amendment providing for universality over grave breaches.²⁹ However, nearly four decades passed before the grave breaches regime was fully incorporated into the Belgian legal system. During this time, the government considered how the Geneva Conventions should be legislated for by establishing a

²⁶ *Law Reports of the Trials of War Criminals*, vols 1-15 (UNWCC, H M Stationary Office); *History of the United National War Crimes Commission* (n 15).

²⁷ Dossier 12.643: letters from Maurice Goor, Belgian Ambassador to Ireland, to Paul-Henri Spaak, Belgian Minister for Foreign Affairs and Trade, dated 11 November 1944 and 17 November 1944.

²⁸ 13.726/V: letter from R Contempre, note pour la direction generale P, dated 17 September 1954, p 1; 13.726/V: note pour Monsieur le Ministre, dated 26 October 1951, p 5; 13.726/III: 9^{ème} session, juridiction criminelle international: rapport du comité de 1953 pour une juridiction criminelle international; 13.726/V: discourse prononce par Mr. A Van Glabbeke devant la 62 Commission, dated 7 November 1950, p 7.

²⁹ See section 4.3.

number of commissions to examine the relevant issues,³⁰ among these issues was whether the Conventions should be incorporated into a military code or be criminalised in a specific act.³¹ The first commission, in the 1950s, found it difficult to interpret the provisions on grave breaches.³² It drafted a bill, but left the question of jurisdiction to domestic law.³³ Later, in the 1960s, the Commission drafted Bill no. 577, which was deposited at the Chamber of Representatives on 27 May 1963.³⁴ The draft law lapsed a number of times,³⁵ before it was suspended when plans to create additional protocols to the Four Geneva Conventions of 1949 became apparent.³⁶ In August 1973, steps were taken to propose a draft law on a military penal code.³⁷ This contained a provision 'of a general nature to repress any breach of the provisions of the international Conventions in force in Belgium with regard to the laws and customs of war'.³⁸

During this time, the Belgian authorities expressed a correct understanding of universal jurisdiction in the Geneva Conventions. The Belgian Government maintained its support for the development of

³⁰ A permanent commission was set up to examine how the Geneva Conventions should be incorporated into the Belgian Legal System by royal decree on 31 October 1952. In the 1960s, the Commission was headed by M. le Chevalier Braas of the University of Liège. As cited in *Senat de Belgique, Projet de loi relative à la repression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et au Protocol I du 8 juin 1977 additionnel à ces Conventions*, 30 avril 1991, no 1317-1 (1990-91) 4, 23. In the 1970s, the government set up a Commission on Humanitarian Law to examine the draft Protocols. A series of meetings were held and attended by the ICRC, academics and persons from Ministerial Departments. 18.907: Commission pour le Droit Humanitaire, process-verbal de la reunion, dated 21 January 1974. An additional committee was also set up, which led to the creation of the 1993 legislation.

³¹ *Projet de loi*, 30 avril 1991, *ibid* 3-6.

³² *ibid* 8.

³³ *ibid* 3.

³⁴ *Projet de loi relatif à la répression des infractions graves aux Conventions internationales de Genève*, 17 mai 1963.

³⁵ 18.906/I: letter from A Vranckx of the Legislative Department of Ministry of Justice to M. P Harmel of the Minister of Foreign Affairs, dated 17 July 1968.

³⁶ As cited in *projet de loi*, 30 avril 1991 (n 30) 5.

³⁷ 18.907: Commission de Droit Humanitaire International près la Croix-Rouge- Notes des délégués de L'Auditoral General, 30 August 1973, p 13.

³⁸ *ibid*.

penal sanctions to punish grave breaches of the Geneva Conventions, in addition to the right of prosecution of the territorial State.³⁹ By the 1970s, it was clear that the incorporation of the grave breaches regime was problematic for the Belgian authorities.⁴⁰ At one Commission meeting, M. de Schutter, a professor at the Vrije Universiteit Brussels, noted the complications in ensuring uniformity of penal laws, in addition to the difficulty in moving away from the notion of territorial jurisdiction.⁴¹ Notably, M. Salmon, a professor at the l'Université libre de Bruxelles, addressed the importance of the retention of public prosecutor control over prosecutions under the *aut dedere aut judicare* framework in the grave breaches regime.⁴² In the interim period between the creation of the grave breaches regime and Belgium's incorporation thereof, successive Ministers for Foreign Affairs were concerned that the delay would harm Belgium's international reputation⁴³ particularly at successive ICRC international conferences.⁴⁴ Thus, one notes the pressures on Belgium to correctly incorporate the Geneva Conventions into Belgian law.

After the first two APs to the Geneva Conventions were adopted, they were ratified by Belgium.⁴⁵ A specialised association was set up, composed of government and military officials as well as academics to

³⁹ 18.904/I: réponse du Gouvernement Belge au questionnaire du CICR relative aux mesures visant à renforcer l'application des Conventions de Genève, dated 1972-73, p 18-19.

⁴⁰ Process-verbal de la reunion du 21 janvier 1974 (n 30) p 11.

⁴¹ *ibid* 9.

⁴² *ibid* 14.

⁴³ 18.906/I: draft letter from Ministry of Foreign Affairs and Trade to M. Herman Vanderpoorten, Minister for Justice, dated 18 May 1974, p 2; letter from A Vranckx, dated 17 July 1968 (n 35); 18.906/I: letter from F. Dambremez, Director General of the legislative department of the Ministry for Justice to the Minister for Foreign Affairs, dated 18 May 1971; 18.906/I: draft letter from Director of Administration for Minister for Foreign Affairs to Director of Administration, Ministry of Justice, dated 19 June 1968.

⁴⁴ Draft letter from Ministry of Foreign Affairs and Trade, dated 18 May 1974, *ibid*; draft letter from Director of Administration for Minister for Foreign Affairs, dated 19 June 1968, *ibid*.

⁴⁵ The treaties were published in *Moniteur belge* on 7 November, as cited in *projet de loi*, 30 avril 1991 (n 30) p 5.

consider how the provisions should be incorporated into domestic law.⁴⁶ This meeting of experts constructed a bill, which provided for universal jurisdiction over grave breaches of the Geneva Conventions.⁴⁷

Belgium incorporated the grave breaches regime into its domestic law under the *Loi du 16 juin 1993 relative à la repression des infractions graves aux Conventions Internationales du Genève du 12 aout 1949 et aux Protocoles I et II du 8 juin 1977* (Law of 16 June 1993 on the punishment of the Grave Breaches of the International Geneva Conventions of 12 August 1949 and Additional Protocols I and II of 8 June 1977).⁴⁸ Its purpose was to give effect to the Geneva Conventions and two APs. Article 1 of the Law contained the substantive law and criminalised grave breaches of the Geneva Conventions and AP I. Significantly, Article 7 affirmed, ‘...Belgian courts shall have jurisdiction over the offenses provided for in this Law, irrespective of the place where they were committed’. Thus, the effect of the legislation was to grant Belgian courts jurisdiction over war crimes committed in both international and NIACs.⁴⁹ The law extended the enforcement jurisdiction of the Belgian courts to the acts classified as grave breaches committed abroad by foreigners against foreigners in NIACs. This demonstrated the commitment of the Belgian authorities to accountability for war crimes committed in both international and NIACs. On the other hand, the law ignored the context in which grave breaches must be committed, particularly the element of the crime that requires the act to be committed against protected persons or protected property, legal concepts fundamentally linked to international armed conflict.⁵⁰ The government commented, ‘The

⁴⁶ *ibid.*

⁴⁷ *ibid.*, 6.

⁴⁸ *Moniteur belge*, 5 August 1993. Hereafter referred to Belgian Law of 1993, 1993 Act or 1993 Law.

⁴⁹ Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 107.

⁵⁰ The predominant view that grave breaches of the Geneva Convention can only be committed in IACs. See Paola Gaeta, ‘Grave breaches of the Geneva

implementation of the '*aut dedere aut judicare*' principle at the domestic level implies...the establishment of a universal jurisdiction..⁵¹ The treaty obligations were consciously extended because the government recognised that the majority of armed conflicts were, as they are today, predominantly non-international in character.⁵² Thus, the Belgian domestic law went significantly further than what the international treaties required.

Decidedly, it was the government's understanding that the characterisation of grave breaches as international crimes '...justifies the enactment of a special law distinct from the ordinary penal and military codes'.⁵³ The law introduced expansive changes to the Belgian legal system, which traditionally operated on the basis of the territorial principle.⁵⁴ The government did not believe that the presence of the accused in Belgian territory was required under the Conventions.⁵⁵ This interpretation is at odds with the ICRC commentary on the common penal sanctions provision in the Geneva Conventions, the obligation to search for and apprehend suspects may be limited to the State in which the suspect is present.⁵⁶ What is more, the *aut dedere aut judicare*

Conventions' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015), 642-44; Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 670-82. Arguments that challenge this perspective are based in customary international law. See Eve La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008) 229; Sonja 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 *Journal of Conflict and Security Law* 63. See also, Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, CUP 2016) 106-10, 332-35.

⁵¹ Projet de loi, 30 avril 1991 (n 30) p 15.

⁵² Stefaan Smis and Kim Van der Borght, 'Belgium: Act concerning the punishment of Grave Breaches of International Humanitarian Law' (1999) 38 *International Legal Materials* 918, 920.

⁵³ Projet de loi, 30 avril 1991 (n 30) p 3, 6.

⁵⁴ See the exceptions noted above.

⁵⁵ Projet de loi, 30 avril 1991 (n 30) p 16.

⁵⁶ Jean Pictet, *Commentary on the Geneva Conventions of 1949*, GCI (ICRC, Geneva, 1952) 365-66.

principle is dependent on the presence of the accused in the State exercising the obligation to prosecute. Thus, the legislative scope of the 1993 Act can be questioned because it goes beyond the boundaries of the universal jurisdiction provided for in the grave breaches regime. However, as *ad hoc* judge Christine van den Wyngaert noted in her dissenting opinion in the ICJ *Arrest Warrant Case*, there is no rule of international law that prohibits universal jurisdiction *in absentia*.⁵⁷ Similarly, she also argued that a teleological interpretation of the Geneva Conventions would not support a limiting interpretation of Article 146 of the Fourth Geneva Convention concerning penal sanctions.⁵⁸ From the perspective of the influence of international law on domestic law, one notes that the terminology in the Geneva Conventions formed the basis of the provisions of the 1993 Act,⁵⁹ in particular Article 1 of the Act, which listed the acts criminalised.

Notably, the procedure of *Constitution de Partie Civile*, which allows private parties affected by the offence to seize an investigating magistrate, who is then bound to investigate the crime once jurisdiction over the offence has been established.⁶⁰ The mechanism allows victims to adjoin proceedings initiated by the public prosecutor.⁶¹ What is more, it is possible for victims to declare themselves civil parties in instances where the public prosecutor has yet to decide whether to pursue the investigation or where they had decided not to proceed.⁶² Civil parties may seize an examining magistrate under Article 63 of the Code of Criminal Procedure (CPP) or summon the accused directly

⁵⁷ *Arrest Warrant Case (DRC v Belgium)* (Judgment) [2002] ICJ Rep 3, 170.

⁵⁸ *ibid.* One notes the similarities between this interpretation of the Geneva Conventions and that relied on by the Israeli Courts in respect of the Genocide Convention, see section 5.2.

⁵⁹ *Projet de loi*, 30 avril 1991 (n 30) p 8.

⁶⁰ Reydam's, *Universal Jurisdiction* (n 49) 108.

⁶¹ Christine Van Den Wyngaert (ed), *Criminal Procedure Systems in the European Community* (Butterworths 1993) 17-18.

⁶² *ibid.*, 17.

before the trial court.⁶³ *Constitution de partie civile* is only open to the victim(s) of the offence and relatives.⁶⁴ The majority of the universal jurisdiction cases in Belgium were initiated under the procedure.

8.3.3 Belgium and the application of universal jurisdiction to genocide

The views of Belgium towards universal jurisdiction over genocide can be illustrated by its opinions expressed during the drafting of the Genocide Convention at the UNGA from 1946-48. Notwithstanding Belgian support for states taking legislative measures to prevent and punish genocide,⁶⁵ the Belgian delegation to the UNGA did not support the draft provision providing for universal jurisdiction over genocide in the Secretariat's draft Convention.⁶⁶ Commenting on the draft Article 7 (concerning universality) and draft Article 8 (concerning extradition), the Belgian Government stated, '...the principles of territorial jurisdiction... are the basis of our extradition law, are formally opposed to the application of those articles'.⁶⁷ It also noted that changes to Belgian domestic law would need to be implemented and that such modifications would be met with serious opposition from Belgian jurists.⁶⁸ It was the opinion of the Belgian Government that the system of repression in the Secretariat draft convention exceeded the principles in the UNGA Res 96 (I) and was premature.⁶⁹ The Belgian Government considered that jurisdiction over its nationals was an essential attribute of state sovereignty.⁷⁰ The Ministry noted that '...from the point of view of international criminal law, it does not seem

⁶³ *ibid.* The latter option is only available where there is significant evidence to support the allegations.

⁶⁴ Reydams, *Universal Jurisdiction* (n 49) 108.

⁶⁵ (2 October 1948) UN Doc. A/C.6/SR/65, p 38.

⁶⁶ See section 4.2.

⁶⁷ 1372/VIII, batch no. PII 1947-48: examen du projet de Convention sur la Prevention et la Repression du genocide Etabli par le Secretariat General des Nations Unies, p 5.

⁶⁸ *ibid.*

⁶⁹ *ibid.*, p 1.

⁷⁰ *ibid.* p 5.

desirable that the nation waive its right of jurisdiction over its own nationals'.⁷¹ The constitutional provision prohibiting the extradition of Belgian nationals abroad was also cited in opposition to the draft Convention.⁷² Thus, the tradition of territoriality along with the importance of sovereignty acted as a barrier to Belgian support for the inclusion of universal jurisdiction in the Genocide Convention. Later, the delegation expressly opposed the concept of 'subsidiary universal repression' and vowed to vote against proposals of that nature.⁷³

At one point in the deliberations in October 1947, Belgian officials opined that the convention would apply to the nationals of non-party States, who could appear before the tribunals of State parties.⁷⁴ Belgian diplomat, Mr. G. Kaekenbeeck noted that the rationale for the prosecution of genocide at the IMT emanated from German defeat and the Allied occupation.⁷⁵ The Belgian delegation favoured the territorial principle for the punishment of genocide.⁷⁶ Although, Kaeckenbeeck noted that genocide was likely to be committed by a State associate thus, the territorial State may not exercise its jurisdiction.⁷⁷ As such, he noted that the crime could only be prosecuted after the government had been overthrown or by an international court, which did not exist.⁷⁸ The Belgian delegation voted in favour of the adoption of the Genocide Convention on 9 December 1948,⁷⁹ and there was a considerable length

⁷¹ 1372/VIII, batch no. PII 1947-48: substance des observation faites par le Ministere de la Justice a propos du projet de convention sur le genocide elabore par le conseil economique et social de l'ONU, p 2.

⁷² 1372/VIII, batch no. PII 1947-48: report of the meeting of the Legal affairs Commission, 13 September 1948, p 3.

⁷³ 1372/VIII, batch no. PII 1947-48: intervention by M G Kaeckenbeeck at the Sixth Committee, 10 November 1948.

⁷⁴ 1372/VIII, batch no. PII 1947-48: note concerning the Problem of Genocide, presently being discussed by the Sixth Committee, dated 2 October 1947.

⁷⁵ Intervention by M G Kaeckenbeeck (n 73).

⁷⁶ *ibid.*

⁷⁷ 1372/VIII, batch no. PII 1947-48: intervention by M G Kaeckenbeeck at the Sixth Committee, 2 October 1948.

⁷⁸ *ibid.*; Report of the meeting of the Legal affairs Commission (n 72) p 2.

⁷⁹ 1372/VIII, batch no. PII 1947-48: letter from the Service des Conferences de la Paix et de L'organisation Internationale, dated 21 December 1948, p 2.

of time before Belgium ratified the Convention on 5 May 1951.⁸⁰ The Convention was incorporated by Belgium on 11 January 1952.⁸¹

The Law of 16 June 1993 did not provide for universal jurisdiction over genocide. However, in giving its opinion on the draft legislation, the Council of State noted that one of the features of the Genocide Convention was that it would lead to an extension of Belgian laws to other territories and therefore would extend the jurisdiction of Belgian courts.⁸² The Council of State believed that the other types of jurisdiction applied to genocide because the territorial jurisdiction in Article 6 was not absolute, 'otherwise one would arrive at an unacceptable consequence'⁸³ in the event of genocide being committed in Belgium by a foreigner, and the foreigner returned to their country of origin. Furthermore, the accused's extradition may not be possible if the State of nationality refused to extradite its nationals abroad.⁸⁴ Thus, it may be convincingly argued that this is further evidence in support of the assertion that the enforcement jurisdiction provided for in the Genocide Convention is not limited to the territorial State or to an international penal tribunal.⁸⁵ However, before the 1993 Law was amended in 1999,⁸⁶ genocide was punishable under ordinary Belgian law, in addition, some scholars argued that the crime could be tried in Belgium under customary international law.⁸⁷ The limited jurisdiction

⁸⁰ In February 1950, Raphael Lemkin wrote to P Harmel of the Chamber of Representatives insisting that the Belgian Government takes steps to ratify the genocide Convention, 1372/VIII, batch no. PII 0477: letter from P Harmel of the Chamber of representative to M. Loridan, Directeur au Ministère des Affaires Etrangères et du Commerce Extérieur, dated 18 February 1950.

⁸¹ Law of 26 June 1951, *Moniteur belge*, 11 January 1952.

⁸² *Sénat de Belgique, Avis du Conseil d'État* (19) p 1.

⁸³ *ibid* 26.

⁸⁴ *ibid* p 27.

⁸⁵ On this argument see sections 4.2, 5.2 and 5.4.

⁸⁶ See below.

⁸⁷ Smis and Van der Borght (n 52) 918.

of the Belgian courts to try genocide was later recognised by a cross-party initiative in 1996.⁸⁸

8.3.4 Belgium and the application of universal jurisdiction to crimes against humanity

Prior to 1999, there was no specific act allowing Belgian courts to exercise universal jurisdiction over crimes against humanity. The exclusion of crimes against humanity from the Law of 20 June 1947 is evident in the temporal scope of the legislation, which coincided with the war.⁸⁹ The preamble to the Law of 13 December 1944, which established the Commission charged with the investigation of violations of international law and of the laws and customs of war (*Commission d'enquete sur les violations des règles du droit des gens, des lois et des coutumes de la guerre*) refers to 'numerous violations of the rules of international law and of the obligations of humanity (*des devoirs d'humanité*)'.⁹⁰ However, it cannot be said that this term was intended to have the same legal meaning as the term 'crimes against humanity' later included in the London Charter.⁹¹ Similarly, from 1945-51, the phrase 'crimes against humanity' frequently appears in Belgian reports and correspondence, but without a clearly defined legal intention.⁹² Belgium, as represented by the European Economic Community, was one of the Western States opposed to the Apartheid Convention.⁹³ Belgium supported the joint statement made by the EEC on the entry into force of the Convention.⁹⁴ Belgium did not want the Apartheid

⁸⁸ Proposition de loi relative à la répression du crime de génocide en application de la Convention internationale pour la prévention et la répression du crime de génocide du 9 décembre 1948, (déposé par M Foret et consorts) 16 October 1997, p 3.

⁸⁹ See section 8.3.1.

⁹⁰ *History of the United National War Crimes Commission* (n 15) 218.

⁹¹ *ibid.*

⁹² Wouters (n 10) 814.

⁹³ 18.854: letter from George Elliott, Belgian Permanent Mission to the UN, to Renaat Van Eslande Minister for Foreign Affairs and Development, dated 22 July 1976.

⁹⁴ See section 4.4.

Convention to apply to its citizens.⁹⁵ In this regard, one wonders if Belgium was concerned that its colonial past in the Belgian Congo may come back to haunt it, particularly considering that the Belgian Congo was ruled by Belgium until 1960, and thus the retrospective application of the treaty's principles would have been a possibility.

8.3.5 Belgium and the application of universal jurisdiction to torture

Belgium did not play a leading role at the deliberations to create UNCAT.⁹⁶ During the deliberations it did not oppose the inclusion of universal jurisdiction in the treaty,⁹⁷ which it signed on 4 February 1985. The Convention was ratified by Belgium on 9 June 1999,⁹⁸ and incorporated into domestic law in 2002.⁹⁹ The shortcomings of Belgian legislation regarding the exercise of universal jurisdiction over serious crimes under international law were rectified with the significant advancements in its domestic laws in the 1990s, which were, in part, a response to the creation of the first permanent international penal tribunal.

⁹⁵ 18.854/V: etat de la Convention international sur l'élimination et la répression du crime d'apartheid, undated, p 10.

⁹⁶ Belgium was not a member of the working group that constructed the treaty, although it was an observer, see Commission on Human Rights, 'Report on the 35th session: Economic and Social Council' (1979) UN doc. E/1979/36, E/CN.4/1347, p 36.

⁹⁷ Hans Danelius and Herman Burgers, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers 1988).

⁹⁸ Loi du 9 juin 1999 portant assentiment à la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, Moniteur belge, 28 October 1999.

⁹⁹ Loi du 14 juin 2002 de mise en conformité du droit belge avec la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée à New York le 10 décembre 1984, Moniteur belge, 14 August 2002.

8.4. Belgian policy towards universal jurisdiction at the Rome Conference

At the Rome Conference, Belgium supported the creation of an ICC empowered to exercise universality.¹⁰⁰ Indeed, the inclusion of universality was one of the seven 'guidelines' cited by Belgium to guarantee an effective operation of the ICC.¹⁰¹ As a Deputy Counsellor at the Ministry of Justice, commented, 'The only way to enable the Court to act effectively was to recognize its inherent and universal competence, whatever the place or nationality of the victim...subject to the principle of complementarity'.¹⁰² Indeed, Article 12 was criticised by Belgium after its adoption.¹⁰³ Significantly, the government changed its attitude towards universal jurisdiction expressed in previous decades. It may be that the 1993 Law added momentum to this position,¹⁰⁴ in addition to the culture of impunity that swept through the international community in the 1990s.

8.4.1 Universal jurisdiction legislation over genocide, crimes against humanity and war crimes after the Rome Statute

In 1999, the 1993 Act was renamed the Act of 10 February 1999 concerning the punishment of Grave Breaches of International Humanitarian Law (*La loi du 10 février 1999 relative à la répression des violations grave du droit international humanitaire*)¹⁰⁵ and amended to criminalise genocide and crimes against humanity.¹⁰⁶ As before, Article 7 of the 1999 Law extended universal jurisdiction over the crimes

¹⁰⁰ (17 June 1998) UN doc. A/CONF. 183/SR.6, para 4.

¹⁰¹ *ibid*, para 1.

¹⁰² (19 June 1998) UN doc. A/CONF.183/C.1/SR.8, para 7.

¹⁰³ William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 350.

¹⁰⁴ The 1993 Law was cited in support of the Belgian stance at the Rome Conference, (17 June 1998) UN doc. A/CONF. 183/SR.6, para 4.

¹⁰⁵ English translation in (1999) 38 *International Legal Materials* 921. Hereafter referred to as Belgian Law of 1999, 1999 Act or 1999 Law.

¹⁰⁶ Arts 1(1) and 1(2) respectively.

prohibited in the Act. The law also criminalised crimes against humanity in times of peace as well as during armed conflict.¹⁰⁷ Notably, the provisions went further than Belgium's treaty obligations in conventional international law and permitted the exercise of universal jurisdiction over genocide and crimes against humanity.

The amendment was proposed with a particular context in mind as it was originally introduced to implement the Genocide Convention.¹⁰⁸ After the Rwandan genocide occurred in 1994, hundreds of Rwandans fled to Belgium,¹⁰⁹ and the country was faced with the presence of alleged génocidaires in its territory. Some suspects sought asylum,¹¹⁰ which is unsurprising given the historical links between the two states, and that some were dual Belgian-Rwandan citizens. To confound matters, there was no extradition treaty in place between Belgium and Rwanda. Thus, the amendment was enacted to allow Belgium to deal adequately with this situation and the objective of the law was to prevent and repress genocide.¹¹¹ Indeed, a further rationale cited for the proposed law was to protect Belgian society from génocidaire refugees.¹¹² This assertion may be questioned given the improbable likelihood of the offender recommitting genocide in Belgium, although, there may have been the possibility of violence between opposing ethnic factions within the Rwandan community living in Belgium.

¹⁰⁷ In this regard, the authorities took into account the jurisprudence of international criminal tribunals, see *Tadic Case* (Jurisdiction) ICTY-94-1 (2 October 1995).

¹⁰⁸ A Destexhe and M Foret, 'De Nuremberg à La haye et Arusha: Actes du Colloque Organisé par le Groupe PRL-FDF du Sénat' (Brussels, Bruylant 1997).

¹⁰⁹ Luc Reydam, 'Belgium's First Application of Universal Jurisdiction: the *Butare Four Case*' (2003) 1 *Journal of International Criminal Justice* 428, 429.

¹¹⁰ Proposition de loi, 16 October 1997 (88) p 2.

¹¹¹ Sénat de Belgique, Proposition de loi relative à la répression du crime de génocide du 9 décembre 1948, rapport fait au nom de la commission de la justice par Mme Merchiers, 1 décembre 1998, p 4.

¹¹² Proposition de loi, 16 October 1997 (n 88) p 3.

The belief that genocide must not go unpunished was another rationale for the law.¹¹³ The deterrent effects of the law as well as the need to protect 'the international legal order' were also cited as justifications for the amendment.¹¹⁴ Thus, the traditional rationale for the application of universal jurisdiction was cited as justifications for the law. In addition, the Senators who proposed the original law commented, '...the importance of the symbolic and pedagogical dimension of a trial for acts as serious as those relating to the genocide can not be denied'.¹¹⁵

There is little doubt that the Rome Statute significantly influenced this amendment. Indeed, the Justice Commission cited it as a justification for amendment, extending the original draft proposal.¹¹⁶ What is more, the definitions of crimes against humanity¹¹⁷ and genocide were taken from the Rome Statute and from the Genocide Convention respectively.¹¹⁸ However, not all of the acts codified as crimes against humanity in the Rome Statute were criminalised in the Act.¹¹⁹ One notes that the draft law was initiated before the drafting of the Rome Statute and was significantly developed to include the crimes of genocide and crimes against humanity after the Rome Conference came to an end. It is notable that the incorporation of the Rome Statute is cited as a justification for a law providing for universal jurisdiction over genocide, crimes against humanity and war crimes when this is not dictated in the Rome Statute itself.¹²⁰ A further reason for the amendment was to provide a uniform basis for the prosecution of war

¹¹³ Sénat de Belgique, 1 décembre 1998 (n 111) p 5.

¹¹⁴ *ibid* 14.

¹¹⁵ Proposition de loi, 16 October 1997 (n 88) p 3.

¹¹⁶ Sénat de Belgique, 1 décembre 1998 (n 111) p 12-13. See also Chambre des représentants de Belgique, *Projet de loi relative à la repression des violations graves di droit international humanitaire, rapport fait au nom de la commission de la Justice par M J van Overberghe*, 29 January 1999, p 2.

¹¹⁷ Sénat de Belgique, 1 décembre 1998, *ibid* p 21.

¹¹⁸ Smis and Van der Borgh (n 52) 919.

¹¹⁹ *ibid*.

¹²⁰ See chapter 6. See also Implementation of the Rome Statute of the International Criminal Court Act No 27 of 2002, s 4 (South Africa).

crimes, crimes against humanity and genocide.¹²¹ In this regard, one notes the role of the Rome Statute as an impetus for States to streamline legislation concerning international crimes. Some other features of the 1999 Law are worth noting. First, it included a provision that removed the immunity granted by foreign States to its nationals,¹²² in order to give effect to Article 27 of the Rome Statute.¹²³ The Act also punished those who manufactured devices in the knowledge that they would be used to perpetrate international crimes.¹²⁴ The new law also included liability for inchoate offences,¹²⁵ and excluded the application of a statute of limitations.¹²⁶ Understandably, Article 7 concerning universal jurisdiction received much commentary.¹²⁷

There were many cases initiated under the Act¹²⁸ and as a result, diplomatic tensions increased between Belgium and States opposed to complaints made against their nationals.¹²⁹ In particular, problems arose in respect of attempts to exercise universal jurisdictions in respect of incumbent or former government officials of other States. Following the initiation of investigations into former US President George H W Bush, former US Secretary of Defense Dick Cheney and

¹²¹ Chambre des représentants de Belgique, 29 January 1999 (n 116) p 2.

¹²² 1999 Law, Art 5(3).

¹²³ Sénat de Belgique, 1 décembre 1998 (n 111) 15.

¹²⁴ 1999 Law, Art 3.

¹²⁵ 1999 Law, Art 4.

¹²⁶ 1999 Law, Art 8.

¹²⁷ Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589; Leen De Smet and Frederic Naert, 'Making or Breaking International Law?: An International Law Analysis of Belgium's Act Concerning Punishment of Grave Breaches of International Humanitarian Law' (2002) 35 *Revue Belge de Droit International* 471; Menno T Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', (2001) 23 *Human Rights Quarterly* 940; Tom Ongena and Ignace Van Daele, 'Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium', (2002) 15 *Leiden Journal of International Law* 687; George P Fletcher, 'Against Universal Jurisdiction', (2003) 1 *Journal of International Criminal Justice* 580.

¹²⁸ See section 8.5.

¹²⁹ Steven R Ratner, 'Belgium's War Crime Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888; De Smet and Naert (n 127) 471.

others, the US authorities threatened to move the NATO headquarters from Belgium to another State.¹³⁰ Similarly, Israel withdrew its ambassador to Belgium in response to proceedings against Ariel Sharon and Amos Yaron.¹³¹ In October 2000, the Democratic Republic of the Congo (DRC) filed a complaint against Belgium before the ICJ after the Belgian authorities circulated an arrest warrant against its then incumbent Minister for Foreign Affairs via Interpol.¹³² This complaint led to a finding against Belgium that it violated the diplomatic immunity afforded to the Congolese Minister under international law.¹³³

In April 2003, the scope of the 1999 Law was reduced and significant changes were introduced.¹³⁴ First, the non-recognition of foreign immunities was altered. Article 5(3) was amended to read 'International immunity derived from a person's official capacity does not prevent the application of the present law, except under those limits established under international law'.¹³⁵ Second, the role of the Federal Prosecutor was enshrined in the procedure. Federal prosecutor consent was required for criminal action, in circumstances where (1) the violation was committed outside of Belgium or (2) when the offender was a foreigner or (3) the offender was not present in Belgium or (4) where the victim was not a Belgian citizen or (5) the victim was resident in Belgium for less than three years.¹³⁶ Third, universal jurisdiction *in absentia* was refined. In cases where there was no link to Belgium, it was the role of the prosecutor to decide whether or not proceedings were admissible.¹³⁷ Furthermore it was now the decision

¹³⁰ Ratner, *ibid* 890.

¹³¹ *ibid*.

¹³² *Arrest Warrant Case* (n 57) para 1.

¹³³ *ibid*, p 32-34.

¹³⁴ Law of 23 April 2003 Amending the Law of 16 June 1993 Concerning the Prohibition of Grave Breaches of International Humanitarian Law and Article 144ter of the Judicial Code. English translation available at (2003) 42 *International Legal Materials* 749. Hereafter referred to as the Law of April 2003.

¹³⁵ Art 4 of the April 2003 Law amended Art 5(3).

¹³⁶ Art 5 of the April 2003 Law amended Art 7.

¹³⁷ April 2003 Law, Art 7(1).

of the prosecutor to assess whether or not to proceed with an investigation.¹³⁸ 'In the interest of administration of justice and in respect of Belgium's international obligations', the Prosecutor was also granted the discretion to transfer the case to a more suitable forum such as the territorial State, the State of nationality or an international tribunal.¹³⁹ Decisions not to proceed with a case could be appealed and persons personally harmed by the offence could only initiate civil actions.¹⁴⁰ On the other hand, the list of offences criminalised was extended to include attacks against cultural property,¹⁴¹ perhaps in order to give effect to the Second Protocol to the Hague Convention on the Protection of Cultural Property.

Finally, in August 2003 the law was repealed,¹⁴² and the crimes of genocide, crimes against humanity and war crimes were incorporated into Article 136 of the penal code or *code pénal* (CP) and the code of criminal procedure or *Code de Procédure Pénale* (CCP). The move included a number of significant changes. First, the prosecution of any foreign heads of State is no longer possible.¹⁴³ Nor can persons guaranteed immunity by virtue of an international treaty to which Belgium was party be prosecuted.¹⁴⁴ Furthermore, foreign head of State can no longer be charged on short-term official visits to Belgium,¹⁴⁵ thus relaying the fears of any foreign government officials in Belgium for the purposes of official business. Second, the nexus between Belgium and the crime was strengthened, as facilitated by the application of the active and passive personality principles into the

¹³⁸ April 2003 Law, Art 7(1).

¹³⁹ April 2003 Law, Art 7(1), para 2, s 4

¹⁴⁰ April 2003 Law, Art 5(4).

¹⁴¹ Art 1 of the April 2003 Law amended Art 2(3).

¹⁴² Amendment to the Law of June 15 1993 (as amended by the Law of February 10 1999 and April 23 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law, August 7 2003 (2003) 42 *International Legal Materials* 1258. Hereafter referred to as repeal law of August 2003.

¹⁴³ Repeal law of August 2003, Art 13, which amended CCP, Art 1*bis*, para 1.

¹⁴⁴ *ibid.*

¹⁴⁵ CCP, Chapter I, Part One, Art 1*bis* as amended by Repeal Law of Aug 2003, Art 14-16.

CCP.¹⁴⁶ These principles were extended to include individuals resident in Belgium for at least three years.¹⁴⁷ Third, Article 10(1) affirmed that only the Federal Prosecutor could initiate an investigation into allegations of serious violations of international humanitarian law. In addition, the ability of private parties to seize an examining magistrate under the *Constitution de Partie Civile* is no longer possible in respect of complaints concerning international crimes.¹⁴⁸ The government stated that this change was necessary to prevent the exploitation of the law by individuals and organisations with political intentions.¹⁴⁹ The presence of the accused in Belgium is now required. The principle of subsidiarity allowing the transfer of the case to an international tribunal or a State with a closer nexus to the crime is maintained.¹⁵⁰

There is little doubt that the decision in the *Arrest Warrant Case* influenced the Belgian authorities. The judgment was rendered in February 2002 and thereafter there was little disagreement among parliamentarians that change was needed.¹⁵¹ When proposing the draft law at a *Session Extraordinaire* in the Belgian House of Representatives, then Prime Minister Guy Verhofstadt stated that a study of the legislation concerning universal jurisdiction in a series of Western Countries ‘...revealed that the majority of countries had established a limited universal jurisdiction’ which preserved immunity and a nexus

¹⁴⁶ CCP, Part One, Arts 6(1) and 10(1) as amended by Repeal Law of Aug 2003.

¹⁴⁷ Repeal law of August 2003, Arts 14-16.

¹⁴⁸ Repeal law of August 2003, Art 16.

¹⁴⁹ Luc Reydam, ‘Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law’ (2003) 1 *Journal of International Criminal Justice* 679, 679; Observations by Belgium on the scope and application of the principle of universal jurisdiction, (Sixth Committee of the UN General Assembly 65th session) para 14 <www.un.org/en/ga/sixth/65/ScopeAppUnijuri_StatesComments/Belgium_E.pdf>.

¹⁵⁰ CPP, Part One, Art 10 as amended by Repeal Law of Aug 2003, Art 16(2)(4).

¹⁵¹ Former investigating judge, Damian Vandermeersch, comments that the changes were made hastily and without extensive public debate, Damian Vandermeersch ‘Prosecuting International Crimes in Belgium’ (2005) 3 *Journal of International Criminal Justice* 400, 400.

between the forum State and the extraterritorial crime.¹⁵² The government affirmed that the reason for the repeal of the 1999 Law was because:

The application of this very far-reaching law gave rise to a number of problems in practice, however, deriving from the combined application of several provisions: the possibility of initiating proceedings in absentia and of opening a case by instituting civil indemnification proceedings before an examining magistrate, and the exclusion of immunities as an obstacle to prosecution.¹⁵³

Thus, in just over ten years Belgium went from having an expansive national legal framework on universal jurisdiction to opting for no universality at all.

What is more, the coming into force of the Rome Statute and a possible conflict that might arise between national tribunals and the ICC in respect of prosecution of cases is cited by the government as a reason for the restrictive measure introduced in 2003:

...[T]he entry into force of the Rome Statute necessitated a reduction in the extraterritorial sphere of jurisdiction of Belgian courts so that they would not routinely enter into potential competition with the International Criminal Court, in application of the principle of complementarity.¹⁵⁴

This belief is at odds with the principle of complementarity, which is premised on the priority of prosecution resting with national tribunals, which demonstrates a misunderstanding of the principle of

¹⁵² Session Extraordinaire, Projet de loi relative aux violations graves du droit international humanitaire, 22 juillet 2003.

¹⁵³ Observations by Belgium (n 149) para 14.

¹⁵⁴ *ibid*, para 4.

complementarity.

Yet, the Belgian Government cites the original rationale for universal jurisdiction as a justification for its current legislation. Recently, the Belgian Permanent Mission to the UN stated:

...[C]ertain crimes concern the entire international community because of their exceptional gravity. Universally condemned, these crimes cannot go unpunished and must therefore be universally suppressed. Any State, which exercises its jurisdiction in respect of such crimes, is acting in the interests of the international community, not simply in its own interest.¹⁵⁵

In addition, the government also reaffirmed impunity as a rationale for the exercise of universal jurisdiction, in the context of subsidiarity where a State with a closer nexus to the crime is unable or willing to try the offender.¹⁵⁶ However, Belgian courts can no longer exercise universal jurisdiction over international crimes. Thus, it is an example of a State that overlooks the voids in its legislative framework. This supports a belief system that the active and passive personality principles have the capacity to resolve the reasons for the development of universality over the crimes to which it applies. Thus, it appears that the rationale for universal jurisdiction is being applied to the active and passive personality principles. The issue here is that the active and passive personality principles are based on a nexus to the offence based on nationality. However, universal jurisdiction contemplates the prosecution of a foreigner in the forum State, where the crime was committed abroad against foreigners.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*, para 5.

8.5 Belgian case law concerning universal jurisdiction

The impunity rationale for universal jurisdiction is also evident in the case of the *Butare Four*, which was the first universal jurisdiction trial in Belgium.¹⁵⁷ In this instance, had the suspects not been prosecuted, they would have lived freely in Belgium as there was no possibility of extradition and the ICTR did not take over the proceedings.¹⁵⁸ This rationale for the exercise of universal jurisdiction is also evident in the discussion on the obligation to try or extradite in *Aguilar v Pinochet*.¹⁵⁹ Here the examining magistrate stated:

The general principle of international law *aut dedere aut judicare* (the obligation to extradite or try) imports the necessity of combating impunity of crimes under international law and the responsibility of state authorities to ensure punishment of such crimes irrespective of the place of commission.¹⁶⁰

Some features of the case law are worth noting. First, like the domestic legislation, some convictions went further than the parameters of conventional international law. The four defendants in the *Butare Four* case were tried under the 1993 Law and convicted of violations of common Article 3 of the Four Geneva Conventions and Article 4(2)(a) of APII.¹⁶¹ Universal jurisdiction over these offences is not provided for in treaty law. The fact that this trial stemmed from a government inquiry and was prosecuted by a State prosecutor means that this is an example of State-led universality in respect of offences to

¹⁵⁷ *Public Prosecutor v Higaniro et al*, Assize Court of Brussels, 8 June 2001. This case resulted from the amalgamation of cases following a government inquiry into the presence of suspected war criminals in Belgium who fled to Belgium after the genocide in Rwanda. Following the inquiry, some suspects were transferred to the ICTR, Reydams, *Universal Jurisdiction* (n 49) 111.

¹⁵⁸ Reydams, *ibid* 112.

¹⁵⁹ *Aguilar v Pinochet*, Tribunal of First Instance of Brussels, examining magistrate order of 6 November 1998, case note by Luc Reydams in (1999) 93 *American Journal of International Law* 700. See also section 5.4.3.

¹⁶⁰ Cited in Reydams, *ibid* 702.

¹⁶¹ Reydams, *Universal Jurisdiction* (n 49) 111.

which universal jurisdiction does not apply in conventional international law. As Luc Reydam's points out, the ICTR reiterated in *Prosecutor v Akayesu* that common Article 3 of the Geneva Conventions is part of customary international law, declaring that it infers individual criminal responsibility.¹⁶² Although, it must be remembered that it does not automatically follow that universal jurisdiction can therefore be applied to violations of common Article 3. The defendants did not challenge Belgian jurisdiction. This case is another example of the exercise of universal jurisdiction in respect of certain war crimes committed in NIACs.

It follows that the domestic law providing for the exercise of universal jurisdiction over war crimes in NIACs was instrumental in this prosecution. It was the domestic law that facilitated the suit, given that universal jurisdiction was not provided for in the international treaties in respect of the indicted charges. Crimes against humanity and genocide were not included on the indictment because they were not criminalised in the statute at the time the crimes were committed,¹⁶³ although the domestic statute predated the events in Rwanda. This emphasises the importance of criminalisation of international crimes in domestic legislation to enable prosecutions. It is unlikely that Belgium would have had jurisdiction to try the offences had the statute not been in place.

In *Aguilar v Pinochet*, investigating judge Damien Vandermeersch relied on the prohibition against the commission of international crimes in customary international law.¹⁶⁴ Here, the examining magistrate also relied on *jus cogens* and *erga omnes* obligations to justify the exercise of universality in such instance.¹⁶⁵ The

¹⁶² *ibid* 112.

¹⁶³ Reydam's, 'Belgium's First Application of Universal Jurisdiction' (n 109) 432.

¹⁶⁴ *Aguilar v Pinochet* (n 159). See section 5.4.3.

¹⁶⁵ *ibid*.

examining magistrate declared, 'Customary international law is equivalent to conventional international law and is directly applicable in the Belgian legal order'.¹⁶⁶ The fact that the law was being applied retrospectively to acts that occurred before its creation was not a bar to the investigating magistrate.¹⁶⁷ However, this position is at odds with the decision of the prosecutor in *The Butare Four* case not to include genocide and crimes against humanity in the indictment. Reydam's notes that there were only two other cases that could be cited in support of the decision in *Aguilar v Pinochet* and, therefore, it cannot be said that there was general State practice in the area.¹⁶⁸ Yet, there is little doubt that customary international norms concerning the prosecution of international crimes were intended by the Government to be binding on Belgium.¹⁶⁹ What is more, the Justice Minister made it clear that the law was to apply to crimes committed before its entry into force, as per the customary international law nature of the subject matter.¹⁷⁰ Indeed, the 'ordinary law approach' to prosecuting international crimes was also relied on in *Aguilar v Pinochet*, and was supported by the government.¹⁷¹

It is also worth noting that in many of the cases initiated under universal jurisdiction in Belgium involved a nexus to the country. In the *Butare Four* case, three of the four accused persons had been educated in Belgium.¹⁷² The Parliamentary Commission of Inquiry into the prosecution of alleged génocidaires of the Rwandan genocide present in Belgium focused on alleged crimes with a connection to Belgium.¹⁷³ Notably, in *Aguilar v Pinochet*, private individuals who were Chilean

¹⁶⁶ Cited in Reydam's case note on *Aguilar v Pinochet* (n 159) 702.

¹⁶⁷ Reydam's, *Universal Jurisdiction* (n 49) 113.

¹⁶⁸ *ibid* 115.

¹⁶⁹ Sénat de Belgique, 1 Décembre 1998 (n 111) p 20.

¹⁷⁰ Chambre des représentants de Belgique, 29 Janvier 1999 (n 116) p 3.

¹⁷¹ Reydam's, *Universal Jurisdiction* (n 49) 113. See also comments by the Justice Minister in *ibid* p 3.

¹⁷² Reydam's, 'Belgium's First Application of Universal Jurisdiction (n 109) 434.

¹⁷³ Reydam's, *ibid* 430.

refugees, living in Belgium, initiated the proceedings.¹⁷⁴ Similarly, in *Prosecutor v Samuel Ndashyikirwa*, the accused was granted refugee status and living in Belgium.¹⁷⁵ This begs the question whether it was State policy to exercise universal jurisdiction in respect of individuals who have a link to Belgium. In contrast, the examining magistrate, Vandermeersch, who launched a series of investigations into international crimes in Rwanda did not limit his investigations to crimes with a nexus to Belgium.¹⁷⁶

It should also be noted that in the cases that proceeded to trial, the State of nationality of the accused person(s) cooperated with the proceedings.¹⁷⁷ This is significant given that diplomatic tension with other States opposing the exercise of universal jurisdiction against their nationals led to the repeal of the universality principle in Belgium. It is also notable that complaints against heads of State or other senior leaders were problematic for Belgium's international relations.¹⁷⁸ Similarly, the cases that proceeded to trial were against non-State actors and less senior officials.¹⁷⁹ In this respect, one wonders if there is a correlation between non-State actors and the exercise of universal jurisdiction. This may be the case, given that the origins of universal jurisdiction lie in its application to pirates who are non-State actors. This also begs the question as to whether universal jurisdiction is a tool to try non-State actors and low level State officials. What is more, the

¹⁷⁴ Reydams case note on *Aguilar v Pinochet* (n 159) 700.

¹⁷⁵ Cour d'assises de l'arrondissement administratif de Bruxelles, 29 June 2005.

¹⁷⁶ Reydams, 'Belgium's First Application of Universal Jurisdiction' (n 109) 429-30.

¹⁷⁷ *Prosecutor v Samuel Ndashyikirwa* (n 175); *Public Prosecutor v Higaniro et al* (n 157); *Public Prosecutor v Bernard Ntuyahaga*, cour de cassation, 12 December 2007; Cour d'assises de Bruxelles, 5 July 2007.

¹⁷⁸ Complaints were made against Fidel Castro, Saddam Hussein, former DRC foreign minister Abuldaye Yerodia, former Iranian President Hashemi Rafsanjani and others, Ratner (n 129) 890.

¹⁷⁹ *Prosecutor v Samuel Ndashyikirwa* (n 175); *Public Prosecutor v Higaniro et al* (n 157); *Public Prosecutor v Bernard Ntuyahaga* (n 177).

majority of cases related to the Rwandan genocide and the historical relationship between Belgium and Rwanda cannot be ignored.

The role played by private parties in initiating litigation under the *constitution de civile* mechanism cannot be underestimated. By far, this is the most common way in which cases were initiated in Belgian courts. Over 100 civil parties participated in the *Butare Four* trial,¹⁸⁰ which demonstrates firstly the importance of the procedure for victims of international crimes, and second, the need for this mechanism to be available to victims. Since the legislative changes in 2003, private parties are still initiating investigations under *constitution de civil partie* with the help of NGOs.¹⁸¹ However, the NGOs and individuals must act within the confinements of the procedural law.

It should also be noted that Belgian exercise of universality was not without criticism. One such reproach was that universal jurisdiction was a form of neo-colonialism.¹⁸² One notes that this is the same argument cited by African nations that are stepping away from the ICC.¹⁸³ It is quite ironic that a State with an abysmal human rights record during its control over the DRC,¹⁸⁴ for which Belgian leaders were not held accountable, later became known as a world court, and attempted to prosecute incumbent Congolese heads of State.

The 'top-down' effect of international law can also be seen in respect of domestic judicial decisions in Belgian courts. Part of the

¹⁸⁰ Reydams, 'Belgium's First Application of Universal Jurisdiction (n 109) 428, 433.

¹⁸¹ Civitas Maximus, 'Annual Report' (2015) 27, 29 <www.civitas-maxima.org/sites/default/files/docs/2017-07/cm_annual_report_2016_2.pdf>.

¹⁸² Vandermeersch (n 151) 401.

¹⁸³ Council of the European Union, 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (Brussels, 16 April 2009, 8672/1/09 REV 1) para 37; Schabas William Schabas, *An Introduction to the International Criminal Court* (5th edn, CUP 2017) 42-44.

¹⁸⁴ The Congo separated from the Belgian State on 30 June 1960 under la loi du 19 mai 1960, Passin 1960.

reason the law in Belgium was changed was because of the judgment of the ICJ in the *Arrest Warrant* case.¹⁸⁵ In addition, it is notable that after the decision of the ICJ in the *Arrest Warrant* case the judiciary began to apply a restrictive interpretation of the domestic law. In February 2003, before the scope of the 1999 Law was restricted, the Belgian Cour de Cassation dismissed the proceedings against Ariel Sharon, the then Prime Minister of Israel, on the grounds the immunity afforded to incumbent head of State in customary international law.¹⁸⁶ This national decision came one year after the ICJ decision in the *Arrest Warrant* case. Similarly, in *Public Prosecutor v Ndombasi et al*,¹⁸⁷ a Belgian court held that the voluntary presence of the accused was required under Article 12 of the preliminary title to the CPP, notwithstanding that Belgium had issued an arrest warrant against the suspects two years prior.¹⁸⁸ An attempt to try Laurent Gbagbo in Belgium under universality was dismissed on the same grounds.¹⁸⁹ In this respect, it is worth noting the government's comments in the explanatory memorandum to the 1993 Law, indicating that it did not believe that the presence of the accused in Belgian territory was required under the Geneva Conventions.¹⁹⁰ The law provided for:

...[T]he deletion of Article 12 of the preliminary title of the Code of Criminal Procedure (contained in the requirement that the person must in principle be found in Belgian territory for the application of the criteria of extraterritorial jurisdiction).¹⁹¹

¹⁸⁵ Observations by Belgium (n 149) para 15 (footnotes omitted).

¹⁸⁶ *Abbas Hijazi et al v Sharon et al*, Cour de Cassation, 2 February 2003.

¹⁸⁷ Chambre de mises en accusation of Brussels, 16 April 2002. Earlier litigation in this case led to the DRC complaint against Belgium before the ICJ.

¹⁸⁸ Reydams, *Universal Jurisdiction* (n 49) 116-17.

¹⁸⁹ Smet and Naert (n 127) 492.

¹⁹⁰ Projet de loi, 30 avril 1991 (n 30) p 16; A Andres, C Van den Wyngaert, E David and J Verhaegen, 'Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire' (1994) 74 *Revue de Droit Pénal et de Criminologie* 1114, 1173.

¹⁹¹ Projet de loi, *ibid*.

Thus, the transformative effect of international law on national courts regarding the exercise of universal jurisdiction can be restrictive and expansive.¹⁹² It could also be argued that the judgments are examples of the national courts using barriers to interpret international humanitarian law.¹⁹³ In this regard one notes Sharon Weill's argument that national courts will use 'avoidance doctrines' when interpreting international humanitarian law.¹⁹⁴

It was the exercise of universal jurisdiction *in absentia* against incumbent heads of State that signaled the death-knell for universal jurisdiction in Belgian law. This aspect of the law led to the ICJ decision against Belgium in the *Arrest Warrant* case. Although, the majority decision dealt with immunity in international law, universal jurisdiction was addressed *obiter dictum* by the judges. The view taken by President M Guillaume in his Separate Opinion, is based on a conservative approach regarding the lack of a permissive rule in international law on the exercise of universal jurisdiction *in absentia*.¹⁹⁵ As Leen De Smet and Frederic Naert note, '[y]et both in legal doctrine and state practice the view prevails that universal jurisdiction is only acceptable if permitted by a rule of international law'.¹⁹⁶ This view is also premised on the view that the exercise of universal jurisdiction must take the form of a positive obligation in an international convention, as opposed to it being an actionable right in customary international law. If one looks to the *Lotus* principle, States are allowed to exercise extraterritorial jurisdiction to the extent that it does not interfere with a rule of international law.¹⁹⁷ The immunity afforded to incumbent heads of State in international law is one such rule. It is difficult to come

¹⁹² See chapters 4, 5 and 7.

¹⁹³ On this see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014).

¹⁹⁴ *ibid.*

¹⁹⁵ *Arrest Warrant Case* (n 57) 42.

¹⁹⁶ De Smet and Naert (n 127) 489.

¹⁹⁷ See comments by Judge Van Den Wyngaert in *Arrest Warrant Case* (n 57) 167-69. This argument was relied on by Belgium in the proceedings.

to the same conclusion as President Guillaume that international piracy is the only 'true case of universal jurisdiction'.¹⁹⁸ This assumption appears to be based on universal jurisdiction *in absentia*, rather than universal jurisdiction based on the presence of the accused in the forum State under *aut dedere aut judicare*. Similarly, the comments are not accurate in respect of subsidiary universal jurisdiction. The problem here may be that the presence of the accused is not required for the pre-trial stage in many countries.¹⁹⁹ However, the presence of the accused is generally required for trial to guarantee the rights of the defendant, and for this reason presence is secured via extradition. Thus, the position of President Guillaume may be challenged.

Recently, the Belgian Government expressed its views on the scope and application of universal jurisdiction to the Sixth Committee of the UNGA. The position of the government on universality in customary international law is worth quoting at length:

Belgium believes that there are also customary obligations, which require States to incorporate rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the international community as a whole, such as grave crimes under international humanitarian law. This customary obligation to prosecute the perpetrators of grave crimes under international humanitarian law does not exist, in Belgium's view, unless such persons are present in the territory of the State concerned. The fourth, sixth and tenth preambular paragraphs, along with

¹⁹⁸ *ibid* 42.

¹⁹⁹ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 30 October 2014, Constitutional Court of South Africa; *Unión Progresista de Fiscales de España et al v Pinochet* Order of the Criminal Chamber of the Spanish *Audiencia Nacional* in Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain*, (Kluwer Law International 2000); *Aguilar v Pinochet* (n 159).

articles 1 and 5 of the Rome Statute, are, for example, evidence of the existence of this customary obligation, particularly in respect of the suppression of crimes against humanity.

... Belgium believes that customary law enables States which are not parties to the 1984 Convention against Torture to prosecute, on the basis of universal jurisdiction, persons suspected of torture who are present in their territory, in view of the nature of the prohibition against torture as a peremptory norm of international law. Similarly, customary law authorises States to exercise universal jurisdiction against persons suspected of acts of piracy, slavery or trafficking in persons.²⁰⁰

Belgium continues to practice extraterritorial jurisdiction and issue arrest warrants in respect of accused persons not present in Belgium, albeit not in respect of incumbent heads of State.²⁰¹ Investigations and cases continue in Belgium since universal jurisdiction was repealed within the confinements of the new procedure.²⁰²

²⁰⁰ Observations by Belgium (n 149) paras 11-12.

²⁰¹ On 19 September 2005, an arrest warrant was issued by a Belgian magistrate, Franssen against Hissène Habré. The warrant accused Habré of committing genocide, crimes against humanity, war crimes, torture and serious violations of international humanitarian law, see Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 286-87. An arrest warrant was circulated in respect of Michel Desaedeleer, a dual Belgian national accused of war crimes who was not present in Belgium until he was arrested in Malaga in August 2015 and extradited to Belgium. The case is now closed due to Desaedeleer's death. In January 2017, a Belgian Court ordered the arrest of Tzipi Livni who is accused of ordering war crimes during Operation Cast Lead while she was Foreign Minister of Israel, see Bethan McKernan, 'Former Israeli foreign minister cancels trip after threat of arrest for "war crimes"' (The Independent, London, 23 January 2017) <www.independent.co.uk/news/world/middle-east/israel-belgium-brussels-war-crimes-foreign-minster-tzipi-livni-benjamin-netanyahu-ehud-olmert-arrest-a7541401.html>. One of the victims is a Belgian national.

²⁰² *Public Prosecutor v Bernard Ntuyahaga* (n 177); *Prosecutor v Samuel Ndashyikirwa* (n 175). See also cases cited in TRIAL and others, 'Universal Jurisdiction Annual Review: make way for justice #3' (2017) 15 <https://trialinternational.org/wp-content/uploads/2016/05/UJAR_2016.pdf>.

8.6 Conclusion

This case study has attempted to answer the following question: *Is the exercise of universal jurisdiction today in line with the original rationale for the principle?* The question was limited in respect of the Belgian practice of universal jurisdiction. The answer to this question is complex, given that universal jurisdiction no longer applies to international crimes under Belgian law. This trajectory is at odds with the purpose and underlying rationale for universal jurisdiction. The active and passive personality principles leave an impunity loophole, because there is a category of persons, namely non-resident foreigners, not subject to the enforcement jurisdiction of the forum State. However, the language of universal jurisdiction and the rationale thereof is applied by the government to the active and passive personality principles. The active and passive personality principle provides a solid link between the forum State and the extraterritorial crime. This is particularly important where the accused is not present in the forum State. It allows the forum State to prosecute crimes that ultimately concern its national interest. The nationality nexus in effect brings the offence within the remit of the forum State, as it gives the State more of a justification to prosecute offences that occur on the sovereign territory of another State. This case study illustrates the extent to which international relations will impact on the exercise of the principle by a State. In this respect, it is notable how the position of foreign States can influence legal change in another State.

On the other hand, the nexus requirement leaves a loophole in the prosecutions of alleged perpetrators of international crimes where non-resident foreigners present in the forum State are not tried in the territorial State or State of nationality. This situation is ultimately at odds with the impunity rationale for universal jurisdiction. Moreover, it also goes against the rationale that some crimes are so heinous that they affect the whole of humanity and must be punished, a belief that is

also asserted by the Belgian Government.²⁰³ Of course, in reality, this loophole is more likely to protect heads of State on short-term visits to Belgium, who are additionally protected by the provisions of the 2003 repeal law, which exclude them from Belgium enforcement jurisdiction.²⁰⁴ This scenario is worrying, given that national tribunals have priority to try persons accused of international crimes. What is more, the ICC can prosecute incumbent heads of State where a State with jurisdiction over the offence is unable or unwilling to try the offence.²⁰⁵ Given the limited capacity of the ICC, it is important and necessary that national courts engage their duties to prosecute international crimes. However, the reality of international politics means that in practice not all heads of States are subject to the jurisdiction of the ICC as explained in chapter 6. This is a particularly detrimental situation for international justice given that Belgium has specifically legislated to exclude heads of State from its enforcement jurisdiction.

The Belgian Government publicly declares its support for universal jurisdiction and the impunity rationale thereof. As Belgium recently noted, 'The States parties to a treaty which includes an *aut dedere aut judicare* obligation must therefore incorporate universal jurisdiction into their legislation...'.²⁰⁶ The irony of course is that Belgium no longer exercises universal jurisdiction. The impunity rationale appears to be the main concern for Belgium, which is faced with a very real situation of alleged perpetrators of international crimes in its territory. Such suspects often live in Belgium legally via residency or asylum. Thus, the rationale for the principle of *dedere aut judicare* asserted by Hugo Grotius in the 16th century whereby it was unjust that a suspect be allowed to live freely in another State following the commission of a crime is relied on in contemporary times. The repeal of

²⁰³ See above.

²⁰⁴ See above.

²⁰⁵ See section 6.3.

²⁰⁶ Observations by Belgium (n 149) para 9.

the law was the result of complaints from a number of States whose nationals were subject to universal jurisdictions proceedings. Thus, ultimately in the conflict between impunity and international relations, foreign policy concerns won. Perhaps a balance may be struck between the exercise of universal jurisdiction to prevent impunity and the preservation of healthy relations with other States if States adopt the principle of subsidiarity in their exercise of universality. This would entail granting priority of prosecution to a State with a closer nexus to the crime that is able and willing to carry out the prosecution. A further measure would be to allow private parties to initiate proceedings, and subsequently require public prosecutor consent for trial.

The role of forward thinking innovative judges is also important in the advancement of universal jurisdiction in the Belgian legal system. In this context, one wonders what is the influence of judges with a background in international law and an understanding of universal jurisdiction on the practice of universal jurisdiction in other States. Similarly, the role of private parties in initiating complaints is important, and indeed this was a reason Belgium became known as a 'world court'. The restricted ability of private parties, particularly victims, to initiate proceedings under universal jurisdiction raises questions in respect of the access to justice of victims of serious violations of international law. One also wonders to what extent the awarding of costs acts as a barrier to these trials.²⁰⁷

A further important issue illustrated in the Belgian case is how law is interpreted by the judges and also by politicians. This point is particularly relevant regarding the conflict between universal jurisdiction as an obligation in an international treaty versus universal

²⁰⁷ In declaring themselves *partie civile*, victims are subject to costs if the case is unsuccessful, Reydams, *Universal Jurisdiction* (n 49) 108; Van Den Wyngaert (n 61) 17. In *Ndombasi et al* (n 187) the pre-trial appeals court awarded costs against the civil parties, see p 2. Costs were awarded against the applicants in *Abbas Hijazi at al v Sharon et al* (n 186) p 5.

jurisdiction as a right of States not codified by an international convention. It is evident that the decision of the ICJ played an important role in instigating the legislative restrictions in Belgium. It is clear that the ICJ will prioritise the former obligation as a source of international law. This suggests that States will have a stronger footing to exercise universal jurisdiction on the basis of an obligation in an international treaty. Prior to 2003, Belgium exceeded the obligations concerning universality in international conventions. It is arguable that part of the issue with Belgium was that it went beyond the parameters of international treaties. If the pre-2003 legislation was based on the parameters of international treaties it is likely that the ICJ would have found in Belgium's favour. Contrast the decision of the ICJ in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* with the ICJ decision in the *Arrest Warrant Case* where Belgium's claim was based in customary international law.²⁰⁸ This contention is unsurprising given the primacy of conventional law in the hierarchy of sources in Article 38 of the ICJ Statute. Of course, the irony is that when Belgium repealed its laws on universal jurisdiction in favour of the active and passive personality principles, it no longer fully complied with its obligations to either prosecute or extradite foreigners present in its territory accused of having committed grave breaches of the Geneva Conventions and AP I and UNCAT. What is more, this further adds to the argument that there is a need for provisions on universal jurisdiction to be included in international treaties concerning war crimes committed in NIACs and crimes against humanity, notwithstanding the influence of the Rome Statute on the application of universal jurisdiction to these crimes.

In examining the Belgian experience of universal jurisdiction, it is important to remember the context in which this law was created and

²⁰⁸ Compare the decision of universal jurisdiction *in absentia* in the *Arrest Warrant Case* (n 57) with the exercise of universal jurisdiction under UNCAT in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422.

expanded.²⁰⁹ The violent armed conflicts in the Balkans and in Rwanda in the 1990s were the impetus for significant advancements in international criminal law. In addition, 1999 Law was introduced for a specific context, namely, to try génocidaires present in Belgium. It is evident that once universal jurisdiction was applied outside of these contexts it became problematic for Belgium. This case study demonstrates that when universality is engaged in respect of a specific situation of importance to the forum State (for example, in the context of WWII or the Rwandan genocide) it will operate relatively smoothly. In part, because the State of nationality of the accused has been vilified by the international community and does not object to the proceedings. However, once exercised outside of this context, the law will not withstand the pressure of objecting States whose nationals are subjected to the exercise of universal jurisdiction. Even as late as 2007, Belgium was still trying Rwandans for international crimes committed in Rwanda.²¹⁰ It is also clear that when exercised against State actors or senior officials, universal jurisdiction is more likely to interfere with the forum State's international relations.

Either way, it is clear that procedural necessities impede the prospect of universal jurisdiction cases coming to fruition, which negates the purpose of universal jurisdiction being legislated for in the first place. What is more, it illuminates the gap that exists between the profession of the need for universal jurisdiction, the reason for its existence and the utilisation of the extraterritorial jurisdiction in practice. This situation begs the question of whether universal jurisdiction really is a rationale-based jurisdiction; perhaps it is a jurisdictional principle based on rhetoric. It is not the case that Belgium must become a global prosecutor, as this would be an unrealistic aim, but, if the Public Prosecutor does not allow prosecutions then the State's adherence to its treaty-based obligations can be questioned.

²⁰⁹ Smis and Van der Borgh (n 52) 918.

²¹⁰ *Public Prosecutor v Bernard Ntuyahaga* (n 177).

Ultimately, a balance must be struck between the rights of the executive to maintain positive relations with other States and the treaty-based international obligations on the State concerning serious violations of international law. Otherwise, the codification of universal jurisdiction in international treaties is pointless.

CONCLUSION

In the International Court of Justice (ICJ) case of *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, presiding judge M. Guillaume affirmed ‘international law knows only one true case of universal jurisdiction: piracy’.¹ This work, and others,² demonstrate that universal jurisdiction exists in international law and is exercised by States on a regular basis. This thesis provided an extensive analysis of the development of universal jurisdiction over serious crimes under international law and international piracy. The central research question for this study was: *Is the exercise of universal jurisdiction today in line with the original rationale for the principle?* Parts one and two of this thesis analysed the development of universal jurisdiction over the crimes to which it applies in order to evaluate the rationale for this evolution. The preliminary research questions for these segments were: *What is the rationale for the development of universal jurisdiction over the crimes to which it applies? How did universal jurisdiction transpose from piracy to other crimes?* It was established that there are a variety of rationales cited when universal jurisdiction is exercised. The reasoning can be categorised into two areas. The first is composed of theory-based justifications and the second is based on practical concerns. The former centers on humanitarian motivations and includes the belief that the nature of the offence is so detrimental to world society that the crime must be punished. *Any* State can therefore prosecute the offender, regardless of whether they have a sovereign link to the crime or not. The second

¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 42.

² Maximo Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational prosecution of International Crimes’ (2011) 105 *American Journal of International Law* 1; TRIAL and others, ‘Making Way for Justice #3’ (2017) 8 <<https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/>>; Trial and others, *Make Way for Justice* (2015) <www.fidh.org/en/issues/international-justice/universal-jurisdiction/make-way-for-justice-universal-jurisdiction-in-2014-scrutinized-by>.

rationale is based on practical reasoning, where the circumstances in the territorial State are such that a prosecution is unlikely to manifest. It follows that the offence will result in impunity if a bystander State does not prosecute the offender. There are other rationales for the exercise of universal jurisdiction. These are: to deter future commission of international crimes, the unification of penal laws, and to prevent vigilantism in the forum State.

Parts three and four of this study compared the original rationale for universal jurisdiction to modern utilisation of the principle since the creation of the Rome Statute. This task was carried out to answer the central research question. This thesis concludes that modern use of universal jurisdiction does not conform to the underlying rationale for the principle. The comments in this conclusion are applicable to States in a similar position to Belgium that have curtailed the scope of the application of the principle in their jurisdiction as a result of foreign policy concerns.³ Indeed, the transition away from universality in favour of a nexus requirement is evident in both civil and common law jurisdictions,⁴ and as such these observations apply to both types of legal systems. Substituting the universality principle with the active personality or passive personality principle does not meet the above-mentioned rationale. This allows persons who do not meet the nexus criteria to be present in a State without being apprehended. In such a scenario, the impunity rationale is not met. Second, increasing the scope of active or passive personality to include persons who are not nationals but residents, or to persons who subsequently acquire residency, does not satisfy the 'no safe haven' rationale for the universality principle. In practical terms, this is unlikely to affect individuals of high political standing who travel to

³ In respect of the recent restrictions introduced in Spain and the UK, see Langer, *ibid*; 'United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes-Police Reform and Social Responsibility Act 2011' (2012) 125(6) *Harvard Law Review* 1554.

⁴ *ibid*.

countries with a similar jurisdictional framework to Belgium.⁵ Other persons who are exempt from prosecution are those who are not nationals and not residents. In respect of such persons, a worrisome situation arises where no extradition agreement is in place between the forum State and the State of nationality of the accused or territorial State. As Amnesty International and others have noted, deportation should not be relied on as a substitute for engaging the obligation to try or extradite in international law.⁶ As the case study in this thesis illustrated, this move away from universality towards the active personality principle was introduced after a series of diplomatic issues with other States whose nationals were subject to proceedings. This leads one to believe that the reason for such a legislative move was to protect such non-nationals or non-residents from being prosecuted.

This is a negative development for a number of reasons. First, it means that some countries are *not* exercising universal jurisdiction when they are obligated to in international law. The universal jurisdiction principle codified in respect of grave breaches of the Geneva Conventions, torture and enforced disappearances is an obligation based in conventional law. The incorporation of the active and / or passive personality principles into national law instead of universal jurisdiction does not give rise to the full breadth of the obligation to try or extradite, envisaged in international treaties. Moreover, the obligation in respect of grave breaches of the Geneva Conventions and torture is recognised as being part of customary international law.⁷ Second, in terms of the crimes over which States have the right to exercise universal jurisdiction under international law,

⁵ See for example, Spain and the UK.

⁶ Amnesty International, International Federation of Human Rights, Hickman & Ross Solicitors and Redress, 'Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law' (July 2008) 19-20 <www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf>.

⁷ See chapter 4.

its utilisation is not being provided for at a national level. This raises serious questions in respect of the implementation of international law in domestic legal systems. In particular this is a significant issue for common law legal systems, like the UK and Ireland that only incorporate the universality principle when this is dictated by international treaties, notwithstanding that customary international law was once considered to be part of the common law.⁸ This is an alarming state of affairs given that the priority for prosecution of international crimes rests with States. It is imperative that States adhere to their obligations and responsibilities under international law.

It is also clear that the same rationale that was traditionally cited for the exercise of universality is now being used for the exercise of the active and passive personality principles. As chapter 8 demonstrated, the Belgian Government cites the humanitarian rationale for universality and applies it to legislation providing for the active or passive personality principles. This feature takes away the uniqueness of the universality principle because part of the rationale for universal jurisdiction is that the heinousness of the offence justifies the forum State prosecuting a crime to which it has *no sovereign based link*. When the active or passive personality principles are exercised, the forum State has an express link to the crime via its national(s) or resident(s). This merely discredits what separates universal jurisdiction from the other forms of extraterritorial jurisdiction. It also suggests that the language of impunity and international crimes today is more rhetoric than substance.

Chapters 6, 7 and 8 illustrated that for some States parties to the Rome Statute, the complementarity principle is viewed as being the

⁸ *Regina v Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet* UKHL, 24 March 1999 reprinted in (1999) 38 *International Legal Materials* 581 (*ex parte Pinochet*) paras 649-50 (comments of Lord Millet); *Filartiga v Pena Irala* (1980) 630 F 2d 876 Court of Appeals, Second Circuit (United States).

way forward for international criminal justice. This entails an increased responsibility on the part of States. The paradox here is that if States parties are reducing the scope of the application of the universality principle, they are failing in their primary duty under complementarity. In addition, there is an increased likelihood of impunity for certain crimes, which in turn means that the objectives of the Rome Statute are not being met. More importantly, States that adopt similar measure to that of Belgium are simply not meeting their primary duty to prosecute international crimes that exists independently of the ICC framework. In addition, they are not meeting their *erga omnes* obligations under customary international law.

It is notable that the codification of restrictions on the exercise of universal jurisdiction coincides with the increase in reliance on the principle from the 1990s onwards. Such legal barriers prevent victims of international crimes and their families from seeking redress for the abuses committed against them. What is more, this is a move away from the strides made in the area of victimology in the 1990s. The right to a remedy in respect of human rights violations is well established in international law,⁹ as it is in IHL.¹⁰ Negating the right of victims to redress is contrary to the impunity prevention justification that is part of the rationale for the exercise of universal jurisdiction. Moreover, it also threatens access to justice for victims of serious crimes under international law. Certain international instruments assert access to

⁹ See also UDHR, Art 8; ICCPR, Art 2; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, Art 6; UNCAT, Art 14; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art 39; ECHR, Art 13. Dinah Shelton, *Advanced Introduction to International Human Rights Law* (Elgar Advanced Introductions 2014) 179-186.

¹⁰ Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907, Art 3; API, Art 91. Indeed, it must be recalled that international human rights treaties are applicable in armed conflict. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136. The Rome Statute of the also contains the right to remedy for victims, Rome Statute, Arts 68 and 75.

justice for victims of international crimes. Article 4 of the 1985 UN Declaration on Victims of Crimes and Abuse of Power asserts that, 'Victims ... are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered'.¹¹ What is more, it is important that States have the necessary mechanisms in place, such as specialised investigation units, to facilitate such prosecutions.¹²

The incapacity of victims to initiate investigations into alleged international crimes in States such as Belgium, reduces the right of access to justice for victims of serious crimes under international law. Indeed, one of the reasons for allowing private prosecutions was to 'prevent aggrieved members of the public from taking the law into their own hands'.¹³ As was noted by Diane Orentlicher, UN Independent Expert to Update the Set of Principles to Combat Impunity:

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as parties civiles or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party

¹¹ See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005), para 4 of the Preamble.

¹² International Federation of Human Rights and Redress, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes' Units (December 2010) <www.fidh.org/IMG/pdf/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf>.

¹³ DD Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124, 128.

and to any person or non-governmental organization having a legitimate interest therein.¹⁴

Indeed, it may be argued that the lack of access to justice for victims of serious crimes under international law could be included by the ICC in the non-exhaustive list of considerations to be taken into account when carrying out a complementarity analysis.¹⁵

The trajectory of universal jurisdiction in Belgium from 1993 onwards can be summed up by the words of examining magistrate, Damien Vandermeersch in *Aguilar v Pinochet*; words that are relevant in Belgium, and indeed other countries, today:

Concerning the enforcement of international humanitarian law, too, the risk is not that states may overstep their competence but rather that by looking for excuses to justify their alleged incompetence, they condone the impunity of the most serious crimes (which certainly goes against the *raison d'être* of international law).

Only one of the following two alternatives can hold: *either* crimes against humanity are ordinary crimes which do not transcend national boundaries and their punishment is left to the discretion of states, *or* crimes against humanity are of an unspeakable and unacceptable nature and their punishment is a common responsibility of all states.

In the latter case, all states and all humankind have a legal interest in the punishment of such crimes. Hence, it follows that

¹⁴ ECOSOC, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN doc. E/CN.4/2005/102/Add.1, p 12.

¹⁵ See section 6.3.

even in the absence of a treaty, national authorities have the right-and in some circumstances the obligation-to prosecute the perpetrators independently of where they hide.

The struggle against the impunity of persons responsible for crimes under international law is, therefore, a responsibility of all states. National authorities have, at least, the right to take such measures as are necessary for the prosecution and punishment of crimes against humanity.¹⁶

In terms of the development of universal jurisdiction and its transposition to other serious crimes under international law, this research has also demonstrated that the history of progression of the universality principle is the result of concerted policy of one or more States. Chapters 1 and 2 attested that the application of the principle to piracy and the slave trade was the result of British Government policy. In respect of war crimes in international armed conflict, it was the concentrated effort of the States that participated in the UNWCC, with a minority of States asserting its application to crimes against humanity. Thereafter, the principle was sponsored by a variety of States depending on their national interest.¹⁷ In addition, this also explains the variation in State support for universality in respect of particular crimes. This research demonstrated that support for universality over crimes varies depending on the composition of the government.¹⁸ Up until the 'war on terror', the US supported the application of universal jurisdiction in respect of torture. In contrast, the UK, which was a strong advocate of the application of universal jurisdiction to the slave trade, was hesitant to agree that it should also apply to genocide and

¹⁶ Cited in case note by Luc Reydam's (1999) 93 *American Journal of International Law* 700, 702.

¹⁷ See for example the US support of the inclusion of universal jurisdiction in UNCAT and the USSR position towards the inclusion of a provision authoring universal jurisdiction over apartheid.

¹⁸ See section on further research, below.

crimes against humanity. It is also evident that States change their attitude towards universality depending on their interests. For example, the US Government was positive towards the application of universal jurisdiction over genocide during the operation of its National Military Tribunals. However, the government was completely opposed to the inclusion of universal jurisdiction in the draft Genocide Convention. Thus, State support for universality was tied to national interest concerns. It is also evident that the trajectory of universal jurisdiction is heavily influenced by legal scholars, whose writings have been relied on by national and military tribunals, and then codified in international treaties in respect of certain offences. In this respect, writers such as Emil Rappaport, Henri deVabres, Raphael Lemkin and Willard Cowles played an important part in the development of universal jurisdiction over international crimes.

Some other features of the development of universal jurisdiction must be highlighted. The case study evidenced that the creation of the Rome Statute has resulted in a streamlining of national legislation concerning international crimes, more specifically the ICC core crimes (excluding aggression), in the legal systems of some State parties.¹⁹ In Belgium, the incorporation of the Rome Statute into domestic law acted as an impetus for criminalising the ICC core crimes that had yet to be criminalised under domestic law. This approach is mirrored in the jurisdiction of other States parties.²⁰

In term of its contribution to the existing literature, this thesis illuminates how universal jurisdiction transposed from piracy *jus gentium* to other crimes. In addition, this study demonstrates a series of important elements of State practice, some of which have been present since the principle's inception. These are: (1) That the presence of the

¹⁹ On this point see Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008).

²⁰ See UN Secretary General Reports on the Scope and Application of Universal Jurisdiction from 2010-2015.

accused in the territory of the forum State is a part of the principle. (2) International comity between the forum State and the territorial State is a component in the decision to prosecute the accused. (3) There is a nexus between universal jurisdiction and serious crimes committed during armed conflict. (4) For the exercise of universal jurisdiction to run smoothly, it must be utilised to try serious crimes under international law that have been committed in an armed conflict that has been condemned by the international community. (5) Universal jurisdiction trials are likely to proceed when the accused is a non-State actor or a low level State official. Each of these points is elaborated on in turn.

1. The presence of the accused in the forum State is required for the exercise of the universality principle

Chapters 3, 4, 5, 7, and 8 demonstrated that the presence of the accused in the forum State is a fundamental part of the exercise of universal jurisdiction over serious crimes under international law. This requirement is enshrined in some international treaties. It forms the impetus for the forum State to initiate the prosecution when it is relying on the right to exercise universality under customary international law. In respect of the right of search exercised against suspect pirates and slave traders on the high seas, presence of the accused was actively sought by the forum State. This was also the circumstance that precluded the presence of Eichmann in Israel. More recently, presence is normally fulfilled by the voluntary entry of the accused into the territory of the forum State. The extent to which the presence of the accused in the forum State is part of State practice means that it can be argued that this is part of the rationale for the exercise of the principle. If one looks to the early writers on the subject, such as Grotius, Lemkin, deVabres and Pella, they all supported the principle based on the presence of the offender in the State to which they have fled. Hence, the early scholars all asserted the exercise of the universality principle

within the framework of *aut dedere aut judicare*. The presence requirement also feeds into the 'no safe-haven' rationale for universal jurisdiction, because it does not allow the alleged perpetrator to live freely in another country after fleeing the place of the crime. It is also clear that when a general duty of universality is proposed outside of this framework it is met with resistance. This thesis concludes that for universality to operate successfully into the future it needs to go back to its *aut dedere aut judicare* origins.

If one analyses State practice, it is evident that universality becomes problematic when it is utilised outside of the *aut dedere aut judicare* framework, namely when universal jurisdiction *in absentia* is exercised. Indeed, the utilisation of universality *in absentia* led to a call for a 'plea for a sensible notion' of the principle, based on the presence of the accused in the forum State.²¹ States should be encouraged to apply the universality principle within this framework, which is where universal jurisdiction is exercised against persons who are *present* in their territory. What is more, this structure is more likely to realise the fair trial rights of the accused. This framework should also be used to encourage the inclusion of universality in future international treaties concerning serious crimes under international law. *In absentia* trials are not an element of the development of universal jurisdiction. In this regard, one notes the separate opinion of President Guillaume in the *Arrest Warrant* case where he stated 'Universal jurisdiction *in absentia* is unknown to international conventional law'.²² Moreover, it is arguable that the *aut dedere aut judicare* approach is more likely to achieve the balance between the sovereignty concerns of States and the need to prosecute torture (and other serious crimes under international law) wherever committed. As was noted in the ICJ case concerning *Questions relating to the Obligation to Prosecute or Extradite*:

²¹ Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589.

²² *Arrest Warrant Case* (n 1) 40.

The obligation to submit the case to the competent authorities for the purpose of prosecution ... was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems.²³

What is more, the obligation to try or extradite provides a nexus between the forum State and the extraterritorial offence, through the presence of the suspect.

However, the presence of the accused in the territorial State cannot trigger the exercise of the jurisdiction where the State has not legislated for universality. In respect of the State examined in detail in Part 4, Belgium opted for nationality-based jurisdiction, which is extends to persons legally resident in the State for at least three years. In addition, Belgium introduced legislation forbidding the arrest of foreign heads of State, while on short-term visits to their jurisdiction.²⁴ Where universal jurisdiction is an obligation under conventional international law, it is important to note that a State may not cite its internal law as a justification for failure to adhere to a treaty provision in international law.²⁵ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law were adopted by the UN General Assembly in 2005. They affirm:

If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

...

²³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 90.

²⁴ See section 8.4.1.

²⁵ Vienna Convention on the Law of Treaties 1969, Art 27.

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.²⁶

The reality of international crimes is that they are usually carried out by the State apparatus or by persons affiliated to a State. Therefore, it is imperative that States incorporate universal jurisdiction into their domestic law, to allow for extraterritorial prosecutions as per their treaty obligations. What is more, obstacles addressed in Chapters 7 and 8 demonstrate that there are other barriers to the exercise of universal jurisdiction when the offender is present in the forum State. Some of these, such as prosecutorial discretion can be rectified. Unfortunately, others such as immunity granted to incumbent heads of State in international law cannot be removed as easily.

2. International comity

The international comity requirement has traditionally been an element of the exercise of universal jurisdiction. Chapter 1 explained how it was a formal factor in the evolution of universal jurisdiction over international piracy. This feature was further legalised in the nationality restrictions that applied to the exercise of the jurisdiction under the UNWCC, as shown in chapter 3. In this regard, it should be noted that a central justification in the rationale for the exercise of universal jurisdiction was that pirates were enemies as opposed to allies of the forum State, and this narrative of 'allies and enemies' is evident in the language of universal jurisdiction today. Thus, it may be convincingly argued that international comity has *always* been an element of the exercise of universal jurisdiction.

²⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation (n11) part I, s 2.

It is asserted that this aspect of the extraterritorial jurisdiction is formalised, in modern times, in the executive discretion that is codified in the laws of States, including the case study country examined in this work. Empowering an office that is linked to the executive to make the decision as to whether the proceedings are initiated ensures that political considerations are codified in law. Public prosecutors are not immune from political considerations when making the decision to proceed with a trial that may damage the State's relations with other States. Too often, this power is utilised to the detriment of those seeking retribution for crimes committed against them and their family members. As chapters 7 and 8 illustrate, foreign policy concerns are superior to the humanitarian obligations that warrant the exercise of the universality principle. At times, domestic policy will overlap with foreign policy, such as the UK in its quest for abolition of the slave trade.²⁷ It is submitted that guidelines for prosecutors in how to address such complaints, along with increased transparency in the decision making process will improve the future exercise of universal jurisdiction.²⁸ As Redress and the International Federation for Human Rights note, 'Clear and transparent criteria can also provide guidance to victims and organisations when filing complaints, helping those victims and making the justice system more efficient'.²⁹ The political interference of the executive demonstrates the inconsistencies in the humanitarian rationale for universal jurisdiction. As Redress and FIDH have noted, there are instances of European Governments leaking the receipt of a complaint to the foreign official concerned, which then gives the accused person the opportunity to flee the forum State before any

²⁷ David Eltis, *Economic Growth and the Ending of the Transatlantic Slave Trade* (OUP 1987); Chaim D Kaufmann and Robert A Pape, 'Explaining Costly International Moral Action: Britain's Sixty-Year campaign against the Atlantic Slave Trade' (1999) 53 *International Organization* 631.

²⁸ Steven R Ratner, 'Belgium's War Crime Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888, 894-96.

²⁹ Redress and the International Federation for Human Rights, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union* (December, 2010) 30 <www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf>.

further action can be taken.³⁰ This reality illustrates that where there is a conflict between humanitarian and foreign policy concerns, the latter will prevail.

Humanitarian consideration will not always be part of a State's foreign policy, because, ultimately, foreign policy is an extension of national policy.³¹ Foreign policy considerations will always prevail when universal jurisdiction is exercised. One can see the influence of foreign policy on the forum State by looking at its effect in the case study, where pressure from other States resulted in changes to the domestic law. Indeed, it could be argued that such pressure interferes with the sovereignty of the forum State.

The current exclusion of private party access to initiate prosecutions that is evident in both the case study and other countries must be rectified.³² If a State's national legislation requires the authorisation of the executive via the public prosecutor's consent for the investigation to proceed at the pre-trial stage, it is the equivalent of placing a caveat on the obligation to try or extradite within the respective treaty. The Geneva Conventions, Additional Protocol I, UNCAT and CED do not make reference to executive consent as a required part of the obligation to prosecute or extradite. Thus, the full breadth of the obligation to try or extradite is not fulfilled in the case study and indeed States in a similar position. Ultimately, this executive consent requirement poses serious problems for the nexus between international law and national courts. It is at this juncture that the power of international rules is truly challenged. At the same time, one may ask what is the point of States promising to exercise obligations in respect of universality in international treaties, if executive discretion

³⁰ *ibid* 4.

³¹ Bruno Syagno Ugarte, 'Human Rights and Foreign Policy: Syntheses of Moralism and Realism' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 141, 148. The US Carter Administration was largely an exception, at p 147.

³² See text at note 3.

buffers them from actually exercising such jurisdiction? Additionally, the role played by judges applying universal jurisdiction principles raises issues in respect of the division of the separation of powers in constitutional democracies.³³ In the case study and other countries, it is evident that judicial interpretation conveniently favoured the foreign policy concerns of the forum State over the rationale for the exercise of universal jurisdiction. Traditionally, the responsibility for the maintenance of international relations rests with the executive, so perhaps we should not be too surprised by the granting of executive decision making to this organ.

3. The nexus between universal jurisdiction and armed conflict

This research demonstrated that the concept of universal jurisdiction originates from armed conflict. Chapter 1 illustrated that the emergence of the application of universal jurisdiction to piracy stemmed from the non-application of the laws of war to pirates. Thus, perhaps the labelling of piracy as the first international crime is not so far removed from the concept of international crimes today as one might think. Similarly, as chapters 2, 3 and 4 demonstrated, prior to the creation of UNCAT, the only period when States supported the application of universality in respect of an act was during wartime. What is more, it was the international armed conflict that internationalised the post-war punishment of WW II. As this thesis demonstrates, the main reason cited in opposition to the inclusion of universal jurisdiction in international treaties is State sovereignty.³⁴ Armed conflict internationalised the punishment of such offences and facilitates the removal of the veil of sovereignty, which would otherwise prevent such action. This was facilitated under customary international law. Thus, the significance of the codification of universal jurisdiction in respect of

³³ Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009).

³⁴ See Chapters 2, 4, 6 and 8.

torture and enforced disappearance during peacetime should be acknowledged. It is foreseeable that a treaty providing for crimes against humanity will be agreed in the future, but only when the possibility of former colonisers being tried for colonial abuses has passed. The non-applicability of statutes of limitations to crimes against humanity means that Western States may still be liable for the international crimes committed in former territories.

4. Universal jurisdiction as a remedy for international crimes committed in armed conflicts that are universally condemned

As this study elucidates, universal jurisdiction advances significantly when the aftermath of an armed conflict garners international condemnation. The strides made in its development at the UNWCC after WW II and the progress in respect of the development of universal jurisdiction over genocide, crimes against humanity and war crimes in non-international armed conflict after the systematic violence carried out in the Balkans and Rwanda are cases in point. This advancement was first fulfilled by the UNWCC, and later by the UNSC. Here, one wonders if the universal jurisdiction prosecutions are part of an emotional response on the part of the international community.³⁵ When the international community, led by powerful States, supports a prosecution under universal jurisdiction, a prosecution is more likely. In the examples given, the international community vilified the perpetrators, and their States of nationality were not in a strategically powerful position to enable them to prevent prosecution. It is further contended that prosecutions under universal jurisdiction run smoothly when they occur in the context of a conflict that receives much media attention. Here, one is reminded of the assertion by Raphael Lemkin

³⁵ On a related note, Michael A Newton's comments that Rome Statute was 'adopted by an emotional vote rather than by international consensus', Michael A Newton, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the ICC' (2001) 167 *Military Law Review* 20, 45.

that one of the reasons for universality applying to genocide was because the heinous act committed abroad was a concern of the population of the forum State and that public uproar in a State is a justification for that State to exercise universal jurisdiction.³⁶

It follows that a forum State relying on the universality principle over a universally condemned crime under international law can be more confident that the trial will succeed. This is an important and formidable factor in terms of prioritising cases with limited State resources. What is more, it also means that the trial will be less political as it otherwise could be. In some cases, the alignment of national interests between those of the forum State and the international community is another reason asserted for the exercise of universality.³⁷ Indeed, this is further linked to the notion of international comity.³⁸ Of course, international condemnation does not equate to universal application of the jurisdiction, as political hegemony dictates reliance on the principle.³⁹ Indeed, it can be said that this has always been the case, if one looks to the British assertions that the principle should be applied to the slave trade, or the Allies assertions in the aftermath of WW II. Universal jurisdiction is a means of punishing offences while at the same time overlooking similar offences committed elsewhere. Non-European States also utilise the jurisdiction in this manner.⁴⁰

³⁶ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) chapter IX, section III. The idea that public consciousness may be violated was also included in the preamble of the Hague Convention, which referred to the 'requirements of the public conscience'.

³⁷ See *Hadamard Trial* in *Law Reports of the Trials of War Criminals*, vol 1 (UNWCC, H M Stationary Office 1947); *Filartiga v Pena Irala* (n 8).

³⁸ See subsection 2 above.

³⁹ Aisling O' Sullivan, *Universal Jurisdiction in International Criminal Law* (Routledge 2017).

⁴⁰ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 30 October 2014, Constitutional Court of South Africa; Jugement rendu par la Chambre Africaine Extraordinaire d'Assises d'Appel dans l'affaire ministère public contre Hissein Habré <www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/653-document-jugement-complet-et-r%C3%A9sum%C3%A9-du-verdict.html>.

5. Universal jurisdiction and non-State actors

The historical trajectory of universal jurisdiction also highlights that the principle developed over genocide and crimes against humanity as a right in customary international law with the increasing recognition that international crimes carried out by non-State actors could be prosecuted under international law. Here, it can be convincingly argued that altercations between the forum State and the State of nationality are less likely where the principle is exercised against non-State actors rather than high-ranking State officials. This in turn goes back to State sovereignty as the main reason for opposition to the inclusion of universality in international treaties, as was illustrated in chapters 2, 4 and 6. These chapters demonstrated that resistance to universality began when the jurisdiction was expanded to apply to State activity in peacetime. State officials represent the State, and as such State sovereignty is engaged. States are more likely to be aggrieved when universal jurisdiction is exercised against high-level State officials than when the principle is used to try non-State actors. However, it appears that the utilisation of the principle in respect of the heads of State of certain countries, largely from the Global South, is an exception to this assertion. The attempts to prosecute former General Augusto Pinochet and the prosecution of former President of Chad, Hissène Habré, both illustrate this point. It is notable that the move away from universality toward the nationality-based types of enforcement jurisdiction occurred after attempts were made to try leaders of the Global North under universal jurisdiction. In contrast, when the leaders of the post WWII Allies first advanced the principle collectively, they did so in a way that protected their officials from prosecution.⁴¹ This illustrates the wider hegemony of powerful States in international relations today.⁴²

⁴¹ See chapter 3.

⁴² Martti Koskeniemi, *The Politics of International Law* (Hart 2011) 238-40. Jean Allain, 'Orientalism and International Law: The Middle East as the

This begs the question whether the application of universal jurisdiction to genocide and crimes against humanity is partly as a result of the need to bring non-State actors who are nationals of other States into the realm of international punishment. If non-State actors are tried under the principle, it is less likely a forum State will run into problems with other States. The origins of universality were against non-State actors, so in some ways the principle has transitioned full circle.

6. Contemplating the future of universal jurisdiction and further research

An earlier proposed title for this study, examining the history of the principle of universality and its rationale, was ‘The transitional nature of universal jurisdiction’. However as the study progressed, it became apparent that the justifications for the exercise of universal jurisdiction since its origins still apply today. Similarly, the reasons cited in opposition to the jurisdiction since its inception are also still relied on today. The jurisdiction has, of course, been extended to apply to more crimes, however barriers to litigation coincided with increased reliance on the principle. These factors negatively impact the fruition of universal jurisdiction. The biggest obstacle to the exercise of universal jurisdiction is the international comity element owing to its capacity to prevent investigations from occurring in the first place while also preventing reliance on the rationale for universality. The universality principle has always been selective and this is due in part to the priority given to international relations concerns. In terms of the importance of universal jurisdiction in the context of the principle of complementarity, this is a worrisome situation. One possible reason why States are limiting their national legislation on universal jurisdiction may be that the Rome Statute does not obligate States

Underclass of the International Legal Order’ (2004) 17 *Leiden Journal of International Law* 391.

parties to incorporate the principle into domestic law. However, it is arguable that the Rome Statute encourages States parties to enact the territorial and active personality principles into their national law.⁴³ States may see the Rome Statute model as the basis for the prosecution of core crimes in the future. Yet, the reality of modern international criminal law is that with a fully functioning ICC, there will still be an impunity gap in the prosecution of international crimes, which is to be filled by national courts.⁴⁴ Furthermore, the ICC is complementary to national jurisdictions, and for this reason it is paramount that States incorporate universal jurisdiction over international crimes in their domestic law as ‘States have primary responsibility to exercise jurisdiction over serious crimes...’.⁴⁵

On the one hand, if this transition toward the active and passive personality principle continues, it could be argued hypothetically that in the long term the customary right to exercise universal jurisdiction could fizzle out. However, it is easily predicted that States will rely on the principle when their interests and relations with other States are not affected. Given that the history of universal jurisdiction evidences that it is a response to international atrocity, it is likely that the international community will continue to rely on it in response to serious crimes under international law. It is also predictable that universal jurisdiction will continue to be utilised to prosecute those declared to be enemies, particularly non-State actor members of fundamental Islamic groups such as Islamic State and Boko Haram.⁴⁶ It

⁴³ See chapter 6.

⁴⁴ Presentation by Dr. Fabricio Guariglia, Prosecutions Coordinator in Office of The Prosecutor at the International Criminal Court, at the Congress on Universal Jurisdiction in Madrid on 22 May 2014.

⁴⁵ Report of the independent expert to update the Set of principles to combat impunity (n 14) 13.

⁴⁶ On the subject of Islamic State, Boko Haram and international criminal law see Mohamed Badar, Masaki Nagata and Tiphonie Tueni, ‘The Radical Application of the Islamic Concept of Takfir’ (2017) 31 *Arab Law Quarterly* 134; Mohamed Badar, El Sayed M A Amin and Noelle Higgins, ‘The International Criminal Court and the Nigerian Crisis: An Inquiry into Boko

is likely that universality will be further codified in future and that it will expand to incorporate more offences.

Further research is recommended in three areas: First, in order to assess if, (and to what extent) the legislation incorporating the Rome Statute into domestic law has led to an increase in universal jurisdiction cases. However, it must be remembered that the Rome Statute is the reason that many States enacted universality into their national law.⁴⁷ Moreover, given that much of the case law since the 1990s stems from the war in the Balkans and the genocide in Rwanda,⁴⁸ the impact of the ICTY and ICTR on universal jurisdiction cases should also be examined. Further study on this is proposed, given that States exercised universality under legislation that was introduced to give effect to the obligations on Member States in respect of the ICTY and ICTR.⁴⁹ Second, given that State support for universal jurisdiction can differ depending on the priority of governments, further study is needed in order to examine whether there is a nexus between the type of government in the forum State and government support for the principle. Third, it is also necessary to study the reasons for the decisions by prosecutors not to go ahead with an investigation, in order to analyse the extent to which these were based on political considerations.

Today, the commission of international crimes is being recorded with the improvements in technology and social media. One hopes that that data will eventually lead to the prosecution of those responsible for these documented atrocities. For this to happen there must be improvements in the international justice system at a national level,

Harem Ideology and Practices from an Islamic Perspective' (2014) 3 *International Human Rights Law Review* 29.

⁴⁷ See for example chapter 7. See also Botswana, Aubrey Lute, 'Botswana adopts universal jurisdiction' Weekendpost (Gaborone, 17 July 2017) <www.weekendpost.co.bw/wp-news-details.php?nid=4032>.

⁴⁸ Out of the 1051 cases under universal jurisdiction included in Langers study (n 2), 185 cases stemmed from the former Yugoslavia and 87 stemmed from the Rwandan genocide.

⁴⁹ This was illustrated in chapters 5, 7 and 8.

including the possibility of international guidelines on how prosecutions under universal jurisdiction should be dealt with by public prosecutors. Universal jurisdiction is one way in which perpetrators of atrocities can be brought to justice. As Luc Reydam's comments, the case of *Military Prosecutor v Niyonteze*,⁵⁰ '...demonstrate[s] that with the necessary expertise and resources perpetrators of crimes under international law can be tried fairly and speedily in a third State'.⁵¹ For universal jurisdiction to be utilised successfully in the present and in the future, prosecutors and practitioners need to learn from the principle's past.

⁵⁰ Tribunal Militaire, Division 2, Lausanne, 30 April 1999; Tribunal Militaire d'appel 1A, Geneva, 26 May 2000; Tribunal Militaire de Cassation, 27 April 2001.

⁵¹ Luc Reydam's, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2002) 201 (insertion added).

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