The Enforcement of Universal Jurisdiction: Assessing Gaps in State, Regional and International Practice.

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Submitted for examination December 2017, updated March 2021.

A thesis submitted for the degree of Doctor of Philosophy of the Australian National University.

Words: 82396 (less Annexes and footnotes)

Statement of original work

This work is the result of original research carried out by the author, except where otherwise stated in the text.

Mount Tamborine, March 2021

Acknowledgements

This research is supported by an Australian Government Research Training Program (RTP) Scholarship.

I would like to acknowledge and express my sincere thanks to my primary supervisor, Professor Hitoshi Nasu, for his patient, considered and constructive guidance throughout my doctoral studies. His encouraging attitude and steady direction assisted me immeasurably. I would also like to thank my secondary thesis supervisor, Professor Rob McLaughlin, for his time and insightful comments on my thesis draft, which helped me develop my ideas more coherently. Thank you to those in the wider academic community at the Australian National University and my work colleagues who have also provided inspiration and encouragement over the extended period it has taken me to complete this thesis. My numerous work supervisors have been extremely flexible in gracing me the time to complete this thesis, for which I am incredibly grateful.

Thank you to the professional and prompt editing service provided by Dr Lines at Capstone Editing, who provided Standard D and E editing on this paper, and without whose assistance I would not have such a polished product.

Despite the anguish I have inflicted upon my friends throughout this process, their patience with my never-ending updates and interest in my progress, knowing the answer would inevitably be, 'I'm not quite finished', has been greatly appreciated. Simone, Jess and Neanne in particular provided the personal encouragement I needed to keep writing.

The impact of the support provided by a partner throughout the writing process will unavoidably be underestimated. Writing a doctoral thesis, particularly when working full time throughout, takes you away from normal life. Without the support provided in innumerable guises by my long-suffering husband (his description, but one I now ascribe to him), I would simply not have completed this document. Thank you.

Finally, I would like to thank my parents for their endless belief in my ability, their belief in the value of education and the opportunities they created for me, which enabled me to undertake studies of this kind.

No man is an island, entire of itself; every man is a piece of the continent, a part of the main …

Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee …

John Donne, *Devotions Upon Emergent Occasions* XVII (1624).

Abstract

Universal jurisdiction is inconsistently understood and relied upon in contemporary international legal practice. The enforcement of universal jurisdiction in its 'pure' form (ie, without reliance upon any traditional jurisdictional nexus to the offender or crime), has been exceedingly rare. Its successful enforcement is further obstructed by the influence of political actors because reliance upon universal jurisdiction is always tainted by the level of political risk associated with the prosecution of another nation's citizen by a third-party state. Further, the absence of a clear understanding of the application of the jurisdiction and its scope results in widely differing use of the doctrine, particularly in regard to the application of fair trial rules, selection of the forum and harmonisation of domestic enforcement with international legal norms. The difficulties and inconsistent application in the enforcement of this doctrine prevents the development of appropriate mechanisms to bring to justice to those guilty of the worst kinds of crimes who would otherwise live with impunity.

This thesis examines how the doctrine of universal jurisdiction has been enforced. Case studies from domestic, regional and international levels are analysed to determine where the gaps in enforcement of universal jurisdiction exist by reference to four overarching criteria: procedural and due process rights; forum selection; harmonisation within international law principles; and political risk. Notably, these case studies assess contemporary examples of the enforcement of universal jurisdiction, and trials addressing similar criminal offences, to identify gaps in the application of universal jurisdiction to end impunity for international criminal law offences. Following this analysis, measures to address these gaps to promote international criminal justice are suggested.

The suggested solutions to these identified enforcement problems are mapped against existing international discourse on the scope and application of the jurisdiction—comparing the United Nations General Assembly Sixth Committee's ongoing reports to existing successful application of the doctrine—to provide an effective framework for states to consider to end impunity for serious international crimes. This analysis and development of suggestions to harness this doctrine of international law seeks to establish the role universal jurisdiction can meaningfully play in bringing an end to injustice for egregious criminal conduct subject to universal jurisdiction.

Contents

List of Abbreviations

AU – African Union

CCAIL – *Code of Crimes Against International Law* (Voelkerstrafgesetzbhuc)

DEA—Drug Enforcement Administration

ECCHR – European Center for Constitutional and Human Rights

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECOWAS – Economic Community of Western African States

EU – European Union

FDLR – Democratic Forces for the Liberation of Rwanda (Forces Democratiques de Liberation du Rwanda)

FIDH – International Federation for Human Rights

ICC – International Criminal Court

ICCPR – *International Covenant on Civil and Political Rights*

ICJ – International Court of Justice

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDF – Israeli Defense Force

IFOR – Implementation Force

ISAF – International Security Assistance Force

KFOR – Kosovo Force

NATO – North Atlantic Treaty Organisation

NGOs – non-government organisations

OTP – Office of the Prosecutor (ICC)

PTC – Pre-Trial Chamber (ICC)

ROLFF-A – Rule of Law Field Force - Afghanistan

SCSL – The Special Court for Sierra Leone

SFOR – Stabilisation Force

TF150 – Task Force 150

UK – United Kingdom

UN – United Nation

UNCLOS – *United Nations Convention on the Law of the Sea*

UNTOC - *United Nations Convention Against Transnational Organized Crime*

UNGA – United Nations General Assembly

UNHCR – United Nations High Commissioner for Refugees

UNMIK/EULEX – United Nations Mission in Kosovo/United Nations European Union Rule of Law Mission in Kosovo

UNOSOM – United Nations Operation in Somalia

UNSCR – United Nations Security Council Resolution

UNTAES – United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium

UNTAET – United Nations Transitional Administration in East Timor

UNTS – United Nations Treaty Series

VCLT – *Vienna Convention on the Law of Treaties*

Chapter 1: Introduction to Contemporary Universal Jurisdiction and its Enforcement Challenges

1.1 Introduction

In 1960, Adolf Eichmann, the man known as the 'architect of the Holocaust', responsible for planning the slaughter of millions of people in World War II, was living with impunity in Argentina.[1] He had escaped Germany at the conclusion of the war, evading capture and avoiding trial before the International Military Tribunal (the Nuremburg trials), where his co-conspirators were brought to justice.[2] His presence in Argentina was known; however, Argentina and Germany demonstrated no intention to prosecute him for the atrocities for which he was responsible.[3] On 23 May 1960, he was kidnapped by Israeli Mossad agents and brought to trial, first in the Israeli District Court, and then the Israeli Supreme Court, finally being sentenced to death and executed in May 1962 for his crimes.[4] Despite the apparent illegality of his abduction, the trial of Adolf Eichmann was a watershed in criminal justice enforcement, bringing an end to impunity for the commission of international crimes.[5] This was achieved through the use of universal jurisdiction—the crime occurred before Israel was a state, hence no traditional territorial or nationality nexus could be made to give Israel the right to prosecute him. However, no person should remain unpunished for murder, and

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[1] Doron Geller, 'Israel Military Intelligence: The Capture of Nazi Criminal Adolf Eichmann', *The Jewish Virtual Library* (Web Page, November 2014) <http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichcap.html>; Gideon Hauser, *Justice in Jerusalem* (Thomas Nelson and Sons, 2nd ed ,1966) 272.

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, rev and enlarged ed, 1994), 243; Hans W Baade, 'World Law—The Eichmann Trial: Some Legal Aspects' (1961) 3 *Duke Law Journal* 400.

[3] 'The Long Road to Eichmann's Arrest: A Nazi War Criminal's Life in Argentina', *Spiegel Online* (1 April 2011) <http://www.spiegel.de/international/germany/the-long-road-to-eichmann-s-arrest-a-nazi-war-criminal-s-life-in-argentina-a-754486-2.html>.

[4] *Israeli District Court Attorney-General of Israel v Adolf, son of Karl Adolf, Eichmann* (Case No 40/61) (1961) 36 ILR 1 (Eichmann District Court); *Israeli Supreme Court Adolf Eichmann v Attorney-General of the Government of Israel* (Case No 336/61) (29 May 1962) (1968) 36 ILR 227 (Israeli Supreme Court) ('Eichmann Supreme Court'); Miša Zgonec-Rožej et al, *International Criminal Law Manual* (International Bar Association, 2010) 342.

[5] See the UNGA Resolution discussing Israel's unlawful actions: The Resolution was adopted by eight votes to none with Poland and the Union of Soviet Socialist Republics abstaining and Argentina not participating in the vote; *Questions Relating to the Case of Adolf Eichmann*, GA Res 138/1960, UN GAOR, 868th meeting, UN Doc S/RES/138 (23 June 1960); Hauser (n 1) 274.

certainly no person should remain unpunished for genocide. Hence, according to Israel, universal jurisdiction filled this jurisdictional gap.[6]

Despite its acceptance as a valid jurisdiction for the prosecution of pirates—as traditional 'enemies of mankind'—the appropriate mechanism for the valid prosecution of war criminals or those guilty of 'core crimes' and the scope and breadth of universal jurisdiction has not been settled by the international community.[7] The Westphalian system of states and states' responsibility for their citizens holds priority

[6] The Supreme Court in its judgment held: 'Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundation. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant': *Eichmann Supreme Court* (n 4*)* 12.

[7] Eugene Kantorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law Journal* 197; Submissions from the Islamic Republic of Iran on behalf of the Non-Aligned Movement, Ecuador on behalf of the Community of Latin America and the Caribbean States, South Africa on behalf of the African Group, Trinidad and Tobago on behalf of the Caribbean Community, New Zealand also on behalf of Australia and Canada, Peru, Singapore, Cuba, Belarus, Sudan, Qatar, Colombia, Slovenia, Czech Republic, Norway, Switzerland, Serbia, Brazil, Vietnam, Israel, Algeria, Poland, the United States of America, the Russian Federation, Thailand, the United Kingdom of Great Britain and Ireland, Lebanon, Kenya, India, Bolivarian Republic of Venezuela, China, Burkina Faso, Mozambique, Egypt, Croatia, El Salvador, Morocco and Guatemala were made to the 6th committee of the United Nations (UN) General Assembly. In these submissions, the permission or obligatory nature of the jurisdiction was raised; the scope of the crimes was divergent; the principles relating to enforcement were inconsistent; and the recommended way to develop the principle were equally inconsistent. The outcome of the 70th session was to adopt a resolution without a vote to continue making submissions about the scope and application of the jurisdiction, with submissions due by 29 April 2016, and a report to be requested from the Secretary-General following such submissions (see summary record, 28th mtg: 6th comm, *Scope and Application of the Principle of Universal Jurisdiction*, UN GAOR, 6th comm, 70th sess, item 86, UN Doc A/C.6/70/SR.28 (16 November 2015). See further the ongoing commentary by the UN sixth committee on item 85, *Scope and Application of Universal Jurisdiction,* GA Res 70/119, UN GAOR, 6th comm, 70th sess, 75th plen mtg, UN Doc A/RES/70/119 (18 December 2015). This resolution demonstrated no more tangible progress in defining the scope and application of the principle compared to the six previous resolutions, all of which reaffirmed the need to fight impunity and the Assembly's commitment to an international order based upon the rule of law; however, it noted the ongoing divergence in views of commenting states and organisations, and thus continued to schedule the issue for further discussion on the Committee's agenda the following year. See: *Scope and Application of Universal Jurisdiction,* GA Res 64/117, UN GAOR, 6th comm, 64th sess, 64th plen mtg, UN Doc A/RES/64/117 (16 December 2009); *Scope and Application of Universal Jurisdiction*, GA Res 65/33, UN GAOR, 6th comm, 65th sess, 57th plen mtg, UN Doc A/RES/65/33 (6 December 2010); *Scope and Application of Universal Jurisdiction,* GA Res 66/103, UN GAOR, 6th comm, 66th sess, 82nd plen mtg, UN Doc A/RES/66/103 (9 December 2011); *Scope and Application of Universal Jurisdiction,* GA Res 67/98, UN GAOR, 6th comm, 67th sess, 56th plen mtg, UN Doc A/RES/67/98 (14 December 2012); *Scope and Application of Universal Jurisdiction*, GA Res 68/117, UN GAOR, 6th comm, 68th sess, 68th plen mtg, UN Doc A/RES/68/117 (16 December 2013); *Scope and Application of Universal Jurisdiction*, GA Res 69/124, UN GAOR, 6th comm, 69th sess, 68th plen mtg, UN Doc A/RES/69/124 (10 December 2014).

in the international legal order.[8] However, egregious breaches such as torture, genocide and crimes against humanity tend to occur in circumstances (such as in armed conflict or authoritarian regimes) in which state enforcement bodies are reduced in both capacity and authority. Consequently, the opportunity for such crimes to be committed with impunity is immense. Notwithstanding the primacy of state domestic responsibility for the enforcement of criminal justice, the use of universal jurisdiction for the prosecution of war crimes and crimes against humanity became prevalent in the late 1990s. This period witnessed the arrest and subsequent prosecution of numerous criminals guilty of the most egregious of crimes.[9] The attempted extradition of former Chilean dictator Augusto Pinochet from London to face trial in Spain, and the United States (US) arrest and prosecution of Charles Taylor Jnr, the son of former Liberian President Charles Taylor are two of the more prominent contemporary examples of attempts to end impunity through universal jurisdiction.[10] Numerous states have since utilised universal jurisdiction to issue international arrest warrants, and in many cases have convicted criminals in absentia, if their presence could not be otherwise secured.[11]

Fast forward to 2017, and despite the recognition of the universal illegality of core international crimes, reinforced by the activities of the International Criminal Court's (ICC) jurisdiction and the postmodern prevalence of ad hoc war crimes tribunals, the practice of bringing war criminals before effective courts or tribunals is still dependent on host state cooperation or a situation spurring intervention by third-party states, regional organisations or under United Nations (UN) auspices. Former Sudanese

[8] See Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 9 *Australian Journal for Legal History* for discussion on the purported change in the legal order resulting from the introduction of the ICC, and the Rome Statute's attempt to bind states not party to the treaty.

[9] Luc Reydams, 'The Rise and Fall of Universal Jurisdiction', *Global Governance Opinions* (2010) 10 <https://ghum.kuleuven.be/ggs/publications/opinions/opinions3_luc_reydams.pdf>. See Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 *International Review of the Red Cross* 878 for discussion of context of the commission of internationally cognisable crimes.

[10] *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 3 WLR 1456 (HL), reprinted in 37 ILM 1302 (1998); *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1999] 2 WLR. 272 (HL), reprinted in 38 ILM 430 (1999); *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1999] 2 WLR 827 (HL); Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction', 35 *New England Law Review* 312; Alpha Sesay, 'Court of Appeals Judges Uphold Charles Taylor Jr.'s (Chuckie Taylor) Convictions And 97 Years Jail Sentence', *IJ Monitor* (21 July 2010) <http://www.ijmonitor.org/2010/07/united-states-court-of-appeals-judges-uphold-charles-taylor-jr-s-chuckie-taylor-convictions-and-97-years-jail-sentence/>.

[11] See discussion of German, Spanish and The Netherlands's practice in Chapter 5.

president Omar Al-Bashir's decade-long evasion of justice is a perfect illustration of this ineffectiveness. Despite the arrest warrant for genocide, war crimes and crimes against humanity issued by the ICC in 2004, Al-Bashir has travelled with impunity to many states. These states have failed to enforce this arrest warrant on grounds relating to maintaining sound political and economic relations with Sudan, and arguments reinforcing immunity ratione personae for heads of state contrasting states' *Rome Statute* obligations.[12] Domestic trials in South Africa challenging the constitutional validity of the ICC warrants following Al-Bashir's visit further reinforced this ineffectiveness.[13] This case highlights the absence of enforcement mechanisms against those guilty of universal crimes in the absence of interstate political will, or traditional jurisdictional nexuses of geography or citizenship, despite the proliferation of international criminal tribunals and courts. More importantly, this example highlights the ineffectiveness of current international criminal law regimes in the face of political pressures.

Widespread prescription of universal jurisdiction for certain crimes may correct this deficiency of international law. However, the proliferation of universal jurisdiction is meaningless without a shared understanding of the scope of its application, accompanying enforcement powers that can be exercised without political influence,

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[12] See International Criminal Court, *Case Information Sheet: The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 6 April 2017 <https://www.icccpi.int/darfur/albashir/Documents/AlBashirEng.pdf> for summary of prosecution case against Omar Hassan Ahman Al Bashir. The first arrest warrant was applied for on 14 July 2008 and issued on 4 March 2009, with the second issued on 12 July 2010. The arrest warrant includes 10 counts for criminal responsibility as an indirect perpetrator for extermination, forcible transfer, torture, rape, internationally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and three counts of genocide. Further, see a summary of his avoidance of arrest in Kenya, Nigeria and most controversially in South Africa: 'Wanted Sudan Leader Bashir Avoids South Africa Arrest', *BBC News* (online, 15 June 2015) <http://www.bbc.com/news/world-africa-33135562>; Norimitsu Onishi, 'Omar al-Bashir, Leaving South Africa, Eludes Arrest Again', *The New York Times* (online, 15 June 2015) <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html?_r=0>. For a full summary of his movements since the issue of this International Criminal Court warrant, see: bashirwatch.org. In its submissions to the ICC Pre-Trial Chamber in the determination of whether South Africa was in breach of its *Rome Statute* obligations in respect of Omar al-Bashir's visit, South Africa presented an elaborate legal argument about the primacy of South Africa's customary international law obligations to respect Bashir's immunity ratio personae over its *Rome Statute* treaty obligations. These arguments were in addition to their grounds relating to sound political and economic relations with Sudan but elaborate legal arguments to justify South Africa's actions: see International Criminal Court, *Decision under article 87(7) of the Rome Statute in the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, ICC-02/05-01/09-302, 6 July 2017, 25-27 <icc-cpi/CourtRecords/CR2017_04402.pdf>.

[13] See Section 7.3.2 for a detailed discussion of this case.

due regard to procedural rights and competing international legal obligations (necessary to ensure the doctrine is applied consistently), impartially and a focus on ending impunity rather than furthering political ends.

1.2 Thesis Question and Focus

While there has been focus on the normative, pre-emptory and *jus cogens* status of crimes with universal jurisdiction,[14] these discussions largely assess the legality of the act—that, is whether the law authorises the prosecution using universal jurisdiction. Once this premise is established, the focus shifts to state obligations to prevent or intervene, prior to or during, the commission of such offences.[15] Despite some international crimes' characterisation as *jus cogens*, the legal implications arising out of that status—the *obligatio erga omnes*—has remained a secondary, contentious consideration of penalists and publicists. The lack of attention or agreement as to the principles of legality associated with the process to prosecute international crimes can some way account for the need to assess available enforcement mechanisms for universal jurisdiction crimes.[16]

[14] Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004); Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (School of Human Rights Research/Intersia, 2005); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2004); International Committee of the Red Cross Advisory Service, 'Universal Jurisdiction Over War Crimes', *International Committee of the Red Cross Advisory Service on International Humanitarian Law* (March, 2014); Amnesty International, 'Universal Jurisdiction, A Preliminary Survey of Legislation Around the World', *Amnesty International Survey* (2012); Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' *Foreign Affairs,* July/August 2001, 80–86; response by Kenneth Roth, 'The Case for Universal Jurisdiction', *Foreign Affairs*, September/October 2001, 150–154; Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009); Tim McCormack et al, *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997)*;* Phillipe Sands (ed), *Justice For Crimes Against Humanity* (Hart Publishers, 2003); Steven R Ratner and Jason S Abrams, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy* (Oxford University Press, 2001); American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, §402(1)(a) (Note: the fourth restatement of the foreign relations law of the United States dealing with jurisdiction has been released in 'Tentative Draft No 3' only).

[15] See the empirical analysis of the impact of human rights prosecutions in the last three decades. Domestic and international legal systems have resulted in a relative decline in human rights atrocities and abuses in relevant countries and neighbouring states over the long term: Kathryn Sikkink, *The Justice Cascade* (WW Norton & Co, 2011).

[16] M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligiatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 4, 63–65.

This thesis considers two distinct aspects to the universal jurisdiction: the prescription of universal jurisdiction, and the enforcement jurisdiction for the doctrine. Once establishing the existence of the offence—how the offences are prescribed in international and domestic law—there is less discussion about the second aspect, the lawful manner in which those accused of these universal crimes are brought to justice (other than broad observations that its application is inconsistent).[17] The first limb analyses the domestic laws that enunciate which crimes are accepted as subject to universal jurisdiction nationally, which should reflect principles of international law. The prescription of the doctrine is well advanced internationally. Over 163 countries have some form of universal jurisdiction described in domestic law, reflecting authority to prosecute core international crimes without a traditional jurisdictional nexus.[18] The second relates to aspects of the doctrine that enable its domestic application, and is reflective of the general Achilles' heel of international law—the absence of obligatory enforcement mechanisms renders international criminal law subordinated to political needs.[19]

This thesis seeks to focus on the enforcement element of the jurisdiction: the criminal justice mechanisms associated with the prosecution of universal crimes and in particular, the methods by which indicted or arraigned individuals are physically brought to justice. In his benchmark study on the applicability of universal jurisdiction, Stephen Macedo stated:

> Universal jurisdiction holds out the promise of greater justice, but the jurisprudence of universal jurisdiction is disparate, disjointed, and poorly understood. So long as that is so, this weapon against impunity is potentially beset by incoherence, confusion, and at times, even injustice.[20]

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[17] Beth Van Schaack et al, *International Criminal Law and Its Enforcement, Cases and Materials (University Casebook)* (Foundation Press, 2007); Raji Surani (ed), *The Principle and Practice of Universal Jurisdiction: PCHR's Work in the Occupied Palestinian Territor*y, (April 2010) Palestinian Centre for Human Rights <http://pchrgaza.org/en/?p=2266>; Aishwarya Padmanabhan, 'Origin, Development and Evolution of the Principle of Universal Jurisdiction: A Study of Its Application in National Courts and Practical Obstacles Facing Its Implementation' (Working Paper Series, West Bengal National University of Juridical Studies, June 2010).

[18] Amnesty International (n 14).

[19] See M Cherif Bassiouni (ed), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008) for a discussion regarding the criticisms of enforcement of international criminal law, and international law generally; Rossalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995).

[20] Stephen Macedo, 'The Princeton Principles on Universal Jurisdiction' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 1.

Thus, the absent analysis is how the application of universal jurisdiction can be used in a coherent fashion, as it relates to the arrest and commencement of prosecution of criminals guilty of universal crimes. The breadth of the jurisdiction has long been the subject of analyses by international legal scholars such as Macedo;[21] however, the practical barriers to prosecution have not been assessed in a single detailed work.

Legal theorists have suggested alternatives to the status quo, such as Niemann's suggestions for entities such as a 'world people's courts';[22] however, the political realities relating to states' reticence to surrender control of their citizenry to international organs make such developments exceedingly unlikely. The shift away from the use of universal jurisdiction to bring the worst criminals to justice has resulted from a lack of an agreed international framework. This framework would provide assurances to states that the imposition upon their sovereignty by this jurisdiction can be reasonably controlled to prevent its misuse by politically guided judicial activists.

Thus, this thesis seeks to further the understanding of international criminal justice by identifying existing principles relating to the enforcement of the jurisdiction in order to shore up prosecutions. It does not seek to appraise the virtues of the universal illegality of the acts under the existing international order.

This thesis seeks to identify when the doctrine of universal jurisdiction has been effectively applied. Further, it seeks to determine the criteria necessary for the effective application of the doctrine in the absence of action by states with alternate jurisdictional claims relating to alleged universal criminal offences. It will analyse the actions taken at domestic, regional and international levels by government officials, non-government organisations (NGOs), non-state actors and individuals to enforce arrest warrants issued under this doctrine of universality. The outcome of this study is intended to briefly define the nature of internationally accepted universal jurisdiction in 2017.[23] More particularly, it is intended to identify the steps required to ensure that when it is applied, the outcome is an effective and just trial of the person accused of the universal crime, hence its focus on state, regional and international enforcement mechanisms.

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[21] Ibid.
[22] Grant Niemann, *Foundations of Intentional Criminal Law* (Lexis, 2014).
[23] 2017 is the cut-off date for this research project, aligned to original the submission date of the thesis.

Thus, the aim of this study is to identify trends for the successful application of universal jurisdiction, and the political imperatives that either support or degrade the doctrine. This thesis will identify whether enforcement of international criminal law is wanting as a result of balancing the existing doctrine of universal jurisdiction with the concurrent jurisdictions of the ICC, ad hoc tribunals, hybrid international criminal tribunals and domestic courts. Finally, the thesis will conclude with an assessment about the future of the doctrine and its ongoing feasibility in the current multipolar world order. Recommended guidelines will be provided to ensure the doctrine remains a meaningful mechanism to end impunity for those responsible for the most heinous of crimes.

1.3 Scope and Structure

Universal jurisdiction is a basis for prosecution, in that it provides a prescriptive jurisdiction to enable legislating the basis to prosecute certain crimes. The prevalence of universal jurisdiction as a basis for prosecution was greatly increased in the late 1990s and early 2000s, as a result of an active judiciary, in Spain, Belgium and France utilising the jurisdiction. In particular, it was relied upon to attend to egregious breaches of international criminal law that appeared to be met with impunity by states, and the international community more generally, with a traditional nexus to the crime. This doctrine allowed these domestic judges to investigate offences that had occurred in other sovereign territories with no traditional jurisdictional nexus to the offence and issue arrest warrants for alleged perpetrators of crimes accepted at international law as subject to universal jurisdiction. This national domestic power was enabled by domestic legislation stating an expansive interpretation of the doctrine.

However, despite these issued arrest warrants, the outcomes of the trials have largely been a result of in absentia judgments. There have been limited effective extraditions as a result of such warrants, despite valid extradition treaties between the affected states. These tensions between sovereign integrity and seeking an end to impunity demonstrates that the reliance upon universal jurisdiction is viewed with suspicion by many states. Further, it causes friction in its application—be it a *bona fide* exercise of the jurisdiction, or one exercised in the hopes of seeking a politically, rather than legally desired, outcome. These tensions demonstrate that while it is relatively easy to

identify the perpetrator of international crimes, it becomes practically unfeasible to bring that individual to justice in a physical sense.

Further, as 'global powers' such as China and the US became the focus of active judges in states exercising expansive universal jurisdiction legislation, political pressure has softened judiciaries' domestic powers. Further, the initiation of prosecution in certain states is allowed by private individuals, rather than through a public prosecutorial office. This has led to a retreat from the broad scope of the jurisdiction previously available to pursue cases against former heads of State of Israel, the United Kingdom (UK), the US and China, for example. As a result of political imperatives, the doctrine has become considerably narrower in application. Further, the doctrine of universal jurisdiction in 2017 has been largely wound back to reflect the selective and narrow construct of the doctrine prior to earlier activism in this field.

1.3.1 Scope

The research methodology of this thesis focuses on a survey of cases of successful and unsuccessful applications of the universal jurisdiction doctrine across various entities—individual, state-based, regionally-based and international—to ascertain how alleged perpetrators of the most heinous of crimes are arrested and brought to justice. While not purporting to be an exhaustive analysis of every single application of the doctrine, the selected cases are representative of the different methods by which universal jurisdiction has been adopted to date. They were selected on the basis of their ability to contribute to the identification of core principles for the application of the jurisdiction.[24] This is predicated on the case having been sufficiently progressed and

[24] For a survey of cases purporting to apply universal jurisdiction see the Annual Reports of TRIAL International, who have released annual reports outlining the reported practice of universal jurisdiction globally during since 2015. The 2015 Report, Make Way for Justice, is the first report which was published in conjunction with ECCHR and FIDH analysed 37 cases in which they considered 'notable developments' to universal jurisdiction occurred during 2014. The second, Make Way for Justice #2, contains reference to 1467 universal jurisdiction cases, being all those that TRIAL international identified in concert with their partner NGOs. In subsequent years, the report analysed specific cases in detail though referred to the overall use of the jurisdiction in tabular format. TRIAL International, *Make way for justice: Universal Jurisdiction Annual Review* (UJAR) 2015 <www.trialinternational.org/wp-content/uploads/2016/06/Universl-jurisdiction-annual-reviw-2015-publication.pdf>; TRIAL International, *Make way for justice #2: Universal Jurisdiction Annual Review* (UJAR) 2016 <www.trialinternational.org/wp-content/uploads/2016/06/Universl-jurisdiction-annual-reviw-2016-publication.pdf>; TRIAL International, *Make way for justice #3: Universal Jurisdiction Annual Review 2017* <www.trialinternational.org/wp-content/uploads/2017/36/UJAR-MEP_A4_012.pdf>; TRIAL International, *Make way for justice #4: Universal Jurisdiction Annual Review 2018*

published. Additionally, the cases have sufficient information available to support analysis of the case, its impact, and in some cases, the information relevant to the decision-making process to commence prosecution in the first instance. Further, not all cases cited as applying universal jurisdiction amount to an application of the jurisdiction as defined in this thesis; thus, they will not be included.

Following this analysis, possible solutions will be derived from assessing analogous examples in other fields. This will result in the proposal of modifications to existing structures to apply to likely cases in the exercise of universal jurisdiction to address previously identified gaps in the doctrine.

This thesis will necessarily trace the roots of universal jurisdiction, establishing the bounds of the first limb of prescription of universal jurisdiction. It will examine pre- and post-Westphalian examples to identify crimes subject to the jurisdiction, and assess a series of contemporary examples of the application of the jurisdiction—both successful and unsuccessful. Further, the jurisprudence of the ICJ relating to this matter will be assessed, and actions surrounding arrest warrants of international and ad hoc criminal tribunals will be analysed as they relate to enforcement mechanisms. These courts and tribunals relate to the application of international criminal jurisdiction under specific treaty or UN Security Council Resolution (UNSCR) authority. However, the political actions surrounding the extradition, arrest and arraignment of alleged perpetrators of similar international crimes is informative in this study of the success of enforcement mechanisms for universal jurisdiction offences.

Case studies have been selected based on the availability of sufficient complementary materials to the written judgment such that a full assessment of the application of the jurisdiction can be assessed. For case studies conducted in depth, assessments include peripheral political discussions and decision-making relating to the prosecution of the case using publicly available documents. When possible, this includes trial transcripts and submissions. In the case of the broader case studies, such as the assessment of international jurisprudence and its impact on the jurisdiction, attempts have been made

<www.trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>.

to assess every judgment that has affected the jurisdiction; however, this is obviously not possible in the case of more diverse jurisdictions.

The development of universal jurisdiction has run alongside, and is somewhat entangled with, the development of international criminal law, ad hoc tribunals and the ICC. This concurrent development has resulted in a somewhat confused understanding by politicians and legal scholars alike as to the true limitations of universal jurisdiction.[25] Accordingly, in tracing the historical development of the jurisdiction, reference will necessarily be made to the developments of international criminal law and the enforcement regimes created to match this development. Further, this thesis will address the distinct expansion of universal jurisdiction as a legally supported construct. Universal jurisdiction itself remains with sovereign states for enforcement; thus, the references to these international legal bodies will reinforce the analysis of enforcement and sovereignty tensions and challenges, rather than represent the application of universal jurisdiction.

1.3.2 Structure

Chapter 2 will define the status of universal jurisdiction in current international law, and delimit which offences are subject to universal jurisdiction. This will articulate how 'universal jurisdiction offences' will be defined for the purposes of this thesis. This chapter will also outline the construct of universality and scope the prescription of the doctrine to enable the thesis to focus on the pragmatic enforcement aspects of the doctrine.

Chapter 3 will discuss the historical development of universal jurisdiction, tracing its origins in Australian Aboriginal culture, ancient Chinese and Indian history, and its appearance in medieval Europe, followed by its codification in the 9th century relating to the prosecution of the first 'enemy of mankind': the pirate. The first contemporary application of the doctrine of universal jurisdiction in the Liepzig, Nuremburg and Tokyo trials will lay the historical foundations for its application. Chapter 3 will discuss in depth the first and most famous successful case of universal jurisdiction: the 1961 trial of Adolf Eichmann. The implications of the alleged illegality of the method by which Adolf Eichmann was brought before the Israeli courts will be discussed for

[25] Inazumi (n 14).

its implications on available enforcement mechanisms for states that have taken unilateral action in the absence of cooperation from the state where the accused is sheltering.

Chapter 4 of this thesis will outline the identified procedural gaps that will form the criteria against which the selected case studies will be measured. The purpose of this chapter is to frame how the case studies will be subsequently measured. The assessment criteria will be explained, as will the basic legal premise underpinning the criteria and the importance of the chosen criteria in the prosecution of universal jurisdiction offences. In particular, the chapter will articulate the practical effects that must be considered in an assessment of an effective domestic criminal trial pursuing an accused for a universal jurisdiction offence. The assessment criteria will be broadly drawn into four categories: due process and fair trial requirements; forum selection and concurrent jurisdiction considerations; harmonisation of domestic and international legal obligations; and finally, political risk in conducting a universal jurisdiction offence trial.

Between the 1961 *Eichmann* trial and the peak of the jurisdiction in 2010, there have been over 1,000 core criminal cases or complaints lodged by public authorities relating to universal jurisdiction offences.[26] However, the outcome of these 1,000-odd complaints has been only 32 trials and 24 convictions.[27] There are very few cases known to scholarship that rely solely on the application of universal jurisdiction—without any link to sovereignty or territoriality of the enforcing state.[28] Accordingly, there is a substantial gap between the successful prosecution of cases of universal crimes compared with allegations leading to indictments or warrants for such offences. Using the four assessment criteria described in Chapter 4, Chapter 5 will focus on this contemporary state-level application of universal jurisdiction. Several successful examples will be highlighted to demonstrate how the exercise of this jurisdiction can be achieved. The well-known contemporary cases of universal jurisdiction such as the

[26] This does not consider piracy convictions, only war crimes, crimes against humanity, genocide and torture. See Macedo (n 14) 6.
[27] Macedo (n 14) 7.
[28] Mark Ellis, 'The Decline of Universal Jurisdiction—Is It Reversible?' (Speech, 10th Annual Ruth Steinkraus-Cohen International Law lecture, SOAS, 22 February 2012) < http://www.unawestminster.org.UK/pdf/grot12_mark_ellis_lecture.pdf>; Cf Maximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforce" to "No Safe Haven" Universal Jurisdiction' (2015) 13(2) *Journal of International Criminal Justice* 245, 256.

Butare 4, the Guatemalan generals and Pinochet—well known because of their purported heralding of an end to impunity for international crimes—will be discussed in this chapter. Equally, unsuccessful cases, such as those attempting to seek prosecution of former-Minister Livni and former-President Bush Jnr, and addressing the Mavi Marmama incident, will be discussed to juxtapose how cases without political concurrence have resulted in the reduction of state practice of the jurisdiction.

This chapter will also include the Australian experience of universal jurisdiction. It will explore the effect of domestic impact on extradition for war crimes and the effect of protective domestic laws on immigration. Using Australia as an example—in particular, *Republic of Croatia v Snedden*[29]—issues such as the host state assessment of the risk to the individual sought for extradition versus the obligation to enforce international justice will be discussed. This case will also highlight international relations considerations that affect the jurisdiction a state may rely upon.[30] The recent proposals and decisions in France, the US and the UK to attempt to limit the application of universal jurisdiction in relation to extradition will also be explored in this chapter. These assessments will demonstrate how the ongoing activism of the doctrine has been affected by concurrent political developments. Amendments and softening of the legislative basis for application of the doctrine across numerous jurisdictions will identify where states have attempted to resolve enforcement problems through domestic legislation.

Further to considering if the domestic jurisdiction of the state where the accused resides has appropriately dealt with their alleged offending—whether a state should, or is obliged to act—is also a relevant consideration when assessing enforcement of the prohibition of war crimes using universal jurisdiction. Indeed, in some cases, there may be a valid operative extradition treaty, coupled with a prosecute or extradite treaty obligation, that would change the nature of the jurisdiction exercised and mandate that a traditional jurisdictional nexus be applied before states can apply universal jurisdiction. Case studies will also ascertain how consideration may be given to the use of universal jurisdiction as a forum of last resort, or if it was considered applicable

[29] [2010] HCA 14.
[30] See Section 5.4.1 for a detailed discussion of the interactions between the Australian government and the Serbian and Bosnian authorities pertaining to this extradition case.

as a right by the states utilising it. Further, they will assess if exhausting alternate jurisdictional options is considered a precondition to exercising the jurisdiction.

Chapter 6 will analyse regional practice influencing the application of universal jurisdiction. Using the Hissene Habre case to assess the differences between the European Union's (EU) and African Union's (AU) approaches to universal jurisdiction, this chapter will identify how regional systems enhance or detract from the practice of the jurisdiction. It will also analyse how regional organisations can establish systems to minimise enforcement problems. The Kosovo example of regional peacekeepers exercising domestic jurisdiction will be used to determine whether regionalism offers a solution to close the enforcement gap.

In some instances, as is often the case with piracy, international agreements will dictate the forum in which an alleged perpetrator will be tried if they are arrested for a particular kind of offence.[31] The agreement between the UN, the Combined Maritime Force Task Force 150 (TF150) contributing states and the receiving state of the Seychelles implements a program whereby arrested individuals suspected of committing piracy offences are transferred to the government of Seychelles for subsequent prosecution.[32] This is a rare example of international cooperation in the exercise of universal jurisdiction, one that will be further analysed in this thesis. Accordingly, in Chapter 7, the successes in enforcement of universal jurisdiction using the piracy framework will highlight commonalities that can apply to the prosecution of other criminals using universal jurisdiction. Further, these will identify the potential influences of the type of crime committed on the method of prosecution of a universal jurisdiction offence.

In addition to examining when universal jurisdiction has been exercised through the model global approach to combat modern-day piracy, Chapter 7 will explore the

[31] See the discussion of Piracy in Section 3.3.1.

[32] David Ryder, 'The Seychelles Anti-Piracy Model: Adopting a Pre-Emptive Approach', *Maritime Security Review* (23 October 2015) <http://www.marsecreview.com/2015/10/the-seychelles-anti-piracy-model/>; See *Exchange of Letters between the European Union and the Government of Kenya on the Condition and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya for Their Treatment After Such Transfer.* European Union–Kenya, signed 6 March 2009, L79 (entered into force 25 March 2009) 49. This agreement was terminated by Kenya in 2010: Lillian Leposo, 'Kenya Ends Agreement with EU to Prosecute Suspected Somali Pirates', *CNN International Edition* (online, 4 October 2010) <http://edition.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/index.html>.

establishment of international frameworks supporting prosecutions more broadly. The application of international criminal law on international crimes will be assessed to determine how this body of jurisprudence influences the application of universal jurisdiction, or creates a viable alternative to the exercise of universal jurisdiction. Further, this chapter will assess the mechanisms that ensure the *bona fide* application of the jurisdiction, when overt politicking is alleged to result in a misapplication of the jurisdiction for purely political ends in current international criminal law enforcement. Specifically, this chapter will assess the application of universal jurisdiction against these two examples: modern piracy and its consideration by international courts—the ICC and ICJ in particular.

Chapter 8 will be the final assessment of the analytical frame of the case studies examined in this thesis. The gaps in the enforcement of the jurisdiction will be summarised, in terms of the assessment criteria of procedural fairness, political impacts, forum selection and international law conflicts presented by the use of the jurisdiction. Measures to overcome these gaps will be proposed. This chapter will not propose guidelines to suggest wholescale change to codify universal jurisdiction. Rather, it will suggest measures to modify existing international systems to reduce the impact of the identified enforcement gaps.

When considering the likely future of the jurisdiction, the current UN General Assembly (UNGA) Sixth Committee Report outcomes will be assessed to predict whether the proposals could adequately address the gaps identified. Further, state submissions that have been lodged thus far to support an ongoing and more in-depth analysis of the current state practice in relation to this jurisdiction will be assessed. There have been limited state submissions. Although the Committee accepts submissions from all member states, these limited submissions largely represent peripheral players in the application of universal jurisdiction, from the fringes of Europe, the Middle East and South America.[33] The report is published by the Secretary-General and considered by the UNGA. However, as the resolutions relating

[33] *Notes of the Oral Report of the Chair for the Working Group on the Scope and Application of Universal Jurisdiction*, UNGA, GAOR 6th comm, 28th mtg, UN Doc A/C.6/69/SR.28 (7 November 2015). This outlines the submissions received from Austria, Azerbaijan, Belarus, Croatia, Cuba, the Czech Republic, Greece, Jordan, Kuwait, Oman and Peru. Responses were also received from the European Union, the International Civil Aviation Organization, the International Maritime Organization, the Organization for the Prohibition of Chemical Weapons and the International Committee of the Red Cross.

to the scope and application of the doctrine have thus far been passed only on the basis of consensus by participating states, this assessment is not necessarily an accurate characterisation of state practice, nor even of the development of trends in regional international law custom.[34] While not a definitive statement of international law regarding the scope and application of this principle, this thesis acknowledges that the ongoing work of the Sixth Committee will provide further information relevant to the conclusions of this thesis. The proposals in Chapter 8 will be cross-mapped with the issues considered contentious by the Sixth Committee.

Chapter 9 will conclude this study by summarising the findings of the thesis and identified trends in the enforcement of universal jurisdiction to prosecute universal crimes. The application of universal jurisdiction is fraught with tensions between the existing international order and the attainment of international justice. The sovereign immigration laws and extradition agreements of states require some protection from dilution by extranational judicial processes. A corollary to this protection is shielding from certain justice mechanisms. No enforcement power enables the extradition of criminals of the most heinous of offences from states with protective extradition or immigration practices. Extradition is also not possible without the political will or practical ability of third-party states or international organisations to bring alleged perpetrators to justice. This chapter will summarise the analysis of current enforcement mechanisms available across the spectrum of international legal actors, and measures that can prevent impunity and enhance the use of this necessary criminal jurisdiction.

1.4 Limitations

The scope of this thesis will be limited to an in-depth assessment of existing exercises of universal jurisdiction, at the state, regional and international level. The historical development of the jurisdiction in the classical international law era has been well treated in other literature,[35] as has the analysis of particular cases of its use and the

[34] For the acceptance of the proposition that UN General Assembly Resolutions are indicative of 'soft law' see: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 97 [183]. See also the Draft conclusions on identification of customary international law, with commentaries, 2018, adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10).

[35] Macedo, above (n 14); Inzume, above (n 13). The 'classical era' refers to the post-Westphalian period of international relations, referring the period when the construct of *jus gentium* regulated international relations: Mark Janis, 'Sovereignty and International Law: Hobbes and Grotius' in Ronald St J Macdonald and T'ieh-ya Wang (eds), *Essays in Honour of Wang Tieya Tieya* (1994)

prescription of the jurisdiction across domestic legislatures.[36] Although this thesis will briefly trace the development of the jurisdiction, it will largely address this historical development to the extent that it affects the enforcement of the jurisdiction as opposed to its prescription.

While an agreed deontological basis for the jurisdiction is missing from international law, this issue will only be treated superficially in this thesis. The ultimate aim of this thesis is to identify practical measures to further the prosecution of core international crimes by domestic judiciaries.[37] In particular, the assessment of the jurisdiction will not examine the differences between state practice as to which crimes are prescribed as universal in nature. Rather, the thesis will outline a number of relatively well-established 'universal' crimes to assess methods of enforcement when the jurisdiction has been invoked for those offences.

Equally, deficiencies in the general criminal procedure of a state, or deficiencies in a particular state's human rights practices will not be addressed. This is because these issues, while important in a global analysis of criminal justice, are less relevant for the consideration of the applicability of universal jurisdiction. For example, the well-known and well-chronicled overcrowding in Somali prisons is exacerbated by international pushes to counter piracy. Indeed, funding to support those prisons is tied to the incarceration of Somali pirates.[38] However, the broader issues pertaining to the

391, 393; and Martin Harvey, 'Grotius and Hobbes', (2006) 14(1) *British Journal for the History of Philosophy* 27-–50; Cf Beaulac, above (n 8).

[36] Amnesty (n 13); Nehal Bhuta et al, *Universal Jurisdiction in Europe: The State of the Art,* Human Rights Watch Report, 27 June 2006 <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art>.

[37] See Ratner's criticism of the absence of this assessment in general academic discourse: Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2016) 15; see generally Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company, 1989) 93–94; also note Kenneth Roth and Henry Kissinger's challenge and reply in relation to universal jurisdiction do not address the underlying deontological groundings of the doctrine. Rather, they seek to justify the existing position for the jurisdiction and the rational grounds for its use into the future: Roth (n 14) 152; Kissinger (n 14) 82.

[38] 'Report by Special Adviser on Legal Issues Related to Piracy (January 2011)' in Kristen E. Boon (ed), *Piracy and International Maritime Security: Developments Through 2011* (Oxford University Press, 2012) 123, 126; Katharine Houreld, 'Somali Opens Prison for Pirates, More Planned', 29 March 2011, *The San Diego Union-Tribune* (online, 29 March 2011), <http://www.sandiegouniontribune.com/sdut-somalia-opens-prison-for-pirates-more-planned-2011mar29-story.html>. For reporting on the ongoing trend of overcrowding in Mogadishu Prison, see United Nations Office on Drugs and Crime, 'Mogadishu Prison and Major Crimes Complex Programme', in *United Nations Office on Drugs and Crime Maritime Crime Programme Annual Report 2014*, (2015) 19; and a progress report in: United Nations Office on Drugs and Crime,

funding for criminal justice will not aid in the thesis's determination of the practical enforcement gaps for universal jurisdiction more broadly. While these issues may be considered peripheral to a political risk perspective, skills, facility and funding gaps in domestic law enforcement systems will not be analysed in detail in this thesis. The practical limitations assessed will focus on the gaps between domestic jurisdictions, rather than the gaps within them.

There will be no analysis of truth and justice commissions, informal dispute resolution or other alternate justice mechanisms in international criminal justice. Further, this thesis will not analyse in detail the interplay between the application of universal jurisdiction and abduction or 'snatch and grab' operations, or targeted killings executed by states. This is because the absence of these assessments will not affect the outcomes of this thesis or diminish the arguments relating to practical impediments to enforcing the universal jurisdiction doctrine. Further, given contemporary practice in the latter issue is underpinned by a state's armed conflict status, this assessment has purposefully been excluded from this thesis. This is because this analysis is not relevant to the issue of enforcement mechanisms for the prosecution universal jurisdiction offences.

Finally, this thesis will not contemplate the operation of 'universal civil jurisdiction' in any depth. The principle of universal jurisdiction in relation to ending impunity in criminal cases is distinct from the outcomes expected at a civil trial. In particular, the issues of primary concern in this thesis relate to custody and punishment of the accused and the interaction of the criminal domestic jurisdiction with other international legal systems. Accordingly, any assessment of practicalities of the jurisdiction when contemplating its civil counterpart is not relevant in considering the functions or reliance upon the criminal enforcement regime. This thesis seeks to focus on the practical measures affecting reliance on universal jurisdiction, before drawing conclusions about how to enhance its application in the future.

'Mogadishu Prison and Major Crimes Complex Programme', in *United Nations Office on Drugs and Crime Maritime Crime Programme Annual Report 2016*, (2017) 19.

Chapter 2: Defining and Limiting Universal Jurisdiction

This chapter will outline the construct of universality, and the scope and methods of prescription of the doctrine, to enable the remaining thesis to focus on its pragmatic enforcement aspects. It will define the status of universal jurisdiction in current international law, and delimit which offences are subject to universal jurisdiction. This will determine how 'universal jurisdiction offences' will be defined for the purposes of this thesis.

2.1 Introduction

The *Eichmann* trial centred on a criminal seeking refuge in South America being smuggled to Israel. The court ignored the methods by which Adolf Eichmann was physically brought to appear before it. This may be considered the high benchmark of the exercise of universal jurisdiction. While there have been several successful universal jurisdiction trials in other European nations, the success of this mechanism has been uneven at best. Despite hints at increasing support for the jurisdiction among domestic European judiciaries, pressure from the US against judicial activism and recent legislative initiatives in Germany and Spain has resulted in a reduction in the reliance on the jurisdiction in recent times.[39] This epitomises the ongoing challenge of the jurisdiction. States seek to balance their long-held control of their citizens and protection from international extradition without agreement with an increasing awareness and drive to act in relation to other states, where atrocities are allowed to continue with impunity, and where the obligations of those states relating to international criminal standards and human rights are not diligently exercised.

The basis of the universal jurisdiction lies in the naturalist law theory of universality. This chapter will introduce the development of universal jurisdiction as a legal concept, define universal jurisdiction and outline the 'traditional' jurisdictional bases with which universal jurisdiction competes. It will discuss how universal jurisdiction is variously prescribed in international law, and outline which offences are considered subject to this jurisdiction. This categorisation of offences will be used throughout the

[39] Ciaran Giles, 'Spain Throws Out Tibetan Abuse Probe', *Global Policy Forum* (February 2010) <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31/48783.html>.

thesis when comparing the exercise of jurisdiction and the enforcement mechanisms used when arresting individuals alleged to have committed one of these offences.

2.2 Jurisprudential Basis for Universal Jurisdiction and Its Enforcement

It has been recognised that the development of international legal systems was derived from 'the necessities of international discourse ... to accord recognition to the same quality in other communities'.[40] Thus, the punishment of criminal conduct must be bound by limitations on sovereignty, set within the broader context of international civilising norms, and therefore, the grounds for universal jurisdiction offences.[41]

The assertion for the genesis of the universality of offences does not, however, perceive expression as based upon any particular philosophical foundation. The legal theorists of the early nineteenth century advocating for universal jurisdiction simply asserted that the core values were based on the impact of the offending on humankind as whole. Thus, power to prosecute absent any connection to nationality is based on support for the civility of humankind generally.[42] The recognition of a universal set of values in international relations, tracing back to ancient times, supports that the fundamental premise of today's international legal order is centred on the rule of law. It requires states to appear neutral, principled and consistent.[43] As discussed in Chapter 1, nascent international and state relations were based upon intrinsic value being placed on the legal system and order. Further, the pursuit of justice was crucial to regulating conduct between states, and the conduct of people within those states. Similarly, the pragmatic view of universal jurisdiction in modern international law is resultant upon the reasoned position that maintaining social order is 'motivated … by a dread for chaos'.[44]

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[40] Thomas A Walker, *A History of the Law of Nations* (University Press Cambridge, 1899); see also David Bederman, *International Law in Antiquity* (Cambridge University Press, 2001) 18.

[41] See generally Michael Longo, 'Reconceptualising Public International Law: Convergence with the European Union Model?' (2002) 25(1) *University of New South Wales Law Journal* 71, 3; Elias Norbert, *The Civilizing Process*, *State Formation and Civilization*, vol II (Blackwell, 1982); Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking, 2011); see also *Prosecutor v Drazen Erdemovic (Judgment, Separate and Dissenting Opinion of Judge Stephen)* (International Tribunal for the Formal Yugoslavia, IT-96-22-A, App Ch, 7 Oct 1997) [25].

[42] Henri Donnedieu de Vabres, *Les Principles modernes du droit penal international* (Librarire du Recuiel Sirey, 1928) 135–136; and Bassiouni (n 19) 43.

[43] Bederman (n 40) 81.

[44] Ibid 85.

Steven Ratner, in *The Thin Justice of International Law*, conducted a rare deontological assessment of universal jurisdiction. He submitted that the extraterritorial protection of human rights is a permission and not an obligation under international law. However, the assessment raises questions regarding prosecutions and investigations in absentia.[45] Ratner reinforced that there is a potential tension—for international law to be just, it requires an exception. His analysis raises questions as to why universal jurisdiction is not a mandatory jurisdiction. He, however, holds that the current system of a permissive right to enforce universal jurisdiction strikes the right balance to address this concern. He contended that universal jurisdiction neatly addresses the tension between his two pillars of the international legal system—international order and human rights protections.[46]

When considering Thomas Franck's assessment of 'legitimacy in the international system', he contended that the concept of 'legitimacy' in the international legal system is based on literary, socio-anthropological and philosophical insight.[47] Accordingly, in the use of 'universalism' to authorise a criminal prosecution on exceptional grounds—as is the case when pursuing universal jurisdiction offences—there is a requirement for a state to adhere to the general legal order to ensure long-term compliance and certainty in regard to the system.[48] The need for order can explain the requirement for states to adhere to the existing international legal regime, despite a lack of obligation or enforcement regime to guarantee compliance. Although it remains a jurisdiction of exceptionalism, universal jurisdiction must necessarily be bound by general principles of international law so that its use does not undermine the international legal order it seeks to support.

Koskenniemi noted that 'law is unable to fulfil any functions unless it has a degree of autonomy from the particular state behaviour, will and interest' it is attempting to regulate.[49] He espoused that:

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[45] Ratner (n 37).
[46] Ibid 90; Dianne Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92 *Georgetown Law Journal* 1057–1134.
[47] Thomas Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705–759.
[48] Oona Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469, 470–472; Thomas M Franck, *Fairness in International Law and Institutions* (Oxford, 1995); Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.
[49] Koskenniemi (n 37) 5; see also Aisling O'Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony* (2017, Routledge).

> For the modern state, the notion of sovereignty provides the legal framework for legitimate authority, while also constructing the basis for its existence and boundaries of engagement … by virtue of the primacy of the state, the efficacy of international law is greatly dependent on the willingness and the extent to which the state wishes to cooperate.[50]

This analysis reinforces that the underpinning premise of universal jurisdiction conflicts with the principle that enables the international legal system to function. State sovereignty is bound by state interest, but the introduction of norms and regulatory systems to regulate state behaviour rely on state cooperation. For a state to act in the absence of self-interest when criminally prosecuting a person accused of conduct with no direct jurisdictional nexus to that state, there must be some other foundational purpose to encourage the otherwise discretionary prosecution.

Thus, universal jurisdiction is necessary to address the impunity gap in international criminal legal justice. It is created by reliance on a justice system fundamentally based around state sovereignty, which is characterised by action or inaction for criminal justice inevitably undertaken with regard to triggering a prosecuting state's own interests. The application of universal jurisdiction is, by definition, a domestic legal concern, applying international legal considerations.

As articulated previously, the fundamental premise of the international legal order is this respect for sovereignty, bound by general norms and fundamental civilising principles. However, adherence to these underlying principles of civility and humanity result in exceptionalism, with universal jurisdiction enabling states to utilise domestic authorities against people to whom they have no sovereign nexus. Specifically, exceptionalism in this context refers to the idea that there is no other nexus to support the jurisdiction and usual jurisdictional limitations may be ignored when relying upon jurisdiction, because upon the exceptional nature of the offending that has occurred. This tension in the principle of universal jurisdiction has resulted in ongoing international debate as to the circumstances that enliven this jurisdiction, and the pre-requisites that amount to exceptional circumstances, for the jurisdiction to then rely on.[51]

[50] Koskenniemi (n 37) 5; see also Abou Jeng, *Peacebuilding in the African Union: Law Philosophy and Practice* (Cambridge University Press, 2010) 20.
[51] International Criminal Court (n 12).

The general enforcement regime against states in relation to international criminal law are:

> mechanism[s] by which the indirect enforcement scheme operates, whereby a state obliges itself under an international convention to include appropriate provisions in its national laws which would make the internationally proscribed conduct a crime.[52]

There is no customary or codified enforcement regime available for universal jurisdiction offences based on the principle of exceptionalism described previously.

When considering current enforcement bases for international criminal justice beyond sovereign authority, the only supranational authority resides within the authority states have given to the UN, or through submission to the ICC. Current UN power in relation to the direction of national law enforcement mechanisms allows the UN Security Council to direct that a state act to manage an offender within their sovereign territory who is accused of core international crimes. The power of the *United Nations Charter* provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[53]

In the event that the state chooses not to respond to this direction, the Security Council may direct sanctions to enforce its decision against the state. However, reliance on the UN Security Council to direct legal enforcement mechanisms requires a nexus to 'threats to peace and security', which are the prerequisite for UN Security Council coercive action.[54]

Noting the abstention by key players in the UN Security Council in both examples of ICC referrals (relating to the situations in Libya and Darfur) in attempts to exempt

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[52] Bassiouni, *International Criminal Law: A Draft Criminal Code* (Brill Archive, 1980) cited in Farhad Malekin, *Monopolization of International Criminal Law* (Almqvist & Wiksell International, 1995) 46.

[53] *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), art 39 ('*United Nations Charter'*).

[54] *United Nations Charter;* (A/59/565) [185]–[203]; see generally Michael Wood, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 *Indian Journal of International Law*, 345–367, 354 citing Secretary-General's high-level panel report, *A More Secure World: Our Shared Responsibility;* and Secretary-General report, *In Larger Freedom: Towards Development, Security and Human Rights for All,* A/59/2005 (2005), UN GAOR*,* UN Doc A/59/2005 (21 March 2005) [122]–[126].

their nationals from the investigations referred to the ICC, it would seem exceedingly unlikely that implementation action would be taken regarding such sanctions.[55]

State practice also demonstrates a general reticence to act upon issued directions pertaining to enforcement in international criminal justice. Arrest warrants issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY) have been left unfulfilled, as like-minded states have ignored calls for the extradition of alleged perpetrators to face justice.[56]

Although the general legal theory supporting the exceptionalism of the jurisdiction is broadly agreed upon (as well as the purpose of the jurisdiction as being to address the impunity gap in existing international criminal law systems), there is no settled defined jurisprudential basis for universal jurisdiction offences, nor for their enforcement. Rather, use of the jurisdiction has been tolerated and developed over time. Despite its domestic application in principle, the nature of this exceptional doctrine requires some kind of common understanding between all states to ensure that offences prosecuted reflect the principles of universality pursuant to which the doctrine espouses.

2.3 'Traditional' Criminal Law Jurisdictions

To ensure clarity and consistency throughout the thesis, it is pertinent to briefly discuss which 'other' jurisdictional regimes apply in the enforcement of criminal law extraterritorially. Although there is some debate about the efficacy and application of these categories,[57] the 'traditional' jurisdictional nexuses defined in this thesis include the:

[55] Security Council Resolution 2022, UN SCOR, 6673rd mtg, UN Doc S/Res/2202 (2 December 2011); The referral to the ICC to investigate human rights abuses in Darfur in response to the UN International Commission Inquiry on Darfur purported to exempt non-Sudanese citizens from states not party to the ICC's *Rome Statute*, including US citizens, from ICC jurisdiction; see *Report of the International Commission of Inquiry on Darfur to the Secretary-General* S/2005/60 (1 February 2005); *Report of the Secretary General on the Sudan,* Security Council Resolution 1564, 5040th mtg, UN Doc S/Res/1564 (18 September 2004). See generally Luigi Condorelli and Annalisa Campi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3(3) *Journal of International Criminal Justice* 590–599.

[56] United States Department of State, *US Department of State Country Report on Human Rights Practices 2000–Croatia* (26 February 2001) <http://www.refworld.org/docid/3ae6aa990.html>.

[57] Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law' (2012) 13(1) *Melbourne Journal of International Law* 122; Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9 *Utrecht Law Review* 4.

- nationality or active personality principle, where the alleged criminal conduct is committed by a person who holds nationality of the prosecuting state
- passive personality principle, where the alleged criminal conduct is committed against a national of the prosecuting state
- protective principle, where the alleged criminal conduct has a link to the security of the prosecuting state.[58]

The above jurisdictional bases all require a link between the alleged criminal conduct and the state asserting jurisdiction, as contrasted to universal jurisdiction.

In some case studies, states refer to other jurisdictional bases as the authority to proceed with a particular matter. For the purposes of this thesis, these additional bases for prosecution will be highlighted. In such cases, even if the case was not considered on grounds of universal jurisdiction, but on an alternative basis, the case provides a useful comparison on considering the categories of assessment (see Chapter 4).

2.4 The Definition of Universal Jurisdiction in International Law

Noting the fundamental tension in the establishment of this jurisdiction, there are numerous competing definitions of universal jurisdiction, which are nuanced in their consideration of the jurisdictional link to the prosecuting state and the type of offence that may fall under the jurisdiction.

Universal jurisdiction, in its purist form, is 'based solely on the nature of the crime'; thus, categorising the nature of the crime provides more certainty in terms of measures to address it.[59] This pure application of the jurisdiction leads to some states applying the jurisdiction in absentia, and in others, with justification for illegal abduction of the defendant, supporting the controversial dictum of wrongly captured, properly detained (*male captus, bene detentus*).

In the context of the debate surrounding the establishment of the League of Nations, and the legal framework pertaining to international law enforcement, Lauterpacht and

[58] Edwin D Dickson, 'Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law Supplement: Research in International Law* 435–656; International Committee of the Red Cross, General Principles of International Criminal Law, (October 2013) ICRC Advisory Service on International Humanitarian Law <https://www.icrc.org/en/document/general-principles-international-criminal-law-factsheet>.
[59] M Cherif Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 43.

Schmitt discussed the contemporary basis for categorising the pirate as *jure gentium* and the justification for subjecting pirates to universal jurisdiction. In 1937, Schmitt contended that piracy was the 'single point of irruption for a completely novel international law, which shatters in a thousand pieces the concept of the State'.[60] Further, its unique nature and statelessness was always an anomaly in international law, which did not immediately translate to the need for international legal regulation. Conversely, Lauterpacht supported the concept of 'cosmopolitan peace'. That is, the need for international regulation of conduct justified the international criminalisation of all offences, expanding on universalism to include all international criminal offences, not simply piracy.[61]

The piracy analogy has since been used by numerous scholars to justify the expansion of universal jurisdiction to other offences. Lauterpacht asserted that 'international criminals be labelled as pirates and "enemies of mankind" in order to legitimate their prosecution and punishment before the international community'.[62] Expanding on this analysis, Lauterpacht contended that the pirate is not simply a criminal figure but a justification for the extension of international law to regulate conduct beyond the boundaries of the state. Piracy is the 'constitutive exception; the extralegal character without whom that body of legal thinking would not have been able to delimit itself in the first place'.[63]

However, Schmitt suggested, as a central argument for the transition of the 'old international law' to the new, that the previously anomalous offence on the high seas did not support the legal suppression of 'stateless rogues acting on the high seas, a zone free from sovereignty but which was necessary to subject to control'. He asserted

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[60] Hersch Lauterpacht, 'Insurrection et piraterie' (1939) *Revue Generale de Droit International Public* 4(2): 513-–549; Carl Schmitt, 'Wesen und Werden des faschistischen Staates' (1929) 9(1) *Schmollers Jahrbuch fur Gesetzgebung, Verwaltung und Volkswirtschaft* 107-–115; both cited in Amedeo Policante, 'Hostis Humani Generis: Pirates and Empires from Antiquity until Today' (PhD Doctoral Thesis, Goldsmiths College, University of London Department of Politics, 2012). While not directly relevant to his position on piracy, for information on Schmitt's personal history, and in particular his Nazi apologism, see Howse, Robert, 'Schmitt, Schmitteanism and contemporary International Legal Theory' in *The Oxford Handbook of the Theory of International Law* (2016); and Scheuerman, Bill, 'The Fascism of Carl Schmitt: A Reply to George Schwab', (1993) 29 *German Politics and Society*, 104-111.

[61] Hersch Lauterpacht, *An International Bill of the Rights of Man*, (Columbia University Press, 1945); Michael Barnett, 'The Cosmopolitan and the National' in *The Star and the Stripes* (Cambridge University Press, 2016), 123.

[62] Walter Rech, 'Rightless Enemies: Schmitt and Lauterpacht on Political Piracy' (2012) 32(2) *Oxford Journal of Legal Studies* 235–263; Lauterpacht (n 60) 513–549.

[63] Lauterpacht (n 60) 6.

that at its highest, pirates were outlaws, 'banned from international law and cast into a space of exception radically void of legal rights and duties', or criminals, 'responsible for some grave offence against some kind of Universal or Natural law'.[64] Schmitt's basis for prosecution of piracy lay in criminal justice for the purposes of international security, as the 'anti-sovereign'.[65] Alternatively, Lauterpacht's was in the enforcement of 'fundamental laws and norms for the whole of humanity, which states would be obliged to implement'.[66]

In Lauterpacht's assessment of the League of Nations establishing a cosmopolitan system of international law, war was essentially outlawed. Thus, pirates would be deemed criminals and subject to universal jurisdiction. In any event, despite the divergence in justification for the basis of universal enforcement against piracy offences, both scholars recognised the value of the piracy analogy as a mechanism to expand the scope of universal jurisdiction in the new world order in which sovereignty would be 'limited by superior norms of international law'.[67]

In a more pragmatic sense, universal jurisdiction applies to cases in which serious criminal conduct has escaped prosecution in any other more relevant forum. Thus, it falls to a domestic court connected to the offender—this being the form that the *Princeton Principles on Universal Jurisdiction* (Princeton Principles) sought to support to strike a balance between ending impunity and maintaining the sovereign integrity of states.[68]

Luc Reydams, in his assessment of the basic principles of universal jurisdiction, stated:

> While nearly all scholars of international law acknowledge the existence of a universality principle, some have also noted that the 'content [and] scope' of that principle is unclear, [t]he universality principle is an 'exceptional international jurisdictional doctrine' because it 'holds that the very commission of certain "universal crimes" engenders jurisdiction for all states irrespective of where the crime occurred or which state's nationals were involved'.[69]

[64] Schmitt (n 60) 107–115.
[65] Abdi Aidid, 'Piracy, Sovereignty, and International Violence: The Pirate as an Anti-Sovereign in International Law', (Paper, presented at Yale Law ASA 2014 Annual Meeting, 26 March 2014).
[66] Lautcherpacht (n 60) 8, cited in Rech (n 62)
[67] Policante (n 60) 253.
[68] Stephen Macedo, 'Foreword by Project Chair, Stephen Macedo', *Princeton Project on Universal Jurisdiction* (2001) <https://lapa.princeton.edu/hosteddocs/unive_jur.pdf>.
[69] Reydams (n 14).

Thus, there are two key elements of the jurisdiction that can be disentangled to further assist in defining this jurisdiction of exceptionalism and assessing gaps in the enforcement in the practicalities of bringing criminals to justice: its well-accepted prescription and poorly understood scope.[70]

2.5 Prescription of Universal Jurisdiction in International Law

In identifying the limits of the prescription of the universal jurisdiction regime in international law, the concept is firmly ensconced as a legitimate principle in international law. However, the limitations of the doctrine are unclear.[71]

This is evidenced by the widespread application of universal jurisdiction in domestic legislation and the wildly disparate scope of offences to which universal jurisdiction applies in various state jurisdictions. Amnesty International, Human Rights Watch and other NGOs have attempted to conduct summaries of the field by collating the legislation of states that have prescribed universal jurisdiction offences.[72] Further, the UNGA report to the Secretary-General on the scope and application of universal jurisdiction reinforced that states' understanding and prescribed jurisdiction encompass different offences and different authorities in relation to the prosecution of such offences.

The outcomes of these assessments are:

- The idea of universal jurisdiction to allow national courts to prosecute serious international crimes is accepted.
- There is no agreement on which crimes are subject to universal jurisdiction.
- Some states adopt prosecute and extradite obligations under international agreements or treaties as variants of universal jurisdiction.

[70] Anthony J Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law', 48 *Harvard International Law Journal* 121, 130–131 (2007) in Allyson Bennett, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Tracking Vessel Interdiction Act' (2012) 37 *Yale Journal of International Law* 433–461.
[71] Anne-Marie Slaughter, 'Defining the Limits' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 173; Anthony J Colangelo 'The Legal Limits of Universal Jurisdiction' (2006) 47 *Virginia Journal of International Law* 149, 150; Kantorovich, Eugene, 'The Inefficiency of Universal Jurisdiction' (2008) *University of Illinois Law Review* 390, 393.
[72] Bhuta (n 36).

- Some apply selective 'universal jurisdiction plus' (ie, recognition of a universal criminal offence plus the presence of an accused) to incorporate universal jurisdiction principles and relevant treaty obligations.[73]

2.5.1 The concept of universal jurisdiction and 'universality'

The concept of universal jurisdiction is grounded in the concept of 'universality' and a corresponding transcendence of national boundaries. This contrasts strongly to the traditional jurisdictional construct, which is inherently designed to limit the authority of the state in what and over whom it may adjudicate. Indeed, the power to wield such authority is derived from statehood.[74] The doctrine can be summarised as:

> the principle that certain crimes are so heinous, and so universally recognized and abhorred, that a state is entitled or obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or victims.[75]

The 'universality' of the doctrine is based on the supranational nature of certain action. National boundaries can be ignored to punish those who have committed crimes that affect humanity as a whole. The historic concept of 'enemies of mankind' is translated into the modern parlance by a concept of 'universality'. Universalist theorists, such as Grotius and Beccaria, and other natural law theorists, gave rise to consideration of a set of common values shared among humankind.[76] Consequent upon the existence of these common values is an 'obligation' to prosecute those responsible for the most egregious crimes, regardless of other jurisdictional links.[77] While theoretically sound,

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[73] This summary is derived from the state submissions to the Sixth Working Committee of the UN General Assembly Agenda Item on the Application and Scope of Universal Jurisdiction Offences, and from Draft Resolution 69/L8, *The Scope and Application of the Principle of Universal jurisdiction,* UN Doc A/C.6/69/L8 (30 October 2014); see (n 12). The informal working paper for this committee submitted that 12 crimes are subject to universal jurisdiction, though these are not supported by the corpus of states (see Table 1): apartheid; corruption; crimes against humanity; crimes against peace/crime of aggression; enforced disappearances; genocide; piracy; slavery; terrorism; torture; transnational organised crime and war crimes. See also the description of obligatory territorial jurisdiction in *Arrest Warrant of 11 April 2000 (Congo v Belgium) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal)* [2002] ICJ Rep 128 3, 74–75.

[74] See discussion of the basis of territorial jurisdiction in *The SS Lotus (France v Turkey) ('The Lotus Case')* 1928 PCIJ Ser A, No 10: 'Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'.

[75] See *Princeton Principle—1(1)* in Macedo (n 14) 4, 43; see also Bassiouni (n 59).

[76] Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers, 1998) 29.

[77] Cesare Beccaria, *On Crimes and Punishments* (republished online 3 September 1997, originally published 1764) <http://www.constitution.org/cb/crim_pun.htm>; Hugo Grotius, *The Law*

this ‘obligation’ has been balanced against other international law obligations and principles. This has resulted in the current expression of universal jurisdiction amounting to permission for states to prosecute certain, accepted ‘universal’ offences, when there is no other connection to the offence other than the conduct being offensive to humankind.

Not to be confused with extraterritorial criminal jurisdiction, or *aut dedere aut judiciare* (prosecute or extradite obligations—usually expressed in international treaties and conventions such as the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*),[78] universal jurisdiction grants a state authority to deal with a matter on the sole basis that the crime is of concern to humankind. Some contend that the content and limits of the sovereignty principle in present-day international law is the more critical consideration when listing offences subject to universal criminal jurisdiction. Specifically, the issue turns upon the ‘extent to which just punishment of war crimes and crimes against humanity can be refused or obstructed by appealing to sovereignty in present-day international law’.[79]

Universal jurisdiction crimes are not limited to the domestic jurisdiction of any one state. When comparing Oppenheim’s definition of non-intervention,[80] it is evident that the use of universal jurisdiction does not offend this Westphalian construct; thus, prosecution of such offences do not amount to an intervention. He defined intervention to mean ‘forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention’.[81] As this principle has a corollary right of sovereign responsibility, which has been translated to impute authority to other states, the international community *writ large* has been equally empowered by states to prevent egregious

[Rights] of War and Peace (1625, enhanced edition), Online Library of Liberty, <http://oll.libertyfund.org/pages/grotius-war-peace>; as discussed in M Cherif Bassiouni, ‘The History of Universal Jurisdiction’ 43, in Macedo et al (n 14).

[78] *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, UNTS 1973 (entered into force 14 October 1971). See also ‘*The Obligation to Extradite or Prosecute (aut dedere aut judicare), Final Report of the International Law Commission’* [2014] II(2), *Yearbook of the International Law Commission* 1, 65. See also Raphäel van Steenberghe, ‘The Obligation to Extradite or Prosecute: Clarifying its Nature’ (2011) 9 *Journal of International Criminal Justice* 108.

[79] Bernhard Graeforth, ‘Universal Jurisdiction and an International Criminal Court’ (1990) 1 *European Journal of International Law* 67; Macedo (n 20).

[80] Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (Oxford University Press, 9th ed, 2008), vol I, 432.

[81] Ibid.

breaches of the rules of humankind. The idea that these rules extend beyond national boundaries is not limited to developments in the Westphalian order.[82]

The modern theoretical construction of universal jurisdiction is based on two justifications: the normative universalist and the pragmatic policy-oriented position.[83] The universalist position recognises the existence of certain core values shared by the international community that are deemed important enough to justify the overriding territorial limitations on the exercise of jurisdiction. However, the pragmatic policy-oriented position recognises that the shared international interest requires enforcement of offences that should not be limited to sovereignty. Standard texts suggest that there are different universal jurisdictions to enforce and try; these differences are born from the basis upon which justification of the crime is derived from.[84] Either position acknowledges the existence of an international community with commonly shared values, and a shared interest in protecting the global interest and status quo through prosecution of the more serious transgressions of these values.[85] In terms of the pragmatic adoption of universal jurisdiction, policy-oriented solutions will enhance its application. In the legalistic adoption of the jurisdiction, its use will be better supported by the adoption of stronger international legal agreements. Therefore, in assessing the practical enforcement of universal jurisdiction in prosecuting war criminals, a pragmatic interpretation of universal jurisdiction will be adopted.

Confusion as to the meaning of 'universality' further complicates the use of the doctrine of universal jurisdiction. Bassiouni contended that 'universality' has at least five meanings:

1) universality of condemnation for certain crimes
2) universal reach of national jurisdiction, which could be for international crime for which there is universal condemnation, as well as others
3) extraterritorial reach of national jurisdiction (which may also merge with universal reach of national legislation)
4) universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction

[82] Beaulac (n 8).
[83] Bassiouni (n 59) 42.
[84] Xavier Phillipe, 'The Principles of Universal Jurisdiction and Complementarity' (2006) 88 *International Review of the Red Cross*, 862.
[85] Bassiouni (n 59) 24.

5) universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused.[86]

For the purposes of this thesis, the 'pure' application of universal jurisdiction that will be considered are those instances in Bassiouni's last option: the use of universal jurisdiction is the use of a national legal system with no connection to the crime being tried, with the exception of the presence of the accused. Importantly, this excises trials in which the accused is not present. Thus, in absentia trials are not considered a valid exercise of universal jurisdiction, for reasons articulated later in the thesis.[87]

2.5.2 The codification of universal jurisdiction

While international law can be derived from sources established under Article 38(1) of the *Statute of the International Court of Justice*, there is no consistent state practice or *opinio juris* that enables a clear understanding of universal jurisdiction, or how it operates. No ICJ decision has directly dealt with this issue. There is no distinct treaty obligation or other source of law to indicate what states might consider their obligations regarding jurisdictional limits. Further, there is wildly differing state practice in this domain.

An Amnesty International report assessing the breadth and impact of universal jurisdiction identified the prescription of the jurisdiction in 163 countries in 2012.[88] Some international treaties and instruments, including UN resolutions (of the General Assembly and Security Council) purport to agree to the scope and application of the principle of universal jurisdiction.[89] Articles 100–105 of the *United Nations Law of the Sea Convention (UNCLOS)* provides an additional source of universal jurisdiction

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[86] Ibid 62.
[87] See *5.3 Forum Selection and Concurrent Jurisdiction.*
[88] Bhuta (n 36).
[89] See for example: *Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'),* opened for signature 9 December 1948, 78 UNTS 227 (entered into force 12 January 1951); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment ('Convention Against Torture'),* opened for signature 10 December 1984, UNTS 1465 (entered into force 26 June 1987); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick in Armed Forces in the Field* [1958] ATS 21; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked of Armed Forces at Sea (Second Geneva Convention),* opened for signature 12 August 1949, 75 UNTS (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention),* opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War* [1958] ATS 21; *Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),* opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

in relation to piracy offences: the imposition under Article 100 of a duty upon all states to 'cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'.[90] With 168 states party to the convention, and components of the convention being viewed by many states as reflective of customary international law, this demonstrates the widespread support for this enforcement obligation.[91]

The most obvious example of codification of a crime subject to universal jurisdiction is the *jus cogens* norm against torture articulated in the *Convention Against Torture*,[92] its denouncement in numerous UNSCR,[93] and its criminalisation in ICT statutes.[94] While not clearly articulating its basis as grounded in universality, this represents attempts by the international community to close jurisdictional gaps for conduct that would otherwise escape punishment because of its endorsement by a state.[95]

Following the brutal world wars of the twentieth century, attempts were again made to codify conduct during conflict, in which the propensity for heinous offending without a suitable civil authority to regulate conduct occurs. The *Geneva Conventions*, to which every state is a party, create a regime for a form of universal jurisdiction to try those guilty of 'grave breaches' of its terms. However, the discussion regarding states' obligation to do so is limited to people within their territories.[96]

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[90] *United Nations Convention on the Law of the Sea ('UNCLOS'),* opened for signature 10 December 1982, 21 ILM 1261 (entered into force 16 November 1994) arts 100–105.

[91] Azubuike, Lawrence, International Law Regimes Against Piracy, (2009) *Annual Survey of International and Comparative Law* Vol XV, 43-59 at 49, citing Bahar, Michael, 'Attaining Optimal Deterrence at Sea: A legal and Strategic Theory for Naval Anti Piracy Operations', (2007) 40 Vanderbilt Journal of Transnational Law, 12; Craig H Allen, 'The International Law of the Sea: A Treaty for Thee; Customary Law for Me?' *OpinioJuris* (online, 14 June 2012) < http://opiniojuris.org/2012/06/14/the-international-law-of-the-sea-a-treaty-for-thee-customary-law-for-me/>

[92] *Convention against Torture,* (n 83) art 1.

[93] For example, Security Council Resolution 2303 [*On the Situation in Burundi*] UN SCOR, 7752nd mtg, UN Doc S/RES/2303 (29 July 2016).

[94] See discussion in Section 6.4 regarding the authorising instruments for the ICTY and in particular, the references to torture.

[95] See n 89. An element of torture as defined in art 1 of the *Convention Against Torture* includes 'instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity', thus addressing the likelihood of state endorsement of the conduct and impunity against domestic prosecution.

[96] Jean Simon Pictet et al, *Commentary on the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987); Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008), 223. Note: the updated commentaries on the Geneva Convention were released following the original submission date for this thesis.

Following this trend for the codification of international criminal law principles, there have been numerous attempts to create sets of rules or guidelines by which the principles of universal jurisdiction should be applied. These have been drafted by advocacy groups, scholars and international organisations alike.[97] The Princeton Principles), enunciated as a set of 14 principles seeking to 'wed principle and practice', were created to:

> formulat[e] principles to help clarify and bring order to an increasingly important area of international criminal law: prosecutions for serious crimes under international law in national courts based on universal jurisdiction, absent traditional jurisdictional links to the victims or perpetrators of crimes.[98]

Further, they are:

> intended to be useful to legislators seeking to ensure that national laws conform to international law, to judges called upon to interpret and apply international law and to consider whether national law conforms to their state's international legal obligations, to government officials of all kinds exercising their powers under both national and international law, to nongovernmental organizations and members of civil society active in the promotion of international criminal justice and human rights, and to citizens who wish to better understand what international law is and what the international legal order might become.[99]

However, despite this intention, there has been no holistic codification of universal jurisdiction. Further, its breadth and understanding has been the subject of rigorous debate by international legal academics, diplomats, judiciaries and governments.[100]

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[97] See for example the 'Brussels Principles Against Impunity and for International Justice', adopted by the Brussels Group for International Justice, following the colloquium 'The Fight Against Impunity: Stakes and Perspectives' (11–13 March, 2002); 'The Princeton Principles' reproduced in Macedo (n 14); the FIGBAR Baltazar Garzon Project on Universal Jurisdiction, *Principles of Universal Jurisdiction*, adopted at the 'II Congress of Universal Jurisdiction', September 2015 <http://en.fibgar.org/publicaciones/revista-academica>.

[98] Macedo (n 68).

[99] Ibid.

[100] See *Preamble* to the *Resolution adopted by the General Assembly on 13 December 2016 [on the report of the Sixth Committee (A/71/516)], The Scope and Application of the Principle of Universal Jurisdiction ('Report on the Scope and Application of Universal Jurisdiction')*, UN Doc A/RES/71/149 (13 December 2016). See also the list of resolutions (n 7). In 2014, noting the work conducted at Princeton, the Baltasar Garzón FIBGAR International Foundation sought to run 'The First International Conference on Universal Jurisdiction' in Madrid to discuss its 18-principle list regarding the application of universal jurisdiction (FIBGAR, *First International Conference on Universal Jurisdiction* (2014) <http://baltasargarzon.org/nosotros/first-international-conference-universal-jurisdiction/>). This list was updated at its second 'Congress' run in 2015 (n 91). Further, numerous non-government organisations have sought to publish comprehensive assessments of the state of play regarding universal jurisdiction with a view to assisting in understanding it and its application to contemporary international criminal law. See *General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework,* <http://www.hiil.org/data/sitemanagement/media/IEF_Brochure_241011.pdf>; Human Rights Watch, *Universal Jurisdiction the State of the Art in Europe* (June 2006) < https://www.hrw.org/sites/default/files/reports/ij0606web.pdf >; Surani (n 17); International

Equally, there has been no development of any international convention pertaining to universal jurisdiction despite the flurry of academic discourse and general rhetoric about its promise in the early 2000s.

Indeed, the need for definition and concurrence in relation to the scope and breadth of universal jurisdiction has been part of the ongoing work of the Sixth Committee of the UNGA, whose work was presented in a secretary-general's report in April 2016.[101] The Sixth Committee is charged with, pursuant to Article 13 of the *United Nations Charter*, the initiation of 'studies and mak[ing] recommendations in order to promote the progressive development of international law and its codification', with all UN member states being member of the Committee.[102] The Committee has discussed '*The scope and application of the principle of universal jurisdiction'* and made it the subject of Secretary-General reporting to the UN since 2009.[103]

In 2009, a submission by Tanzania on behalf of the Group of African States requested an attempt to harmonise the disputed application of the universality principle, despite some states' recognition of it as 'well-established in international law'.[104] This request resulted in the adoption without vote of UNGA Resolution 64/117, which recognised that the principles require ongoing consideration. The Committee has considered the principle annually since, and the resolution adopted in 2010 mandated the Sixth Committee to 'undertake a thorough discussion of the scope and application of universal jurisdiction'.[105] Further, the Committee requested the input of the Secretary-General and member states.

Committee for the Red Cross, *Universal Jurisdiction over War Crimes,* ICRC Advisory Service (March 2014) <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>, Australia Red Cross, *Topic 2(a)—The Principle of Universal Jurisdiction*, Principles of International Humanitarian Law (3 September 2010) <http://www.redcross.org.au/files/2010_The_Principle_of_Universal_Jurisdiction.pdf>, African Union–European Union Report, *AU–EU Expert Report on the Principle of Universal Jurisdiction,* (16 April 2009), EU Document 8672/1/09, Rev 1; Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (September 2001); Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (August 2011).

[101] *Report on the Scope and Application of Universal Jurisdiction* (n 100).

[102] n 73.

[103] UN Doc A/C.6/69/L.8 (30 October 2014); also n 7.

[104] Letter from the Permanent Representative of the United Republic of Tanzania to the United Nations, addressed to the Secretary-General (29 June 2009), UN Doc A/63/237/Rev 1, 23 July 2009.

[105] *The Scope and Application of Universal Jurisdiction,* GA Res 64/117, UN GAOR, 6th comm, 64th sess, 64th plen mtg, UN Doc A/RES/64/117 (16 December 2009); *The Scope and Application of Universal Jurisdiction,* GA Res 65/33, UN GAOR, 6th comm, 65th sess, 57th plen mtg, UN Doc A/RES/65/33 (6 December 2010); also n 7.

Equally, these submissions identified that there is no codification or specific international legal principle that guides the enforcement of the jurisdiction. There is only a reliance on generic international legal principles, such as general human rights laws or the recourse of a state to protect its citizens through international adjudication measures such as the mechanisms outlined in the *Articles for State Responsibility for Internationally Wrongful Acts*.[106]

In July 2015, the UN Secretary-General's report outlined the content and observations of the various submissions to the working group.[107] Following the submissions from members states in 2015, a further Secretary-General report was presented to the General Assembly in April 2016.[108] While the report was welcomed in the following session, there were no firm outcomes nor consensus reached regarding the principle. The report recalled how individual states apply universal jurisdiction, but noted that 'the lack of consensus on the definition and scope of application of the principle of universal jurisdiction … can be observed at the international level'.[109] The report noted that further analysis was required, and the matter was again listed on the agenda of the Sixth Committee for discussion in its 71st session (which occured in December 2017).

Consequently, it is hoped that there will be further clarification of the doctrine, to achieve the resolution adopted by the UNGA:

> Reiterating its commitment to fighting impunity, and noting the views expressed by States that the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible and judicious application consistent with international law.[110]

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[106] General Assembly Resolution 56/82, *Responsibility of States for Internationally Wrongful Acts*, UN GAOR, UN Doc A/RES/56/82 (18 January 2002). See Marjan Ajevski, 'Serious Breaches, The Draft Articles On State Responsibility And Universal Jurisdiction' (2008) 2(1) *European Journal of Legal Studies*, 12–48.

[107] Submissions and responses from member states such as Austria, Azerbaijan, Belarus, Croatia, Cuba, the Czech Republic, Greece, Jordan, Kuwait, Oman and Peru. Regional organisations and other bodies provided responses, including the European Union, the International Civil Aviation Organization, International Maritime Organization, the Organization for the Prohibition of Chemical Weapons and the International Committee of the Red Cross. A summary of these submissions is contained in Table 2.

[108] International Justice Resource Centre, 'UNGA Sixth Committee Advances Discussion of Universal Jurisdiction' (17 November 2014) <http://www.ijrcenter.org/2014/11/17/unga-sixth-committee-advances-discussion-of-universal-jurisdiction/>.

[109] *Secretary General Report—The Scope and Application of the Principle of Universal Jurisdiction,* UN GAOR, 6th comm, 70th sess, item 87 of preliminary list, UN Doc A/70/125 (1 July 2016).

[110] *The Scope and Application of Universal Jurisdiction*, GA Res 64/117, UN GAOR, 6th comm, 64th sess, 64th plen mtg, UN Doc A/RES/64/117 (16 December 2009); also n 7.

Further to these needs, in the same fashion as the demand for an international court was foreshadowed through the work of advocacy groups,[111] submissions to international bodies and draft codes suggested by pre-eminent jurists and academics in the field of universal jurisdiction are yet to produce the identified fully articulated and codified doctrine. However, this work may foreshadow international codification and development of agreed principles to remove the inconsistency and lack of clarity plaguing its current use.

2.6 Scope: Offences Subject to Universal Jurisdiction

Crimes subject to universal jurisdiction are those that are most heinous, and those considered more important to ensure that perpetrators do not escape with impunity. The commonality between war crimes, crimes against humanity and the other 'core' crimes, in addition to their seriousness, is their international character. As a consequence of this international character, the enforcement of these offences usually falls to the post-conflict regime or an international body. These crimes, by their nature, usually occur during armed conflict in the absence of a functioning government or effective legal system, or on a global common, such as in the case of piracy. However, they include a high likelihood that the perpetrators of the crime are protected by the government, flee from the jurisdiction, or commit the offence in the absence of functioning judicial systems. During, and in the immediate aftermath, of conflict, state governance functions such as police and courts are rarely fully effective, resourced or capable of retrospectively investigating matters that occurred during the anarchical state of war. Therefore, in the absence of functioning domestic criminal justice systems, traditional jurisdictions are ill-suited to obtaining justice. Further, for largely egregious criminal offending that typically occurs in the absence of a strong regulatory framework (such as in conflict, or in authoritarian regimes),[112] the reliance upon domestic jurisdictions differs depending on the state in which it is being applied (pending state interpretations of international humanitarian law obligations).

Despite seemingly falling into a jurisdictional gap, absent any international enforcement body, the extension of a jurisdiction for national courts to try perpetrators of these international crimes is the general rationale for universal jurisdiction. Crimes

[111] Lisa Barnett, 'The International Criminal Court: History and Background' (Canadian Parliamentary Paper Background Paper No PRB 02-11-E, November 2008).
[112] Rauschenbach (n 9); Tim Stephens, 'International Criminal Law and the Response to International Terrorism' (2004) 27(2) *University of New South Wales Law Journal* 454.

of aggression, crimes against humanity, war crimes, genocide, piracy and torture are generally accepted as universal crimes.[113] However, for the purposes of this thesis, an understanding of why these particular international crimes may be universally prosecuted by states must be achieved.

The pre-Vattelian concept of 'enemies of mankind' is the general basis for universal jurisdiction. There are certain *jus cogens* norms that identify particular offences that are punishable internationally.[114] The absolute prohibition on genocide, torture and crimes against humanity are uncontroversially included in the list of offences that are universally punishable. This is not only reflected in customary international law, but also in uniformly codified applicable treaty law.[115] Equally, piracy as a crime against humankind is readily accepted in this list.[116]

Despite disagreement about the impact of crimes yet to make the list, there is a generally agreed set of conduct that is considered so heinous that it is in the interests of international peace and security to end or punish the conduct. Discounting the purely domestic prosecution of piracy, this consideration of the impact on humankind underpins the development and proliferation of international criminal law in the later part of the twentieth century. It also explains the creation of ad hoc, international and

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[113] The 1993 International Tribunal For the Former Yugoslavia and the 1994 International Tribunal for Rwanda statutes include the *Statute of the International Tribunal for the Former Yugoslavia*, Security Council Resolution 827, UN SCOR, 48th sess, 3217th mtg, at 1, UN Doc S/RES/827 (25 May 1993); and the *Statute for the International Tribunal for Rwanda*, Security Council Resolution, UN SCOR, 49th sess, 3453rd mtg, at 1, UN Doc S/RES/955 (8 November 1994). They address Genocide, Crimes Against Humanity, and War Crimes. The 1996 *Code of Crimes* includes these three crimes, plus aggression. See: *Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind Adopted by the International Law Commission on its Forty-Eighth Session*, UN GAOR, 51st sess, UN Doc A/CN.4L.532 (1996), revised by UN Doc A/CN.4L.532/Corr.1 and UN Doc A/CN.4l.532/Corr.3; M Cherif Bassiouni, 'Crimes Against UN Personnel', in *International Criminal Law Conventions* (Oxford, 1997).

[114] Note that the submission by Australia to the UNGA Sixth Committee (*Summary Record of the 11th and 12th Meetings,* UN GAOR, 69th sess, 11th and 12th mtgs, item 85, GA/L/3481 (15 October 2014)) contends that universal jurisdiction should 'not be confused with *jus cogens*'; however, this statement misunderstands the interaction between international criminal law and the domestic application of prescribed criminal offences in the enforcement of universal jurisdiction. That is, *jus cogens* principles are peremptory international legal norms that cannot be derogated from, whereas universal jurisdiction supports the adherence to certain *jus cogens* principles, through enforcement against breached behaviours. For example, the absolute prohibition on torture is recognised as a *jus cogens* rule, but prosecution of breaches of this principle through use of universal jurisdiction support this rule.

[115] Bassiouni (n 59) 24.

[116] See discussion of Lauterpacht and Schmitt debate in Section 2.4.

special or hybrid legal bodies[117] to ensure that conduct considered barbaric and inhumane is punished.

The inclusion of other offences in this list, such as drug trafficking and slavery, differs from state to state. The offence of slavery has reached *jus cogens* status, based upon the universality of the *Slavery Convention* signed in 1926, the 1956 *Convention on the Abolition of Slavery* and its prohibition listed as non-derogable in the *International Covenant on Civil and Political Rights*.[118] It is equally a heinous criminal offence. However, this offence is not widely included in the list of offences to which universal jurisdiction applies. In some cases, slavery is considered an offence cognisable through a delegation of authority created by these conventions, rather than one that has universal effect because of its *jus cogens* nature.[119] Thus, categorisation based solely upon the heinousness of the crime is not a definitive criteria for an offence to be subject to universal jurisdiction.

Separately, the genesis of international enforcement for individual criminal responsibility is often referred to as the 'legacy' of the Nuremburg trials, which established the 'lasting international awareness for the necessity of the rule of law in international relations'. Further, 'nobody is above the law. There can be no impunity for grave crimes, which concern the international community as a whole, regardless of the rank or nationality of the perpetrators in question'.[120]

Since the military tribunals post-World War II and the attribution of individual criminal responsibility for international crimes, individual criminal responsibility has been strengthened by numerous international instruments and ad hoc tribunals.[121] However, the ability to bring the accused individual before a *competent* tribunal has

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[117] For a detailed discussion of the evolution of individual criminal responsibility at international criminal law, see Edoardo Greppi, 'The Evolution of Individual Criminal Responsibility Under International Law' (1999) *International Review of the Red Cross* 835.
[118] *Slavery Convention,* adopted 1926, 182 UNTS 51, adopted 25 September 1926 (entered into force 7 July 1955); *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 1956,* 226 UNTS 3 (entered into force 30 April 1957); *International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), reprinted in 6 ILM 369 (1967) (*'ICCPR').*
[119] See Kantorivich (n 7), cited in Rahim Hesenov 'Universal Jurisdiction for International Crimes—A Case Study', *European Journal on Criminal Policy and Research* 19(3) 275–283, 285.
[120] Hans-Peter Kaul, 'Nuremberg Legacy and the International Criminal Court—Lecture in Honor of Whitney R Harris, Former Nuremberg Prosecutor' (2013) 12 *Washington University Global Studies Law Review* 637.
[121] Farhad Malekin, *Monopolization of International Criminal Law* (Almqvist & Wiksell International, 1995) 67.

been one of the most difficult issues in relation to enforcing international criminal law. For example, certain international and non-international conflicts have resulted in the establishment of ad hoc or military tribunals to address war crimes and grave breaches of the *Geneva Conventions* (in international armed conflicts). However, there have been many more grave breaches that have gone unpunished where no tribunal has been established.[122] Another limb underpinning the principles of universal jurisdiction is to ensure that serious criminal conduct does not escape punishment because of the lawless context in which it occurred (international humanitarian law is *lex specialis* given armed conflict typically occurs in vacuums where normal judiciary functions are not operational).

Notwithstanding the absence of extraordinary tribunals, the prevalence of international instruments seeking to combat international crimes has increased significantly since the mid-twentieth century.[123] Numerous regimes have been installed to address specific offences, meeting certain geographical, temporal or gravity thresholds. These have been created as an entire criminal system, such as the ICC (discussed later). These attempts at unification of international criminal law have, in some measure, affected the operation of universal jurisdiction by creating alternate avenues for prosecution in cases in which the offending has not enlivened the interest of states with traditional jurisdiction in ensuring criminal justice.

2.6.1 The Sixth Committee of the UNGA and its impact on the scope of universal jurisdiction offences

The UNGA Sixth Committee, in its discussion of the advancement of universal jurisdiction in 2014, noted that it 'provides that national courts can prosecute serious international crimes—such as piracy, genocide or torture—because such crimes affect the international community or international order'.[124] It does not, however, provide a definitional limit to the crimes that the jurisdiction may apply to, nor does it provide

[122] Office of the High Commissioner of Human Rights, 'Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016–28 February 2017', Conference paper, *Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/34/CRP.3; Julian Borger, 'Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria', *The Guardian* (online, 18 March 2015) (online) <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>.
[123] Samantha Besson, 'The Authority of International Law—Lifting the State Veil' (2009) 31 *Sydney Law Review* 343, 346.
[124] UNGA (n 7).

further direction regarding jurisdictional limits of the principle. Further, the working paper published by the Committee in November 2014 prescribes that the definition of universal jurisdiction should be considered with regard to the role and purpose of the jurisdiction, its relevant components, and in distinguishing it from other related concepts.[125] Thus, the future work of the Committee is focused on defining this jurisdiction based on the consensus in Committee submissions.

Through analysing the state submissions, it is evident that states do not agree with the list proposed by the Secretary-General's report;[126] however, the offences listed are the most widely accepted universal jurisdiction offences. When analysing submissions to the Sixth Committee, the scope of universal jurisdiction (as detailed in Table 1) indicates that there are no offences that are universally agreed as being universal. Of the 39 state and non-governmental submissions to the Committee, 19 considered war crimes universal jurisdiction offences, 18 included war crimes and 16 included genocide. However, only 10 submissions included torture as universal jurisdiction offences. Four submissions included slavery among the universal jurisdiction offences. Surprisingly, only six supported universal jurisdiction for piracy offences, despite the widely spread academic discourse upholding piracy as the most prevalent universal jurisdiction offence.

2.6.2 The *Rome Statute* and its impact on the scope of universal jurisdiction offences

The ratification of and accession to the Rome Statute by 124 states and the subsequent creation of the ICC in 2003 was touted by many as the commencement of a new era in the enforcement of international criminal law.[127] The first suggestion of an international criminal court was raised by Gustav Moynier in 1872.[128] The long-winded history of the creation of the Court, from the attempts under the failed League of Nations,[129] to Trinidad and Tobago's requests to create an international court to

[125] *Report on the Scope and Application of Universal Jurisdiction* (n 100).
[126] Secretary-General (n 109).
[127] This position has been reflected in many legal academic writings since; however, it was also adopted in popular media and by governments as an epoch-changing institution, see Luke Jerod Kummer and Anna Gawel, 'New Era for International Justice, Though Verdict Still Out on ICC', *The Washington Diplomat* (online, 30 November 2011).
[128] Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2014) 27.
[129] Ernst Pollock, 'The International Court of the League of Nations' (1921) 1(1) *The Cambridge Law Journal* 29–41.

manage their transnational drug crimes[130] ultimately resulted in the creation of the Court. The Court is an avenue of last resort, in accordance with the principle of complementarity. It has a very limited remit insofar as the crimes that eventually made their way into the statute were significantly fewer than first anticipated. The prioritisation of the principle of complementarity was key in obtaining a large support base for the statute, and in effect, provided assurance for states that the Court could not be used for ulterior purposes. further, their citizens could not be the subject of vexatious criminal charges in relation to action conducted in the pursuit of legitimate state interests.

In light of these limitations, the Court is not designed to replace domestic criminal institutions, but to address the most egregious crimes under international law as they relate to human interaction. The criminal offences within the Court's subject matter jurisdiction are genocide, crimes against humanity, war crimes, the crime of aggression and offences against the administration of justice. Notably, most crimes for which there was agreement that the ICC should have jurisdiction are generally accepted as being subject to universal jurisdiction.

The generally accepted position in international law is that there are no specific provisions of the statute of the ICC that are directly relevant to the furtherance of universal jurisdiction. Additionally, there is no furtherance in relation to which offences are considered subject to state universal jurisdiction.[131] The preamble of the ICC statute instead recognises that states have a responsibility to prosecute the most

[130] *Trinidad and Tobago Request to the UN General Assembly*, letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General, UN Doc A/44/195 (1989) and UN General Assembly, UN Doc A/44/49 (1989). See also UN Office of Legal Affairs, 'Overview: Rome Statute of the International Criminal Court' (1998) *Rome Statute of the International Criminal Court* <legal.un.org/icc/general/overview.htm>.

[131] The ICC has accepted this as a reflection of its jurisdiction. See *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, ICC-01/04-01/07-717, 13 October 2008) 14: 'under Article 12(2) of the Statute one of the two alternative criteria must be met: (a) the relevant crime was committed in the territory of a State Party or … (b) the relevant crime was committed by a national of a State Party …'. See also *Situation in the Republic of Cote D'Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire)* (International Criminal Court, Pre-Trail Chamber III, ICC-02/11-14, 3 October 2011); *Prosecutor v Lubanga (Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims)* (International Criminal Court, Trial Chamber I, ICC-01/04-01/06-2127 16 September 2009). See generally Jean-Baptiste Maillart, 'Article 12(2)(a) Rome Statute: The Missing Piece of the Jurisdictional Puzzle', EIJL Talk! <http://www.ejiltalk.org/articule-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/>, citing Judge Hans-Peter Kaulin in Antonio Cassese (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002): 'if a core crime is committed by an individual in the territory of a State Party to the Statute, the ICC will have jurisdiction'.

serious of crimes. However, it does not go so far as to state this responsibility in terms of an obligatory universal jurisdiction. The preamble to the Rome Statute explains:

> the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[132]

While some writers suggest that the ICC exercises 'universal jurisdiction', this contention is only accurate in a colloquial sense, if in this case, universal jurisdiction means 'free from any form of State consent'.[133]

Article 12(2) of the *Rome Statute* provides that:

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.

Some contend that a more careful reading of this article shows that this provision contemplates the extension of jurisdiction of the Court to prosecute any conduct that has occurred on the territory of a state party.[134] However, this expansive reading has not been supported by practice of the Court, nor by state practice in relation to support for any expansion of the Court's jurisdiction.[135]

A more satisfactory argument regarding the contribution of the *Rome Statute* to the furtherance of universal jurisdiction is that pursuant to the principles of complementarity, states are given a clearer authority to act in relation to all crimes listed in the statute if an alleged offender is their own national. While this is more relevantly an application of other existing jurisdictions, it incentivises states to act under the principle of complementarity for offences that may have been conducted in another state's territory, affecting non-state nationals.

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[132] *Rome Statute of the International Criminal Court*, opened for signature 17 Jul 1998, UNTS 2187 (entered into force 1 July 2002).
[133] Inazumi (n 14) 115.
[134] Maillart (n 131).
[135] Ibid.

The status of all crimes articulated in the statute as subject to universal jurisdiction has been supported by some states and writers merely because the criminal offence has appeared in the statute. This obligates ratifying states to prosecute any of these offences that occur in their territory. In particular, following the ratification of the statute, several states enacted legislation allowing their citizens to be surrendered to the ICC in certain circumstances, in the event that national courts were unwilling or unable to act. Canada, the UK, Germany and Belgium are examples of states where legislation has been enacted to support surrender of citizens when 'international' criminal offences are committed and not prosecuted. They have directly mirrored the offences contained in the *Rome Statute*.[136] Australian amendments to the domestic criminal legislation (see Section Harmonisation of International Law Principles) are an example of the mirroring of the international obligations to prosecute some crimes considered subject to universal jurisdiction.[137]

Equally, the *Rome Statute* resulted in the amendment of certain states' domestic legislation to reflect the *Rome Statute* concept of universal jurisdiction offences, as compared to previously enacted legislation dealing with universal jurisdiction in those states. Such legislation reflects a type of 'universal jurisdiction plus', insofar as the conduct criminalised reflects offences that are the subject of an international treaty obligation, and that derive their authority from a connection to the person being prosecuted. For example, prior to the ratification and domestic incorporation of the *Rome Statute*, Belgium had domestic legislation creating universal jurisdiction over war crimes, genocide offences and crimes against humanity.[138] The legal authority for this jurisdiction was ostensibly derived from the nation's treaty obligations as a signatory of the *Geneva Conventions* and the *Genocide Convention*. Both conventions required that the signatory state take active measures to prevent the commission of the offences of genocide. The state incorporation of its treaty obligations was to extend

[136] *International Criminal Court Act 2002* (Cth) (Australia); *Crimes Against Humanity and War Crimes Act 2000* (Canada); *Völkerstrafgesetzbuch* (Code of Crimes Against International Law) 2002 (Germany) ('CCAIL'); *The International Criminal Code Act of 2001* (UNITED KINGDOM); *War Crimes Act 1993* as amended in 1999 by the Act of 10 February 1999 (Belgium) (Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire, *Moniteur belge* 23 March 1999).

[137] Although this section discussed the inclusion of international legal obligations generally through the adoption of the *International Criminal Court Act 2002* (Cth), this paper will not discuss in detail the separate inclusion of piracy offences in Part IV of the *Crimes Act* 1914 (Cth).

[138] A Hays Butler, 'The Growing Support for Universal Jurisdiction' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 69.

universal jurisdiction to the conduct that was sought to be prohibited in the subject conventions. While these treaties do not necessarily create universal jurisdiction per se, the creation of universal jurisdiction for these offences was based upon these treaty obligations. Following the ratification of the *Rome Statute*, the Belgian legislation was expanded to include the offences listed under the statute—that is, they expanded the jurisdictional basis for domestic prosecution of these offences to people over whom they had no traditional jurisdictional nexus. This expansion exceeds the obligations articulated in the ICC statute for its domestic implementation. Despite the political pressures related to their expansive use of universal jurisdiction, this provided additional treaty obligations upon which the Belgian legislation could be reasonably based.[139]

2.6.3 Other treaty law and its impact on the scope of universal jurisdiction offences

As will be discussed, the authority for the exercise of universal jurisdiction in the case of many of the offences commonly accepted as being subject to the jurisdiction, is a consequence of state practice being codified in individual international instruments. The interaction of universal jurisdiction with other constructs, such as *aut dedere aut judicare*, is equally enhanced by the existence of international agreements and treaties reflecting the international community's understanding of the universality of some international crimes.

In *Convention Against Torture*, the prosecute or extradite jurisdiction is established through Article 5(2), which specifies that:

> each State Party shall … take such measures as may be necessary to establish its jurisdiction over [torture] offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.

This jurisdiction is akin to 'universality plus', but does not extend to pure universal jurisdiction. In the *Genocide Convention*, the prosecution regime is created through Article VI, which specifies that:

> [p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act

[139] See discussion in Section 5.5 of the political aspects related to this domestic legislature change.

> was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This treaty obligation does not extend to creating universal jurisdiction for acts of genocide.

Although the influence of treaties and agreements dealing with the criminalisation of individual offences will be discussed for each individual crime, the broader impact of the codification of universal jurisdiction offences through treaty agreement is a key enhancement to the understanding of the jurisdiction more generally. In the subsequent discussion, it will become apparent that the universality of some treaty obligations purporting to impose the doctrine is wanting. This is due to the breadth of universal jurisdiction offences.[140] This is also a consequence of the differing subscription to the tapestry of international criminal law treaty obligations, and in particular different domestic incorporation of offences for which the treaty prescribes prosecutorial authority. Further, the difference in approach across the various conventions relating to the scope and application of universal jurisdiction makes it equally difficult to ascertain a consistent and meaningful process to apply universal jurisdiction uniformly across national criminal jurisdictions.

2.6.4 General principles approach to determining crimes subject to universal jurisdiction

For the reasons outlined previously, there is no generally accepted list of crimes subject to universal jurisdiction. The Working Group of the Sixth Committee of the UNGA circularly described the scope of universal jurisdiction as limited to crimes that trigger the application of the jurisdiction. It noted that this list of offences is 'subject to lively and engaging debate'.[141]

The 1949 International Law Commission conducted a survey to assess which crimes had developed to become international. It concluded:

> Throughout most of the history of international law it has been customary to speak of certain offences as *communis juris* and to describe these as *delicta juris gentil* or 'crimes against the law of nations'. The best-known example of such an offence is of course piracy. Indeed, subject to what is said in the paragraph next following, piracy is perhaps the only example of such an offence recognized by customary law. International conventions have, however, added to the number of such offences certain others of like concern to more than one State. Amongst these may be

[140] See 'Chapter 5: Contemporary State Practice in Prosecuting Universal Jurisdiction'.
[141] See n 109, in particular *Oral Submission of the Chairman of the Working Group* [10].

> mentioned the slave trade, traffic in narcotics, traffic in women and children, the dissemination of obscene publications, the counterfeiting of currency and the injury of submarine cables.[142]

Since this survey was conducted, there has been further expansion in international criminal law. This expansion followed the development by treaties, customary international law and the practices of the numerous ad hoc tribunals established to address these offences.[143]

However, while the above list includes many offences committed in international criminal law, not all of these crimes have been subject to universal jurisdiction. The Princeton Principles set out a list of crimes at Principle 2(1), the 'serious crimes under international law'. This list is based on the purist contention of the nature and seriousness of the crime. It specifies that these crimes are subject to universal jurisdiction: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. These are specified as 'serious' offences subject to universal jurisdiction, with a caveat at Principle 2(2), stating this list is 'without prejudice to the application of universal jurisdiction to other crimes under international law'.[144]

Separately, the Restatement of Foreign Relations lists 'piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism' as recognised universal crimes.[145] The list of offences that may be subject to universal jurisdiction, as listed by the UNGA Working Group, was limited to 12 items: apartheid, corruption, crimes against humanity, crimes against peace or the crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organised crime and war crimes.[146] As discussed previously, state submissions were markedly different from this list. However, despite these lists, the cited sources purportedly making these offences universal jurisdiction offences, such as *UNCLOS* and the UN *Convention on Transnational and Organised Crime*, only

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[142] 'Historical Survey of the Question of International Criminal Jurisdiction—Memorandum Submitted by the Secretary-General, Question of International Criminal Jurisdiction', *International Law Commission*, UN Doc A/CN.4/7/Rev 1 (1949) <http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf> 14.
[143] See Inazumi (n 14) for a comprehensive assessment of the breadth of contemporary universal jurisdiction.
[144] See Macedo (n 14) 22.
[145] Bennett (n 70) 449; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, §404.
[146] See UNGA (n 7).

create obligations upon ratifying states. A global obligation under international law and the customary law significance of those conventions is not yet settled.[147] Further, crimes that are the subject of universal jurisdiction in international and domestic practice are more limited in number, mainly on the basis that there has been restraint in both *opinio juris* and state practice in the enforcement of crimes subject to universal jurisdiction.

Nevertheless, in its 2016 Resolution, the UNGA Sixth Committee, in its discussion of the advancement of universal jurisdiction, noted that universal jurisdiction 'provides that national courts can prosecute serious international crimes—such as piracy, genocide or torture—because such crimes affect the international community or international order'.[148]

2.7 Universal Jurisdiction Definition for the Purposes of This Thesis: Scope and Prescription

At its highest, the generally accepted position in relation to universal jurisdiction can be stated as relating to the number of crimes over which a state can exercise jurisdiction without personal or geographical links to the crime.[149] However, that exercise must be balanced against other competing international legal interests, such as respect for the sovereign territorial integrity of states. Finally, the doctrine is limited to a permissive jurisdiction only, one that does not impose any positive obligation on states to prosecute people over whom they hold no traditional jurisdictional.

With regard to this assessment, the Princeton Principles' attempt to define universal jurisdiction provides a relatively balanced and nuanced definition of universal jurisdiction, which is not discordant with most submissions made to the UNGA Sixth Committee regarding various state practices and understanding of the jurisdiction.[150] Further, the Princeton Principles' definition aligns with the International Law Association Committee's 2000 report assessing the jurisdiction, reinforcing its general

[147] *UNCLOS* (n 90); *United Nations Convention Against Transnational Organized Crime* ('*UNTOC'*), opened for signature 8 January 2001, 40 ILM 335 (entered into force 29 September 2003).
[148] *Resolution Adopted by the General Assembly on 13 December 2016 [on the report of the Sixth Committee (A/71/516)], The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/RES/71/149 (13 December 2016); see also UNGA (n 7).
[149] See Section 2.3 for a definition of 'traditional jurisdictions'.
[150] See Table 2.

relevance as a definition of the doctrine. Therefore, for the purposes of this thesis, universal jurisdiction is taken to mean:

> [A] legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.[151]

The list of crimes considered universal, for the purposes of this thesis, will be those that satisfy the pragmatic conception of universal jurisdiction.[152] They form a combination of offences committed on the global commons, such as piracy, thereby importing statelessness and universality to the conduct. Additionally, the offence could breach a *jus cogens* norm, such as torture, which, as a non-derogable principle of international law, is open for all states to enforce the breach of. The following assessment will outline the offences considered to satisfy these requirements. However, this list is not settled, nor does it reflect any one state's position on which offences should constitute universal jurisdiction.

For the purposes of this thesis, crimes subject to universal jurisdiction will be taken to be those enunciated by the Princeton Principles:

- piracy
- slavery
- war crimes
- crimes against peace
- crimes against humanity
- genocide
- torture.

For the sake of clarity, 'universal jurisdiction offences' will, for the purposes of this thesis, be used as an expression for the offences, listed above, that are accepted as being capable of prosecution by any nation state, irrespective of the location of the

[151] 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences' (Paper, International Law Association, *Committee on International Human Rights Law and Practice*, 2000) art 2; reflecting the principle articulated by Mary Robinson in 'Foreword', *The Princeton Principles* in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 16.

[152] Dianne Orentlicher, 'Universal Jurisdiction: A Pragmatic Strategy in Pursuit of a Moralist's Vision' in Michael Scharf (ed), *The Theory and Practice of International Criminal Law Essays in Honour of M Cheri Bassiouni* (Brill, 2003) 147; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice*, 735–760, 740.

crime, or the nationality of the perpetrator or victim.[153] This definition is not intended to be representative of a particular category of offences (ie, it is not intended to delve into which offences are considered to constitute the category of offences listed as war crimes, nor comport a level of 'heinousness' or gravity to the offence). Conversely, 'universally cognisable crimes' will refer to crimes that have been recognised as universally punishable—crimes that have been accepted through other jurisdictional means to prosecute, such as those established through prosecute or extradite jurisdictions. Finally, there will be no distinction drawn in referring to universal jurisdiction offences that are tried in absentia, or in person, as the relevant consideration for this thesis is the methodology.

[153] From the definition outlined in the 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', International Law Association (n 142) 2.

Chapter 3: Historic State Practice in Prosecuting Universal Jurisdiction Offences

Chapter 3 will discuss the historical development of universal jurisdiction, tracing its origins in Australian Aboriginal culture, ancient Chinese and Indian history, and its appearance in medieval Europe. This will be followed by an exploration of its codification in the ninth century relating to the prosecution of the first 'enemy of mankind': the pirate. The first contemporary application of the doctrine of universal jurisdiction in the Liepzig, Nuremburg and Tokyo trials will lay the historical foundations for the application of the doctrine. Chapter 3 will also discuss in depth the most famous successful case of universal jurisdiction: the 1961 trial of Adolf Eichmann.

3.1 Introduction

This chapter traces the development of universal jurisdiction, citing a number of historical examples. It focuses on the methods by which individuals were brought before the relevant tribunal or court exercising the universal jurisdiction, which will provide context for the early development of this jurisdictional concept. Following these early examples, a number of more recent precedents relating to the arrest of individuals under the premise of universal jurisdiction crimes will be highlighted. These examples will be broken into ancient and post-Westphalian examples, allowing the juxtaposition of the jurisdictional basis for the offences being premised on a universalist human rights norm to be compared to the basis in sovereignty (and policy) for the use of the jurisdiction within the current international order.

3.2 Universal Jurisdiction in Antiquity—pre-Westphalian Universal Jurisdiction

Like the development of international law itself, the development of the concept of universal jurisdiction has apparent origins across various ancient legal systems. It is observable in more obvious examples in recent times and is now an accepted concept of international law, although its limits and application remain uncertain. The historical precedents that have resulted in the development of universal jurisdiction are informative in ascertaining the actions considered legitimate in bringing alleged

perpetrators before national courts and tribunals in relation to their offending. Harking even further back, however, an assessment of the development of ancient international law will reveal that the idea of universality is not confined to the modern international vernacular. Further, the historical development of universal jurisdiction provides clarity about the nature and specific offences that are considered subject to it.

Notably, assessments of ancient legal systems are often criticised for their Eurocentric historiographic analysis. However, the search for various examples of universal jurisdiction concepts in antiquity is not an attempt to suggest that there is a single, continuous thread between state relations and the development of states from ancient times.[154] Rather, this assessment serves to identify the development of the natural law theories that underpin modern international law constructs as having roots in a broader set of normative values. Further these constructs have been derived from numerous ancient civilisations that mirror the modern concept of 'universality' within the current framework of international law. This assessment confirms that universal jurisdiction remains elusive in definition and origin.

Scholars generally maintain that the basis of universal jurisdiction lies in the jurisprudence of Grotius in his treatise, *The Law of War and Peace* of 1625.[155] However, there are more examples of the universalist approach to justice in antiquity.[156] Equally, some scholars tie the development of the jurisdiction to 'metaphysical and philosophical conceptions arising in differing cultures and at different times'.[157] However, they rely on religious precepts such as Judaism,

[154] Bederman (n 40) 12.

[155] Bassiouni, above (n 59). Luc Reydams's assessment in detail of Grotius's *In War and Peace* (n 792) interprets that Grotius only spoke about the power to prosecute fugitives, rather than for crimes in the name of the common good: Reydams, above (n 9).

[156] Zgonec-Rožej et al (n 4) 43. The Indian and Sri Lankan ancient references to universal jurisdiction can be found in early Sanskrit writings dealing with violence in Buddhist culture and in the *Mahrahabatra* itself. The two examples of universality as a Buddhist and ancient Indian construct are cited below. The Bhagavad Gita references: 'Actions performed under the direct guidance of the Supreme Lord or His representative are called akarma. This type of activity produces neither good nor bad reactions. Just as a soldier may kill under the command of his superior officer and not be held responsible for murder, though if he kills on his own accord he is liable for punishment, similarly, a Krishna-conscious person acts under the Lord's direction and not for his own sake'. See Jeaneane Fowler, *The Bhagavad Gita: A Text and Commentary for Students* (Sussex Academic Press, 2012). Applying the natural law from an Indian perspective, the 'Dharma-Eternal Source' provided that the 10 characteristics of Dharma, according to Manu, are fortitude, forgiveness, mind control, non-theft, purity of body and mind, sense control, wisdom, knowledge, truth and non-anger. These principles were expected to be universal in application and upheld by the king, as protector of the people, defender of the faith and moral values: SN Dhyani, *Jurisprudence: A Study of Indian Legal Theory* (Metropolitan Book Co, 1985) 19, 37.

[157] Ancient Chinese legal writing refers to 'universality' as a construct: . Thomas Buoye, 'Filian Felons: Leniency and Legal Reasoning in Qing China', in Robert E. Hegel and Katherine Carlitz

Christianity and Islam to support universalism as a legal construct.[158] The reliance on religion as a basis for the international legal order has been criticised, as it reinforces the primitive nature of international law, rooted in custom and mythology. Thus, some scholars attempt to divorce the basis of international legal obligation from religious principles, although this separation of church and state does nothing to further understanding of universal jurisdiction.[159]

Despite criticisms of seeking to identify international law concepts through tracing historical examples, these examples do demonstrate a recognition that there are some offences that transgress the rules of the community in which the civilisation emerged at the time. There are ancient Australian Aboriginal, Chinese and Indian examples of the application of a nascent version of universal jurisdiction. Some Australian Aboriginal cultures created rules for punishing visitors from other tribes, if it was determined that person had murdered someone, or was seeking to escape their own tribe for similarly serious criminal transgressions.[160] These crimes did not require a

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(eds), *Writing and Law in Late Imperial China* (University of Washington Press, 1984). See also R Randle Edwards, 'The Tao-kuang Emperor, 1830—Ch'Ing Legal Jurisdiction Over Foreigners', in Alan Jerome eds et al (eds) *Essays on China's Legal Tradition* (Princeton University Press, 1980) 22: 'The ideal policy is to show concern and kindness of the outer barbarians, while not departing from the fundamental regulations of the Celestial Empire'.

Chinese universalism was based upon 'its insistence that in principle all power be derived from the central government and in its general character as a system of norms to which, no less than those of Confucian orthodoxy, all men were subject in some measure', and was later incorporated into Korean legal systems: William Shaw, 'Traditional Korean Law and Its Relation to China' in *Essays on China's Legal Tradition*, Alan Jerome et al (eds) (Princeton University Press, 1980) 303.

In this case, when dealing with universal jurisdiction offences, their procedural law made special provision for whose legal procedure should apply, though eventually this changed to allow Westerners to apply their own criminal codes for any offenses committed by them—on Chinese Soil or otherwise: See 'The T'ang Code' in *Essays on China's Legal Tradition*, Alan Jerome eds et al (eds) *Essays on China's Legal Tradition* (Princeton University Press, 1980). With respect to offences committed by aliens in China, if the offense offence only involves only persons people of the same nationality, the case hall shall be decided according to the laws of their own country; . whereas If where the offense offence involves persons people of different nationalities, the case shall be decided according to the T'ang Code.

In the Manchu period, the concept of universality was derived from having 'shared obligations to common ancestors [growing] a solidarity': Sybille Van Der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* (The Athlone Press, 1962).

American Cheyanne Indian legal studies reveal a reference to universality regarding its applicability of normative rules: '"Law", as we see it, purports to speak for the Entity which is in question. If in a given society one can recognize, for instance, a tribe, various associates a governmental staff, bands, and families, he recognises thereby a number of subgroups—smaller entities within the great Entirety.'. KN Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1992) 28.

[158] Ibid.

[159] Yoram Dinstein, 'International Law as a Primitive Legal System' (1986) 19(1–2) *New York University Journal of International Law and Politics*; Bederman (n 40) 49.

[160] RL Ginibi, 'Aboriginal Traditional and Customary Law' (1994) 1 *Law Text Culture* 8–12; Russell Goldflam, 'The (Non-)Role of Aboriginal Customary Law in Sentencing in the Northern Territory' (2013) 17(1) *Australian Indigenous Law Review* 71–80.

link to the tribe. Rather, they offended the general values required to live in that society, thus, the link to universality. The Indian *Mahrahabatra* created rules pertaining to soldiers who commit murder outside conflict, and empower the king to prosecute any person found guilty of such an offence.[161] Manchu China created a system to recognise concurrent and competing jurisdictions, applying the jurisdiction of the criminals' domicile if their offending pertained to one of their countrymen or women. This system defaulted to the Tang Code if the victim was from another country—in essence creating a basic system to establish jurisdictional precedence in international criminal cases, premised upon the universality of the offending and the need for criminal enforcement regimes.[162] There are examples throughout history in which the prosecuted person was not a member of the community hearing the charge and the crime alleged did not affect the community specifically.[163]

The ancient Greek legal system is purported by many classical scholars to represent the birth of the construct of 'universality'. These scholars cite philosophers' treatment of justice as the deontological basis, and the diplomatic relations between the Greek city-states as the practical exemplar of people seeking common purpose, with different rules within each society.[164] The ancient Roman culture of universalism was more rooted in the centralisation of power and control by force, despite many scholars claiming the creation of the concept of *jus gentium* (ie, the law of nations) was a formalisation of international law in ancient Rome. In fact, a technical reading of this system of law reveals it was a rational collection of unwritten law and custom that regulated international and commercial relations as distinct from the *fetial* laws of Rome, which dealt with written laws addressing treaty obligations, declarations of war and reparations.[165] Despite these divergent assessments, these examples highlight that '[a]ncient, like modern scruples were often based on moral and humanitarian

[161] Dhyani (n 156).
[162] Edwards (n 157).
[163] See also Bederman (n 40). Note, that although this analysis presents an opportunity to elaborate on ancient custom and tradition as precedent for more contemporary developments, the analysis in this thesis is limited to a relatively cursory analysis of the literature based upon the breadth of this topic.
[164] See Bederman's discussion of Aristotle's *The Art of Rhetoric* (n 40) 139–141: 'There is naturally a common idea of justice and injustice which all men intuitively understand it somewhat, even if they have nether communications not treaty with one another'; and the Greek 'common ides of justice'. See also Bederman's discussion of Laurent's *Histoire dud riot des gens* (n 40) 34.
[165] Bederman (n 40) 48, 84; Coleman Phillipson, *The International Law and Customs of Ancient Greece and Rome* (MacMillan, 1911) 43; Henry Maine, *Ancient Law, Its Connection with Ancient History of Society and its Relation to Modern Ideas* (John Murray, 1861) 36–93.

grounds'.[166] Further, as summarised by Bederman in his excellent treatment of law in antiquity:

> Religion, ritual and reason were all part of the common effort of early civilisations to 'create order (a cosmos) out of chaos, an effort which extended from mythopoeic cosmology to the ordering of the state'.[167]

While the postmodern existence of universal jurisdiction necessarily rests in the post-Westphalian system, in which jurisdictional limitations are based on state boundaries, the idea that there are offences so heinous that they offend humankind as a whole, hence anyone may prosecute the offenders of such crimes, predates the existing international order. The jurisprudential value of such early examples reinforces that whether viewed from the legalistic or pragmatic perspective—from which the assessment of universal jurisdiction is made in this thesis—the basic tenet of the jurisdiction lies in enforcing the developing and evolving values of humanity.[168]

3.3 Early Pre-modern Examples of Universal Jurisdiction

Although the examples of universal jurisdiction systems in antiquity point to the moral grounding for the doctrine, early post-Westphalian examples of universal jurisdiction demonstrate the tension between state territoriality and impunity for criminal offences resultant from the current international order based upon state sovereignty. Thus, this section will examine early cases of piracy and early war crimes trials to foreshadow the difficulties pertaining to due process, forum selection, international legal principle harmonisation and political influence in modern-day universal jurisdiction. Notably, these examples are not strictly applications of pure universal jurisdiction. The blended jurisdictions and other influences in the development of piracy, and later the war

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[166] AJ Holloday and MD Goodman, 'Religious Scruples in Ancient Warfare' (1986) 36 *The Classical Quarterly* 150–152.

[167] Bederman (n 38) 86, citing David Lorton, *The Juridical Terminology of International Relations in Egyptian Texts through Dyn.* (John Hopkins University Press, 1974) XVIII, 82, 179.

[168] Consider the 1474 trial of Peter Von Hagenbach for allowing his soldiers to rape and kill innocent civilians, and pillage their property during the occupation of Breisach, Germany. A trial of 26 judges from the Holy Roman Empire found him guilty of murder, rape and other crimes against the 'laws of God and man' and sentenced him to be hung, drawn and quartered. This trial is often referred to as the first international criminal tribunal; however, it can also be considered an exercise of universal jurisdiction, given the town occupied by him and his soldiers was not then part of the Roman Empire and nor was Von Hagenbach. See Gregory Gordon, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law* (University of North Dakota, 2012).

crimes tribunals, indicate why the contemporary understanding of universal jurisdiction is confused and not well articulated in international law.

3.3.1 Pirates in the Vatellian era

In ancient times, piracy was mentioned in numerous texts, including Homer's *Odyssey*,[169] and discussed by Thucydides as a problem affecting ancient traders in his history of the Peloponnesian War.[170] In some cases, the pirate was viewed as a member of a hostile 'nation' rather than as a criminal. Specifically in these accounts, including in the later treatment of piracy by Grotius in *The Law of War and Peace*, piracy was not perceived as an unlawful pursuit. Indeed, it was contemplated as a permitted method of sacking and robbing without declaring war on the subjects of the attack.[171] However, over time, as trade regulation increased and control of trade routes was increasingly sought by city-states, piracy was concomitantly frowned upon, with attempts to eliminate pirate states. Further, acts of law were created outlawing the conduct.[172] The crime of piracy gradually developed as a matter deemed to affect not only municipal jurisdictions, but one that required interstate regulation given its impact on state relations and commerce in particular. A treaty between the Carthaginians and the Romans in 509 BC declared a limit on the authority of the Carthaginians to sail past Pelorum for the purposes of either commerce or piracy.[173]

Cicero famously noted in his orations reproaching Verres, the proprietor of Sicily, for harbouring a pirate king, that this pirate was an 'enemy who was fighting desperately and very relentlessly against the Roman people, or rather the common enemy of all races and all people'. This phrase was seized upon by international academic jurists in the fourteenth and fifteenth centuries, reinforced in English and French maritime law until the seventeenth century.[174] Bassiouni provided a detailed treatment of the

[169] Homer, *The Odyssey,* XV, verse 427 (reprinted Prestwick House, 2006).
[170] Thucydides, *History of the Peloponnesian War* vol I, 5 (reprinted Penguin, 1974).
[171] Grotius indirectly suggested the actions were lawful when discussing the 533 AD *Imperial Constitution of Justinian* in the Digest of Justinian: Edward Cavanagh, 'Prescription and Empire From Justinian to Grotius' (2016) 60(2) *The Historical Journal*.
[172] Dominique Gaurier, 'The Enemy of Mankind, in Piracy' in Charles Norchi and Gwenaelle Proutiere-Maulion (eds), *Comparative Perspective: Problems, Strategies and Law* (Hart Publishing, 2012) 29–31.
[173] AT Whatley, 'Historical Sketch of the Law of Piracy' (1874) 3 *Law Magazine and Review Monthly* 536–537, citing Polybius iii, 24–34.
[174] Ibid 31–34. See also the discussion in Tamsin Paige, 'Piracy and Universal Jurisdiction' (2013) 12 *Macquarie Law Journal* 17: 'On the basis that pirates were res nullius (without allegiance to any state) and they were the only actors to be considered separate from citizens of states in the treaties of the 9th century'.

development of piracy in his *History of Universal Jurisdiction*, tracing its apparent origins from Roman law and Greek literature to its contemporary treaty law, dealing with piracy as an international crime.[175] From its development in national laws of seafaring nations during the seventeenth and eighteenth centuries, the commonality of the interests of these states in protecting safe passage on the high seas and limiting privateering as a method of warfare, resulted in a similar outcome in terms of the development of piracy law.

Importantly, the crime of piracy has been used as an analogy for subsequent offences being recognised as universally cognisable.[176] It is generally observed that the development of universal jurisdiction and international criminal law are rooted in the offence of piracy—on the basis that pirates had no state of origin and no loyalty to any sovereign. The offence occurred in international waters and, as such, their actions had no sovereignty attached.[177] The absence of any jurisdiction to charge these 'enemies of mankind' was unsatisfactory in dealing with these criminals.[178] On the basis that pirates were *res nullius* (without allegiance to any state), they were the only actors to be considered separate from citizens of states in early treaties between states.[179] Pirates were outside the international order and the only natural people not subject to direct state control. Compared with diplomats, soldiers and aliens, pirates were not regulated by interstate relations. This made their crime nationally enforceable by any state.

Classical law refers to concepts of *jus in bello*. Grotius's legal system, while based on very different constructs to the post-Vattelian legal order, still referred to powers to execute prisoners of war presupposed on the notion of the commission of a crime.[180] Lauterpacht held that, alongside Vitoria, Grotius's concepts of judgment prior to

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[175] Bassiouni (n 59).
[176] Eugene Kantorovich (n 7).
[177] *Peace of Westphalia* (France, the Holy Roman Empire, Sweden) signed 24 October 1648; *Declaration Respecting Maritime Law* (France–United Kingdom) signed 16 April 1856, British State Papers 1856 vol LXI, 155–158; *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 15; *UNCLOS* (n 90) art 101; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ('SUA Convention')*, opened for signature 10 March 1998, UNTS 1678 (entered into force 10 March 1992). See Paige (n 174) for a detailed analysis of the concurrent municipal jurisdiction of piracy, compared to traditionally held views of universal jurisdiction based on heinousness of the offending. See also commentary in Eugene Kantorovich, 'Penalties for Piracy: An Empirical Study of National Prosecution of International Crime' (Working Paper No 211, North Western University, 2012).
[178] Gerry Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (2007, Polity Press) 159.
[179] Ibid 161.
[180] Grotius (n 77).

punishment in such circumstances marked him as one of the founders of international criminal law.[181] However, use of this analysis for the basis of universal jurisdiction in piracy does not align with the interpretation of the status of pirates in the Roman era. The label *hostis humani generis* also reflected Rome's self-endowed imperial authority as 'the sole place of human flourishing' and 'the incubators of the most human way of life ever achieved' to determine who was an enemy to the Empire, and thus, humankind.[182]

From a pragmatic perspective, the definition of piracy, as exercising the jurisdiction available to any state, ensured that piracy did not become a 'tool of interstate conflict'.[183] There is debate between some academics about whether the heinousness of the offence of piracy supports its universal jurisdiction, or if the statelessness of the offending supports its universal application.[184] Some scholars have attempted to further refine the application of the jurisdiction as being concurrent municipal jurisdictions rather than universal.[185] However, these distinctions focus on confirming the origins and status of its agreed universal justiciability; they do not provide a framework assessing how the crime of piracy can be universally, uniformly and consistently tried and punished by domestic courts of any nation.

The development of piracy as a universal jurisdiction offence and its enforcement are discussed later in this thesis. However, it is sufficient to affirm that the notion of an 'enemy of humankind' as a basis for the expansion of jurisdiction to enable all states to prosecute an offender can be traced to the development of piracy's universal jurisdiction (whether it be a vernacular understanding of the historic roots of the term

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[181] Hersch Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man', *Transactions of the Grotius Society* vol 29 (Cambridge University Press, 1943) 1–33; commenting upon Emerich de Vattel, *The Law of Nations, Or, Principle of the Law of Nature* (GG and J Robinson Paternoster-Row, 1794). See generally Cryer (n 128) 22–23.

[182] MT Cicero, 'Flaccus' in *Three Orations on the Agrarian Law, The Four against Catiline, the Orations for Rabirius, Murena Sylla, Archias, Flaccus, Scaurus, etc.* (HG Bohn, 1856) 424–470. Equally, they contended that Cicero's use of the phrase *inter arma enim silent leges* as a justification for an alternative legal order within the conduct of war (thus elevating the prosecution of such offences to an international legal order) has oft been misread in contemporary legal analysis to mean 'in times of war, the law falls silent';[182] however, in 'Pro Milone', Cicero used the words, '*silent enim legis armes*', which more relevantly pertained to the lawful defence of killing a person in self-defence. The context surrounding this quotation was the 'innate right derived from nature' to use every means to protect one's life by any means possible. Tamas Notari, *Killing a Tyrant—Remarks on Cicero's Miloniana* (Annals Faculty of Law Belgrade International Ed, 2012).

[183] Madeline Morris, 'Universal Jurisdiction in a World Divided' (2001) 35(2) *New England Law Review* 420. See also discussion of Lauterpacht's concept of *hostis humanii generis* in Section 2.4.

[184] See Paige (n 174) and Kontorovich (n 7).

[185] Paige, above (n 174).

or otherwise). Thus, the following assessment will focus on the crime of piracy and its development, with reference only to pre-Westphalian examples.

Piracy was referred to by Thucydides as a common problem. Throughout the early Roman Empire, piracy was considered a problem only because of its economic impact on Roman city-states. It remained prevalent during the post-classical period when the control of sovereigns was diminished; thus, the regulation of piracy was also diminished. However, despite these peaks and troughs of tolerance or acceptance of piracy, a custom developed around the treatment and management of pirates, which reflected the extraterritorial impact of the offence. With increasing reliance on maritime commerce, preventative measures against piracy became more important to states. Thus, regulation of piracy increased, as did state legislation articulating how to deal with pirates.

Through the development of the concept of piracy—and states identifying the need to act against pirates—legislative and protective measures against pirates considered levels of due process with regard to the practicalities of identifying locations for trials, follow-up detention (or corporal punishment), and even the distribution of wealth from captured pirate ships.

In 1274, Norwegian law required two witnesses to prove ownership of goods reclaimed from pirates.[186] In 1288, the *Law of Aragon*, a subsequent edit of the earlier *Consolato del Mare*, codified a requirement for trial of pirates (rather than the previously expected option where they would be thrown overboard) and a need to identify the true owner of goods stolen by pirates.[187] Early German attempts to repress piracy came with legislation about how to divide any 'merchandise' reclaimed from pirates. The Hanseatic League was a group of towns from in and around the Rhine. In 1380, these towns created legislation about how to deal with the piracy threat, importing a duty on the nearest local port to send 'ships of war' to destroy pirate vessels. The towns that formed the league were to share the expenses incurred in doing so.[188] The charging of 'sound dues' (ie, fees for mooring vessels) in early Denmark was attributed to the cost of dealing with piracy.[189]

[186] *Norewgian Landslov of 1274*, in Kantorovic (n175).
[187] Whatley (n 173) 541.
[188] Ibid.
[189] Ibid 542.

The treatment of piracy changed significantly over time—from being tolerated for the slaves that pirates brought to city-states in Roman times, to being outlawed when it had an impact on the proper functioning of states and their economies. There are some ancient examples of application of state responsibility or ownership of former citizens for the punishment of piracy offences. However, these are largely related to 'pirates' who conducted their marauding under state sanction—now considered a different offence (privateering rather than piracy).[190] This ownership was a mechanism for states to enforce ownership of the bounty obtained or reclaimed from the captured pirate ships. It was not recognition of the conflict of laws as contemplated in contemporary international law.

Early versions of the British *Piracy Act*[191] represented an indication of the need to create special processes for the trials of pirates. Previously, pirates were required to be returned to England for trials. However, this amendment enabled the examination, inquiry, trial and hearing at 'any of his Majesty's islands, plantations, colonies, dominions, forts or factories'.[192] The use of such provisions addressed the practicalities of a crime committed without link to a state's traditional geographic jurisdiction. Again, this development did not recognise the concurrency of jurisdiction among many states over pirates. It was merely an effort to assert the state's power over people who targeted and degraded the vulnerability of the British Empire, its control and free movement over the high seas.

Thus, there had been no common reason to seek criminal enforcement against pirates in competing jurisdictions. Although there has been some competition in jurisdiction over pirates between Spain, England and France, the individuals pursued in these cases were in fact privateers by later definition, not pirates.[193] Indeed, although the basis of universal jurisdiction points to the *jus gentium* nature of the pirate to support the basis of universal jurisdiction, there are numerous competing perspectives that hold that the

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[190] See various examples in Whatley (n 173). Also note that during the negotiations for the *Declaration Respecting Maritime Law* (n 169), the United States did not agree, as it sought to exempt all private property from capture at sea, and had sanctioned privateers for some time. It declared at the commencement of the Civil War in 1861 that it would respect the declaration principles during times of hostilities, though it continued to use privateers, including during the American Civil War. International Committee of the Red Cross, *Declaration Respecting Maritime Law. Paris, 16 April 1856,* ICRC Treaties, State Parties and Commentaries <https://ihl-databases.icrc.org/ihl/INTRO/105?OpenDocument >.

[191] See British *Piracy Act 1819* (11 Will 3 c 7).

[192] Ibid.

[193] Janice E Thomson, *Mercenaries, Pirates and Sovereigns: State Building and Extra-Territorial Violence in Early Modern Europe* (Princeton University Press, 1996) 24–27.

basis for piracy is concurrent municipal jurisdictions. Specifically, the basis for this assertion is extending the early argument of Admiralty law, that posited that the Admiralty had jurisdiction. Thus using an argument that each state enforces its municipal jurisdiction to enforce piracy laws concurrently on the high seas, an argument is made that piracy is a crime by virtue of the statelessness of the offender but occurring within the high seas where all states enjoy jurisdictional authority to prosecute those pirates they encounter and detain, as compared to the alternative argument that the crime is based in universal jurisdiction based upon the heinousness of the offence. This argument regarding the jurisdictional basis for piracy is beyond the scope of this thesis. However, this jurisdiction, in competition with the varying support to prosecute pirates over time, indicates that the offence of piracy is not the best proposition to support the genesis of universal jurisdiction in contemporary international criminal justice.

Early Baltic laws made provision for minimum standards of treatment for pirates—namely, the provision of three days' food, a knife and fire. However, when the declared punishment was to be 'exposed on an uninhabited island', the treatment of the recaptured goods were of greater concern to lawmakers.[194]

Heinousness or statelessness have been competing criteria for piracy; however, since the inception of the concept, piracy has universally been viewed as criminal conduct. Its gradual codification as an international offence recognised that the eventual prosecution of piracy has been consistent with competing international law principles.

The delinking of piracy from political aims has been the underpinning tenet of the crime at sea.[195] The recognition of piracy as organised crime on the high seas for personal gain was previously broad enough to cover offences committed with underlying purposes linked to insurgency or political aims. This delinking was arguably to ensure that prosecutions of pirates, as enemies of humankind, and the *jus gentium* offence of piracy, were not influenced by state political and economic aims.

Some scholars contend that this basis for the extension of universal jurisdiction to other offences based on the particularly heinous nature of the crime does not align with the

[194] Whatley (n 173) 542.
[195] See 'Belligerency at Sea' as discussed in *Piracy*: *Preliminary Draft Project and Various Previous Drafts* 2 (1930, Harvard Law School); also see International Law Commission, 'Comment to Article 13' (1956) 2 *Yearbook of the International Law Commission* 25, UN Doc A/CONF.4/Ser. A/1955/add.l.

international attitude towards piracy. That is, that it was not a crime viewed as particularly heinous compared with other offences. Consequently, the contention that piracy is the basis of the modern universal jurisdiction is not a widely accepted position in international law. Kantorovich asserted that the basis for universal jurisdiction, premised on 'the piracy analogy', is a hollow jurisdiction. By tracing the history of piracy, Kantorovich unpacked the basis for other universal jurisdiction offence crimes as being distinct bases of jurisdiction. He noted the use of piracy as a starting point for Israel to extend its jurisdiction over Adolf Eichmann, the author of the Holocaust, on the basis that his actions raised him to the same status as pirates—that is, the enemy of humankind.

This assessment is further supported by Paige's submission that piracy is not a universal jurisdiction offence crime at all. Rather, it is a crime that recognises that those guilty of such offences are stateless. Thus, prosecution of piracy is an extraterritorial application of domestic criminal jurisdiction in the absence of an applicable criminal regime.[196] Paige's conclusion is dependent on the criteria for a crime to be considered subject to universal jurisdiction purely because the crime is 'so heinous as to shock the conscience of mankind'. She further separated piracy from this jurisdiction on the basis that most treaty obligations and international agreements relating to the prosecution of piracy are grounded in mutual legal assistance obligations, or built upon prosecute or extradite jurisdictions. She concluded that 'piracy *jure gentium* is not a crime of universal jurisdiction but a crime which occurs outside the sovereign territory of any state and thus all states have a concurrent municipal jurisdiction'.[197] This argument is misleading, as the historic roots of piracy do not remove the ability to prosecute this offence through the application of universal jurisdiction developed through contemporary international legal practice. As outlined previously, a crime of universal jurisdiction 'allow[s] or require[es] a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim', based upon the impact of that offending upon international interests. Accordingly, through both state practice

[196] Although this analogy could be aligned with the application of universal jurisdiction given it is also an extraterritorial application of domestic criminal jurisdiction, Paige distinguishes these jurisdictional bases on the grounds 'of the requirement that the crime occur on the high seas (with similar acts occurring within the territorial sea, archipelagic or internal waters being armed robbery at sea and within the exclusive jurisdiction of the relevant state) the crime attracts the concurrent municipal jurisdiction of all states to enforce and prosecute, distinguishing it from other jus cogens crimes which attract a universal jurisdiction'. See Paige (n 174) 154.

[197] Paige (n 174) 151.

and *opinio juris*, states have supported this definition of piracy.[198] Piracy is a crime of universal jurisdiction, based not on the heinousness of the alleged conduct, but a reflection of the need to ensure crimes committed absent a traditional jurisdictional nexus do not escape regulation (given the statelessness of the offenders and the location of the conduct).[199]

Thus, the adopted approach to the acceptance of piracy as a crime that is subject to the doctrine of universal jurisdiction is better justified on the absence of a traditional jurisdictional nexus for the criminal offending. The conduct occurs on the global commons; accordingly, it is justiciable by any state, as the offending affects the interests of all states. Bennett identified two criteria that may be present to enliven or justify the application of universal jurisdiction. The first is that the offence is so heinous as to affect all humankind—the atrocity limb. The second relates to the absence of any of the four traditional prescription jurisdictions at international law, specifically that there is no ability to ascribe any connection between the offending and the state.[200] Described as the 'prototypical' universal jurisdiction offence, piracy satisfies a second-tier consideration when contemplating the application of universal jurisdiction: practicality. Therefore, the basis for universal jurisdiction over piracy offences is primarily that 'it is difficult for any state to gain jurisdiction over pirates because their actions occur on the high seas'.[201]

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[198] See in particular the submission by Kenya to the UNGA Sixth Committee: The Scope and Breadth Of Universal Jurisdiction: A/64/452-RES 64/117, Comments from Kenya, <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf>.

[199] Paige's example of the summary execution of pirates who had kidnapped Caesar (in Plutarch's account of the event) stated that the offenders were treated as 'prisoners of war, rebels, or the populace of a resisting city'. This unconvincingly suggests that the status of piracy was treated as a war crime by Rome, supporting Rubin's contention that Rome was in permanent state of war against pirates. Paige (n 174) citing Plutarch, *The Life of Julius Caesar* (George Gill & Sons, 1997) 2. This contention fails to consider the universalism of Imperial Rome, and that Roman actions against pirates over the span of the Empire was more focused on the declaration of 'enemy' against threats to Rome's power and commercial interests, rather than an enemy subject to the laws of war. See Policante (n 60) 29–30.

[200] Bennett (n 70) 161; Anne H Geraghty, 'Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems' (2004) 16 *Florida Journal of International Law* 371, 393, 778–779; B Jordan, 'Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime' (2000) 9(1) *Michigan State Journal of International Law* 110. 'Universal jurisdiction can be exercised over an international crime, as a matter of customary law, only after a majority of nations have consistently followed the practice of allowing nations to exercise jurisdiction over offenders of such crimes which they have captured'.

[201] Geraghty (n 201); Christina E Sorensen, 'Comment: Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law' (1990) 4 *Emory International Law Review* 207, 228.

In 1933, the Full Court of Hong Kong dismissed a criminal matter on the basis that an act of piracy *jure gentium* does not apply to 'a frustrated attempt to commit a piratical robbery'. The King then referred this to the Judicial Committee of the UK for consideration. Subsequently, the Privy Council Special Reference decision, *In re Piracy Jure Gentium*, discussed the basis for offence of piracy.[202] This decision answered the question by tracing the development of piracy in international law, juxtaposed by its development in English civil and criminal law. The conclusion of the Privy Council was bookmarked by considerations of international law, rather than municipal law. They considered 'treaties between various states, State papers, municipal Acts of Parliament and the decisions of municipal courts and last, but not least, opinions of jurisconsults or text-book writers'.[203] Additionally, they adopted a process of inductive reasoning to distil the principles of the crime on the basis that there was no strict codification of an offence under international law. Further, they recognised that international crimes could be prescribed at international law. However, as there is no 'means of trying or punishing them', enforcement of such crimes must be 'left to the municipal law of each country'.[204] They recognised that while ordinarily restricted to their own territorial land, waters or vessels and nationals, the crime of piracy was an exception also falling within the jurisdiction of states. This reasoning was based on the theories of Grotius:

> because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but '*hostis humani generis*' and as such he is justiciable by any State anywhere.[205]

The *Nyon Agreement*, struck in 1937 in response to 'fascist German and Italian submarines' conducting strikes on merchant shipping in the Mediterranean, deemed these strikes 'piratical acts'.[206] In this case, the agreement condoned the actions and permitted the use of force by participating powers to respond to the submarine threat, under the rules of 'international law'. The piracy was recognised as a state-sponsored act, compared to its previously stateless character. Since the *Nyon Agreement*, the customary law regulating the use of state vessels (including submarines) has been separately regulated. Thus, this outlier example is unlikely to influence the current

[202] [1934] AC 586.
[203] Ibid 588-–589 (Viscount Sankey LC).
[204] *In re Piracy Jure Gentium* [1934] AC 586, cited in *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501 (14 August 1991) ('*Polyukhovich'*) 656.
[205] Lauterpacht (n 187), citing Grotius (1583–1645) '*De Jure Belli ac Pacis'* vol 2, chap 20, 40.
[206] *The Nyon Agreement*, signed 14 September 1937, 181 UNTS 137 (entered into force 14 September 1937).

understanding and definition or piracy. It does, however, demonstrate, that with all universal jurisdiction offences, there are numerous offences that can purport to fall under their purview, but are in fact separately regulated offences.

Treaty law expressly provides for the crime of piracy. In 1958, the *Geneva Convention* on the *Law of the High Seas* provided in Articles 18 and 19 that nationality is maintained by vessels on the high seas. In the event of pirate ships or aircraft being outside the high seas, any state may seize control of the pirate ship, and 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 property, subject to the rights of third states acting in good faith.[207]

Piracy was again outlawed in the 1982 *UNCLOS*, which states that piracy may be addressed by every state in the same manner as outlined in the earlier *Geneva Convention*.[208] Bassiouni contended that these treaties establish positive international law for the universal jurisdiction of piracy offences.[209]

The combined effect of these factors has resulted in the somewhat inexplicable reliance on piracy as a justification for the basis of universal jurisdiction. The Schmitt–Lauterpacht exchange demonstrated that the oft-referred 'piracy analogy' provided a justification and explanation for the extension of a judicial regime to redress individual criminal misconduct, affecting the conscience of humankind, to support internationalisation of criminal law.

3.3.2 Liepzig, Nuremburg and Tokyo trials

The Liepzig trials, following World War I, witnessed the prosecution of German officers before the German *Reichsgericht*, giving limited effect to the calls for justice in the *Treaty of Versailles*.[210] Specifically, attempts were made to bring those guilty of the most heinous offences during the conflict to justice. For reasons of political expediency, these trials were eventually conducted by the German state, rather than other states affected by the war. The treaty established a process by which the Allied victors would try German war criminals, and Germany agreed to comply with any

[207] *UNCLOS* (n 90) arts 18–19.
[208] *UNCLOS* (n 90).
[209] Bassiouni (n 59).
[210] *Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles')* signed 28 June 1919, 225 CTS 188 (entered into force 10 January 1920).

extradition order issued to give effect to these trials. The eventual outcome of these trials was a concession by the Allied powers to allow the German state to try its own citizens before its own Supreme Court, thereby ignoring the issued extradition orders. It foreshadowed post-conflict ad hoc justice systems more recently, creating a regional universal jurisdiction by bestowing authority upon victor states over conduct that affected other Allies more broadly, compared with the individual prosecuting state. However, in practice, the outcomes of these trials were less impressive. The initial list of 900 names subject to extradition was eventually whittled down to 45 accused people, of whom only 12 were eventually brought to trial.[211]

Following World War II, a similar system of trials was agreed upon. This was followed with the creation of international military tribunals, established with judges from, again, the winning states following the cessation of hostilities. These trials provided a basis for the universality of the offences themselves. However, the tribunals drew their authority from postwar treaties that established them, and ceded jurisdiction by the affected states through these international instruments. For example, the oft-called 'victor's justice' was enforced through inclusion in provisions in the armistice about how the crimes committed during the conflict would be addressed. The October 1943 *Moscow Declaration* stated that major war criminals whose offences could be assigned no particular geographic location would be jointly punished by decision of the Allied governments.[212] Thus, the international agreements bringing an end to the conflict established the jurisdiction for post-conflict trials. Further, they addressed the extraterritoriality of the gravest offences committed during the war through creation of the transnational tribunal.

In tracing the history of universal jurisdiction, the claim that the *International Military Tribunal* and the *International Military Tribunal for the Far East* (Nuremburg and Tokyo tribunals, respectively) heralded a new era in the application of universal jurisdiction does not align with postwar Allies' powers, which formed the basis of their jurisdiction. These tribunals as the basis for universal jurisdiction is less justifiable than relying on the exercise of jurisdiction in those trials being resultant on immediate postwar exercise of powers by the Allies under laws of occupation. This argument is a stronger jurisdictional basis for the appointment of the tribunals, rather than asserting

[211] Claud Mullins, *The Leipzig Trials: An Account of the War, Criminals Trials and a Study of German Mentality* (Forgotten Books, 2012).
[212] *Moscow Declaration* in United Nations Documents 1941–1945 (Oxford University Press, 1946.

that they represented the application of a new jurisdiction based on universality.[213] Thus, the application of universal jurisdiction to prosecute war crimes finds its origins in other areas. In this case, the heinous nature of the offence was the commonly cited justification to support prosecution by the tribunals, subject to a postwar agreement, thus surrendering jurisdiction in the terms outlined in the agreement.[214]

The *Moscow Declaration* outlined in detail the process to be followed in prosecuting the cases subject to the authority espoused in the declaration—specifically, 'atrocities, massacres and cold-blooded mass executions'.[215] In the case of the Liepzig trials, the process followed was that of the German *Reichsgericht*.[216] Thus, there were no controversies pertaining to the procedures followed in the prosecution of those offences.

In the case of Nuremburg, the *Charter of the International Military Tribunal* was annexed to the 1945 *London Agreement*.[217] It included similar detail to the *Moscow Declaration* in terms of which offences were subject to the tribunal's jurisdiction and the processes to be followed in its trials.[218] Similarly, the *Charter for the International Military Tribunal for the Far East*, issued by MacArthur in his capacity as administrator for postwar territories, relied on transitional state authority to dictate the procedure to be followed by the tribunal.[219] This provided clarity and fairness to the accused. Fair trial rights and selection of legal representation were obvious embodiments of this concern.

Despite this codified procedure, the greatest criticism arising from both the post-World War I and II tribunals was the one-sided nature of the tribunals and that only people

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[213] Willaird B Cowles, 'Universality of Jurisdiction over War Crimes', (1945) 33(2) *California Law Review* 177. The personal accountability of individuals for war crimes was gaining adherents among jurists after World War II.
[214] See Phillipe (n 84).
[215] Ibid.
[216] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals,* vol 1 (The United Nations War Crimes Commission by His Majesty's Stationery Officer, 1947) <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf>.
[217] European Advisory Committee, C*harter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement')* signed 8 August 1945, reproduced in 'The Charter and Judgment of the Nürnberg Tribunal: History and Analysis Appendix II' [1949] *International Law Commission*, A/CN.4/5.
[218] The Avalon Project: Documents in Law, History, and Diplomacy, *The International Military Tribunal for Germany,* Yale Law School <http://avalon.law.yale.edu/subject_menus/imt.asp>.
[219] *Special Proclamation by the Supreme Commander tor the Allied Powers at Tokyo*, signed 26 April 1946, *Treaties and Other International Acts Series 1589*.

who had committed offences against the conflicts' victors were tried. Specifically, none of these tribunals addressed the issue of selectivity in international criminal law regarding when, and who, to prosecute.

This argument has also been levelled against contemporary international criminal tribunals: the prosecutorial decision to commence proceedings not being predicated on the triage or prioritisation of the most heinous of offences, but rather on which entity established the power to create a trial regime for the accused. The greatest complaints levelled against the Liepzig, Nuremburg and Tokyo trials related to the political nature of the selection of accused, and the how the trials were conducted. In the case of Liepzig, the lack of political impetus to insist on prosecuting German war criminals left the trials to fizzle out against a limited number of accused because the offending state had no political interest in prosecuting its own citizens for the conduct that was endorsed and encouraged by the state. In the case of the Nuremburg and Tokyo tribunals, only a limited number of defendants were tried.[220] This did not adequately represent justice for the expansive and horrific conduct that occurred during the war.

Arguably, the failure of the Liepzig trials to produce any tangible outcomes pertaining to the prosecution of serious war criminals resulted in renewed efforts following World War II to ensure that post-conflict trials were conducted by external parties and followed through to address the sufficient gravity of offending.

The term genocide did not exist prior to World War II. Following the petitioning of Jewish lawyer Raphael Lemkin, the term was adopted by the UN in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide.*[221] Equally, the *Geneva Conventions*—and the contemporary conception of grave breaches of the laws of armed conflict and war crimes—were not codified or harmonised in international law prior to the atrocities of World War II.[222] Regardless of the absence

[220] There were limited numbers of other trials run utilising domestic German law under Control Council Law No 10, which had limited success. See Sprecher, Drexel, and John Fried, T*rials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*. 'The Justice Case.' Vol 3 (US Government Printing Office, 1951).

[221] United to End Genocide, 'Raphael Lemkin and Creation of the Word "Genocide"', *End Genocide* <http://endgenocide.org/learn/what-is-genocide/>; See also Phillipe Sands, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'* (Knopf Doubleday Publishing Group, 2016).

[222] Although breaches of the laws and customs of war were evidently cognisable crimes well before 1900, they were not codified and, in the case of international armed conflict, the subject of universal acceptance through the *Geneva Conventions*. Antonio Cassese, *International Criminal Law* (Oxford University Press, 3rd ed, 2013) 67.

of the articulation of these offences, the criminal tribunals following World War II, in both the Nuremburg and Far East Military tribunals, prosecuted criminals for conduct that would today be readily categorised in the list of international criminal offences now accepted in international customary law as attracting personal criminal responsibility. While there is extensive literature on the influence of these tribunals on international criminal law, the significant effect on universal jurisdiction was the concept of offences that offended humankind. Thus, these offences were subject to prosecution in the interest of humankind writ large, supporting universal jurisdiction.

Contrastingly, in the case of the Nuremburg and Tokyo trials, the opposite was true: the chosen accused were only tried because they were selected by the victors of the conflict, and although they represented some of the senior leaders, they were not representative of the most heinous of offences nor the entirety of the senior leadership who were capable of being successfully prosecuted.[223] Despite allegations of selectivity in prosecution, these trials unarguably created a new regime to protect against impunity.

3.4 Adolf Eichmann

The Israeli use of universal jurisdiction demonstrates a number of the key procedural concerns regarding the exercise of the jurisdiction: political motives for prosecution; the use of evidence collected across jurisdictions or without evidentiary concerns in mind; requirements to provide a fair trial for the accused; and the use of laws that balance both international and domestic legal considerations. After discussing the *Eichmann* trial in depth, as the first and most infamous use of 'pure' universal jurisdiction, an assessment will be made regarding Israel's use of the principle of universality in 2016, and its protestations regarding its alleged misuse by those with agendas different to the Israeli state.

Adolf Eichmann's trial commenced on 2 April 1961 in the District Court and concluded on 14 August 1961. It dealt with 15 counts of criminal conduct, varying from crimes against humanity, crimes against the Jewish people and membership in a criminal enemy organisation, specified in Israel's domestic legislation—the 1950 *Nazi*

[223] The Robert H Jackson Centre, 'The Influence of the Nuremberg Trial on International Criminal Law' (2012) <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/>.

and Nazi Collaborators (Punishment) Law.[224] The court sought to exercise its jurisdiction on multiple grounds: domestically through Section 1 of the *Nazis and Nazi Collaborators (Punishment) Law* and the broader universal jurisdiction authorising it to punish Adolf Eichmann based on the universal character of his alleged crimes.[225]

Adolf Eichmann pleaded not guilty to all offences. The District Court, comprising judges who had all undertaken their legal training in German universities, held that the arguments raised by Adolf Eichmann were invalid. It found him guilty of all offences in the indictment.[226] Specifically, Adolf Eichmann's defence counsel's four main arguments and the Court's responses were, in summary, that:

1) The judges lacked objectivity, as they were Jews and the offences related to the extermination of the Jews. The Court rejected this on the basis that a fundamental aspect of being a judge is to displace basic human emotions that would otherwise affect them in the case of every 'heinous' crime or allegation.
2) Adolf Eichmann could not be charged with retrospectively active laws. The laws were not retrospective, as they were clearly acts known to be illegal, but had not been criminalised by the illegal German regime. The *Nazi and Nazi Collaborators Laws* did not introduce new legal norms, but created a forum to punish people guilty of the offences that had no relevant forum in which to punish them at the time of the commission of the offences.
3) Adolf Eichmann's presence was illegal due to his unlawful kidnapping from Argentina. How he was brought before the Court was not a matter within its

[224] *Eichmann District Court* (n 4). The indictment included the following charges:
1. the murder of millions of Jews
2. placing Jews in living conditions calculated to bring about their physical destruction
3. causing them grave physical and mental harm
4. devising measures for the sterilisation of Jews and the prevention of childbirth
5. their enslavement, starvation and deportation
6. the general persecution of Jews on national, racial, religious and political grounds
7. spoliation of Jewish property by inhuman measures, involving compulsion, robbery, terrorism and violence
8. deporting half a million Poles
9. deporting 14,000 Slovenes
10. sending tens of thousands of Gypsies to concentration camps
11. causing the deportation and murder of about 100 Czech children from the village of Lidice.
Adolf Eichmann was charged in counts 13, 14 and 15 of being a member of organisations declared illegal by the International Military Tribunal of Nuremburg, being the SD, the Gestapo and the SS, respectively. The first 12 charges carried the death penalty pursuant to Sections 1 and 3 of the *Nazi and Nazi Collaborators (Punishment) Law* (Israel) 1950. See Hauser (n 1) 300–301; Zgonec-Rožej (n 4) 342.
[225] Surani (n 17).
[226] Hauser (n 1) 306.

subject matter jurisdiction. The Court only had to determine the terms of the criminal statute relevant to the indictment.

4) The offences listed in the indictment occurred before Israel was a state and were committed outside its borders. The date of Israel's creation was considered irrelevant to the trial. Offences related to the extermination of all Jews triggered the State of Israel's concern as the homeland of Jewish people.

Note that this last assertion will be discussed in greater detail later in the thesis. In terms of the actual jurisdiction that was ultimately relied on to prosecute Adolf Eichmann, this argument attempts to create a territorial nexus to the State of Israel, using the 'universal jurisdiction plus' construct.[227]

In particular, Adolf Eichmann was charged for his actions in his role as a senior Shutzstaffel / Protection Squadron (SS) member, but moreover for his specific planning and coordination of 'the Final Solution' and a principal author of the Holocaust. Ultimately, the Israeli Supreme Court sentenced him to execution. He was hanged on May 1962.[228]

Before the Supreme Court, the two main challenges to jurisdiction raised by Adolf Eichmann's defence counsel related to the validity of the offence for which he was indicted, and the notion that Adolf Eichmann was acting in accordance with his duties on behalf of a foreign country. The first challenge related to the *nullum crimen sine lege* principle—that the law cannot impose legal obligations ex post facto on a person. It represented a more fundamental challenge to the basic precept of universal jurisdiction. The second challenge related to the unlawful nature of the prosecution because of Adolf Eichmann's abduction from Argentina, claiming that his presence before the Court was in conflict with international law. This challenge was further argued on the basis that it occurred outside the State of Israel, before Israel was even recognised as a state, against persons who were not Israeli citizens, before the operative legislation existed. This challenge related to the lawfulness of unauthorised enforcement mechanisms.

[227] Slaughter (n 71) 173.
[228] *Eichmann Supreme Court* (n 4).

However, the Supreme Court upheld the District Court's decision to assert jurisdiction and noted that Adolf Eichmann's abduction did not vitiate the proceedings on the basis that:

> Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundation. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.[229]

In dismissing Adolf Eichmann's claim regarding an absence of jurisdiction for his trial, the court relied on the UN Crimes Commission determination on the trials of war crimes.[230] The universality of jurisdiction over war crimes was, at that time, 'recently expounded' in the trials of war criminals following World War II, and supported by the extensive application of the jurisdiction by the Allied military tribunals.[231] The Court also relied on statements by numerous international jurists to support the existence of jurisdiction to try individuals for offences 'against the law of nations', thus incorporating war crimes, crimes of genocide and crimes against humanity.[232]

The Court essentially ignored the illegality of the abduction itself, relying on the wrongly captured, properly detained (*male captus, bene detentus*) rule.[233] By maintaining that Adolf Eichmann was wrongly captured and properly detained, the Court established jurisdiction over Adolf Eichmann, though international jurists expressed unease about the Israeli application of this principle. Specifically, there was concern over whether the illegality from which the trial commenced was an 'unacceptable stretching of the law upon the substance of the matter'.[234] These

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[229] *Eichmann District Court* (n 4) 12.
[230] Ibid.
[231] Covey Oliver, 'Judicial Decisions—Jurisdiction of Israel to try Eichmann—International Law in Relationship to the Israeli Nazi Collaborators (Punishment) Law' (1962) 56 *American Journal of International Law* 805, 811.
[232] Charles Hyde, *International Law, Volume 1* (1945, 2nd ed, Little, Brown and Company); Cowles (n 198) 177; United Nations War Crimes Commission (n 200); Emerich de Vattel, *The Classics of International Law*, tr James Brown Scott (Carnegie Institute of Washington, 1916) 232–233; Henry Wheaton, *Elements of International Law* (London, Stevens & Sons, 1944) 104; Steffan Glaser, *Infraction Internationale* (Libraire Generale De Droite et De Jurisprudence, 1957); *In re Piracy Jure Gentium* [1934] AC 586; Grotius (n 77); William Blackstone, *Commentaries on the Law of Nations* (Clarendon Press, 2nd ed, Oxford, 2003, first published 1765–1769) book IV, chap 5.
[233] Nick Donovan, *The Enforcement of International Criminal* Law (Aegis Trust, 2009) 12; Hunjoon Kim and Kathryn Sikkink, 'Do Human Rights Trials Make A Difference?', *Minnesota International Relations Colloquium* <http://www.polisci.umn.edu/~mirc/paper2007-08/fall/Kim&Sikkink.pdf>.
[234] JES Fawcett, 'The Eichmann Case' (1962) 27 *British Yearbook of International Law* 181.

criticisms did not go so far as to condemn the case. This was because the magnitude of Adolf Eichmann's offending prevented any miscarriage of justice by bringing him before the Israeli national courts, albeit illegally.[235] Regardless, the Supreme Court of Israel did not deign to further dissect the doctrine of *male captus, bene detentus*, and appeared satisfied that the establishment of subject matter jurisdiction over the offending was sufficient to continue the trial. Thus, there was no determination regarding the illegal conduct of the agents of the Israeli governments that brought Adolf Eichmann before the Court. Instead, the Court side-stepped this issue by justifying the trial on the egregious nature of Adolf Eichmann's crimes.

The basis of universal jurisdiction was discussed at length by the Court. The origins of the basis for this jurisdiction were traced back to the crime of piracy,[236] the reasons for which are similar to those outlined in Chapter 2, namely that the prosecution was important in the 'interest of the international community', as the offending affected all humankind. [237] The Supreme Court expanded the application of the universal jurisdiction applicable to piracy on the basis that the jurisdiction extends to 'heinous crimes':

> [t]hey damage vital international interests; they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations.[238]

This finding established the basis of the contemporary concept that 'some human rights have become *erga omnes* obligations and thus able to be prosecuted by third-parties'.[239]

The court reinforced this position by rejecting the second argument put forward by the defence counsel: that the *Nazi and Nazi Collaborators (Punishment) Law*, legislated

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[235] William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26(3) *Leiden Journal of International Law* 667–699.
[236] *Eichmann Supreme Court* (n 4) 287–292, 298–304.
[237] See Section 2.3.1; see also D Lasok, 'The Eichmann Trial' (1962) 11(2) *The International and Comparative Law Quarterly* 355–374; Petra Baumruk, 'The Still Evolving Principle of Universal Jurisdiction' (Doctoral Thesis, Charles University, 2015).
[238] *Eichmann Supreme Court* (n 4) 291; cited in Kantorovich (n 7) 196.
[239] Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3(1) *Oxford Journal of International Dispute Settlement* 7; Gleider I Hernandez, 'A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community' (2013) 5 *British Yearbook of International Law* 39; Karl Zemanek, 'New Trends in the Enforcement of erga omnes Obligations' (2000) 1(1) *Max Planck Yearbook of United Nations Law* 5.

by Israel in 1950, did not apply to Adolf Eichmann because it had to apply retrospectively given his alleged conduct occurred in 1945. The court held that:

> crimes dealt with in this case are not crimes under Israeli law alone, but are in essence offences against the law of nations. Indeed, the crimes in question are not a free creation of the legislator who enacted the law for the punishment of Nazis and Nazi collaborators, but have been stated and defined in that law according to a precise pattern of international laws and conventions which define crimes under the law of nations.[240]

The crimes addressed by the Court were brought upon not a protective principle, but a universal one. The crime, as it related to a 'crime against the Jewish people', was recategorised by the court as a subset of the crime of genocide. It was couched as falling within the general tenor of a crime of genocide, based on the 'pattern of the Genocide crime defined in the Convention on the prevention and punishment of genocide'. This provided justification for the specific nature of the offences for which Adolf Eichmann was tried.[241] Some contend that the universal jurisdiction exercised by the Israeli Supreme Court was not the basis upon which jurisdiction was asserted.[242] As the Israeli government was the 'sole representative' of the Jewish people, the state had a unique connection to the offence as the state representative of the victims of Adolf Eichmann's crimes.[243] In her analysis of the limits of universal jurisdiction, Slaughter proposed that the Eichmann prosecution relied on both the passive personality principle and the protective principle in bolstering its use of jurisdiction, rather than relying solely on principles of universality.[244]

The other branch of the Supreme Court's analysis held that the primary grounds for jurisdiction over Adolf Eichmann were purported to be the application of the offence in terms of a 'crime against humanity' as a whole, rather than specifically against the Jewish people.[245] Thus, the dual jurisdictional approach is still underpinned by the universality of the offences committed by Adolf Eichmann. The notional jurisdiction of the State of Israel as a 'representative' of a people as justification of the jurisdiction of the Supreme Court was arguably a stretch of a state's sovereign authority to

[240] *Eichmann District Court* (n 4) 16.
[241] Oliver (n 231).
[242] *Eichmann Supreme Court* (n 4).
[243] Kantorovich (n 7) 197.
[244] Slaughter (n 71) 173.
[245] *Eichmann Supreme Court* (n 4) 277.

prosecute a non-national individual for offences committed against a people to which that state considered it has a particular connection.[246]

The *Eichmann* trial was, in essence, the exercise of universal jurisdiction in its purest sense, but by domestic courts. In applying the jurisdiction based on universality, the argument relating to retrospectivity and the authority of the state to try an individual for an offence committed before the existence of that state was made irrelevant. This is because the crime was found to exist in international law as an offence against humanity in general, and one that any nation state had an opportunity to prosecute.[247] Thus, the Israeli Supreme Court recognised that the crimes were a 'grave offense against the law of nations'. From this, it derived its 'right to punish' Adolf Eichmann.[248] The invocation of the *Nazi and Nazi Collaborators (Punishment) Law* was viewed as the Israeli legal organs discharging their obligation to 'bring criminals to trial'.[249] Thus, the Court reinforced the prevailing tone of the times to presage the 'demise of immunity for international crimes'.[250]

The most informative aspect of the *Eichmann* case was its jurisprudence, as it related to the method by which Adolf Eichmann was brought before the Court. Adolf Eichmann's abduction was prima facie unlawful. Mossad drugged Adolf Eichmann.[251] He was taken from the jurisdiction of Argentina without respect for Argentina's customs or border laws, nor with due regard to the extradition laws surrounding the international movement of criminals.[252] More instructively, Adolf Eichmann's

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[246] O'Sullivan (n 47); Yad Vashem, *The Eichmann Trial,* The World Holocaust Remembrance Centre <https://www.yadvashem.org/yv/en/holocaust/eichmann_trial/pdf/eichmann_trial.pdf>.

[247] Notably, the Court linked Eichmann's conduct to the nascent Israeli State, not on grounds of legal requirement to establish jurisdiction, but arguably for their own political imperative. Although the judges noted that the trial would elucidate 'lessons [that] Israel and the nations of the world derive' from questions relating to issues such as 'how and why could so immense and evil have arisen from the German nation', they also stated that 'the court is not adequately equipped to resolve general questions of the type referred to'. The judgment has been subsequently criticised for its reliance on the nationality of the victims, which correctly identifies that this link provided no support for the legality of the conviction, but was used as a political tool to strengthen the sovereign identity of the Israel State. For a general discussion of the politicisation of the trial, see Janna Yablonka, 'The Development of Holocaust Consciousness in Israel: The Nuremburg, Kapos, Kastner and Eichmann Trials' 8(2) *Journal for Israel Studies* 1–24.

[248] Simma (n 239).

[249] *Eichmann District Court* (n 4) 12.

[250] Surani (n 17) 21.

[251] This was not admitted by Israel at the time of the abduction, but was later revealed during the trial proceedings and the international submissions of Argentina and Israel: Hauser (n 1) 260.

[252] The laws of Argentina prevent the rendition of a citizen, 'whether by birth or naturalization, before the commission of the crime, for trial abroad', but do allow for extradition of a fugitive by his own state. There is no provision for the exercise of jurisdiction by a third state. See Ivan Shearer, *Extradition in International Law* (Manchester University Press, 1971) 115.

abduction represented a breach of one of the fundamental tenets of international law: the sovereign integrity of a nation state, and the responsibility of that state to regulate the behaviour of its citizens and protect the citizenship privileges of those citizens.[253] Israel recognised the unlawfulness by which Adolf Eichmann was brought before the Israeli court, but from the Israeli government's perspective, the relative injustice that would occur if Adolf Eichmann was not tried superseded such a concern.[254] Indeed, the Israeli government openly acknowledged that its actions had breached international law and Argentina's sovereignty, and gave the Argentine government 'a note to that effect which it had regarded as the equivalent of reparation'.[255] Thus, it appears that the political calculus in seeking retribution for grave wrongs against a state superseded concerns about territorial sovereignty.[256] Here, the Court deferred to the heinousness of the alleged offending as the priority for its consideration of justice, as compared with the basic criminal procedural principles relating to the process within the trial itself.

Although there was some discussion about the attribution of this action to the Israeli state,[257] the International Law Commission surmised that, despite Israel initially denying Mossad's responsibility for the abduction, because of their submissions to the General Assembly, the government had sufficient constructive knowledge of the abduction for the act to be an act on behalf of the state. Thus, subsequent adoption of the act as its own make this action attributable to a state.

Following the abduction of Adolf Eichmann, Security Council *Resolution 138* was passed to outlaw such actions.[258] This resolution states that the principle of sovereign integrity prohibits extraterritorial abductions without the permission of the nation in

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[253] Alberto Costi, 'Problems with Current International and National Practices Concerning Extraterritorial Abductions' (2003) 9(8) *The New Zealand Association for Comparative Law Yearbook* 58, 62.
[254] *Eichmann District Court* (n 4) 13.
[255] *Letter Argentina to President of Security Council* S/4336 (15 June 1960); referred to in *United Nations Meeting Records 1959–1963, Part Chapter VIII Maintenance of international peace and security,* UN SCOR, 160 (1969–1963) 27–28.
[256] 'Summary Records of the Meetings of the Forty-First Session (2 May–21 July 1989)' [1989] *Yearbook of the International Law Commission* A/CN.4/SER.A/1989.
[257] *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, supp no 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) ('Responsibility of States for Internationally Wrongful Acts') art 93.
[258] The breach of the United Nations Charter was stated in general rather than specific terms: 'Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations': Security Council Resolution 138, UN SCOR, 868th mtg, UN Doc S/RES/138 (23 June 1960).

which the alleged criminal is maintaining asylum.[259] *Resolution 138*, as it relates to abduction of alleged criminals, declares that the actions such as those committed by Israel 'affect[ed] the sovereignty of a Member State and therefore cause international friction', and, if repeated 'may... endanger international peace and security'.[260] Regardless, it seems that *Resolution 138* was perceived as 'giving blessing' for its action, due to the 'universal condemnation of the persecution of the Jews by the Nazis'.[261]

UNGA Resolution 2625, of October 1970, regarding the *Declaration of Principles on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, reinforced the requirement for states to adhere to the principles of the *United Nations Charter* with a deferential focus on the maintenance of international peace and security in the discharge of states' obligations under the Charter.[262] Seeking a political agreement to definitively determine the balance between avoiding impunity for egregious criminal offences and the abrogation of state sovereignty and control is unlikely to be reached, even in the face of illegal acts conducted by one state. The *Eichmann* case proves a salient example in recognising that this issue remains one to which states do not stringently bind themselves.

This case drew international attention and commentary from jurists proclaiming that one state may not exercise its police powers within another state, without the necessary consent of that state, or the authorisation of the international community writ large through a resolution by the UN Security Council.[263] Despite the international community denouncing the action of the Israeli government as it related to the internationally unlawful abduction of Adolf Eichmann, support for the consequent conviction suggests that, despite a hollow declaratory resolution, any such act will be overlooked by the international community. In the case of *Eichmann*, the Israeli government readily acknowledged and accepted it had committed an internationally wrongful act by impinging on Argentina's state sovereignty. Subsequently, the Israeli

[259] Douglas Kash, 'Abducting Terrorists' (1999) 13 *American University International Law Review* 139, 142; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London Institute of World Affairs, 1966) 293–295.
[260] Security Council Resolution 138 (n 258).
[261] Lasok (n 237) 355.
[262] UN GAOR, 25th sess, supp no 18, UN Doc A/8028 (17 December 1970).
[263] Kristin Berdan Weissman, 'Extraterritorial Abduction: The Endangerment of Future Peace' (1994) 27 *University of California Davis Law Review* 459, 465.

government made admissions to the Argentine government in response to the Argentinian complaint to the UN Security Council via their embassy in a *note verbale* that the group of people involved in the kidnapping were 'volunteers'.[264] In reparation, they issued 'a note' to the Argentine government acknowledging this breach, which was taken to represent restitution for Israel's actions.[265] This is arguably a reparation in name only, there being no estoppel to Israel's actions regarding Adolf Eichmann's ongoing trial at the time, nor any ownership of the actions of the actors whom Israel had publicly distanced itself.

Several governments still conducted abductions for the purposes of criminal prosecutions following the *Eichmann* case and the UN denouncement of Israel's actions. State-sponsored abduction has been a 'fairly consistently' appearing phenomenon, with claims this has been so for the past 160 years.[266] There are many specific examples of states ignoring the UN declaration that such abductions 'affect the sovereignty of a Member State and therefore cause international friction', and if repeated 'may…endanger international peace and security'.[267] Specific examples include the French kidnapping of Anton Argoud from Munich in 1963 in connection to an attempted assassination attempt on President De Gaulle, and the Egyptian attempted kidnapping of an alleged double agent by shipping him in a trunk to Egypt.[268] As a further extension of these principles, and arguably one that exceeds the jurisdiction of universality, the US subsequently conducted 'dozens of kidnappings' in relation to the prosecution of drug-related offences, seeking to rely on the precedent established in *Eichmann*.[269] Most recently, Vietnam abducted asylum seekers in Germany for trial.[270]

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[264] Costi (n 253).
[265] 'Summary of the Meetings of the Forty-First Session (2 May–21 July 1989), Parts 2 and 3 of the Special Rapporteur's Report' [1989] [I] *Yearbook of the International Law Commission* 1, 250.
[266] Jonathan A Gluck, 'The Customary International Law of State-Sponsored International Abduction and United States Courts' (1994) 44 *Duke Law Journal* 612, 613.
[267] Simma (n 239).
[268] M Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press, 3rd ed, 1996) 16–17.
[269] Stephen J Hedges et al, 'Kidnapping Drug Lords', *US News and World Report* (online, 14 May 1990) <http:usnews.com/news> cited in Michael G McKinnon, '*United Stated v Alvarez-Machain*: Kidnapping in the "War on Drugs"—A Matter of Executive Discretion or Lawlessness?' (1993) 20(4) *Pepperdine Law Review* 1505.
[270] Edmund Heaphy, 'Vietnamese Abduction Suspect is Extradited to Germany' *The New York Times* (online, 24 August 2017) <https://www.nytimes.com/2017/08/24/world/europe/vietnam-germany-abduction-suspect-extradite.html>.

The application of universal jurisdiction in *Eichmann* has had a significant impact in the ability to prosecute crimes on the basis of universal jurisdiction. Some commentators hold that the case represented a new 'limitation on sovereignty' by ignoring the illegality of the arrest; its jurisprudence has since been relied upon internationally to support the proposition that universal jurisdiction is a viable methodology to prosecute serious offences.[271] Further, *Eichmann* provided a basis for the future application of universal jurisdiction being relied upon as precedent for similar prosecutions, such as the Pinochet extradition case in the UK, which will be discussed in Chapter 5.[272]

3.4.1 *Eichmann* and due process

The contention that any state may prosecute offences against humankind, regardless of when that state was created or the legislation addressing such crimes was enacted, has been adopted in later cases. In *Demjanjuk v Petrovsky*, in which the extradition hearing was based upon an extradition warrant issued by Israel claiming that John Demjanjuk was 'Ivan the Terrible', who operated a gas chamber and 'murdered tens of thousands of Jews and non-Jews', the US relied heavily on the precedent set in *Eichmann* to establish universal jurisdiction over an alleged Nazi war criminal, despite the offences not being known to law at the time of their commission. [273] The argument applied in *Eichmann* regarding the inability of a court to ex post facto impose a law for previous conduct was dismissed on the same grounds:

> neither the nationality of the accused or the victim(s) nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so Israel or any other nation regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations to punish the perpetrators of such crimes.[274]

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[271] Henry J King, Jnr, 'Without Nuremburg? What?' (2007) 6(3) *Washington University Global Studies Law Review* 653–661.
[272] House of Lords, *Regina v Bartle and the Commissioner of Police for the Metropolis and Others* (Appellants), *Ex Parte Pinochet* (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division); *Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others* (Appellants), *Ex Parte Pinochet (*Respondent) (On Appeals from a Divisional Court of the Queen's Bench Division (No 30), Judgment of 24 March 1999, reported as *R v Bow Street Stipendary Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No 3) in [1999] All E.R. 97 (Lord Browne-Wilkinson).
[273] 776 F.2d 571 (6th cir 1985); 475 US 1016 (1986).
[274] Ibid, 582–583.

Thus, Adolf Eichmann's trial set a precedent for 'pure' universal jurisdiction insofar as the accused was brought before the jurisdiction, claiming a general interest in prosecuting him before sentencing and executing him. The investigation conducted was run under the rules of the prosecuting nation, though efforts were made to ensure steps were taken to ensure that Adolf Eichmann received a fair trial and access to and the choice of counsel; efforts to ensure that evidence obtained from other jurisdictions adhered to the rules of law according to the prosecuting state; and affected victims were equally able to observe justice being done, with the trial itself being sufficiently broadcast to enable those affected by Adolf Eichmann's actions to know the outcome of his trial. The final sentence—the execution of Adolf Eichmann—occurred after rights of appeal were exhausted. However, the tension between the domestic law of a state exercising the death penalty over a suspect they had unlawfully abducted was not born out in any kind of legal argument before his execution.

3.4.2 *Eichmann* and forum selection

Numerous Nazis alleged to have committed war crimes and crimes against humanity were indicted at the Nuremburg tribunals; but they had fled Germany and found protection in sympathetic countries, prior to being arrested for trial. Adolf Eichmann was one of these people, living in relative anonymity in Argentina following World War II. These people were still subject to international investigations by public and private interest groups, including the Israeli government. The Israeli Secret Service, Mossad, eventually located Eichmann and an extraction operation was planned to bring Adolf Eichmann before the Israeli Supreme Court to answer the arrest warrant issued for him years earlier.

The trial of Eichmann in Israel commenced through a unilateral decision on Israel's part. Argentina had no extradition treaty to consider. The arrest of Adolf Eichmann occurred following an elaborate abduction from Argentina by a group of people described in some literature as Mossad agents, in others as an Israeli commando squad. In Israeli government documents submitted to the UN, they were described as a group of 'volunteers' whose exact status was unclear, but who appeared to be acting in some capacity on behalf of the state.[275] Subsequent writings on Adolf Eichmann's

[275] The Resolution was adopted by eight votes to none with Poland and the Union of Soviet Socialist Republics abstaining and Argentina not participating in the vote. Questions Relating to the Case of Adolf Eichmann, GA Res 138/1960, UN GAOR, 868th mtg, UN Doc S/RES/138 (1960) [S.4349] (23 June 1960); Hauser (n 1) 274.

abduction, by Isser Harel, the first director of Mossad, responsible for the planning of the abduction mission, revealed that it was Mossad agents who coordinated and conducted the abduction.[276] The group went to extraordinary lengths to conduct the abduction, even going as far as creating a false travel agency in Europe to cover the movements of the Mossad agents into Argentina to support the abduction.[277]

It was established through intelligence leads that Eichmann was living a life of relative anonymity as a factory worker in Buenos Aries, with his family in an apartment in the suburbs. He caught the bus to and from his workplace under the assumed name of Ricardo Klement.[278] Ironically, Adolf Eichmann's son Nicholas, who sometimes used his real surname, was unknowingly dating a Jewish girl to whom he boasted about his father's role in planning the Holocaust. The German Embassy apparently knew of his location. Equally, the US Central Intelligence Agency knew of his whereabouts. However, they apparently declined to act in relation to extraditing Adolf Eichmann because they did believe they had any jurisdiction over him on the basis that none of his crimes touched on traditional jurisdictions connecting the US to his conduct.[279]

Although Argentina lodged a complaint with the UN about Israel's conduct, it did not assert a desire for Eichmann's return, nor any desire to conduct a criminal prosecution of Adolf Eichmann in lieu of Israel.[280] The absence of further protestations from Argentina in terms of the abduction do not amount to an implied consent from the

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[276] Isser Harel and Shlomo J Shpiro, *The House on Garibaldi Street* (Frank Cass Publishers, 1975).
[277] Geller (n 1); Ibid, Harel.
[278] Geller (n 1).
[279] Speigel, 'The Long Road to Eichmann's Arrest: A Nazi War Criminal's Life in Argentina' *Speigel Online International* (1 April 2011) <http://www.spiegel.de/international/germany/the-long-road-to-eichmann-s-arrest-a-nazi-war-criminal-s-life-in-argentina-a-754486-2.html>.
[280] In initial negotiations, Argentina insisted on Eichmann being returned to Argentina, including a suggestion that he be delivered to the Argentine Embassy. However, an international forum determined what could be done with him. Israel's counter-offer was to take him to the Embassy 'for a few minutes' before formally returning him to Israel's custody. These negotiations eventually resulted in Argentina making a formal complaint to the United Nations Security Council about the breach of their sovereignty. The United Nations Security Council met on 22 June 1960 to discuss Argentina's complaint. The complaint stated that Israel had violated the rules of international law and the United nations. The outcome of the meeting was a Resolution to censure Israel. See generally Raanan Rein, 'The Eichmann Kidnapping: Its Effect on Argentine–Israeli Relations and the local Jewish Community' (2001) 7(3) *Jewish Social Studies* 101–130, citing copies of the text of the letters from Argentina, and Israel to the United Nations, the draft United Nations Security Council Resolutions in Blumental, ed, *Teudot migeto Lublin,* Jerusalem: Yad Yashem, 196, 822. The removal of this complaint from the United Nations Security Council's agenda occurred in 1965, following Israel 'virtually apologising' to Argentina: <https://www.jta.org/1965/08/12/archive/u-n-security-council-removes-complaint-on-eichmann-case-from-agenda>.

abduction, nor did it alter the legal fact that the presence of the accused in Israel was brought about by illegal means.

On his capture, Adolf Eichmann apparently signed a deed at the request of his abductors. He disclosed his true identity, recognising he was captured, and signed a deed stating that he was willing to travel to Israel of his own free will to undergo a trial 'before a competent court'.[281] In the trial, this deed was not relied on as an acceptance of jurisdiction by Adolf Eichmann, and a jurisdictional argument still ensued.

Adolf Eichmann's counsel specifically argued:

> (a) that the Israel law, by inflicting punishment for acts done outside the boundaries of the State and before its establishment, against persons who were not Israel citizens, and by a person who acted in the course of duty on behalf of a foreign country ('Act of State') conflicts with international law and exceeds the powers of the Israeli legislator;
>
> (b) that the prosecution of the accused in Israel upon his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court.[282]

However, this argument was dismissed by the Israeli Supreme Court, on the basis that the maxim of *nulle poene sine lege* (no crime, no punishment without a previous penal law) was not a rule of general international law. The gravamen of the offending was not deemed new, merely the detail of the offending law had not yet been articulated in a codified fashion.[283] Accordingly, Adolf Eichmann was able to be tried within Israeli jurisdiction for these offences.

3.4.3 *Eichmann* and harmonisation of international law

The adoption of universal jurisdiction because of the nature of the crime in consideration, and as its basis for universal application, has since been found in numerous fora. Most prevalent is the adoption of the analogy relating to the crime of piracy to crimes against humanity in the ICJ decision of *Arrest Warrant of 11 April 2000*.[284]

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[281] Hasuer (n 1) 275.
[282] Oliver (n 231) 8.
[283] Baade (n 2) 400–421.
[284] *2002 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Merits Case) ('Arrest Warrants Case')* [2002] ICJ Rep 128; Antonio Cassese et al, *International Criminal Law Cases and Commentary* (Oxford University Press, 2011) 312.

By adjudging the reasons for punishment of Adolf Eichmann's crimes against humanity was of 'vital interest common to all civilized States and of universal scope', drawing the analogy with reasons the crime of piracy was universally justiciable, the Supreme Court adopted universality based on the nature of the crime, rather than the location of its committal.[285] While piracy occurs on the high seas, the global commons (thus, in the absence of territoriality),[286] crimes of humanity became universal offences because of the impact of the crime on humanity. While some analogously suggest these crimes occur in a new, borderless kind of global common, the proposition that these crimes are universally cognisable is more firmly grounded in the severity of the criminal conduct.[287] Similar to the precept that piracy is a crime committed without borders, upon the high seas where all countries retain jurisdiction over the common 'enemy to mankind', war criminals and people such as Adolf Eichmann, whose crimes are so heinous and monumental in nature, transcend national borders and are in the interest of humanity to prosecute.

3.4.4 *Eichmann* and political risk

The requirement to respect the territorial sovereignty of a nation seems to have been displaced by the Israeli Supreme Court in this particular instance in deference to the overriding legal theory of avoiding impunity for the most egregious breaches of the law offending base principles of humanity. This suggestion has been supported by the contemporary actions of the US, Spain, Belgium and Germany relating to the prosecution of crimes against humanity, genocide and war crimes (these specific applications of universal jurisdiction will be discussed in later chapters).[288] However, in this instance, the State of Israel was comfortable in conducting this activity despite the prima facie illegality of abducting Adolf Eichmann to bring him before an Israeli domestic court.

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[285] Ibid.

[286] Noting the requirement for all vessels to have a flag state importing an attempt of territoriality or state relationship with those vessels: *UNCLOS* (n 90) arts 90–96.

[287] Hesenov (n 119) 284, discussing the 'terra nullius' requirement for universal jurisdiction offences; Hovell, Devika, 'The Authority of Universal Jurisdiction' (2018) 2(29) *The European Journal of International Law* 450.

[288] Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105(1) *The American Journal of International Law* 8.

3.5 Conclusion—universal Jurisdiction's Jurisprudential Grounding

Having now assessed the early practice of universal jurisdiction, including the infamous case of Adolf Eichmann, the practical difficulties in establishing universal jurisdiction are evident. These early examples of the development of the principles of universal jurisdiction demonstrate the inconsistencies in the practical enforcement mechanisms associated with the jurisdiction. The jurisprudential grounding of the jurisdiction is not self-evident.

In conclusion, *Eichmann* represents one of the 'watershed' moments in the development of universal jurisdiction in the postmodern era. There is clearly some confusion about the nature of the universal jurisdiction applied in this case as a result of the concurrent jurisdictional application of the passive personality of the Jewish people as represented by the State of Israel and the universal jurisdiction as it applied to war crimes and genocide offences. However, despite this confusion, the case lay the foundations for the postmodern application of universal jurisdiction by national courts. Therefore, it has had a significant positive impact on the development of the modern doctrine.

This historic survey of universal jurisdiction in piracy has highlighted the inherent tensions between the applicability of a universal jurisdiction and traditional jurisdictional nexuses, as well as the political and diplomatic imperatives to ensure sovereign integrity of states. Balancing these concerns within the overarching framework of concern for international peace and security, and ultimately the international adherence to principles of humanity, became more complex as more international regimes and treaties interacted. The modern development of guiding principles, such as the Princeton Principles, has sought to clarify the application of universal jurisdiction. This list was established by historical precedent and does not presuppose to list any crime in any order of seriousness or gravity.

However, ongoing tensions between political and moral requirements have not been resolved satisfactorily. The doctrine remains uncertain in its application, with many states challenging the application of universal jurisdiction as being a tool for furthering political agendas rather than international justice. Even the categories of offences subject to universal jurisdiction are not prima facie apparent, without analysis of the basis for their universality. Thus, this chapter has elucidated how the individual has

become criminally liable at international criminal law. Further, it has explored which of these international legal offences can be prosecuted by a state, when the offence is otherwise divorced from that state. The subcategorisation of universal jurisdiction offences into internationally enforceable offences and national authority-based crimes will be reflected upon throughout this thesis to assess if the enforcement mechanisms used for these categories differs in any way.

The *Eichmann* trial remains contentious, and one that is argued by many scholars as being the breakpoint application of universal jurisdiction. Some maintain that there was no need for Israel to apply universal jurisdiction in this case, on the basis of other more relevant jurisdictions such as passive personality or the protective jurisdiction based upon Israel's position as representative of the Jewish people. However, Adolf Eichmann's trial unarguably established precedent for the application of universal jurisdiction in future cases. Further, it established a construct for its practical use, despite effectively glossing over issues such as an in-depth discussion regarding the illegality with which the defendant was brought before the tribunal, in which he was ultimately sentenced to death.

While this seminal case created some precedent regarding the universality of offences that affect humanity and civilisation, the tensions identified in *Eichmann* remain contentious in the application of universal jurisdiction even today. The future application of the jurisdiction did develop the doctrine as presented in the *Eichmann* case. Chapter 4 seeks to identify how other states have applied the doctrine in more recent times.

Chapter 4: Criteria to Assess Gaps in Enforcement of Universal Jurisdiction

Chapter 4 will outline the identified procedural gaps that will form the criteria against which the selected case studies will be measured. The purpose of this chapter is to frame the manner in which the case studies will be subsequently measured. The assessment criteria will be explained, as will the basic legal premise underpinning the criteria and why the chosen criteria are important in the prosecution of universal jurisdiction offences. In particular, it will articulate the practical effects that must be considered in an assessment of an effective domestic criminal trial pursuing an accused for a universal jurisdiction offence. The assessment criteria will be broadly drawn into four categories: due process and fair trial requirements; forum selection and concurrent jurisdiction considerations; harmonisation of domestic and international legal obligations; and finally, political risk in running a universal jurisdiction offence trial.

As discussed in Chapter 1, the general academic discourse and debate regarding universal jurisdiction relates to the prescription of the jurisdiction; that is, the power of the state to declare certain conduct as unlawful, as reflected in national statutes or other relevant rules. However, the key issue regarding the understanding and consistency in application of universal jurisdiction offences lies in the enforcement of the jurisdiction rather than in its prescription.

Enforcement of universal jurisdiction is not obligatory.[289] This in itself creates a problem for the triggering events for its use. However, further to this permissive nature of its use, through the case analyses of state, regional and international practice, four main areas regarding the enforcement of the jurisdiction will be examined to outline the weaknesses in the enforcement of the doctrine:

- procedural and due process norms
- selection of forum and concurrency of jurisdictions
- harmonisation of international and domestic law
- political risk.

[289] See for example *UNCLOS* (n 90) art 109.

These are considered the most useful criteria against which to analyse the enforcement mechanisms affecting the prosecution of universal jurisdiction offences, based upon these criteria capturing the main decision making criteria to launch a prosecution into these offences, when triggering multiple jurisdiction, citizens of different nations, and offences that are impacted upon by international legal obligations, noting most offences relating to universal jurisdiction are impacted upon by a state's obligations under international humanitarian law and international criminal law.

Other issues considered, but discounted from the analysis of this thesis are:

1) Rights and obligations for prosecution. The rights and obligations placed on states, international organs and individual judicial officers regarding criminal prosecutions of individuals alleged to have committed the worst offences known to humankind has been treated in numerous other works.[290] This issue was excised from consideration on the basis that the non-obligatory nature of the jurisdiction is not contentious. The contentious issue pertaining to application of the jurisdiction relates to the circumstances in which a state would elect to prosecute using universal jurisdiction. This is addressed as an aspect of forum selection.
2) Authorities for arrest. The provision of authority to arrest in domestic legislation and the procedural protocols to prosecute, in the absence of a traditional jurisdictional nexus, is not relevant to establishing the application of universal jurisdiction and the scope of its enforcement. This is because this issue largely reflects differences in domestic criminal procedure. Instead of assessing this by focusing on the physical arrest process, the actual use of the jurisdiction, as compared to decisions pertaining to extradition law, are analysed. This is discussed in relation to forum selection.
3) Procedure for arrest. Equally, while the arrest of criminals is a central issue in considering enforcement of breaches of the law, this issue holds little value to an assessment of the enforcement challenges of the jurisdiction. This is because the procedure to arrest a person concerns domestic criminal law process. An absence of records relating to indictment and arrest decisions remains an ongoing problem. It is highly unlikely that the documents that relate to the preparation of the cases would be made publicly available at any rate, due to

[290] See generally Inazumi (n 13); Baumruk (n 237); 'The Princeton Principles', Macedo (n 14).

obvious legal privilege and political constraints. Equally, the varying thresholds for triggering arrest across domestic criminal jurisdictions does little to further the holistic understanding of the challenges to the enforcement of universal jurisdiction. Accordingly, this aspect of enforcement has been excised from this thesis.

4.1 Procedural—Due Process

Fair trial standards have witnessed contemporary expression in all legal systems, and are claimed to be 'the most widely acknowledged human rights norm in criminal proceedings'.[291] There are numerous international and regional legal instruments that grant rights to individuals during trial. However, a few states who have utilised the principle of universal jurisdiction have relied on in absentia judgments that have precluded an accused from representing their position in defending their ongoing liberty.[292] The absence of any other jurisdictional connection between the offence and the prosecuting state for universal jurisdiction prosecutions, coupled with an in absentia trial, exacerbates the potential unfairness of this approach. The *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights*, *European Convention for the Prosecution of Human Rights and Fundamental Freedoms*, *American Convention on Human Rights* and *African Charter on Human and Peoples' Rights* all contain provisions enshrining due process guarantees.[293] In absentia trial rights are included in these instruments in the form of fundamental guarantees to equality before the courts, including assistance before those courts; protections against arbitrary detention; a right to be present unless it is in the interests of the proper administration of justice to proceed in their absence. These in absentia rights effectively require a demonstration of a proper attempt by the court to summons

[291] Glen Crane, 'The Bangalore Principles and the Internationalisation of Australian Law' (2002) 1 *Australian International Administrative Law Forum*.
[292] For example, the only successful prosecution identified in the study of Europe's use of universal jurisdiction is the 2005 French prosecution of a Mauritanian officer, Ely Oud Dah, for torture. He was sentenced to 10 years' imprisonment. See 'VIII France', Bhuta (n 36).
[293] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 10–11; *ICCPR* (n 118); Council of Europe, *European Convention for the Prosecution of Human Rights and Fundamental Freedom*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) arts 5–7; now the Council of Europe, *European Convention on Human Rights*, as amended by Protocol No 14, opened for signature 13 June 2004, CETS 195 (entered into force 1 June 2010); Organization of American States, *American Convention on Human Rights*, opened for signature 22 November 1969 (entered into force 18 July 1978) arts 7–9; *African Charter on Human and Peoples' Rights,* opened for signature 27 June 1981, UNTS 1520 (entered into force 21 October 1986) arts 3, 6–7.

the accused person, and may only proceed if the accused person refuses to submit to the court's jurisdiction or consents to the trial proceeding in their absence.

In addition to the inclusion of fair trial rights in the *Universal Declaration of Human Rights*,[294] the right of an individual to a fair trial is articulated in Article 14 of the *International Covenant on Civil and Political Rights*.[295] While the deontological basis of the human right to a fair trial is variously ascribed as relating to the intrinsic value of human life, or the secular 'sacredness of persons',[296] the procedural rights associated with implementing a fair trial have evolved in the twentieth century from merely following formal procedure and protocol in the courtroom (a trial 'free from blemish'), to ensuring that the rights of the parties to the trial are observed. Some hold that this development is an Anglo-centric approach to criminal procedure, spread with the globalisation of European legal philosophies.[297] However, linguistic subtleties aside, the existence of the right to a fair trial in domestic law is accepted as a developed principle in human rights law, since at least the Nuremburg trials and the codification of this right in first the *Geneva Conventions*, then the *Universal Declaration of Human Rights*. The combined application of the above conventions covers the entirety of the globe. It could be assumed that there would be a requirement for the appearance of the accused before a court before that person could be convicted, unless that person had given their consent for their trial in absentia, or a failure to submit to the court's jurisdiction, if the court is properly seized of such jurisdiction, and had afforded the person appropriate opportunity to comply with relevant summons provisions. The critical lack of fairness in these cases is from an absence of consent to be tried in absentia; thus removing the opportunity to either submit to the jurisdiction (through consent of trial in the accused's absence) or attending the trial to defend themselves.

Different views were expressed in the submissions made to the UNGA Sixth Committee relating to the scope and application of the jurisdiction pertaining to procedural rights.[298] The application of due process guarantees is not new to international criminal law, nor to domestic jurisdictions. The various ad hoc and

[294] *Universal Declaration of Human Rights* (n 293).
[295] *ICCPR* (n 118).
[296] Ari Kohen, 'The Problem of Secular Sacredness: Ronald Dworkin, Michael Perry, and Human Rights Foundationalism' (2006) 5 *Journal of Human Rights* 235–256; citing Ronald Dworkin, 'Life is sacred. That's the easy part', *The New York Times Magazine* (16 May 2019); Michael Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press, 1998).
[297] Ian Langford, 'Fair Trial: The History of an Idea' (2009) Vol 8: (1) *Journal of Human Rights* 37-–53.
[298] n 14.

international criminal tribunals have included consideration in their founding documents of how to guarantee fair trial rights for accused individuals. As discussed previously, the *London Charter* establishing the Nuremburg tribunal, the *Rome Statute* and the various international criminal tribunals and hybrid criminal tribunals of the late twentieth century have all referenced individuals' trial rights.[299]

These fair trial rights have been summarised by Bassiouni as minimum guarantees, all of which could possibly be put at risk in the application of universal jurisdiction. These rights are:

- the right to be judged by an independent and impartial tribunal
- the right to be informed of the nature and cause of the criminal charges
- the right to humane conditions during detention
- the right to a fair and public hearing
- the right not to incriminate oneself
- presumption of innocence
- the right not to be subjected to any form of coercion
- the right to an interpreter
- the right not to be subject to arbitrary arrest of detention
- the right to legal assistance
- the right to disclosure
- the right to a fair and expeditious trial
- the right to have adequate time and facilities to prepare a defen[c]e
- the right to be present at trial
- the right to confront witnesses and obtain their attendance
- the right to a reasoned judgment
- the right to appeal
- limitations on double jeopardy

[299] See *London Charter of the International Military Tribunal Nuremburg Rules of Procedure; Charter of the International Military Tribunal for the Far East Rules of Procedure*; *International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence*, Doc No IT/32/Rev 44 (adopted 10 December 2009); ICTR, *Statute and Rules of Procedure and Evidence*; SCSL *Statute and Rules of Procedure*; UNTAET *Regulation 2000/30 on Transitional Rules of Criminal Procedure*; *Code of Criminal Procedure of Timor-Leste*, Law No 15/2005; UNMIK/EULEX *Courts in Kosovo, UNMI Regulation* 1999/24; *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (Framework Agreement),* opened for signature 1 April 2005, 2329 UNTS 117 (entered into force 29 April 2005*)*; *Rome Statute* (n 132); *Rules of Procedure and Evidence*.

- the prohibition on retroactive application of criminal laws.[300]

Several of these fundamental minimum rights are placed at risk in the use of universal jurisdiction, both in the cases of in absentia judgments and an abduction or extradition to bring the accused before the tribunal exercising the enforcement jurisdiction. For example, coercion cannot be excluded in cases in which a person is abducted to appear before a judge.

While proponents of universal jurisdiction extoll its use as a method to end impunity for serious international crimes, the misuse of the jurisdiction by jurists for their own ends, or the misapplication of domestic laws for ulterior political motives, has been equally commented upon by academics and statespersons.[301]

By contrast, judgments made in absentia purport to exercise a pure version of the jurisdiction, but troublingly, fail to adhere to one of the basic precepts of human rights law: the right to fair trial. Different to a preliminary hearing relating to the issuance of an arrest warrant, the completion of a trial in the absence of the alleged perpetrator does not support the well-ensconced right of a person to a fair trial.[302] However, in some instances, practical methods have been devised when prosecuting under universal jurisdiction to overcome these difficulties. For example, in the *Eichmann* trial, following the example set in the Nuremburg trials in which international counsel represented the defendants, a key consideration in ensuring Adolf Eichmann received a fair trial was making special provisions for him to select his counsel. He was authorised him to have Dr Robert Servatius represent him in his year-long trial. Examples of similar practices derived in the application of universal jurisdiction will be drawn out across the selected case studies to identify which methodologies

[300] M Cherif Bassiouni, 'Appendix II in Human Rights in Context of Criminal Justice: Identifying International Procedural Protections' in National Constitutions' (1992–1993) 3 *Duke Journal of Comparative International Law* 235.

[301] Kissinger (n 14); Roth (n 14). See Michael Kirby, 'Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points"' in Stephen Macedo et al (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 240. Regarding the supervening reasons judges will not be prone to 'judicial tyranny' (ie a busy work sheet, requirement to confine their work to the law, and the potential for politically controversial cases to engender caution in a judiciary), the application of domestic law to new crimes or crimes of uncertain application will be limited.

[302] See *Colozza v Italy* [ECtHR] Series A No 89 for a discussion of the impact of in absentia trial rights on human rights and due process obligations, more generally. Here it was found that an in absentia criminal prosecution denied the defendant their rights under Article 6 of the ECHR, 'taken as a whole' for the person to take part in the hearing.

overcome likely fair trial deficiencies because of the nature of trials for universal jurisdiction offences.

In addition to the right of the individual in criminal trials, there are competing international law instruments that address victims' rights in criminal proceedings. These instruments include the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and the 2006 *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* adopted by the General Assembly, also reinforced by the standing victims are afforded under the *Rome Statute* to the ICC.[303] These instruments include binding and non-binding obligations regarding how victims shall be entitled to have their views heard in criminal proceedings. Some are as expansive as to allow victim participation in sentencing procedures, while others are limited to the right to be heard and bear witness.[304] According to the 2006 Office of the High Commission for Human Rights report into the international standards and national and international practice relating to victim participation in criminal proceedings, the scope and content of this participation is unclear. However, the 'right' of victims in international criminal law clearly extends to participation in the trial process.[305] Accordingly, the mechanisms incorporated into trial procedures to purport to address the rights of victims will also be analysed in the selected cases studies.

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[303] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GAOR, GA Res 40/34 (29 November 1985) UN Doc A/CONFI.21/22/Rev; *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*, UN GAOR, GA res 147, (21 March 2006), UN Doc A/RES/60/147, 13 IHRR 907; M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2009) 6(2) *Human Rights Law Review*.

[304] Ibid; Council of Europe Committee of Ministers, *Recommendation 85(11) on the Position of the Victim in the Framework of Criminal Law and Procedure; African Commission on Human Rights and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; European Convention on Human Rights; American Convention on Human Rights*; *European Union–Council Framework Decision on the Standing of Victims in Criminal Proceedings of 15 March 2001.*

[305] Implementation of the GA res 60/251 of 15 March 2006 entitled 'Human Rights Council', Right to the Truth, Report of the Office of the High Commissioner for Human Rights, UN Doc A/HRC/5/7 (2007) [89]–[90]; cited in Brianne Nora McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011) 21.

4.1.1 Independent investigation and rules of procedure

A necessary element for the enforcement of a just criminal system, is ensuring that any trial seeks an outcome that will result in the criminal punishment of a person. The likely consequential deprivation of their liberty, or potential death sentence, requires sufficient evidence to make an appropriately fair determination regarding the outcome of that trial. [306] Equality, non-discrimination, impartiality, independence and sufficiency of evidence are espoused by the Hague Institute for the Institutionalisation of International Law as principles required for the proper discharge of international criminal justice.[307] Establishing processes for the collection of evidence in a manner that discharges these minimum requirements is challenging when the offender comes from another state, the offence occurred in another state, and there is no linking authority to compel witnesses or evidence except in reliance on interstate agreements or cooperation processes. Hence, assessing how state, regional and international criminal proceedings have managed these challenges will identify measures that have been implemented to address these complications in the context of enforcement of universal jurisdiction offences.

The jurisdiction to prosecute criminal conduct is, by its nature, strictly territorial. The long-held international legal position, enunciated by the Permanent Court of International Justice in *Lotus,* that a state may not enforce its criminal law in another state without that state's permission, reinforces the territorial nature of criminal enforcement jurisdictions.[308] This extends to criminal enforcement powers. Police investigation powers, authority to arrest, the compellability of evidence and witnesses and even the physical location in which the court may sit are bound by state borders.[309] The legal authority to prosecute someone for universal jurisdiction offences is specified by the domestic executive authority or legislature that is bound under its domestic construct to reflect international law principles. However, the enforcement

[306] Alette Smeulers et al, 'The Selection of Situation by the ICC: An Empirically Based Evaluation of the OTP's Performance' (2015) 15 *International Criminal Law Review* 1–39, citing MM deGuzman and WA Schabas, 'Initiation of Investigation and Selection of Cases', in G Sluiter (ed), *Towards Codification of General Rules and Principles of International Criminal Procedure* (Oxford University Press, Oxford, 2012) 3.
[307] William Schabas (ed), 'General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework', *Hague Institute for the Internationalisation of Law and the Amsterdam Center for International Law* (October 2011) <http://www.hiil.org/data/sitemanagement/media/IEF_Brochure_241011.pdf> 6.
[308] *The Lotus Case* (n 69) [18]–[19].
[309] O'Keefe (n 152) 740.

jurisdiction of international law offences are limited by purely domestic law considerations. Equally, although it is assumed that states will implement their international law obligations, reliance on domestic legislatures to reflect customary international law is fraught. This is, in part, because regular updates to international criminal jurisprudence takes time to be domestically incorporated into state legislation.[310]

Accordingly, in seeking to prosecute a person for a universal jurisdiction offence, the state is hindered by application of its domestic criminal laws as they relate to rules and procedure. The collection of evidence from a crime that occurred beyond its borders, where it has no powers of compulsion for its investigating agencies and the application of domestic rules, may undermine either the efficacy of the proceedings or the procedural fairness provided to the accused. Case studies in this thesis will explore this enforcement challenge and discuss the practices adopted by regional and international criminal tribunals to overcome the same evidentiary challenge. Further, they will assess the applicability or limitations for the use of those practices in prosecuting universal jurisdiction offences.

4.1.2 *Nes bin idem* and *concursus delictorum*

The *Rome Statute of the International Criminal Court* specifically addresses the concurrency of jurisdictions when both domestic and international jurisdictions maintain authority to try a person for an international crime.[311] In the case of the February 2014 preliminary proceeding of Uhuru Muigai Kenyatta, of Kenya, the prosecution and defence both made specific submissions in relation to this issue.[312]

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[310] Consider the 2016 update to the Australian *Criminal Code Act 1995* (Cth) (incorporation of amendments relating to the war crimes offences in the Act) to authorise actions by combatants that may incur lawful collateral damage in non-international armed conflict. Although this principle is reflected in customary international law, the domestic legislation (which wholly incorporated the *Rome Statute Elements of Crime*, but without reference to developments in international law—an express requirement in the interpretation of the *Rome Statute* at Article 21) resulted in an inconsistency in international law and its domestic articulation. *Criminal Code Amendment (War Crimes) Bill 2016* (Cth).

[311] *Rome Statute* (n 132) art 40(1).

[312] *Prosecutor v Uhuru Muigai Kenyatta (Defence Response to the 'Prosecution's Submission on the* ne bis in idem *Principle')* (International Criminal Court, Trial Chamber, ICC-01/09-02/1-899, 17 February 2014) <https://www.icc-cpi.int/iccdocs/doc/doc1734226.pdf>; *Prosecutor v Uhuru Muigai Kenyatta (Defence Response to the 'Prosecution's Submission on the* ne bis in idem *Principle')*, (International Criminal Court, Trial Chamber, ICC-01/09-02/1-899, 10 February 2014); *Prosecutor v Uhuru Muigai Kenyatta (Prosecution Submission on the* ne bis in idem *Principle')* (International Criminal Court, Trial Chamber, ICC-01/09-02/11-899, 17 February 2014) <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-899>.

The trial chambers held, by majority, that Kenyan domestic courts had appropriate jurisdiction to address the offences committed. While they were egregious criminal offences, they were not of sufficient international character to satisfy the *jurisdiction ratione materiae*:

> There are, in law and in the existing systems of criminal justice in this world, essentially two different categories of crimes which are crucial in the present case. There are, on the one side, international crimes of concern to the international community as a whole, in particular genocide, crimes against humanity, and war crimes pursuant to articles 6, 7 and 8 of the Statute. There are, on the other side, common crimes, albeit of a serious nature, prosecuted by national criminal justice systems, such as that of the Republic of Kenya.
>
> (...)
>
> [A] demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation.

This ultimately resulted in the withdrawal of charges by the prosecutor.[313]

The Princeton Principles identified a need to address this issue in the use of universal jurisdiction through their treatment of the *nes bis in idem* principle:

> In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.
>
> A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial body or a competent international judicial body exercising such jurisdiction in accordance with international due process norms.
>
> Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and

[313] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Decision on the Confirmation of Charges Pursuant to Article 61(1)(a) and (b) of the Rome Statute),* (International Criminal Court, Pre-Trial Chamber II, ICC-01/09-02/11-382-Red, 29 January 2012) <https://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>; see also *Situation in the Republic of Kenya (Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)*, International Criminal Court, Pre-Trial Chamber II, ICC-01/09-19-Corr, 31 March 2010) <https://www.icc-cpi.int/pages/record.aspx?uri=854562> 8, 65.

> legal standing to raise before any national or international judicial body the claim of *non bis in idem* in opposition to any further criminal proceedings.[314]

This enunciated position reflects the need to ensure there have been no previous convictions relating to the same conduct. Further, it requires that the state exercising the jurisdiction assess the bona fides of a trial in another state, if one had been conducted. This aspect of the jurisdiction is most prone to misapplication if there is no regulation of the standards to be considered sufficient to displace the legal obligation to have offender tried. This assessment is inherently subjective, and thus, risks misapplication if there is an ulterior agenda at play.

Further, the decision to prosecute in the first instance relies on general principles of fairness, with standards like 'a reasonable prospect of success' being necessary before a prosecutor may instigate criminal proceedings against an alleged offender, or a determination of sufficiency of evidence to support the charges. For example, in Australia, the prosecutorial discretion is often articulated as having been depoliticised. A two-stage test is required first, a sufficiency of evidence to support the trial, and second, a requirement that the prosecution be in the public interest.[315] Conversely, in the US, prosecutors exercise very broad discretion in both charging and plea bargaining. In addition to considering the sufficiency of evidence to support a charge, a US prosecutor has broad discretionary power to decide what to prosecute and whether to prosecute, which also includes extensive plea-bargaining powers. Thus, the prosecutor makes a 'unilateral determination of the level of defendants' criminal culpability and the appropriate punishment for defendants', [316] following an 'expediency principle' of justice. A baseline of sufficiency to support the criminal trial before its commencement is required. Distinctly, in inquisitorial legal systems, such as Germany, the decision is articulated as following the legality principle, and provides prosecutors no discretion. It requires that they prosecute all cases that are supported by the evidence.[317] Despite this seeming lack of discretion, the underpinning premise

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[314] Macedo (n 20).

[315] Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (AGPS, 1992) [2.2]; Michael Rozene, 'Keynote Address: Prosecutorial Discretion in Australia Today' (Prosecuting Justice: Australian Institute of Criminology Conference, 19 April 1996). A counter argument to this process being depoliticised is the Attorney-General, as the first law officer, providing discretion prior to a prosecution under Division 268 offences in the *Criminal Code* (Cth) for war crimes offences: see s268.121 *Criminal Code Act 1995* (Cth).

[316] Ibid.

[317] Sara Sun Beale, 'Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control' in Michele Caianiello (ed), *Discretionary Criminal Justice in a Comparative Context* (Carolina Academic Press, 2015) 27–58; Yue Ma, 'Prosecutorial Discretion

is the requirement for a consideration of fairness in prosecutorial decision-making. Although notably, the Germanic system provides victims the authority to complain to the chief prosecutor if they are not satisfied with the prosecutor's decision.[318]

Across the various domestic criminal law systems, prosecutors have discretion in relation to the sufficiency of evidence and the selection of the appropriate charges to prefer upon an accused. Again, this will be subject to political shaping and influence—consciously or unconsciously. The criticisms levelled by the AU against the ICC for its alleged 'Africa-bias' (see Chapter 6) outline the risk in relation to the application of any discretionary jurisdiction, particularly where the decision to prosecute can be made in relation to any alleged offender of the offence. Specifically, where the choice made to prosecute an individual is not subject to any clear criteria, any decision to prosecute is liable to criticism for ulterior motives. This could be due to alleged neo-colonialism imperative, or an intention to further a political rather than justice-based motive.

As will be discussed in Chapter 5, the selection of the appropriate moment to raise the complaint against Pinochet in a Spanish court was motivated by:

- a discerning assessment of when other legal measures might have been taken by either international or national criminal systems
- the likelihood of the prosecuting state and judiciary's support
- an alignment of people who might be able to support that complaint with evidence available in the jurisdiction where the offence is tried.

These considerations are not the same as those that underpin the discharge of justice for egregious crimes related purely on an absence of proper prosecution for an alleged crime against humanity in an alternate jurisdiction. In many criminal jurisdictions, a prosecutor is obligated by the relevant enforcement jurisdiction to act if the case presented reaches the standard of *prima facie* admissibility, or if there is a reasonable suspicion that an offence has been committed. The *prima facie* admissibility standard requires sufficient evidence to be admitted to establish a fact or raise a presumption unless disproved or rebutted.[319] A reasonable suspicion, although falling short of

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and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 2(22) *International Criminal Justice Review*, 5, 15.

[318] Ma (n 317) 18.

[319] Legal Information Institute, 'Definition: Prima Facie', *Cornell Law* <https://www.law.cornell.edu/wex/prima_facie>; Office for Public Integrity, 'What is a

knowledge or belief, requires that a case is not commenced merely on a 'hunch'. Arguably, in the case of universal jurisdiction, this is not necessarily followed. There are many cases of criminal offending worldwide for which a prosecutor could reach this threshold. Nevertheless, they would defer action based on secondary considerations pertaining to diversion of resources, competing case-load priorities within their normal jurisdiction, and a deference to other states that have a traditional jurisdiction over the alleged offending, compounded by the non-obligatory nature of the jurisdiction.

In assessing the issue of complementarity in the drafting of the *Rome Statute* and in consideration of the *Rules of Procedure and Evidence for the International Criminal Court,* it was recognised that the nature of the Court's 'macro-delinquency' subject matter jurisdiction would inevitably result in *concursus delictorum* (concurrence of offences). Further, there would be procedural repercussions regarding the form of indictments and the scope of *non bis in idem* (double jeopardy or 'not the same thing twice').[320] *Kupreskic et al*[321] before the ICTY was the first international criminal tribunal to discuss this issue in depth. In this case, the prosecutor submitted that the proper test borrows from the *Tadic* two-stage test,[322] but also considers the *Akayesu* test. This test determines that cumulative charges may be used when:

1) the Articles of the Statute referred to are designed to protect different values;
2) each Article requires proof of a legal element not required by the others; and
3) offences may not be co-extensive but rather have different elements.[323]

Reasonable Suspicion?', *Independent Commissioner Against Corruption* <https://icac.sa.gov.au/content/what-reasonable-suspicion>.

[320] Carl-Friedrich Stuckenburg, 'Multiplicity of Offences: *Concursus Delictorum'* (2001) *International and National Prosecution of Crimes under International Law Current Developments*, 44.

[321] *Kupreskic et al v Prosecutor (Trial Judgmen*t) (International Criminal Tribunal for the former Yugoslavia, IT-95-16-T, 14 January 2000) ('*Kupresic et al'*).

[322]In establishing whether an individual was acting on behalf of a state, the Tribunal espoused the overall control test (favouring it over the effective control test articulated in *Nicaragua*), stating that the two stages to establish individual criminal responsibility for acts were:'[1] not only [the] equipping and financing [of] the group, but [2] also [the] coordinating or helping in the general planning of its military activity'. *The Prosecutor v Duško Tadić (Judgment in Appeal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, IT-94-1-A, 15 July 1999) 131 ('*Tadic Decision'*).

[323] *Kupreskic et al* (n 321) 640–645. The prosecution maintained that the Tadic test was unnecessarily limiting compared to the text and intent of the Statute, but was nonetheless met in the *Kupreskic* case. In this case, the 'separate provisions serve to fully describe the magnitude of the offence', which further supports the cumulative charging.

In response, there were four defence submissions regarding this issue. These included arguments that the cumulative charges related to aggravated forms of the same offence. Also, multiple charges could only be laid in situations of 'real concurrence' as distinct from 'ideal' or 'apparent' concurrence.[324] The defence also submitted that such multiple charging offends the principle of *non bis in idem*.[325]

The Trial Chamber addressed this issue from both a substantive and procedural perspective. It is the procedural perspective that is relevant for the purposes of universal jurisdiction. In this case, the trial chamber considered that the relevant issues to consider were the safeguarding of the accused's rights to understand the charges, balanced with the prosecutor's obligations to 'be granted all the powers consistent with the Statute to enable her to fulfil her mission efficiently and in the interests of justice'.[326] These issues were resolved by considering the nature of the conduct that could be appropriately charged. The lesser offences were included in the alternative. The contention that the accused did not know the basis of the charges was resolved by reference to the practice in common law and civil law countries. It determined that the systems of domestic criminal law provided a procedure to follow in respect of this aspect of criminal procedure. The charge sheet was refined using standing procedural rules; thus, procedural fairness was achieved.

The issue raised by this principle in the application of universal jurisdiction offences, is that the jurisdictional basis upon which a crime is brought in a third-party state is limited by the type of offending alleged. In the case of the ICC and the various ad hoc international criminal tribunals, their founding statutes provide for a long list of offences that may be prosecuted. These necessarily include the international core crimes that justify the existence of the tribunals and courts in the first place. They also include a list of less serious, but still significant, criminal conduct. For example, the ICC's subject matter competence extends to only breaches considered grave and serious. If a state were to try a criminal in relation to breaches of offences in international criminal law, they would be limited only by the requirement that the offending is subject to universal jurisdiction. The state could prosecute criminal conduct—still amounting to egregious criminal misconduct, but beneath the threshold requirement of the ICC's subject matter jurisdiction. That is, in cases before the ICC,

[324] Ibid 660–662.
[325] Ibid 666.
[326] Ibid 726.

if the offence of genocide was charged, but the war crime of murder was not, in the event that the element of intent specific to elevate murder to genocide was not proved, the entire case would require dismissal. However, a state could prosecute for the offences below the ICC's threshold of murder.[327]

A compelling argument to displace this concern is that most universal jurisdiction offences largely involve 'widespread and systematic' breaches of the law, such as gross human rights violations. Thus, meticulous calculations of blameworthiness of a single criminal conduct seem neither possible nor appropriate. Therefore, the absence of the minor crimes that comprise the whole are not of concern in such prosecutions. Nevertheless, this does pose sentencing concerns for various domestic legislatures, because those domestic sentencing processes are established to recognise the circumstance and degree of criminal conduct. They do not contemplate the mass breaches that would otherwise be addressed by an international tribunal. It also leaves open circumstances such as the situation in the Democratic Republic of the Congo, where leaders were prosecuted, but 'lesser' criminals still responsible for breaching international criminal law escape conviction unless addressed by domestic courts. The application of this concern in domestic legislatures will be discussed in Chapter 5 when considering the sentences issued by national courts.

4.1.3 Form of indictment

The issue of the breadth of the indictment is also one of concern in the application of universal jurisdiction for international criminal offences in national jurisdictions. A crime of genocide comprises many offences of murder. Crimes against humanity are a conglomeration of events that combine to make the offence significant enough to reach the threshold of being of concern to the international community. As discussed previously, the tests for a multiple charge are subject to the existence of differing elements or the protection of differing social interests in the listed offence. Thus, some international criminal offences may be listed separately for the same factual events, though only in the case of offences of different footing. In circumstances charging universal jurisdiction, arraignments may describe both the more serious offending and the lesser conduct—such as genocide and complicity in genocide—as being the same

[327] Ibid 742–748.

conduct.[328] Thus, they are subject to national interpretation of international law offences, and principles of multiplicity and duplicity. However, in some cases, involvement as an individual as well as a commander may attract criminal liability, as in *Delalic.* In this case, the conduct was considered aggravating rather than sufficient to result in double sentences for the same conduct.[329]

Therefore, in the case of universal jurisdiction, there must be measures to prevent multiple trials for the same conduct. Further, there must be a balanced approach to ensure that the arraignment of an individual appropriately captures the conduct that amounts to an international crime. The procedure must ensure that lesser offences that would support prosecution from other jurisdictions do not distract from previous trials encountered in other fora. Thus, the rationale for prosecution must avoid:

> the double evaluation of identification behaviour for punishment purposes ... to exhaustively reflect the criminality of the defendant's behaviour in both verdict and sentence; and to avoid disproportionate (unduly harsh and unduly lenient) punishment.[330]

The consideration of the Australian *Criminal Code* in regard to both of these issues is informative. This will be addressed in Chapter 5.[331]

4.2 Selection of Forum and Concurrent Jurisdictions

Another consideration exists in relation to the concept of complementarity and concurrency of jurisdiction. While not in the same sense as the principle as enunciated in the *Rome Statute* of the ICC, the possibility of competing jurisdictions attempting

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[328] *Prosecutor v Dusko Tadic (Decision on Defence Motion on the Form of the Indictment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, IT-94-1-T, 14 November 2014) ('*Tadic*') 10: 'In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can be dealt with it and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading'; *Prosecutor v Akayesu* (*Trial Judgment),* (International Criminal Tribunal for Rwanda, Trial Chamber, ICTR-96-4-T, 2 September 1998) ('*Akayesu*') 468: 'on the basis of national and international law and jurisprudence … that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests or (3) where it is necessary to record a conviction for both offences in order to fully describe what the accused did'.

[329] *Prosecutor v Delalic et al (Sentencing Judgement I)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, IT-96-21-T, 6 November 1998) ('*Celibici Case'*) (1200]–[1201].

[330] Stuckenburg (n 299) 603.

[331] See Section 5.4.1.

to prosecute for the same offence exists when a jurisdiction for a single offence is both domestically and internationally applicable at the same time. The most prevalent examples of disagreement in this field can be observed between regional organisations such as the EU and the AU regarding the application of universal jurisdiction to African heads of state accused of serious offences, also subject to ICC warrants, and as to who should properly prosecute.[332]

Equally, there exist competing jurisdictional considerations when there are multiple arrest warrants and extradition requests issued by states in relation to an alleged offender's conduct. Regarding the US and Canadian approaches to the enforcement of universal criminal offences, the prioritisation of these multiple requests will be discussed. This will include examination of whether or how a state should prioritise types of criminal conduct alleged. This analysis will also consider the use of concurrent and competing jurisdiction to pave the way for later prosecutorial actions utilising universal jurisdiction to hold individuals to account. This is witnessed in US immigration law proceedings as a precursor to other criminal or civil actions.

A principle that a crime is universal implies that every state can, and should, issue arrest warrants if they have sufficient evidence to support a prosecution for a core crime. Which state should then have priority in the extradition and prosecution of the alleged criminal? Should it be based on the first warrant in time to be issued? Or the state with the strongest traditional jurisdictional nexus (eg, a former colonial power holding legacy citizenship rights over the victims)?

The cases of Pinochet's extradition highlight this issue, in that many countries issued arrest warrants for the dictator's arrest: Belgium, Spain and Germany.[333] However, in determining which warrant to honour, there must be some consideration given to the concurrent jurisdictions seeking extradition of this 'universal criminal'.

The many cases instigated by Spain and France related to their previous colonies in the form of prosecutions against Rwandan and Guatemalan leaders. The UK, France and Italy prosecuted pirates in Somalia, Somaliland and Djibouti, respectively.

[332] See discussion of President Kenyatta and President Bashir in Beth Van Schaack, 'African Heads of State Before International Criminal Court', *International Criminal Justice Today* (online, 21 June 2015) <https://www.international-criminal-justice-today.org/arguendo/african-heads-of-state-before-the-international-criminal-court/>.

[333] Pablo De Greif, 'Comment: Transition to Democracy' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 123.

Questions by regional organisations, such as the AU, have interrogated the efficacy of having a neo-colonial power exerting its ongoing domestic jurisdiction over non-citizens.[334] Further, there have been contemporary critiques that principles such as universal jurisdiction have been utilised as a tool of ongoing subjugation by those former colonial states.

In her work on universal jurisdiction, Mitsue Inazumi identified four differences in the nature of 'the perceived universal jurisdiction'.[335] Inazumi contended that the nature of the jurisdiction can be broken into right/obligation and primary/supplemental categories. She suggested that the prioritisation of obligations to prosecute or extradite should be compared with the right of the state to utilise universal jurisdiction without first exhausting extradition.[336] This contention identifies that the application and enforcement of universal jurisdiction is dependent on the circumstances surrounding the location of the offence and the offender, and the choice made by the state who holds the person subject to the extradition request. For example, a state may have an extradition request from a third state for an alleged criminal, who is resident or visiting their state, who is purported to have committed an offence in another state. Assume that the two states have concluded an extradition treaty that allows for the extradition of the alleged criminal to the requesting state. However, they also have the option to prosecute that person utilising the doctrine of universal jurisdiction. In this case, the state may or may not have domestic legislation that assists in the decision-making of the state as to whether to prosecute or extradite, or rely on universal jurisdiction as the basis for prosecution.

Inazumi discussed in detail the differences in the application of universal jurisdiction but she drew a slightly different conclusion as to which variations of universal jurisdiction exist in practice.[337] She concluded that there are a variety of notions of universal jurisdiction, which depend on whether the jurisdiction is permissive or obligatory, and primary or supplemental jurisdiction.[338] In this assessment, Inazumi considered that obligatory universal jurisdiction is represented in cases in which states have an obligation to either prosecute or extradite under grounds of universal

[334] See commentary of various academics: 'Is the ICC Targeting Africa Inappropriately?', *ICC Forum* (March 2013–January 2014) <http://iccforum.com/africa>.
[335] Inazumi (n 13) 153.
[336] Ibid 28.
[337] Ibid 105.
[338] Ibid 28, 240.

jurisdiction. This thesis does not support this category of jurisdiction. Instead, it differentiates it as comprising two separate elements: a permissive exercise of universal jurisdiction; with an optional, concurrent extradition option in relation to the same offending.[339] This difference is based upon the assertion that those international treaties impose an obligation to either prosecute or extradite, and are thus not true representations of universal jurisdiction. This is because the authority to prosecute and then extradite the individual is based on a treaty obligation, which is complementary to the obligations of those other states that are subject to the same treaty. That is, the right to discharge criminal justice in relation to individuals comes from an agreement by the other states' parties to abrogate their jurisdiction over that individual. It does not stem from a universal right of the receiving state to act in relation to the conduct, regardless of the genesis of the offending or because of the nature of the offence. In extradite or prosecute jurisdictions, the authority to prosecute is rather the result of a specific treaty authorisation to so prosecute.[340] For example, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* criminalised conduct that is akin to the universal jurisdiction offence of piracy. It created a prosecute or extradite jurisdiction pertaining to these offences.[341] Thus, states party to this Convention have agreed to be obligated to act in relation to any offences described in the Convention, such as those relating to the seizure of a ship by force. This is preferred rather than leaving prosecution of this type of conduct, which could in some circumstance also be considered piracy, to the discretion of the detaining or intervening state. Thus this is not an example of universal jurisdiction because the authority to prosecute stems from consent and a deferral to prosecute by the others states party to the Convention.

However, the real issue in this rights/obligations and primary/supplemental analysis is that the concurrent forum provides the state with a problem regarding which competing forum should take priority. The understanding of universal jurisdiction in this thesis does not, however, support the view that there is a distinct difference in the *nature* of universal jurisdiction based upon this distinction. Rather, the enforcement of universal jurisdiction is *concurrent* with the obligation to prosecute or extradite and other

[339] Ibid 28–29.
[340] Ibid.
[341] *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* ('*SUA Convention'*), opened for signature 24 February 1988, UNTS 1990 (entered into force August 1989).

jurisdictional bases. The decision-making of a state in relation to which jurisdiction is relied upon is a political or prosecutorial decision rather than a legal one. While conflict of laws principles will provide guidance as to whether to extradite, or utilise universal jurisdiction, the ultimate decision will be based on political interest and risk, in the sense that the state will have to make the determination as to which legal rule to prioritise: the legal obligation of the extradition agreement or the permissive jurisdiction imported through universal jurisdiction.

The selected cases will be assessed to determine what pre-trial and pre-arrest arrangements were made regarding the selection of forum for the alleged perpetrator. Further, the cases will be explored to ascertain the ongoing tensions during trial regarding who retains responsibility for the indicted individual, from the perspectives of citizenship, a financial liability and victims' rights. This assessment will be contrasted with the examples of piracy, in which international agreements have provided guiding principles to assist in the determination of the appropriate forum for the trial of a universal jurisdiction offence. Such assessments will enable the development of a recommendation regarding forum selection, which should be considered by an arresting agency prior to the commencement of any universal jurisdiction offence indictments.[342]

Traditional jurisdictional nexus requires a current link to the enforcing authority. That is, the perpetrator or victim are resident or citizen of the enforcing state, or that state is affected in some manner—notionally related to its security—by the alleged crime.

The determination as to whether a matter should be enforced domestically or through another available enforcement regime remains an ill-defined issue at international law. Bassiouni asserts:

> Though in many respects international criminal law is a continuum of internationally protected rights there are distinguishing characteristics attributable to each of these areas. International penal proscriptions, whether or not established

[342] The cases used in this thesis are not necessarily representative of 'pure' universal jurisdiction trials. There are some passive personality or extraterritorial or active personality links. Anne-Marie Slaughter proposes the concept of 'universality plus' as the method by which contemporary judges base their application of universal jurisdiction to overcome the inherent inconsistencies in the application of 'pure' universal jurisdiction. 'Pure universal' jurisdiction contemplates the absence of the accused from the territory in which proceedings are commenced and a subsequent extradition (lawful or otherwise) resulting in the accused's presence before the domestic tribunal. Accordingly, the cases cited here will include prosecutions that also incorporate trials based upon the accused being a resident, temporary or permanent, in the country in which the trial is commenced. See Slaughter (n 71).

> for the preservation and protection of human rights, required that each crime have an international or transnational element. This element can be found in the very nature of the violative conduct, its target-victim, or in its impact. The international elements can be defined by virtue of the impact of the conduct, in that it affects the collective security interests of the world community, or if by reason of the seriousness and magnitude of the violative conduct it constitutes a threat to the peace and security of humankind. The transnational element merely affects the interests of more than one state and therefore is more limited in its impact on the world order than is the international element.[343]

However, universal jurisdiction offences are only those considered the most heinous of crimes. Thus, the threshold for application of international criminal tribunals and the triggering of domestic jurisdiction to enforce universal offences are arguably identical.

How then, can this principle be reconciled with circumstances such as those in Rwanda, where the International Criminal Tribunal for Rwanda (ICTR) has selected only the worst offenders to prosecute, while there are thousands of other people against whom arrest warrants have been issued for the crime of genocide and mass killings, but who have not reached the critical threshold for the international tribunal to act? If it is accepted that genocide is a crime of universal jurisdiction, theoretically any other state, where justice sector resources may be sufficient to prosecute these 'lesser' criminals, could rely on existing extradition treaties or international diplomatic requests to seek the extradition of these thousands of criminals to prosecute them for this international crime.

Such an action would be highly unorthodox and take significant ongoing resources, not only to support the trial of the alleged offenders, but also to support the incarceration of those found guilty of genocide. The issue of resources, while not a jurisprudential consideration for the prosecution of international crimes, is a practical one. A state is likely to consider this when exercising a jurisdiction with mandatory enforcement obligations. For example, while surrounding African states could have exercised universal jurisdiction with respect to the individuals eventually put on trial at the ICTR, the lack of action was not triggered by of a lack of political will to act. Rather, it was a resourcing issue.[344] This issue was overcome by the international

[343] M Cherif Bassiouni, *International Criminal Law and Human Rights* (Nijhoff, 2013) 24.

[344] Both Burundi and the Democratic Republic of the Congo were also affected by the conflict, and housed many of the people who participated in the violence in Rwanda from the former government, army and *interahamwe* militia, and Democratic Forces for the Liberation of Rwanda (*Forces démocratiques pour la libération du Rwanda,* FDLR), but fled following the conflict. The lack of action has been attributed by some to a lack of political capacity and capability. However,

community's commitment to dealing with the breaches of international law in Rwanda by the establishment and resourcing of the ICTR.

Distinct from relating to the decision of hierarchies of extradition agreements or obligations, the selection of forum through illegal abduction, as occurred in the *Eichmann* trial, remains an issue with which contemporary theorists struggle. The Princeton Principle Project acknowledged that the precept of universal jurisdiction is to ensure that egregious breaches of criminal law do not escape punishment by allowing 'that national courts should prosecute alleged criminals absent any connecting factors'.[345] However, it raised concerns regarding rogue states misapplying this concept, or governments seeking to indict or harass peacekeeping forces by 'unjustified prosecutions' to discourage such peacekeeping operations. Thus, contemporary application of the concept of universal jurisdiction seeks to move away from the 'pure' application of the jurisdiction based only on the nature of the crime, as was applied in *Eichmann*.[346]

It is evident that the motivations for some universal jurisdiction trials are not altruistic. The motivation for the abduction of Adolf Eichmann was particular to the State of Israel. It considered itself representative of the Jewish people. Therefore, it had a moral imperative to seek justice for the crimes committed by Adolf Eichmann. Interestingly, throughout the trial there were no objections to the adoption of the Israeli rules of criminal procedure. For example, the Appeal Court adopted the rules of Israeli criminal law as they pertained to dismissing Eichmann's defence that Adolf Eichmann had relied on superior orders. Further, the manner in which the trial was conducted accorded with the criminal procedure laws of Israel.[347] Arguably, this issue was addressed in the original application of Adolf Eichmann's counsel on the basis that Israel did not have jurisdiction to hear the case at all.[348] This application was dismissed on two grounds. The universal character of the crimes and the absence of an

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a preoccupation with domestic troubles having been affected by violence, genocide and limited resources are more likely to account for the lack of domestic trials against these refugees. See Human Rights Watch, *Rwanda: Justice After Genocide—20 years on* (online, 28 March 2014) <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years>. See also 'The Struggle to Create the ICTR' in Victor Peskin, *International Justice in Rwanda and the Balkans, Virtual Trials and The Struggle For State Cooperation* (Cambridge, 2008) 151–160.

[345] Macedo (n 14).

[346] Macedo (n 20) 31.

[347] The Nizkor Project, 'Eichmann Appeal Trial transcripts: Appeal-Session-07-08 and Appeal-Session-07-07; Israel's Criminal Procedure (Trial Upon Information) Ordinance', <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Appeal>.

[348] *Eichmann District Court* (n 4).

international court to hear the crimes granted domestic jurisdiction to any court. Second, the character of the crimes provided a link between Adolf Eichmann and the newly-founded State of Israel, a State established and recognised as the State of the Jews. The basis of the offending related to the attempted extermination of the Jews.[349] Thus, the self-selected forum approved its own jurisdiction; the laws that apply to that jurisdiction were necessarily followed in the conduct of Adolf Eichmann's trial. The absence of any independent corroboration of the appropriateness of the forum and thus the procedure followed within it appeared to be a cause for tension that was not adequately addressed in *Eichmann* trial. In the *Eichmann* trial, the Court did not take into account any of the commentary provided by the UN in respect of the unlawfulness of the initial arrest of Adolf Eichmann responding to Argentina's applications to the UN for resolution of this issue, but proceeded on the basis of their own reasoning to support the ongoing prosecution.

Flowing from this issue of the adoption of laws relating to the procedural fairness of the trial is the contention that the outcome of the trial was the execution of the defendant, which is arguably a breach of the defendant's right to life.[350] Adolf Eichmann was sentenced to death, the highest sentence available under Israel's *Nazi and Nazi Collaborators (Punishment) Law*.[351] The District Court even discussed in its decision that this sentence is manifestly inadequate to address the offending of Adolf Eichmann.[352] Thus, they did not consider any mitigation for his actions after dismissing his contention of reliance on any kind of compulsion through superior orders.[353] While the appropriateness of the death penalty was raised by the defendant's counsel, the Court determined that it should not mitigate the punishment merely

[349] *Eichmann District Court* (n 4) 12, 34.
[350] In the event that the court lacked jurisdiction to hear Eichmann's case, the outcome would be that the death sentence imposed upon Eichmann lacked lawful authority and would amount to a breach of right to life. Right to life is couched in terms of absence of other authority to take that life (ie, a lawful authority in the case of combatant's lawful use of force on behalf of the state, or an executioner's lawful discharge of a death penalty upon a lawfully convicted person): see ICCPR (n 118) art 6.
[351] No 64, 5710 (1950), art 1. Passed by the Knesset on 18 August 1950, 5710 (1 August 1950), in Seier Ha-Chukkirn No 57 of the 26th Av 5710 (9 August 1950) 281. The Bill and an Explanatory Note were published in Balza'ot Chok, No 36 of the 11th Adar, 5710 (28 February 1950) 119.
[352] They held it 'utterly inadequate this death sentence is as compared to the millions of deaths in the most horrible ways he inflicted on his victims. Even as there is no word in human speech to describe deeds such as the deeds of the Appellant, so there is no punishment in human laws sufficiently grave to match the guilt of the Appellant': *Eichmann District Court* (n 4) 282.
[353] Telegram Ribbenstrop to Veesenmayer (N/85 of 10 July 1944) referenced in 'Eichmann Appeal Trial transcripts, Appeal-Session-07-09', *The Nizkor Project*, <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-07-09>.

because Adolf Eichmann had been so successful in avoiding capture until such time as his 1961 trial.

It seems that Bassiouni's distinction between transnational elements and international elements of crime can also be used to predict whether a state will rely on universal jurisdiction to deal with an offender. There must, therefore, be some kind of impact on the state exerting domestic jurisdiction before action will be taken.

4.3 Harmonisation of International Law

The golden thread of humanity has pervaded the development of international laws and agreements since the *United Nations Charter* was signed on 26 June 1945. However, international criminal law has experienced somewhat of a renaissance as a result of enlightenment of states in relation to human rights. This is also because of convergences in political progress following the end of the Cold War, and increasing public interest in the enforcement and application of human rights principles through codification of international legal aspirations, such as ending impunity through mechanisms such as universal jurisdiction.

The existence of monist and dualist states indicates that there will be different processes through which international legal obligations will be incorporated domestically into enforceable laws.[354] In the UNGA Sixth Committee Working Group's report relating to the application and scope of universal jurisdiction, it was clearly established that the conditions for application of universal jurisdiction, including its interaction with other rules of international law, were unclear. Various submissions of states, which outlined the differing understanding of the basis for the jurisdiction, its purpose, and how it had been expressed domestically, established this. While there has been an increasing and positive influence of international criminal tribunals on national legal systems,[355] this has by no means been conducted in a consistent or uniform fashion. Further, there has not been many publicly settled matters derived from these determinations across numerous domestic legal systems.

[354] George Slyz, 'International Law in National Courts' (1995–1996) 28 *New York University Journal of International Law and Policy* 65.

[355] Sheila O'Shea, 'Interaction Between International Criminal Tribunals and National Legal Systems' in Thomas Franck (ed), *International Law Decisions in National Courts* (Irvington-on-Hudson, 1996).

In Amnesty International, Human Rights Watch and other NGOs' attempts to summarise the issue (as discussed previously), it is apparent that the enforcement of universal jurisdiction consistent with international law obligations is as unclear as the prescription of universal jurisdiction offences. Some countries have attempted to incorporate specific rules regarding application of the jurisdiction to align with international legal obligations. Some have attempted to address conflict of law issues in relation to the application of universal jurisdiction. Others have simply prosecuted universal jurisdiction offences in the same manner as they have any other domestic criminal offence.[356]

Particular considerations have been raised in relation to issues such as the basic criminal law principle prohibiting retrospectivity of laws. This principle is enshrined in numerous international law instruments, which protect against the application of retrospective laws on the basis that a person cannot be held criminally liable for actions not deemed criminally culpable until after the offence. However, in the application of universal jurisdiction, arguments regarding the laws importing criminal responsibility for core crimes are overcome by asserting that the conduct discussed is so heinous that its nature was always offensive to law. Thus, it was always an offence for which a person could be held responsible despite an absence of its codification. The ICJ, in its *Nuclear Weapons Advisory Opinion*, is informative in articulating the 'transgressional nature' of crimes[357] specified in international criminal law, that are so heinous that their commission is subject to general prohibition at international law. In the case of nuclear weapons, the Court held that the use of nuclear weapons is not subject to an express prohibition. Prevention of their use does not flow from a lack of explicit authorisation, but rather as part of a broader prohibition when considering underlying customary international law principles.[358] While the Court declined to definitively state whether the use of nuclear weapons would be illegal, the Court did note that use of nuclear weapons must comply with the rules of customary international law applicable in an armed conflict. Thus, it must comply with the requirements of proportionality, distinction and unnecessary suffering. Referring to the Martens Clause, the Court noted that it is:

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[356] Ibid.
[357] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion*), International Court of Justice (ICJ), 8 July 1996 ICJ Reports.
[358] Ibid 52.

> undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put in its judgment of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports* 1949, p.22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[359]

Accordingly, there are offences under international customary law that attract individual criminal liability, although they have not been expressly prescribed as illegal acts. This is because the acts are fundamentally contrary to the basic principles of humanity and civilisation that underpin international humanitarian law.

The international military tribunals in Nuremburg and Tokyo addressed these issues, as has every international criminal tribunal established since.[360] The decision in *Kupreskic* discussed how the International Military Tribunal avoided triggering this concern by charging defendants with multiple applicable offences, including the constituent elements of crimes that comprised the greater offences under its subject matter jurisdiction (eg, charging murder as well as the associated crimes against humanity).[361] This process purported to ensure the criminal trial was not voided for a technicality if any of the elements of a particular offence were not met. Thus, the charging addressed the overall gravity and full nature and circumstances pertaining to the offending.

In its discussion regarding the development of international criminal law, the ICTY identified the principles relating to the criminality of conduct now categorised as core crimes. For example, in *Kupreskic*:

> the legal notion of 'crimes against humanity' is now firmly embedded in positive international law, its legal contours are neatly drawn and it no longer gives rise to doubts as to its legitimacy; in particular, its application does not raise the issue of retroactive criminal law.[362]

Therefore, there is no consistent international law approach to this issue.

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[359] Ibid 78–79.

[360] For a discussion particular to German and Australian Constitutions, see Greg Taylor, 'Retrospective Criminal Punishment Under the German and Australian Constitutions' (2000) 23(2) *University of New South Wales Law Journal* 196.

[361] *Kupreskic* (n 321).

[362] See *Kononov v Latvia* (European Court of Human Rights, former third division, Application no 36376/04, judgment, 24 July 2008) for a decision supporting the applicability of retrospective legislation in the Baltic States for conduct that occurred pre-WWII.

4.3.1 Harmonisation with treaty obligations

Relying on the universality of the offence purports to provide every state the authority to domestically prosecute a criminal for offences against humankind. Thus, this jurisdictional basis assumes that there is a universal acceptance for the criminal procedure, sentencing and domestic legal systems by all states in relation to others. This is obviously not a true reflection of comparative national law.

The existence of numerous competing treaty obligations, and reservations to said treaties, is obvious evidence that one state's understanding of an obligation relating to certain individual rights is not the same as another's. A simple example is the competing international positions on the lawfulness of the death penalty. A further complication is that treaty obligations do not necessarily reflect *jus cogens* norms, or address how to deal with cross-border criminal activities. Rather, they may only reflect customary international law at a regional level, or even only a bipartisan reflection of legal arrangements relating to criminal law procedure and practice. Additionally, different models are adopted regionally that affect how particular offences are dealt with or punished domestically. For example, the *UNDOC Manual on Mutual Legal Assistance and Extradition* articulates the differences in approach between civil law traditions, common law traditions and Islamic legal traditions in their fundamental approaches to criminal practice, and thus, their differential approach to exercising jurisdictions. Further, this manual articulates the difference in approach between monist and dualist legal systems as a further complicating consideration in a consistent approach to extradition practices across the globe.[363] Indeed, building upon the death penalty example, some extradition treaties or agreements may place conflicting obligations upon states purporting to exercise universal jurisdiction over offenders in their custody.

A further consideration in the harmonisation of international law with domestic application of criminal proceedings is the absence of consistency in states' interpretation of underpinning legal constructs and the consequential offences that may then be prosecuted. Certain offences can only be prosecuted when particular preconditions are met. For example, war crimes require either an international armed conflict or a non-international armed conflict to be present at the time of offending. A

[363] United Nations Office on Drugs and Crime, *Manual on Mutual Legal Assistance and Extradition* (New York, 2012).

domestic law crime of murder does not constitute a war crime, unless committed in the context of an armed conflict. Although the underlying conduct is the same, the context in which those acts are committed elevate the offending to be considered a grave breach of the *Geneva Conventions*. The existence of international and non-international armed conflict is a matter of legal classification. However, a state's interpretation of such a state of affairs is inconsistent. The current conflict in Iraq and Syria is an illustrative example. While some states consider that the non-international armed conflict is occurring in both Iraq and has spread into Syria, others contend that it is localised within Iraq.[364] Accordingly, this inconsistency may give rise to one state considering that it has universal jurisdiction available to prosecute someone who has committed a war crime, where the offence of murder is aggravated by its conduct in armed conflict. Conversely, another state may only consider that conduct murder, at its highest.[365]

4.3.2 Domestic processes aligning with international law

International law contains numerous human rights that are established to guarantee a baseline of civility for all of humanity. The domestic processes of prescribed law, and its enforcement, must align with these international legal principles to preclude potential breaches of international State responsibility that may give rise to reparations. For example, Article 9 of the *Universal Declaration of Human Rights* and Article 9 of the *International Convention on Civil and Political Rights* (ICCPR) contain a prohibition against arbitrary arrest or detention. The ICCPR specifies that no-one shall be deprived of their liberty except 'on such grounds and in accordance with such procedures as are established by law'.[366]

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[364] Rulac, Geneva Academy, *Non-International Armed Conflicts in Iraq* (12 September 2017) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq#collapse2accord>. Note: this position does not include an updated status of the armed conflict subsequent to this date.

[365] The trigger to escalate to a war crime, either in the context or an international armed conflict or non-international armed conflict is the existence of an armed conflict (referring to Common Article 3(1)(a) of the Geneva Conventions. The definition of where an armed conflict is occurring is a question of fact. Thus, in cases where alleged conduct occurs outside of the boundaries of the armed conflict, it may not constitute a war crime (whether committed in a non-international armed conflict or an international armed conflict) but may revert to a domestic criminal offence.

[366] See the treatment of human rights in Theodore Meron, *Internal Strife: Their International Protection* (Cambridge University Press, 1987) 17. Specifically, refer to state positions and statements on this position.

Pictet, in his principles of commonality—analysing the international humanitarian law of Geneva with human rights norms—noted:

> The individual has a right to the respect of his life, integrity, both physical and moral, and of the attributes inseparable from his personality … Everyone is entitled to recognition as a person before the law … and deportations shall be prohibited.[367]

In the case of in absentia judgments undertaken without consent of the accused, and without appropriate notice being issued to the accused, for example, recognition before the law and due process are denied. A method to overcome denial of these rights is through domestic legislation regarding the recognition of international criminal judgments. For example, the Italian *Penal Code* of 19 October 1930 specifically provides that foreign judgment can be recognised if the minister for judgment obtains copies of the judgment, and its records and associated evidence are sent by the public prosecutor to the court of appeal. The public prosecutor then decides whether to apply to the court of appeal to recognise that judgment. In these cases, due process rights are protected in the subsequent article of the code, which specify that:

> I. The Court of Appeal may not recognise a foreign judgment:
>
> 1) when the convicted person has not been formally charged or has not been defendant or represented by Counsel;
>
> 2) when the judgment has not acquired res judicata force under the law of the State in which it was pronounced;
>
> 3) when the judgment contains provisions contrary to the letter or spirit of the law of the Kingdom;
>
> 4) when recognition is precluded under the final paragraph of Article 12 of the Penal Code.[368]

Similar legislative measures have been implemented in other jurisdictions to ensure that in absentia judgments are only recognised in their domestic legal system if certain criteria aimed at protecting the rights of the individual are met. These include: the awareness of the criminal proceedings by the accused, through personal service of a summons; restriction on the type of offence authorised to be prosecuted; the limitation

[367] Meron (n 343) 34–47, citing Jean Pictet, *Commentary on the Geneva Conventions, 1949* (ICRC, 1952).
[368] H Grutzner, 'International Validity of Criminal Judgments, Summary of Problems', *Criminology Research, The International Validity of Criminal Judgments* (Council of Europe Strasbourg, 1968) 22.

on issuance of severe penalties such as imprisonment of a set period or confiscation of property or fines; a requirement that the facts are able to be determined without the accused being present at trial; and in some cases, consent for their absence is required of the accused before judgment will be considered for domestic enforcement.[369] While these provisions consider the requirement to ensure the protection and partly address Bassiouni's list (see Section 4.1) of individuals' fair trial rights during criminal prosecution, their restrictive nature prevents the domestic recognition of a trial in most circumstances of universal jurisdiction offences. Universal jurisdiction offences are the most serious of criminal offences. Thus, they attract significant punishment in the event of conviction.[370]

While attempts to provide domestic legislative protections for an individual may reduce any unfairness to that person, they do not address the overall justice outcome, which is the basis for enabling the prosecution of the offence by all nations in the first instance. Arguably, a state does not have the ability to balance an individual's rights against common interests of the international community, given one state cannot speak for the world. This function should be assumed by an external body, rather than by domestic judiciaries who would apply limited and restrictive domestic legislation, which would impede the international justice outcome contemplated by a universal jurisdiction offence prosecution. Possibilities for such regulation will be discussed later in Chapter 8.

4.4 Political Risk

Perhaps represented as a conglomeration of the enforcement gaps listed above, the key risk to the proper application of universal jurisdiction offences is political risk. This risk lies in the decision to create the appropriate enforcement jurisdiction for universal crimes, and in the consistent and true application of that enforcement jurisdiction free from political influence. Accordingly, a key tension in the application of universal jurisdiction relates to the political imperative in applying universal jurisdiction. There

[369] See Austria, Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Norway, Netherlands, Sweden and Turkey in L Hulsman, 'The Role of Sentences Passed in the Absence of the Accused in Arrangements for the Enforcement of Foreign Criminal Sentences', in *Aspects of the International Validity of Criminal Judgments* (Council of Europe Strasbourg, 1968) 42.

[370] Note that in trials before the Special Tribunal for Lebanon, the UN established international criminal tribunal conducts trials in absentia. Article 22 of the *Statute of the Special Tribunal for Lebanon* established the criteria for in absentia trials to ensure that they are considered fair to the accused: see Amal Alamuddin et al, *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press, 2014) Chapter 12.

is comparatively little legal impediment to countries with universal jurisdiction legislation issuing warrants relating to matters brought to their attention. However, the competence of the court is largely affected by the political imperative in prosecuting foreign nationals.[371]

There is a concomitant international relations cost that comes with the prosecution of another state's national.[372] The general type of defendant subject to universal jurisdiction for war crimes or crimes against humanity is one whom the international community has 'most clearly agreed should be prosecuted and punished and that their own states of nationality have not defended'.[373] The application of universal jurisdiction is generally disincentivised by international political pressures. Accordingly, the inclusion of an assessment of political risk when analysing the use of universal jurisdiction will assist in determining an effective universal jurisdiction enforcement regime.

Reconciling political or policy grounds as compared with legalistic arguments represents an ongoing bar to the adoption of international principles regarding the application of universal jurisdiction.[374] In the absence of any legal grounds forcing domestic action to prosecute, states will often act selectively in the application of international criminal law, with numerous domestic and international political influences at play.[375] An oft-made criticism of international law is its inability to enforce the obligations and principles behind them. This is a failing often observed in international criminal law and the application of universal jurisdiction more generally. Selectivity in international criminal law is a general criticism of international justice systems and is not levelled only against the application of universal jurisdiction.[376] Indeed, one could argue that the creation of universal jurisdiction has developed through a need for accountability despite the existence of state sovereign limitations. In its purest form, the doctrine exists to ensure that a person cannot be immune from

[371] Alexander Orakhelashvili, 'Between Impunity and Accountability for Serious International Crimes: Legal and Policy Approaches' (2008) *Netherlands International Law Review* 207–232.
[372] Langer (n 288) 2.
[373] Ibid 3.
[374] Dianne Orentlicher, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1(10) *International Journal of Transitional Justice* 16–17.
[375] Leslie Vinjamuri and Jack Snyder, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) 7 *Annual Review of Political Science* 345, 352–353.
[376] Hesenov (n 119) 277.

punishment for their heinous crimes by hiding in a country that would shield them from prosecution, whether it be for technical jurisdictional or political grounds.

In particular, when discussing the political risks associated with the enforcement of universal jurisdiction, it is again relevant to consider if the practicalities of the enforcement of the jurisdiction are lacking, as compared to discussing the existence of universal jurisdiction offences.[377] From this perspective, the political debate in a state prior to its legislature enacting universal jurisdiction offences is less relevant for the following case study analyses than aspects of the enforcement of the jurisdiction that relate to how a state gives effect to the jurisdiction.

While the altruistic application of international criminal law may achieve a justice-oriented outcome for the world at large, it may not necessarily serve the interests of transitional justice and stability in post-conflict situations. Thus, there is a pragmatic approach to the doctrine proposed by some scholars, such as Vinjamuri and Sydner, which maintains that the interests of the community at large may not be served by prosecution of particular offenders.[378] Concepts such as truth and reconciliation commissions, pardons and immunities are often espoused as solutions to transitional justice problems. However, there is no definitive answer as to how such localised solutions relate to internationally available jurisdiction. Indeed, the political angst caused by domestic citizens claiming that visiting dignitaries and heads of state are 'war criminals' and should be prosecuted by the visited state under the doctrine of universal jurisdiction, has been a concern for states such as China and the US. This can account for their ongoing campaign to undermine the application of universal jurisdiction.[379] The legalistic approach of the EU has drawn criticism from the AU.

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[377] See Colangelo (n 70) 130–131: '[A] distinctive symbiosis exists between universal prescriptive jurisdiction (the international legal prohibition on the crime) and universal adjudicative jurisdiction (the judicial competence of all states to apply that prohibition to perpetrators of the crime). The prescriptive substance of universal jurisdiction both authorizes and circumscribes universal adjudicative jurisdiction. That is to say, the prescriptive substance defines not only the universal crimes themselves, but also the judicial competence of all courts wishing to exercise universal jurisdiction'.

[378] Vinjamuri (n 376).

[379] United Nations, 'Principle of "Universal Jurisdiction" Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission', 66th GA (12 October 2011) <https://www.un.org/press/en/2011/gal3415.doc.htm>. In Australia, see the example of protests and briefs of evidence being sent to the Australian Federal Police ahead of Australia hosting the Commonwealth Heads of Government Meeting, seeking to have Sri Lankan President Rajapaksa arrested for war crimes alleged in connection with the Sri Lankan Civil War: Peter Boyle, 'War Criminal Rajapaksa to Visit Perth', *Green Left Weekly* (online, 21 October 2011) <https://www.greenleft.org.au/content/war-criminal-rajapaksa-visit-perth>. See also attempts by Ben Saul to have Indonesian officials indicted for East Timorese atrocities on their proposed visit

Further, the political pressure on European states demonstrating a forward-leaning approach to the application of universal jurisdiction, and the issue of arrest warrants demonstrate the competing concerns in applying this doctrine from a legalistic perspective.[380]

The central issues around the political pressures in enforcing universal jurisdiction are how to ensure that competing states apply it *bona fides* and not to further political or personal agendas. Other issues include how states can be dissuaded or influenced in their decision to rely on the jurisdiction when competing states attempt to undermine the doctrine for fear of the implications for its own citizenry who have committed or may commit human rights abuses or universal jurisdiction offences.

This strain plays out in a practical sense when prosecutions are abandoned because of political pressure, domestic legislation importing the legal principle is undone following pressure and/or extradition requests are refused by states who fail to recognise the basis of the arrest warrant. At its highest, this tension can be observed when individuals are kidnapped from one sovereign territory and stand trial in another—such as in the controversial and illuminating *Eichmann* matter.

Further, the practical considerations as to who bears the cost of such trials warrants examination. Justice does not come cheap. Trials, particularly those with an international dimension, take significant resources. Further, the financial liability does not end once the trial is over, given that someone must pay for the incarcerated individual to stay in jail. This pressure has been most keenly felt in relation to prisoners convicted of piracy-related offences.[381] Thus, consideration of the financial

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to Australia: Ben Saul, 'Prosecuting War Crimes at Balibo Under Australian Law; The Killing of Five Journalists in East Timor by Indonesia' (2009) 31(1) *Sydney Law Review* 83.

[380] *Summary Record of the 14th mtg: 6th comm*, UN Doc A.C6/71/SR.14 (13 October 2016) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/322/67/PDF/N1632267.pdf?OpenElement>. Other states, such as Saudi Arabia, noted that the US's recently implemented *Justice Against Sponsors of Terrorism Act*, enabling civil universal jurisdiction for terrorism offences (an offence not traditionally accepted as being universal in application) drew criticism as 'pav[ing] the way for chaos, abuse and politicization'. This sentiment was further reinforced by the statements of China, Togo, Israel, the Republic of Iran, Saudi Arabia, Algeria, Norway, Serbia and Croatia, who echoed these concerns.

[381] Jade Lindley, *Somali Piracy: A Criminological Perspective* (Routledge, 2016): see in particular discussion on the Seychelles and Kenyan prison solutions. See also Captain, 'By the Numbers: How Much Does Somali Piracy Cost' (9 February 2012) <http://gcaptain.com/somali-piracy-cost-report/>; Mark Tran, 'Inside Somaliland's Pirate Prison, The Jail No Country Wants', *The Guardian* (online, 24 August 2014) <https://www.theguardian.com/world/2012/aug/23/inside-somaliland-prison-pirates>.

imperatives for universal jurisdiction trials will also be considered, with analysis of the selected cases to assess who bears the ongoing responsibility for jailing, trial costs and the diplomatic impacts for the harbouring country. State resourcing and budgeting is a political concern. International funding allocation for peace and security initiatives is also based on a political process. Through analysis of the political dimension of selected cases, these tensions will be teased out to identify the existing international custom regarding such political perspectives in the application of universal jurisdiction.

Chapter 5: Contemporary State Practice in Prosecuting Universal Jurisdiction Offences

Chapter 5 will focus on contemporary state-level applications of universal jurisdiction. By analysing both existing state practice and combining this assessment with the preceding tracing of the historical roots of the jurisdiction, a picture of the customary international law construct of universal jurisdiction from an enforcement perspective can be properly assessed. A number of successful examples will be highlighted to demonstrate how the exercise of this jurisdiction can be achieved. The well-known contemporary cases of universal jurisdiction such as the Butare 4, the Guatemalan generals and Pinochet—well known because of their purported heralding of an end to impunity for international crimes—will be discussed in this chapter. Equally, the unsuccessful cases, such as those attempting to seek prosecution of former-Minister Livni, former-President Bush Jnr and addressing the Mavi Marmama *incident, will be discussed, to juxtapose how cases without political concurrence have resulted in the reduction of state practice of the jurisdiction.*

This chapter will also include the Australian experience of universal jurisdiction, examining the effect of domestic impact on extradition of war crimes and the effect of protective domestic laws about immigration. Using Australia as an example, and in particular Republic of Croatia v Snedden*, issues such as the host state assessment of the risk to the individual seeking to be extradited versus the obligation to enforce international justice will be discussed. The recent proposals and decisions in France, the US and the UK to attempt to limit the application of the universal jurisdiction in relation to extradition will also be explored in this chapter. These assessments will demonstrate how the ongoing activism of the doctrine has been affected by concurrent political developments. Amendments and softening of the legislative basis for application of the doctrine across numerous jurisdictions, and Spain in particular, will identify where states have attempted to resolve enforcement problems through domestic legislation.*

5.1 Introduction

Eichmann witnessed a criminal seeking refuge in South America abducted and smuggled back to Israel, yet the Israeli courts dismissed concerns regarding the

methods by which Adolf Eichmann was brought before the courts when trying his case. This may be considered the high watermark in the exercise of the jurisdiction. While there have been several successful universal jurisdiction trials in other European nations since, the success of this mechanism has been fickle at best. Arrest warrants issued by states under the guise of universal jurisdiction have been ignored by states with complementary extradition obligations.[382] Despite hints at increasing support for the jurisdiction among domestic European judiciaries, calls for and pressure from the US and China for judicial activism in Germany and Spain to cease show a reduction in reliance on universal jurisdiction in recent times.[383] This dichotomy represents the ongoing challenge of universal jurisdiction. States seek to balance their long-held rights over their citizens and protection from international extradition without agreement, with an increasing awareness and compunction to act in relation to other states, where atrocities are allowed to continue with impunity, and where the obligations of those states relating to international criminal standards and human rights are not diligently exercised.

Put succinctly, 'the confusion on the definition of universal jurisdiction also comes from its inconsistent use.' [384] Accordingly, the assessment of contemporary state practice against the criteria established in Chapter 4 will seek to identify which principles are consistent in the enforcement of universal jurisdiction.

As the application of universal jurisdiction is a matter for a domestic legal system, this chapter will outline the development, rise and relative decline of the doctrine by examining how universal jurisdiction has been applied in a number of states. Common law jurisdictions and civil law jurisdictions will be assessed to determine the gaps in the enforcement of universal jurisdiction offences. In assessing the state practice of universal jurisdiction offences, appraisal is limited to states that have been judicially active in relation to the jurisdiction. Analysis seeks to compare states that actively

[382] See Spain's submission to the UN GA sixth comm in Table 2.
[383] Giles (n 39).
[384] Zachary Mills, 'Does the World Need Knights Errant To Combat Enemies of All Mankind?: Universal Jurisdiction, Connecting Links, and Civil Liability' (2009) 66 *Washington and Lee Law Review* 1315 (discussing sovereignty concerns); Gabriel Bottini, 'Universal Jurisdiction After the Creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Policy* 503, 550–555 (universal jurisdiction raises serious due process concerns because someone could be subject to prosecution in any country with little warning and there is a lack of agreement on which crimes are subject to universal jurisdiction); see also Colangelo (n 68) 26 (universal jurisdiction is contrary to the traditional sovereignty model because it allows one state to exercise jurisdiction over conduct with no relationship to it without the permission and despite the prescriptive legislation of the territorial state).

support application of the universality and those that oppose its introduction into the wider international legal order.

5.2 Due Process

The ostensible problem with prosecuting a criminal trial against a person who is neither a citizen nor connected to the state by their offending would be the gathering of evidence. However, existing international cooperation mechanisms used for other transnational crimes appear to have been adopted by states to good effect to overcome procedural issues pertaining to universal jurisdiction offence trials.[385] In Sections 5.2.1–5.2.2, examples from the Netherlands, the US, Canada and Germany will be used to highlight the due process and fair trial rights problems created through use of universal jurisdiction in national criminal systems. Despite the existing sharing mechanisms, challenges to due process remain.

5.2.1 The Netherlands

In the Netherlands in 2005, two former Afghan generals were accused of war crimes and torture, allegedly committed decades earlier in relation to their treatment of Afghani prisoners. Both generals lived in the Netherlands at the time. This trial was touted as a 'widening application' of universal jurisdiction, as the prosecution of the former Head of Afghan intelligence and his deputy, the chief of interrogations, was the result of investigations conducted by the specialised war crimes investigations unit, established by the Dutch in response to the increase of refugees flocking to the country in the 1990s.[386]

In this case, the Prosecutor's Office noted the difficulty in investigating the crimes because of the passage of time and the distance involved in the investigation. The different cultural backgrounds of the Netherlands and Afghanistan posed further

[385] For example, the *UNTOC* supports this cooperation through creation of domestic criminal offences (specifically, participation in an organised criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities. See *UNTOC* (n 137).

[386] Heshamuddin Hesam and Habibulla Jalalzoy were part of the Khad secret police during the Soviet occupation of Afghanistan, and were sentenced to 12 and 9 years' imprisonment, respectively: Marlise Simons, 'In Rare Case, Dutch Try Two Afghan Ex-Generals', *The New York Times* (New York), 29 September 2005.

difficulties for the investigators.[387] Further, this case identified the requirement to protect vulnerable witnesses, despite the transnational nature of the trial. There were threats to court translators and witnesses who later requested their names be withdrawn from the records, or who changed their recorded testimony as a consequence of the threats.[388] Countering this, defence counsel for the accused claimed that the witnesses were 'bought' by the prosecution, because they were provided financial aid to enable them to provide testimony. Coming from a 'very poor country', this was submitted to make their testimony inadmissible. However, despite these difficulties and claims, the case proceeded, utilising the specialist national investigative authorities, cooperation with the Afghan authorities and support for the defence counsel to participate in the investigative process.[389] The case ultimately resulted in convictions and periods of incarceration for both.

While these two examples indicate that there is a supportive judiciary for universal jurisdiction in the Netherlands, current practice is more akin to 'universality plus', as the Dutch authorities have not supported the issuance of arrest warrants to support extradition requests, and will not try any person in absentia.[390] The domestic legislation includes this limitation explicitly, stating that the suspect must be present in the Netherlands for Dutch authorities to carry out the investigation against the

[387] Bhuta (n 36).
[388] Simons (n 387).
[389] Bhuta (n 36).
[390] *International Crimes Act* (Netherlands), s 2(1)(a); Human Rights Watch interview with Dutch officials, Special Unit, 6 October 2005 in Bhuta (n 36). The Van Anraat case has been cited as another example of 'universal jurisdiction in the Netherlands; however, this jurisdiction was grounded in Van Anraat's Dutch citizenship. The 2009 case in the Netherlands (*Prosecutor v Frans Van Anraat*) is a cited as an example of the application of universal jurisdiction in the Dutch 'universality plus' construct on the basis that the use of universal jurisdiction occurred through the extension of the *Wartimes Offences Act* of 1952, to apply to actions that occurred in another state. In this case, as a result of Saddam Hussein's actions. The accused was a Dutch trader in chemicals, who sold the raw materials for mustard gas to Saddam Hussein, who subsequently used those chemicals to attack Kurdish villages in Iraq in 1987 and 1988. Van Anraat was arrested by the Italian police on a warrant issued by the US government, but then fled to Iraq for 14 years before returning to the Netherlands. He was arrested in the Netherlands in 2004 on the original information (warrant). During his trial, Van Anraat appealed the basis of jurisdiction to try him, claiming among other grounds that criminalisation of war crimes, in an internal conflict not amounting to an armed conflict, required that the Netherlands be a party to the conflict before such jurisdiction was enlivened.[390] This appeal was overturned on the basis that the offences were subject to the active personality principle of the *Dutch Criminal Code*. Thus, the Netherlands had jurisdiction: see Onate Santiago et al, 'Lessons Learned: Chemical Trader Convicted of War Crimes' (2008) 1 *Hague Justice Journal* 38. In this case, universal jurisdiction was relied upon as an alternative jurisdictional basis in the absence of other extraterritorial legislation to support the validity of the original arrest of Van Anraat. As a Dutch national, the nationality principle supported the jurisdictional basis of the eventual prosecution of Van Anraat in the Netherlands, purely on active personality grounds: Trial International, 'Trial Watch: Frans Van Anraat' (7 June 2016) <https://trialinternational.org/latest-post/frans-van-anraat/>.

accused.[391] It does not, however, specify at what time the suspect must be within the Netherland's physical jurisdiction. This requirement has resulted in the Netherlands Supreme Court reading in this prerequisite in the case of *Bouterse*, which confirmed this 'universality plus' requirement extended to the extinguishment of a person's citizenship following independence of former colonies of the Netherlands. Here, Bouterse was no longer a Dutch citizen based on Suriname's independence from the Netherlands in 1975. Thus, he could not be prosecuted in the Netherlands unless he appeared voluntarily in Dutch territory.[392] Despite *Bouterse* giving rise to complaints against the Netherlands for continued attempts of dominance over former colonies, the support of the state in which the offences occurred—Suriname—was critical in this case, and in the successful conduct of other such trials.[393]

The balanced approach of the Dutch in dealing with universal jurisdiction offences has been developed by:

- creation of a specialised investigative unit seized with investigating universal jurisdiction offences
- proactive outreach to immigrant and refugee communities to investigate universal jurisdiction offence crimes
- internal cooperation between arms of government to exchange information regarding possible offences (such as the immigration department, the War Crimes Unit and normal prosecutorial authorities)
- reliance on regional and bilateral support agreements to gather evidence (in particular, mutual legal assistance arrangements and existing regional and international organisations and agreements such as the EU Network and Interpol)
- creation of dialogue for informal support in collection of evidence by states with which no mutual legal assistance agreements are in place

[391] *International Crimes Act* of 19 June 2003 (ICA); see also Bhuta (n 36).
[392] Decision of the Court of Appeal of Amsterdam in the case of Desire 3 Mar 2000 ('*Prosecutor-General of the Supreme Court v Desire Bouterse'*); L Zegveld, 'The Bouterse Case' (2001) 32 *Netherlands Yearbook of International Law* 97–118. See also the ICRC translation of the 'Amsterdam Court of Appeal Judgment of 20 November 2000'.
[393] Pita van der Oije and Steven Freeland, 'Universal Jurisdiction in the Netherlands—The Right Approach But the Wrong Case? Bouterse and the "December Murders"' (2001) 7(2) *Australian Journal of Human Rights* 20, 89.

- following attempts to obtain evidence through the relevant state ministry of justice or foreign affairs, travel to the state in question to obtain evidence directly through Dutch embassy staff contacts
- cooperation during the investigative phase with the defence counsel, including support to travel to the affected state to gather evidence with the investigative unit, to ensure a balanced case is put forward to trial.[394]

While still not guaranteeing that all of the practical problems with enforcement are overcome by the institution of this system, it is evident that the Dutch system creates a procedure by which a large number of the procedural complications can be overcome. These complications relate to the conduct of a criminal investigation in a state with no territorial jurisdictional nexus to the offending, without cooperation from states with such a territorial connection.

The main issue affecting the application of universal jurisdiction offences internally in the Netherlands has turned on the uncertainty as to the scope of the prescribed universal jurisdiction. The focus of *Bouterse* was the torture committed by the former President, committed prior to the commencement of the *Convention Against Torture*. The court was required to consider the *jus cogens* nature of the offence to support application of the *International Crimes Act*.[395] Following a similar argument in *Van Anraat*, the main contentions with the application of jurisdiction related to whether the offences as alleged were able to be tried on the basis that Dutch jurisdiction only applied if the offences constituted war crimes or crimes against humanity.[396] Dutch legislation requires that the proceedings can only be brought in relation to offences that were prohibited in the Netherlands at the time of offending.[397] The defence argued that crimes of torture, charged under the basis of universal jurisdiction, could only apply to acts committed after the enactment of the *Netherlands Act Against Torture*, which was enacted in 1989. However, the Amsterdam Court of Appeal determined in 2000 that the prohibition against torture, while a *jus cogens* norm, reached customary international law status in 1982, after the alleged offending was committed. Thus, it ordered the trial of Boutrerse for the alleged torture and murders. However, the

[394] Simons (n 387); Bhuta (n 36).
[395] Zegveld (n 393).
[396] See n 391.
[397] *International Crimes Act* of 19 June 2003 ('ICA'); Bhuta (n 36).

Netherlands had no authority to try Bouterse under its universal jurisdiction laws in respect of those offences.[398]

For universal jurisdiction to enable the court to effectively hear matters relating to offences for crimes that have been accepted as universal, there is a requirement to ensure that the procedural enforcement mechanisms clearly articulate the limits of the jurisdiction. In the case of the Netherlands, the dualist nature of its domestic incorporation of international legal principles prevented the trial of Bouterse when the other enforcement hurdles had been overcome. Despite political will to support the prosecution, no competing international prosecution interests, and strong evidence that the head of state had personally been involved in the murder of his own citizens, procedural issues undermined this prosecution.[399]

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[398] During the Amsterdam Appeals Court, the court directed the trial to proceed: 'On that subject, the expert stated, in paragraph 8.4.3 and following of his report that the Convention against Torture is of a declaratory nature. In other words, the convention only confirms that which was already contained in customary international law in so far as its prohibition, punishment and description of torture as a crime against humanity are concerned. From this it follows in the opinion of the expert that the *Netherlands Act against Torture* could be applied retrospectively to cover conduct that was illegal under Dutch law before 1989 but was not criminalised under the name of torture, such as assault or murder', at para 6.3 of the International Commission of Jurists translation of the Amsterdam Court of Appeal on 20 November 2000, provided by the International Red Cross IHL Databases, at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/274ebdfa57c67762c1257706003512d4/$FILE/Bouterse%20case%20-%20Amsterdam%20Court%20of%20Appeals%20decision%20of%2020.11.2000%20-%20in%20English.pdf. However, during the trial by the Supreme Court, the application of the *Act against Torture* and its *Implementation Act* was determined to only apply to acts that had occurred after their adoption (in 1989); otherwise, such prosecution would violate the principle of legality established by the Amsterdam Constitution: see [4.3.1] and [4.4]–[4.6] of Prosecutor-*General of the Supreme Court v Desire Bouterse* (n 370)*;* International Crimes Database, 'Prosecutor-General of the Supreme Court v Desire Bouterse', <http://www.internationalcrimesdatabase.org/Case/1082>; Trial International, 'The Bouterse Case' *Trial International Online* <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/3705/action/show/controller/Profile/tab/legal-procedure.html>. The charges proceeded with were the acts of torture and summary execution of 15 people, alleged to have occurred based upon his orders in in Parmaribo, Suriname on or around 8/9 December 1982.

[399] Regarding political will, during the military trial in Suriname relating to the December murders, where Bouterse was originally a suspect, it was heard that Bouterse was personally involved in the murder of two civilians in the village where a separate massacre occurred in 1986. Immediately following this testimony, the National Assembly passed an amnesty law granted to Bouterse and the other 24 suspects in the trial. The trial was adjourned on 11 May 2012, pending an appeal to the Constitutional Court regarding the legality of the amnesty. As the Constitutional Court had not yet been established in Suriname and any justices appointed in that Court would be appointed by Bouterse as current head of state, it is highly unlikely that there will be any reversal of these amnesty decisions. As Bouterse was not present in the Netherlands at the time of the Supreme Court decision, the Court also considered that universal jurisdiction could not apply without some kind of jurisdictional link with the Netherlands, namely the presence of the accused, as the domestic *Implementation Act* in respect of the Torture Convention created a requirement to establish a traditional jurisdictional nexus with the Netherlands to deal with crimes of torture. See *Prosecutor-General of the Supreme Court v Desire Bouterse* [8.2]–[8.3], [8.5]; n 393.

5.2.2 The United States

The US has not enacted any domestic legislation that enables the criminal prosecution of people for crimes without a jurisdictional nexus to the US. The US Constitution limits the application of penal legislation to the floating territorial principle.[400] However, the powers of Congress can base status on the protective principle, the citizenship of the offenders and the passive personality principle.[401] There are also examples of the application of powers amounting to the protected interest principle that this power could be assumed to be part of the US's legislative authority. The power to make this legislation regarding universal jurisdiction has come from the precedent set by the adoption of laws relating to the prosecution of piracy and 'offences against the law of nations'.[402] Thus, the basis for the prosecution of universal jurisdiction offences in the US is seemingly set.

A high standard of evidence is required to support an extradition request from the US to convince the US judiciary to approve the removal of a citizen from its territory. The previously accepted standard of the law under which the arrest occurred, has been changed in all US extradition treaties to reflect the 'federal bindover standard', which requires 'probable cause' to be found before an extradition will be agreed.[403] However, US judgments do not reflect this strong protective principle. In the event of an extradition request held as a matter for determination of the executive, the court will only consider it in the context of a *habeas corpus* application by reference to the foreign procedural safeguards in likely criminal proceedings.[404] In *Gallina*, in which a citizen was convicted in absentia in Italy for armed robbery, the extradition request was upheld on the basis that the foreign evidentiary standards in the Italian courts were considered sufficiently fair to conclude that the extradited person would have fair trial

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[400] The floating territorial jurisdiction principle holds that the state in which the vessel is registered, or the flagstate, is recognised as having jurisdiction over any offence committed on its vessels. *United States v Baker,* 609 F.2d (5th cir, 1980); BJ George Jnr, 'Jurisdictional Bases for Criminal Legislation and its Enforcement, Transnational Aspects of Criminal Procedure' (1983) 3 *Michigan Yearbook of International Legal Studies* 42.

[401] The protective 'is invoked to justify claims of extraterritorial jurisdiction by a regulating state for offences against the security, integrity, sovereignty or government functions of that state'; the passive personality principle is where a state asserts jurisdiction to prosecute a person outside their territory if the alleged crime affects one of its citizens. See Ireland-Piper, 57.

[402] George Jnr (n 401) 27: *United States Constitution* art 1, s 8, cl 10. See also *Convention on the High Seas* (n 169) arts 14–21.

[403] Robert Rosoff, 'The Quantum of Evidence Required to Extradite from the United States, Transnational Aspect of Criminal Procedure' (1983) *Michigan Yearbook of International Legal Studies* 123-151.

[404] George Jnr (n 401) 5.

rights extended to them.[405] The political basis for such a position has been justified by the US Department of State on the grounds that:

> The United States does not negotiate extradition treaties with nations which do not permit defendant's free trial … Further our extradition treaties provide that extradition will not be granted if the person sought has already had a trial or is undergoing trial in the United States for the same act.[406]

In the 2011 immigration case against Lazare Kobagaya, a US citizen who lied to immigration authorities about his role in the 1994 Rwandan genocide, the US Department of Justice commenced prosecution in the Kansas District Court to deal with the irregularities in his immigration application. This case was touted as a 'landmark' indictment that sought to deal with Kobagaya's offending, noting the absence of the US's universal jurisdiction in relation to offences, and the specified requirement to have a further connection to the US for prosecutions.[407] During the conduct of the trial, the US government flew out over 50 witnesses from Rwanda to attest to Kobagaya's involvement in the genocide. However, the charges were eventually withdrawn on the basis that the defence led evidence outlining that prisoners were being encouraged by Rwandan officials to implicate others in the genocide, and the country was 'racked by corruption and manipulation'.[408] Coupled with evidence that Kobagaya's wife was a Tutsi, suggesting he was unlikely to have been involved in inciting the mass murder of Tutsis, but had protected her and other Tutsis during the genocide, the Court also heard that Kobagaya had a limited command of English. Thus, his son filled out his immigration paperwork for him.[409]

Although not utilising universal jurisdiction, this case demonstrates the willingness of the US to act in relation to acts of genocide. This includes incurring significant expense in the running of trials and creating novel methods to import jurisdiction for potential crimes against humanity, in relation to conflicts in which there is no political capital to be gained or lost by their action or inaction, further exacerbated by the 'CNN effect',

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[405] *Gallina v Fraser*, 278 F.2d at 78-79 (1960) cited in *Extradition from the United States; Neely v Henkel* 180 US, 190, 122.
[406] Herbert J Hansell, 'Administration Recommends Senate Approval of Genocide Convention', 76 *Department of State Bulletin* 676, 679.
[407] John S Friedman, 'Genocide Trial in Kansas' (2011) 292 *The Nation* 18, 10.
[408] Ibid.
[409] Trial International, 'Lazare Kobagaya Profile', *Trial International Online* <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/3498/action/show/controller/Profile/tab/legal-procedure.html>.

or the spectacularisation of international criminal law.[410] It further highlights the difficulties with the admission of evidence collected across jurisdictions—in particular when the state providing the evidence has suffered from conflict and a degraded rule of law.

That said, the ongoing divergence in standards for US citizens versus non-citizens can be observed in the difference in approach by courts relating to those whose crimes affect the US, as compared to justice for victims of US officials who have complained of breaches to their fundamental human rights. This will be discussed below when considering requests for extradition of US officials by other states.[411]

5.2.3 Canada

Since 1985, Canada has had a War Crimes Program, prompted by a Commission of Inquiry to address Nazi war criminals who were then resident in Canada. Since its inception, this specialised program was an interdepartmental initiative that included the Department of Justice, the Royal Canadian Mounted Police, and later, the Canada Border Services Agency and Citizenship and Immigration Canada. Prior to the existence of universal jurisdiction legislation and the acceptance of the ICC jurisdiction in Canada, Canadian authorities addressed the presence of those accused of egregious international crimes through deportation proceedings.[412] For example, the deportation of Yusuf Abdu Ali, a Commander in the Somali Army during the oppressive Siad Barre regime, was a consequence of evidence of his brutality being brought to the attention of Canadian authorities in 1992.[413]

The early program emphasised remedying any breaches through immigration practices (through denial of visas and entry) as a cost-effective measure to address impunity.

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[410] Christine Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood' (2016) 4(2) *London Review of International Law* 247; Piers Robinson, 'The CNN Effect: Can the News Media Drive Foreign Policy' (1999) 25(2) *Review of International Studies* 301–309. See also Samantha Powers, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002); Brendan Simms, *Unfinest Hour: Britain and the Destruction of Bosnia* (Penguin, 2001).

[411] See Section 5.3.2.

[412] Canada Border Services Agency, *12th Report on Canada's Program on Crimes Against Humanity and War Crimes, 2008–2011* (2011) <http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html>.

[413] The Centre for Justice and Accountability, *CJA Case Summary—Doe v Ali,* Centre for Justice and Accountability http://cja.org/what-we-do/litigation/amicus-briefs/. Ysufu Abdi Ali moved to the US following his extradition from Canada and faced a civil suit under the *Alien Tort Statute* in relation to his conduct in Somalia.

Over time, and the concomitant commitment to the development of domestic legislation utilising universal jurisdiction, domestic judicial authority was expanded to deal with war crimes through domestic legislation and other international criminal law mechanisms. The program outlines the basis for the program that has been created to uphold the government's policy that 'Canada is not a safe haven for anyone involved in crimes against humanity, war crimes, or genocide'.[414]

The program outlines how Canada has codified its application of universal jurisdiction, creating processes to implement the *Crimes against Humanity and War Crimes Act 2000*. The program outlines numerous practical measures implemented to support the application of this legislation. For example, the steering committee provides oversight, and coordinates domestic departments in relation to the prosecution of any offences relating to these crimes. In addition to the allocation of permanent funding to support this work (set in 2005 as C$15.6 million per year), Canada has created a comprehensive approach to the prevention of impunity. This program not only focuses on trials of those in Canada guilty of offences, but in the pre-immigration screening of potential Canadian citizens, and the removal of people in Canada who have been assessed as at risk of having committed such offences. While this pre-immigration screening is common in many states, Canada's approach differs, as the removal of potential suspects only occurs after an assessment is made as to whether Canada will institute domestic criminal proceedings against that person based on its universal jurisdiction laws.

Importantly, in the assessment of which crimes are to be prosecuted, rather than dealt with as immigration matters, the Royal Canadian Mounted Police and the Department of Justice have instigated their own practical test regarding which potential offenders they will investigate or prosecute. The 2005 report stated:

> for an allegation to be added to the [Royal Canadian Mounted Police/Department of Justice] inventory, the allegation must disclose personal involvement or command responsibility, the evidence pertaining to the allegation must be corroborated, and the necessary evidence must be able to be obtained in a reasonably uncomplicated and rapid fashion.[415]

[414] Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes, Ninth Annual Report, 2005–2006* (2006) <http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html>.
[415] Ibid.

The Canadian use of this threshold test for the use of the jurisdiction can be best illustrated by an analysis of *R v Finta*.[416] Following the adoption of legislation to amend the Canadian *Criminal Code* to allow jurisdiction to be exercised in the event of accusations of war crimes and crimes against humanity for crimes committed by non-Canadians outside Canada, charges were preferred against Imre Finta, for unlawful confinement, kidnapping and manslaughter of 8,617 Jews between 16 May and 30 June 1944 in Szeged, Hungary. Finta had previously been convicted in absentia in a Hungarian court for these crimes. However, his punishment was barred by statute and he later received an amnesty regarding his conviction.[417] This was not held to be a bar to proceedings in Canada, on the basis that the amnesty did not amount to a retrial for offences prosecuted in the Hungarian trial, and so did not offend the principle of *autrefois convict.*

In *obiter dicta* of the case pertaining to the *mens rea* as a requisite element of the crime against humanity, as compared to a domestic murder or assault, the Canadian court recognised the different jurisprudence to be applied in universal jurisdiction offences trials in domestic courts. Universal jurisdiction offences are international law crimes, not merely domestic crimes applied to a person who has committed an offence at another time and place.[418] Procedural arguments pertaining to the retrospective nature of the crimes and the delay in proceedings since the alleged acts were made. These arguments were unsuccessful on the basis that a retroactive law providing individual punishment for acts that were illegal though not criminal at the time they were committed is an exception to the rule against ex post facto laws. They were also dismissed because the charges were laid within a year of the legislation being created, albeit 45 years after the commission of the offence, respectively.[419] Critically, from a procedural perspective, the case was ultimately unsuccessful on the basis that at trial, despite overwhelming evidence, the jury found him not guilty of the offences—following standard domestic Canadian rules of procedure. There are complaints from the writer of the *amicus curae* brief in the case (David Matas from B'nai Brith) of a stacked jury, antisemitism and Holocaust denial on behalf of Finta's counsel being

[416] [1994] 1 SCR 701 ('*Finta'*), following *R v Finta* [1993] 1 SCR 1138.
[417] C Eboe-Osuji, 'Crimes Against Humanity: From Finta to Mugesera', *Canadian Council on International Law* (November 2005); International Crimes Database, *R v Imre Finta,* <http://www.internationalcrimesdatabase.org/Case/193/Finta/>.
[418] Slaughter (n 71) 175–177.
[419] *Finta* (n 417) 12–13.

allowed throughout the trial, resulting in an improper result.[420] However, ultimately the lack of support for conviction was attributed to the strict and heavy emphasis on jury decision-making. In this case, the jury did not decide that the acts, subjectively viewed, would be considered inhumane. Matas attributed this to the effect of the accused being 'old, when he has been a quiet friendly neighbor for decades, when the crime was committed a long time ago and far away in another country, and when the victim is a stranger and a foreigner'.[421]

Despite this disappointing start, in 2007, the trial of Desire Munyaneza made history. He was the first person to be convicted of war crimes and crimes against humanity in Canada, for his role in the Rwandan genocide in 1994. The War Crimes Unit was made aware of his presence in 1999 and the Royal Canadian Mounted Police effected the arrest of Munyaneza in 2005. In prosecuting this offence, the Canadian criminal justice system largely mirrored those successful features of the Dutch system to overcome procedural difficulties. Prosecutors travelled to Rwanda with defence lawyers, a judge and support staff to interview witnesses who were unable to attend Montreal for the trial. Key witnesses were flown to Montreal with their identities protected to ensure their safety when providing testimony to the court.[422]

Although this case demonstrated that in some circumstances, the Canadian government was willing to expend considerable resources to reach a conclusion in a trial, it is an outlier in terms of the manner in which Canada deals with impunity. In 1994, Canada publicly acknowledged it was abandoning its prosecution of resident Nazi war criminals.[423] Equally, only two cases prosecuting war crimes were held in Canada in 2011–2015 (the cases of Munyaneza and the unsuccessful prosecution of Jacques Mungwarere for crimes against humanity associated with the genocide in Rwanda). Despite this, there were 242 refusals of temporary residence applications

[420] Ibid.
[421] David Matas, 'The Case of Imre Finta' (1994) 43 *University of Brunswick Law Journal* 281–300.
[422] Sue Montomgery, 'War Crimes Trial First Test', *The Montreal Gazette* (online, 25 March 2007 <https://www.globalpolicy.org/component/content/article/163/29431.html>.
[423] Bob Edwards and John Hauber, 'Canada to Stop Prosecuting Suspected Nazi War Criminals', *NPR Morning Edition* (online, 5 January 1994) <https://www.npr.org/sections/news/>; Michele Mandel, 'Last Nazi Trial: Canada has Been Held for Nazi War Criminals', *Toronto Sun* (online, 19 June 2016) <http://torontosun.com/2016/06/17/last-nazi-trial-former-ss-guard-reinhold-hanning-convicted-of-aiding-and-abetting-murders-at-auschwitz-birkenau/wcm/bd6ba056-1c1e-4eac-9145-ec8b06072643>.

under Section 35 of the *Immigration and Refugee Protection Act* in the same period.[424] This refusal is based upon a person being deemed inadmissible to Canada on grounds that they are reasonably suspected of violating international human rights standards. This indicates a clear propensity for the use of the immigration refusal 'prong' of Canada's multi-prong program to combat impunity, compared to proceeding to criminal trial using universal jurisdiction.

These restraints are apparently attributed to resourcing limitations. They highlight that the prosecution of international crimes is balanced by the state's assessment of practicalities in relation to which crimes should be investigated. This assessment makes no mention of the relative seriousness of the crimes alleged. There is no mirror of the 'grave breaches' standard outlined in the *Rome Statute* in relation to the establishment of jurisdiction. Rather, the ability of Canadian authorities to respond seems to be the pre-eminent consideration in exercising jurisdiction for universal jurisdiction offences in Canada. While the coordinated actions of the government are commendable, the limitations in enforcement mechanisms, as separate from prescription of universal jurisdiction offences in Canada, are not determined on legal grounds, but rather by fiscal and non-legislated enforcement restrictions.[425]

5.2.4 Germany

The German Federal Police Central Unit for the Fight Against War Crimes and Other Offences under the *Code of Crimes Against International Law* (CCAIL) was established in April 2009, for the purposes of supporting ICC trials. It was also created to investigate matters under universal jurisdiction in domestic courts that would require such dedicated, specialised support.[426] This unit represents one practical measure that can create a homogenous approach to the investigation of war crimes in domestic courts, as it ensures alignment with processes and practices in the ICC. In a

[424] Government of Canada, *Canada's Program on Crimes Against Humanity and War Crimes, 2011–2015* (2015) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/wc20112015-cdg20112015.pdf>.
[425] Canadian Department of Justice, *Crimes Against Humanity and War crimes Program Report*, '5.3 Efficiency and Economy' (13 February 2017) < https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/cahwc-cchcg/p6.html#sec53>.
[426] CCAIL (n 126); Human Rights Watch, 'Groundbreaking Trail for Congo War Crimes', *Human Rights Watch* (19 September 2015) <www.globalpolicy.org/interntational-justice/universal-jurisdition06031/50146>.

four-year period, the unit has investigated some 128 offences relating to the Yugoslavian conflict.[427]

This specialised unit investigated and preferred charges against the president and vice-president of the Democratic Forces for the Liberation of Rwanda (Forces Democratiques de Liberation du Rwanda, FDLR), Ignace Murwanashyaka and Straton Musoni for war crimes committed in Congolese territory during January 2008 and November 2009. Both men had been living in Germany for several years, and were arrested in December 2010 for 26 counts of crimes against humanity and 39 counts of war crimes. In this case, the offending was committed by their troops in the Congo while the Rwandans directed the action from afar. In this case, while utilising the universal jurisdiction offences, some of the acts alleged against the two leaders were committed by direction by telephone from Germany. Hence, not all offences were examples of universal jurisdiction (or event offences that could be categorised as universality plus) offences under the CCAIL.[428]

During the trial, several offences were discontinued, not for want of evidence, but based on a determination that the court did not want to re-traumatise the rape victims or child soldiers. Thus, the charges were limited to those relating to the unlawful killings committed by the FDLR at the behest of its leaders.[429] Conflicting reporting suggests that these charges were dropped on the basis of poor investigation by the prosecution.[430] Thus, only the most well-developed charges were proceeded with.

The trial of the Rwandan rebel leaders in Stuttgart in 2001 was met by calls by human rights groups for the communication of the outcome of the trial to affected victims in the Democratic Republic of Congo.[431] Such calls recognise that the corollary to fundamental human rights, such as the right to life in the case of this genocide trial, is

[427] From 1999 to 2003, German practitioners investigated 128 cases of crimes committed in the former Yugoslavia: see Bhuta (n 36).
[428] Evidence included logs of 240 satellite telephone calls to subordinates in the Democratic Republic of Congo to approve attacks against the civilian population: Katharine Foran, 'Conviction of FDLR Leaders by German Court', *Armed Groups and International Law* (online, 28 September 2015) <https://armedgroups-internationallaw.org/2015/09/28/conviction-of-fdlr-leaders-by-german-court/>.
[429] 'Rwandan Rebel Leaders Jailed in Germany for War Crimes', *The Guardian* (online, 29 September 2015) <https://www.theguardian.com/global-development/2015/sep/28/rwandan-rebel-leaders-jailed-in-germany-for-war-crimes>.
[430] Note: Trial International cites the dropping of several charges as being on the basis of lack of evidence: Trial International, 'Ignace Murwanashyaka', *Trial Watch International*, <https://trialinternational.org/latest-post/ignace-murwanashyaka/>.
[431] Human Rights Watch (n 391).

that those who commit mass human rights atrocities shall be brought to account for their breaches. In this case, the application of fair trial rights to victims was recognised through their attendance, and in regard to the refusal of some witnesses to give evidence. However, the Court received complaints by NGOs about the failure to ensure the safety of witnesses still in the Democratic Republic of Congo after they had given evidence to the German court.[432]

Trial judge Juergen Hettich also noted that the prosecution encountered significant difficulties in proceeding. He deemed the length of time taken to run the trial—four years—as a result of these difficulties, was unacceptable. Further compounding this criticism were problems in how the translation of evidence was conducted. At the conclusion of the trial, Musoni's eight-year sentence had in effect already been served, while Murwanashyaka still had 12 years to serve on his 20-year sentence.

While a significant trial for the message it portrayed, and despite the use of a specialised crime unit, Germany's experience demonstrates that the procedural difficulties in conducting a criminal investigation and trial geographically displaced from the place in which the crimes occurred causes significant challenges.

5.2.5 Observations

To effectively discharge obligations pertaining to the exercise of universal jurisdiction domestically, successful investigations have necessitated special units, created and funded to enable investigators, prosecutors and judges to overcome the practical impediments to conducting criminal procedures by distance. While procedures have proved successful in the cases analysed in the previous sections, they remain costly in terms both of time and resources. They require a level of specialist expertise to address the international law nuances associated with crimes against humanity and war crimes (as compared to purely domestic criminal offences), as well as the procedural requirements to support the trial.

5.3 Forum Selection and Concurrent Jurisdiction

While somewhat connected to the criminal procedure and due process rights of individuals during criminal trials, the decision to commence a prosecution for universal jurisdiction offences requires a decision in relation to conflict of laws and

[432] Foran (n 429).

concurrency of criminal jurisdictions. There are numerous concurrent jurisdictions for a state to consider prior to the commencement of a criminal trial: territorial, passive and active personality, protective, prosecute or extradite and international criminal jurisdictions. Therefore, considerations of complementarity are assessed by states prior to the commencement of proceedings, also noting that consideration to extradition treaties and other international obligations must also be taken into account. The practices of Spain, the US, Germany and Israel will be assessed in Sections 5.3.1–5.3.5, reflecting on these difficult considerations with regard to the non-mandatory nature of the jurisdiction.

5.3.1 Spain

The Spanish trial of the Guatemalan generals was probably the second-most prominent and influential of the successful prosecutions in Spain of a universal jurisdiction offence for conduct with no traditional jurisdictional nexus to the state. Proceedings in the Guatemalan generals' case, before the Spanish National Court, commenced in 1999, were commenced by the Rigoberta Menchi Tum Foundation as a private prosecution against Rios Montt and seven other former Guatemalan government officials.[433] Charges included terrorism, torture and genocide, committed against the indigenous Mayan population. Following the initiation of the case, the Public Prosecutor filed a motion to dismiss the action, claiming that legal remedies in Guatemala had not yet been fully exhausted.[434]

A full account of the five-day hearing outlines the testimony of the survivors of the two massacres that was used as evidence of the genocide against the Mayan people.[435] One witness recounted how he was forcibly marched from his village as 10-year-old child after his parents had been forcibly disappeared or killed. He recounted how the man who kidnapped him after killing his two-year old brother in front of him had been sentenced to death for his crimes in 1999. However, he stated:

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[433] Lisa Skeen, 'Universal Jurisdiction: Spain Steps Down', *Global Policy Forum* <https://www.globalpolicy.org/international-justice/48104-spain-steps-down-universal-jurisdiction-and-the-guatemalan-genocide-cases.html>.

[434] The Center for Justice and Accountability, 'Foreign National Court: Spain' <http://cja.org/what-we-do/litigation/the-guatemala-genocide-case/foreign-national-court-spain/>.

[435] Kate Doyle, 'Summary of Genocide Proceedings before the Spanish Federal Court; Round One February 4–8, 2008', *National Security Archive,* Greater Western University, <http://nsarchive.gwu.edu/guatemala/genocide/round1/summary1.pdf>.

> the government is willing to condemn an indigenous to the death penalty, but no one dares do that to the intellectual authors of the genocide. For that reason, we came to Spain.[436]

This statement is an insightful observation about the utility of universal jurisdiction. Where strong political influences remain at play within a state, there is very unlikely to be any kind of justice against those planning the genocide at the domestic level. The remaining options are to force a state to act, through international sanctions, or to commence proceedings in a foreign court, should that jurisdiction be available. The prosecutor's initial application was upheld by the Spanish National Court on 13 December 2000.

This decision was appealed to the Spanish Supreme Court in March 2001. The National Court's decision was partially overturned, allowing the trial to proceed if there was a demonstrated link to Spain. Thus, trial of offences related to the killing of Spanish citizens were authorised to continue.

The decision was again appealed, and in 2005, the Spanish Supreme Court established it had jurisdiction in the matter and commenced proceedings.[437] The Court held that jurisdiction existed on the basis of universal jurisdiction, in this case prescribed by the *Geneva Conventions*, as the crimes related to torture, genocide and crimes against humanity.[438] Spanish trial judge, Judge Pedraz, travelled to Guatemala to obtain witnesses statements. He obtained sufficient evidence to support the continuation of proceedings.

This resulted in the issuance of arrest warrants and extradition requests through the Spanish National Court; these were deemed invalid by the Guatemalan Constitutional Court.[439] The Guatemalan Constitutional Court initially accepted the arrest warrants and initiated extradition proceedings; however, the Court reversed its decision in December 2007. Despite this setback, the Spanish proceedings continued to hear evidence, both directly from witnesses, supported by human rights organisations to

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[436] Ibid.

[437] 'A historic verdict in Guatemala: Genocidal general', *The Economist* (online, 11 May 2013) <https://www.economist.com/blogs/americasview/2013/05/historic-verdict-guatemala >.

[438] The Centre for Accountability and Justice (n 410). Prosecution by the ICC (as these crimes appear in the ICC Statute) was not relevant to the considerations of universal jurisdiction but demonstrated an additional, complementary jurisdiction.

[439] Naomi Roht-Arriaza, 'The Trial of Rios Montt' (December 2013) 18(6) *Aportes DPLF*: *Magazine of the Due Process of Law Foundation* <http://www.dplf.org/sites/default/files/aportes_18_english_web_final_6_0.pdf> 41–44.

travel to Spain to give testimony, and through obtaining official documents from the US government in relation to their records of the civil war in Guatemala.[440]

Although the Guatemalan government resisted these international arrest warrants, the success of this case was evident in the ability of victims to have their stories heard, and indeed, have progressive recognition of the genocide through incremental cooperation by the Guatemalan national courts. For example, in 2008, a survivor from Rabinal gave evidence in a Guatemalan court to pass this testimony to Spanish judges. Further, Spanish pressure resulted in certain military documents being declassified.[441] While not achieving a complete and definitive judicial outcome, this process brought incremental justice to victims of the genocide.

Ironically, although Spain was under political pressure to retreat from its position on the breadth of universal jurisdiction by states (including the US), a contributing factor in the success of the domestic trial of Montt was the US pressure to continue the prosecution.[442] Incumbent president of Guatemala, Molina, called for the US to end its 'indirect pressure' in the courtroom, not only by virtue of its diplomats' presence in the courtroom, but its public announcement that its continued support for Guatemala rested on the advancement of criminal processes associated with the trial.[443] This demonstrates the political complications associated with bringing to justice authors of genocide. However, in this case, Guatemala was eventually forced to act through political pressure, just as Spain ceased to pursue the matter for similar reasons.

Thus, the most promising outcome of this case was not the application of universal jurisdiction, but the international attention and political pressure brought upon Guatemala in relation to Montt's conduct. In January 2015, although claiming ill health, Montt was forced to attend his domestic trial in Guatemala in relation to genocide and crimes against humanity for the massacres in 1982 and 1983. Montt objected to a judge on the grounds of bias. The judge recused herself and the trial was suspended again. However, this still represented significant progress in ending impunity for his conduct.[444] Notably, the historic conviction of Montt, as the first

[440] Ibid.
[441] Skeen (n 434).
[442] Roht-Arriaza (n 10) 312; see Section 5.5.1.
[443] Ibid.
[444] Emma MacLean and Sophie Beaudoin, 'Eighteen Months After Initial Conviction, Historic Guatemalan Genocide Trial Reopens but is Ultimately Suspended', *International Justice Monitor* (6 January 2015) <http://www.ijmonitor.org/2015/01/eighteen-months-after-initial-conviction-historic-guatemalan-genocide-trial-reopens-but-is-ultimately-suspended/>.

person convicted of genocide in their own country in a trial marred by technical delays, and now subject to a closed-door review based on Montt's claim of ill mental health, represents a critical step to ending impunity in Guatemala for past human rights violations.[445]

If one measures the success of a criminal prosecution as the physical appearance of the perpetrator before a tribunal with authority to indict and detain a person, then the Guatemalan general's case could be viewed as a success, albeit an indirect one. This case aptly demonstrates the tensions with the universal jurisdiction doctrine:

- The selection of an appropriate forum will affect the available options to extradite the accused.
- The absence of clear jurisdiction and the inability to collect a complete body of evidence in accordance with domestic procedural rules runs the risk of trials falling afoul of technical defences.
- The competing rights of the accused as compared to those of the victims can result in a seemingly disproportionate outcome favouring the defendant.
- The impact of politics can undermine a trial utilising universal jurisdiction, and can pressure the home state to act against its own citizen in the face of international pressure and an international arrest warrant.

Further, this case demonstrates the value of international cooperation in the pursuit of justice against criminals, particularly in coordinating concurrent extradition requests and concurrent jurisdictions.

5.3.2 The United States

Demjanjuk contained an analysis by the US Sixth Circuit Court of its competence to recognise another state's extradition request to support the trial of a universal jurisdiction offence. It is an example of a state recognising, and deferring to, another state's exercise of universal jurisdiction. This case relates to the selection of forum insomuch as it demonstrates an acceptance of one state's choice to exercise this right, with the concurrence of another. It also relates to the absence of any competing claim

[445] Kenneth Roth, 'Guatemala: Events of 2016', *Human Rights Watch* (2017) <https://www.hrw.org/world-report/2017/country-chapters/guatemala>.

to exercise universal jurisdiction in the US, despite a recognition by that state of the validity of the exercise of universal jurisdiction by Israel.

Following the denaturalisation of John Demjanjuk in the US in 1981,[446] Israel issued an arrest warrant for John Demjanjuk, utilising the same legislation relied upon for the earlier trial of Adolf Eichmann. John Demjanjuk was accused of operating a gas chamber while working in a Nazi concentration camp in Poland in World War II, resulting in the death of tens of thousands of Jews.[447] Israel issued an arrest warrant, and submitted it to the US, stating that John Demjanjuk had murdered tens of thousands of Jews and non-Jews, which was equated by the US District Court as 'murder and malicious wounding [and] inflicting grievous bodily harm'. This offence is specifically listed in the *Convention on Extradition* between the US and Israel. Raising similar arguments to those employed by Adolf Eichmann in his trial to deny the jurisdiction of the Israeli court, John Demjanjuk argued that the offences occurred in Poland and not Israel. Further, he claimed that Israel did not exist at the time of the commission of the offence and so had no jurisdiction to request his extradition. Argument was raised that the requirements of the *Extradition Convention* necessitated the offences to have been committed on the territory of the requesting party. The Court held that the requirements of Article III of the Convention were satisfied on the basis that the Convention required that laws of the other party to 'provide for the punishment of such an offense committed in similar circumstances'.[448]

In this case, the requirement of double criminality (ie, that the offending amounted to offences in both countries to the Convention) were met. The court considered that 'murder is a crime in every state of the United States. The fact that there is no separate offense of mass murder or murder of tens of thousands of Jews in this country is beside the point'. John Demjanjuk's counsel argued that the extradition warrant specifying the 'murder of thousands of Jews and non-Jews' was not covered by the treaty when

[446] *Extradition of Demjanjuk* (*'Demjanjuk'*), 612 F Supp 544 (ND Ohio); Lisa Del Pizzo, 'Not Guilty—But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and its Impact on the Future of Nazi War Crimes Trials' (1995) 18(1) *Boston College International and Comparative Law Review* 137–178.

[447] See Criminal Case 373/86, *The State of Israel v Ivan (John) Demjanjuk*, 16 February 1987, Jerusalem District Court. Specifically, the indictment relied upon the *Nazis and Nazi Collaborators (Punishment) Law 1950*, issued on 18 October 1983 and specified: crimes against the Jewish people; crimes against humanity; war crimes; and crimes against persecuted people. He was accused of serving as an SS *wachmann*, of perpetrating unspeakable acts of cruelty by pushing his victims towards and into the gas chambers at Treblinka, and of beating their naked bodies and cutting pieces from their living flesh.

[448] *John Demjanjuk v Joseph Petrovsky et al* 776 F.2d 571 at 578 A and B.

it referred to 'murder'. His argument that the treaty required amendment to specifically include this as a separate crime before it could apply was dismissed as 'absurd and offensive'.[449]

The US Court of Appeal maintained the same reasoning as the Northern District Court of Ohio. It determined that the basis for the extradition request was lawful because international law permits any state to prosecute criminals who are deemed 'common enemies to mankind' and in which all states have interest in the consequential punishment thereof.[450] Further, the courts held that the precedents established by the many courts exercising jurisdiction over similar offences in Allied states following World War II, and in relation to the Nuremburg Military Tribunal and trials, supported the establishment of universal jurisdiction.[451] This line of reasoning was utilised to discount John Demjanjuk's argument that Israel must have been in existence at the time of the commission of the offence to exercise jurisdiction. This is because there was an assumption the prosecuting state was doing so on behalf of all states, and the status of Israel as a nation at the time of the offending was thus irrelevant.[452] In this case, it was contemplated that universal jurisdiction existed. Therefore, the question of the possible concurrent application of passive personality jurisdiction and protective jurisdiction was not considered by the Court.

Thus, the US courts demonstrated a shift in reliance on 'territorial' jurisdiction to that of universal jurisdiction as the primary consideration in the case to justify the extradition request. Further, they supported Israel's application of universal jurisdiction in absentia.

Competition in forum selection is not only limited to the forum with the strongest claim to jurisdiction. In several cases, a strong prospect of conviction for a less significant offence was preferred to commencing universal jurisdiction prosecutions for the serious crimes subject to universal jurisdiction. For example, separately, Jorge Sosa Orantes was a participant in the massacre of over 200 civilians in a systematic slaughter in the village of Dos Erres over a three-day period, implementing the Guatemalan military's 'scorched earth' policy. In 2011, Judge Pedraz of the Spanish National Court issued an extradition request in relation to his conduct associated with

[449] *Demjanjuk* (n 273) 578.
[450] *Demjanjuk* (n 273) 580.
[451] Ibid 581.
[452] Ibid 582.

the Dos Erres massacre, and in particular, requested his extradition so he could face criminal charges relating to his crimes against humanity.[453] Similarly, the Guatemalan government also indicted him for his alleged war crimes.[454] Finally, as a Canadian citizen living in Canada, Orantes also faced the possibility of criminal charges under the Canadian *Crimes Against Humanity and War Crimes Act*. This legislation creates universal jurisdiction in relation to war crimes offences that occurred in different states with the only connection to Canada being the presence of the accused.[455]

Despite these compelling and competing opportunities to try Orantes for his alleged criminal conduct, the extradition request that eventually won was that of the US. Their request was not in relation to the alleged slaughter of women and children (with sledgehammers, burying them in the city's water well) but rather in relation to his fraudulent immigration paperwork to the US about his association with the Guatemalan military.[456] The eventual outcome of this case was for the US criminal trial to convict Orantes on two counts of citizenship fraud, leading to his US citizenship being revoked immediately.[457] He was sentenced to the maximum jail term for both counts—the maximum sentence of 10 years for each count. This sentence is wholly inadequate when compared to the consecutive life sentences, amounting to a 6,000-year sentence, issued as a result of the Guatemala prosecution that dealt with the same massacre and conviction of four soldiers who were also participants in the massacre.[458] This Guatemalan prosecution founded the basis for the request to extradite Orantes to Guatemala. Although currently serving his sentence in a US prison, at least this case could result in Orantes being extradited to Guatemala to face justice for his atrocities at the conclusion of his 20-year sentence for the lesser crimes of citizenship fraud. This case highlights the impact of international leverage and dominance among states. It also demonstrates the inability to properly prioritise the punishment of more egregious criminal offences over lesser ones, when multiple jurisdictions are competing for

[453] *Annual Human Rights Report Submitted to Congress by the US Department of State* (2000) vol 25b, 2581–2615.
[454] Ibid.
[455] Notably, this application of universal jurisdiction relies on the presence of the accused and thus, is not a 'pure' application of the jurisdiction. Fannie Lafontaine, 'The Unbearable Lightness of International Obligations: How and When to Exercise Jurisdiction under Canada's Crimes against Humanity and War Crimes Act' (2001) 23(2) *Review Quebecoise de Droit International* 1–50. See also *Machain* (Section 5.5.2).
[456] Ibid.
[457] Trial International, 'Jorge Vinicio Sosa Orantes', *Trial Watch* (online, 14 July 2016) <https://trialinternational.org/latest-post/jorge-vinicio-sosa-orantes/>.
[458] See Guatemalan City Court proceedings in the case of Keyes, Gualip, Hernandez and Carias: *Prensa Libre* (2 August 2011), cited in Centre for Accountability (n 410).

custody over an individual. However, this also evidences the practical consideration in prosecutions in the desire to use the most evidentially robust prosecution—even if targeted—to secure custody of alleged perpetrators as a starting point.

5.3.3 Germany

Germany's experiences with universal jurisdiction followed a similar path to those of other liked-minded European states. Following a period of support for the doctrine, the domestic legislation authorising criminal proceedings based on universal jurisdiction was reduced in scope. Following its unenviable position as the main catalyst for the development of international criminal law consequent upon the German atrocities committed in World War I and World War II, Germany has made significant efforts contemporaneously to be perceived as supporting international criminal justice.[459] A staunch supporter of the ICC, German domestic legislation relating to the trial and punishment of international criminal offences arguably goes further than most other nations.[460]

The application of universal jurisdiction in Germany is based upon its CCAIL, which provides for universal jurisdiction over crimes of genocide and grave breaches of the *Geneva Conventions* (committed before 30 June 2002).[461] While incorporating the crimes specified in the *Rome Statute* and implementing its responsibilities as a signatory thereto, this legislation reaches one step further. It creates domestic legislation authorising the exercise of universal jurisdiction against these offences. Using the ratification of the *Rome Statute* as an opportunity to update its domestic criminal legislation, the German legislature created authority to try offenders within its jurisdiction for universally cognisable crimes.

The highlight of the German use of universal jurisdiction was in response to the Bosnian war, when the prosecutor initiated some 128 investigations against 177 defendants. However, in most of these cases, there was a link to Germany through the long-time residency of the defendants.[462] Following these trials, Dusko Tadic was

[459] Florian Jessberger and Gerhard Werle, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law' (June 2002) 13(2) *Criminal Law Forum* 191–223.
[460] Ibid.
[461] CCAIL (n 126); German Federal Gazette I (2002) 254; see also Bundetag-Drucksachen (Parliamentary Documents) 14/8524 and 14/8892.
[462] Langer (n 288).

transferred to the ICTY,[463] while four cases resulted in the conviction of Bosnian Serbs for, among other charges, genocide, murder, or aiding and abetting murder.[464] The use of the nationality principle was also the basis for the previously noted trial of two Congolese FDLR members, who ordered the commission of offences while living in Germany.[465]

The trial of John Demjanjuk represented a further attempt to apply universal jurisdiction under German domestic law, despite the arguable additional jurisdictional nexus to John Demjanjuk on the basis of passive personality under the German *Penal Code*.[466] After the Israeli Supreme Court acquitted him in 1993, and the US Sixth Circuit Court of Appeals stripped John Demjanjuk of his US citizenship in 2001, the German Government announced it would seek his extradition in relation to his service in Nazi death camps.[467] However, the reliance on alternative jurisdictional grounds removed the dependence on universal jurisdiction as the grounds for this extradition request. Rather, this case turned on John Demjanjuk's German citizenship, as he was a previous resident of Munich, and on his deportation to Germany from the US he was arrested and brought for trial in the Munich courts. Although John Demjanjuk was found guilty of being an accessory to the murder of 27,900 Jews and sentenced to five years' prison, he was released subject to his appeal and died before the appeal was heard. His conviction was invalidated.[468]

In contrast, the trial of Novislav Djajic was the result of a prosecution of multiple offences based on universal jurisdiction. Genocide was the initial charge, but, absent evidence of the *mens rea* element for this offence, he was eventually convicted of war

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[463] *Prosecutor v Tadic*, above (n 301).

[464] See *Novislav Djajic, Nikola Jorgic, Maksim Sokolovic and Djuradj Kusljic*: Bayersches Oberstes Landersgericht (BayObLG) [Bavarian High Regional Court] May 23 1997, 1998 Neue Juristische Wochenschrift [NJW] 392 (Djajic); Bundergerichtshof (BGH) [Federal Court of Justice] 30 April 1999, 1999 Neue Zeitschrift Fur Strafrecht (NStZ) 396, International Domestic Courts [ILDC] 132 (English Translation); Bundesverfassungsgerucht (BVerG) [Federal Constitutional Court] December 12, 2000, 2001 JuristenZeitung (JZ) 975; *Jorgic v Germany* App No 7 74613/01 (European Ct HR Rule 12, 2007) (Jorgic); BGH, Revision Judgment February 21, 2001, NJW 2728, ILDC 564 (Sokolovic); BGH, Revision Judgment, February 21 2001, NJW 2732 ('*Kusljic'*).

[465] See Section 5.2.4.

[466] *Demjanjuk* (n 422) 588.

[467] Ibid 589.

[468] The Court lifted the order or arrest keeping Demjanjuk in jail, pending appeal, based on the submissions of his defence counsel, Ulrich Busch, that he was terminally ill and unfit for incarceration. Demjanjuk died 10 months after his conviction, before his appeal could be heard. Lawrence Douglass, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trials* (Princeton University Press, 2016) 253, 257.

crimes, relying on the universal applicability of the *Geneva Conventions*.[469] This prosecution relied on the international legal character of the offences to support prosecution under universal jurisdiction—supporting the third Princeton Principle, 'a core crime, once accepted at international law, should bring with it universal jurisdiction for prosecution', despite an absence of a specific treaty obligation to do so. This particular trial recognised the European practice in the enforcement of universal jurisdiction whereby the judiciary plays an important role in ensuring those guilty of core crimes—recognised as such at international law—do not escape justice because of an absence of domestically enunciated legislation. In this case, the offence of genocide was not expressly included in the German *Penal Code* at the time of offending. However, the Court held that the *Genocide Convention* was acceded to by Germany in 1948; thus, the prosecution of genocide was subordinate to global principles of international law and available for German legal prosecution.[470] This pragmatic reasoning for judicial activism is not supported in other states, and represents a core criticism in the enforcement of international crimes.

The appropriate selection of forum in the German system can be best analysed by assessing the *Tadic* cases. Arguably one of the most important war crimes convictions of the 1990s, the prosecution and sentencing of *Tadic* in the ICTY set the benchmark for several important international criminal law principles—such as the attribution of responsibility in non-international armed conflicts to leaders of militia groups that are non-state actors.[471]

However, the handover of Tadic from a domestic German court to the ICTY is based on universality, grounded in this case on the authority of the UN Security Council which established the tribunal.[472] In this case, Tadic was arrested when he travelled to Germany, under German universal jurisdiction laws, on the basis of suspicion of

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[469] Slaughter (n 71) 185.
[470] Translation of media into English: Federal High Court of Germany, 'Federal High Court makes Basic Ruling on Genocide' (30 April 1999) <http://www.preventgenocide.org/punish/GermanFederalCourt.htm>.
[471] *Prosecutor v Tadic* (n 301) 43.
[472] See specifically Security Council Resolution 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/Res/827 (25 May 1993); and Security Council Resolution 808, UN SCOR, 48th sess, 3175th mtg, UN Doc S/RES/808 (22 February 1993). See also *Statute of the International Criminal Tribunal for the Former Yugoslavia*, compilation of the ICTY (September 2009) as amended by Security Council Resolution 1877, UN SCOR, 6155th mtg, UN Doc S/Res/1877 (7 July 2009) ('*ICTY Statute'*).

having committed offences at the Omarska camp, subject to a domestic arrest warrant issued under the CCAIL.[473]

The ICTY determined an application for deferral of criminal jurisdiction by Germany, in favour of the Prosecutor. Germany handed Tadic to the Tribunal, having reference to the UNSCR that gave rise to its creation. In the defence's challenge to this jurisdiction, the Tribunal held that the nature of the offences for which Tadic was accused were universal because they were serious breaches of international humanitarian law, transcending the interest of any one state. Thus:

> the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world.[474]

As the Tribunal was acting on behalf of the international community, and the entire community had an interest in his prosecution, Tadic had no grounds to challenge the primacy of the Tribunal over Germany's claim in its national jurisdiction.[475] This decision demonstrates that the extent of the application of universality is not limited merely to the domestic enforcement of crimes, but as part of the broader response to international criminal justice, working in concert with regional and international criminal justice mechanisms. This decision reinforces that the national exercise of universal jurisdiction is not prioritised over other lawfully established courts or tribunals effectively seized of a matter. It supports the proposition that national jurisdiction can effectively be used as a forum of last resort, rather than a primary or preferential forum to prosecute international criminal law offences.

At the conclusion of the trial, Tadic was transferred back to Germany to serve his prison sentence. Although the German government had no framework agreement with the UN on enforcement of ICTY sentences, he was transferred to Germany because of his initial arrest and detention in that State before his trial.[476] Again, this action represents an example of the cooperative nature of practical enforcement mechanisms

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[473] Cedric Ryngaert et al, '*Prosecutor* v *Dusko Tadic'*, *Judicial Decision on the Law of International Organisations* (Oxford University Press, 2016) 134.
[474] *Prosecutor v Tadic* (n 301) 45.
[475] *Prosecutor v Tadic* (n 301) 43.
[476] JL/P.I.S/538.e, ICTY Registry, 'Dusko Tadic Transferred to Germany to Serve Prison Sentence' (Media Release, 31 October 2000) <http://www.icty.org/en/press/dusko-tadic-transferred-germany-serve-prison-sentence>; Geoffrey Watson, 'The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadic'* (1996) 36 *Virginia Journal of International Law* 687–719.

that can support universal jurisdiction offences and international criminal justice more generally.

5.3.4 Israel

One of the main criticisms internationally regarding the 'pure' form of the universal jurisdiction is the possibility for states to exercise their own state agenda over other states, ignoring the long-held and defended rights of states to territorial integrity. The somewhat analogous issue pertaining to the Israeli policy of 'targeted killings' represents the extreme concerns relating to the absence of jurisdictional restrictions upon states. The generally held justification for use of these tactics is that the targeted individual poses an ongoing security threat to the state and is incapable of being captured, thus enlivening the state's right to use force in self-defence.[477] Extending this to universal jurisdiction, exercise of universal jurisdiction by a third-party state may result in a declaration about the status of a conflict, contrary to the state of affairs considered in force by the affected states at that time.

The *Targeting Killing Case* is illustrative of this issue.[478] The Israeli court's determination on the lawfulness of targeted killings is relevant for consideration in scoping the applicability of universal jurisdiction. It purports to justify state action impeding on other sovereign state authorities, based on the impact of those actions in protecting human dignity. In the case of targeted killings, Israel purported to extend its lawful sovereign authority to utilise lethal force against a person involved in an armed conflict with Israel, ostensibly with no consideration given to geographic boundaries. In a similar fashion, universal jurisdiction—particularly exercised in absentia or consequent upon an extradition or abduction—also purports to act in relation to a person over whom another state exercises a sovereign interest. While complicated by issues numerous issues, including those associated with the extent of the applicability of *jus in bello* principles in a country disconnected from the conflict, the analysis of this judgment assists in considering the underpinning justification for states to try universal jurisdiction offences in a national forum.

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[477] Roland Otto, *Targeted Killings and International Law: With Special Regard to Human Rights Law* (Springer, 2011) 523, citing Supreme Court of Israel *Public Committee Against Torture Israel v State of Israel,* The Targeted Killings Case, 23 Kislev 5767 HCJ 769/02 (13 December 2006) (2007) 46 ILM 375 ('*Targeted Killings Case'*) 381.
[478] *Targeted Killings Case* (n 451).

This analysis is important for its flow-on effect on the application of universal jurisdiction. The circumstances in which the offence occurs is a relevant consideration for any state commencing an action under universal jurisdiction. The presence of armed conflict enables a trial for war crimes, and more particularly, grave breaches of the *Geneva Conventions*.[479]

The *Targeted Killing Case* in the Israeli Supreme Court considered the government of Israel's use of 'a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip'.[480] The case turned on an interpretation of the laws of war applicable to the use of preventative strikes in Israel against targets who had questionable status as combatants or civilians directly participating in hostilities. The resultant judgment determined that these attacks were legally permissible provided that the principle of proportionality was adhered to and the targeted individual—limited by the Court to those 'terrorist[s] taking a direct part in hostilities'—could not otherwise be arrested. Further, the Court determined that a 'thorough and independent (retrospective) examination is required, regarding the precision of the identification of the target and the circumstances of the damage caused'.[481] This was supported by the assessment that the central tenet was that of human dignity, as it related to both the treatment of the targeted person and the possible civilian collateral deaths.[482] This consideration was balanced between upholding the rule of law against individual human rights, accounting for the attribution of individual responsibility for an individual's actions.[483] Specifically, this finding contemplated that a constituent element of war crimes offences pertain to the balancing of group rights over individual

[479] *Tadic Jurisdiction Appeals Judgment (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* (International Tribunal for the Former Yugoslavia, IT-94-I-AR72, 2 October 1995) [79]; *Celebici Case* (n 302); *Aleksovski, Trial Judgment (Dissenting Opinion of Judge Rodrigues)* IT-95-14/1-T, [44] (25 June 1999). See generally Christine Byron, 'Armed Conflicts: International or Non-International' (2001) 6(18) *Journal of Conflict and Security Law* 63–66.
[480] *Targeted Killings Case* (n 451).
[481] Ibid.
[482] Ibid.
[483] Ibid. See in particular the judgment of Vice President E. Rivlin: 'Both normative systems applicable to the armed conflict are united, in that they place in their centers the principle of human dignity. That principle feeds the interpretation of international law, just as it feeds the interpretation of internal Israeli public law. It expresses a general value, from which various specific duties stem. On the status of this principle in international law, see Benvenisti. It should be noted that Benvenisti identifies two principles which are relevant to the implementation of the principle of preserving human dignity in the context under discussion: the individuality principle, according to which every person is responsible only for his own actions; and the universality principle, according to which all of the individuals are entitled to the same rights, be their group identification as it may. The latter principle is not expressly recognized in the laws of armed conflict. That does not negate the duty regarding enemy civilians. The scope of the duty varies, but the very existence of the duty does not'.

rights and the underpinning concept of the protective obligations under international humanitarian law. Here, the analysis addressed the international humanitarian law construct of proportionality. The Court noted that whether a targeted killing was lawful was a matter of construction based on the circumstances of each operation. In this case, it was held that the *lex specialis* of international humanitarian law applied to the case in question. This was because the State of Israel was deemed to be in an international armed conflict in the occupied territory of Palestine; thus, the appropriate legal regime to apply was that of the laws of armed conflict.[484] Consequently, following each targeted killing, an independent fact-finding inquiry was undertaken by the Israeli government to confirm its lawfulness according to the standards required at international humanitarian law—the relevant applicable legal regime.

The determination of when a state is in armed conflict is not a matter for another sovereign state's domestic judiciary to determine.[485] Although sometimes aided by declarations through UNSCR, this determination is objective, based on a state ascertaining that the level of conflict has met the threshold of violence required to amount to a conflict (in the case of non-international armed conflicts), or recognising the parties to the conflict as a state's armed forces (in the case of international armed

[484] It is not relevant to ascertain whether this construct was legally correct. Commentators have annotated that a more in-depth analysis of how the Court determined the relevant legal regime would have been helpful in defining the conduct and delineation between international and non-international armed conflict into the future: see Sharon Weill, 'The Targeted Killing of Salah Shehadeh: From Gaza to Madrid' (2009) 7 *Journal of International Criminal Justice* 617–631.

[485] The declaration of war (in the case of an international armed conflict) is a matter for governments; art 2 of the *Geneva Conventions* defines international armed conflict as 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. In the case of non-international armed conflict, *Geneva Conventions* art 3 does not provide the same level of specificity in defining non-international armed conflicts. However, to be afforded the protections of international humanitarian law as combatants, parties to the conflict must be sufficiently organised and intend to be bound by the laws of war to be afforded protection under them, and party to a conflict of sufficient intensity to amount to an armed conflict. International tribunals have provided jurisprudence about when that threshold (intensity and organisation of the parties) may have been met. See *Tadic* (n 452) [70]; see generally Anthony Cullen, *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (Cambridge University Press, 2010); Paola Gaeta and Andrew Clapham (ed), *The Oxford Handbook of International Law In Armed Conflict* (Oxford University Press, 2014) 584; *Commentary on the Draft Articles on Responsibility of States for International Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session;* Advisory Opinion No 4, *Nationality Decrees issued in Tunis and Morocco,* 1923 PCIJ I (ser B) No 4; see *Nottebohm Case (Liechtenstein v Guatemala)* 1955 ICJ 4; Leo Van den hole, 'Towards a Test of the International Character of an Armed Conflict: *Nicaragua* and *Tadic'* (2005) 32 *Syracuse Journal of International Law and Commerce* 269–286.

conflict).[486] Extending this to universal jurisdiction, exercise of universal jurisdiction by a third-party state may result in a declaration about the status of a conflict, contrary to the state of affairs considered in force by the affected states themselves at that time.

Following the 2002 targeted killing operation that resulted in the death of Salah Shehadeh (the head of the Hamas military wing in Gaza) and 14 others, and injury to a further 150 people, a complaint was lodged by the families involved to instigate criminal proceedings in Spain against this attack. As these offending acts were characterised as war crimes, the basis for Spain's jurisdiction was reliant upon an international treaty obligation as a grave breach of the *Geneva Conventions*, establishing a basis for the head of universal jurisdiction.[487] This position was based on an acceptance by the Spanish court that the conflict was international.[488] The original jurisdiction was found in the case on the basis of application of the 1959 *European Mutual Assistance in Criminal Matters Conventions*,[489] which was determined by Judge Merelles to be applicable to allow the Spanish judicial commission to investigate the alleged offences.

However, this position was ultimately rejected by the Spanish Court of Appeal. It was later upheld by the Spanish Supreme Court on the basis of the *nes bis in idem* principle, as the Israeli government was investigating the matter through the Committee established following the *Targeted Killings Case*.[490] Following this, the Spanish legislature amended its universal jurisdiction statute (discussed below). Thus, there has been no further action following the conclusion of the Israeli inquiry into this matter. Commentators on the application of universal jurisdiction noted that it is 'ironic' that the petitioning of NGOs in the *Targeted Killings Case*, which resulted in an internal investigation assessing the government's actions, ultimately resulted in justification for the rejection of the application of universal jurisdiction in this case.[491] It does, however, indicate that there exists a need for a state to demonstrate in its

[486] For a discussion of contemporary *jus ad bellum* principles, see Dale Stephens and Michal Lewis, 'The Law of Armed Conflict—A Contemporary Critique' (2005) 6(1) *Melbourne Journal of International Law* 55.
[487] For discussion regarding *jus cogens* principles, see Section '2.3.1.
[488] Weill (n 457).
[489] Ibid.
[490] *Targeted Killings Case* (n 451). See also Yuval Shany, 'The International Struggle Against Terrorism—The Law Enforcement Paradigm and the Armed Conflict Paradigm', *The Israel Democracy Institute* <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-3/universal-jurisdiction-spanish-court-initiates-an-inquiry-of-the-targeted-killing-of-salah-shehadeh-in-gaza/>.
[491] *Targeted Killing Case* (n 451).

utilisation of universal jurisdiction that the host nation of the offender must be unwilling or unable to act prior to the utilisation of the jurisdiction. In some fashion, this addresses the additional concern pertaining to the issue of concurrent jurisdiction.[492]

5.3.5 Observations

The main consideration for states in their application of universal jurisdiction in determining an appropriate forum appears to centre on concerns as to which concurrent jurisdiction, if any, should be given precedence over their own domestic criminal jurisdiction. There is a developing trend to give priority to international tribunals, in an informally determined layer of jurisdictional precedence. However, in the absence of a tribunal being established to deal with a specific conflict and the conduct associated with that conflict, the stated principles of complementarity articulated by the *Rome Statute* appear to have been informally adopted by states in their application to universal jurisdiction. This contradiction cannot be accounted for in legal principle. Rather, it reflects the uncertainty of the scope and application of universal jurisdiction and international criminal law offences, particularly when considering appropriate forum selection.

Separately, recognition of the need to first ascertain the inability or unwillingness of a state with a traditional jurisdictional nexus to act amounts to a pre-determinative factor as to whether the application of universal jurisdiction is appropriate. In some cases, the use of universal jurisdiction serves as a prompt for states to take domestic action. Thus, the commencement of criminal proceedings is effectively the measure by which states determine a state's willingness to prosecute the accused.

However, these concurrency issues are not clearly defined at international law, and appear to be determined on a case-by-case basis by states seeking to exercise universal jurisdiction. The limited guidance provided through international criminal tribunal jurisprudence does not define how states can resolve the conflict of jurisdictions presented in universal jurisdiction cases with any degree of certainty or consistency.

[492] For a similar argument, see the decision of the Netherlands Supreme Court in *Van Anraat* (n 391), where the arguments against jurisdiction of the Netherlands for war crimes pertaining to the Iraqi conflict, necessitating that the Netherlands Court make a determination of the culpability of the Iraqi Government, and the status of that conflict, were rejected by the Court.

5.4 Harmonisation of International Law Principles

In applying universal jurisdiction, states often apply principles that pertain to international legal obligations. Indeed, the basis for many states applying universal jurisdiction is grounded on the offending conduct representing a grave breach of the laws of war, or a breach of an international law obligation.[493] Sections 5.4.1–5.4.3 will assess, using Australia's and the US's experiences, how such harmonisation can be achieved when exercising universal jurisdiction.

5.4.1 Australia

Australia's attempts to legislate for prosecution of war criminals residing in Australia following World War II resulted in a very limited legislative instrument: the *Australian War Crimes Amendment Act* (Cth) of 1988. This legislation purported to incorporate enforcement jurisdiction for offences limited to war crimes committed between 1 September 1939 and 8 May 1945 (and only in certain geographic areas) if those people were now residents of Australia.[494] This enforcement of a temporally limited and conflict-specific universal jurisdiction is a quite narrow enunciation of the doctrine of universal jurisdiction.

In this regard, Australia's legislation overcomes some of the procedural concerns regarding *concursus delictorum* and *non bis in idem* by containing specific provisions to avoid changes to the maximum punishment available for the gravest offence. Specifically, it limits sentencing to life sentences or less for the crime of murder. Further, it separately determines that an offence should be considered a war crime, rather than merely a series of 'serious crimes', if the serious crimes are of the same or similar character, form part of a single transaction or event, and were committed in the course of hostilities or an occupation. This had the effect of deeming two or more offences as amounting to a singular war crime.[495]

When it became known that a number of Europeans suspected of war crimes relating to World War II lived in Australia, the 1988 Labor Government instigated a formal investigation.[496] It also changed the *War Crimes Act* to cover war crimes in Europe—

[493] See Table 1.
[494] Australian *War Crimes Amendment Act 1988* (Cth).
[495] Ibid s7.
[496] Damien Murphy, 'Cabinet Papers 1988–89: Nazi War Crimes Trials; Rise of Extreme Racism', *Sydney Morning Herald* (online, 1 January 2015) <http://www.smh.com.au/federal-

amending it under the 1988 *Amendment Act* to expressly include the geographic areas occupied as a consequence of war.[497]

The 841 investigations by the Special Investigations Unit (established by the Labor governmental investigation) identified 27 cases of suspected war criminals.[498] However, the eventual result was the apprehension of only three suspects: Polyukovich, Wagner and Berezowsky. Although the Polyukovich trial proceeded, trials against the latter two never happened. Wagner was deemed unfit to stand trial due to sickness. In the case of Berezowksy, the Office of the Public Prosecutor determined that there was insufficient evidence to proceed.[499] Nonetheless, this effort has been considered a success by some commentators, as the proceedings supported the contention that distance from the location of the crime did not engender impunity from prosecution for war crimes.[500]

In *Polyukhovich v Commonwealth*, the justiciability of the war crimes legislation and its purported retrospectivity makes this case informative in relation to the method by which Australian courts approached the principle of universality in compliance with basic criminal fair trial standards. The case was brought in 1990 as a consequence of evidence discovered in a town in the Ukraine after the exhumation of a mass grave. Polyukhovich was charged with the murder of 24 people and complicity in the murder of a further 850 people. The Adelaide Magistrates Court issued an arrest warrant in January 1990. In 1993, Polyukhovich challenged the validity of the war crimes legislation for its retrospective application.[501]

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politics/political-news/cabinet-papers-198889-nazi-war-crimes-trials-rise-of-extreme-racism-20141219-12atsu.html>.

[497] *War Crimes Amendment Act 1988* (Cth) s 5. This also expressly extended to include the occupied sections of Latvia, Lithuania or Estonia resulting from the Germany/Union of the Soviet Socialist Republics' 23 August 1939 Agreement.

[498] Gideon Boas, 'War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations' (2010) 21 *Criminal Law Forum* 313, 319; Gideon Boas and Pascale Chifflet, 'Suspected War Criminal in Australia: Law and Policy' (2016) 40 *Melbourne University Law Review* 46–84.

[499] Triggs states both trials were discontinued because of lack of evidence: Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy L H McCormack and Gerry J Simpson, *The Law of War Crimes: National and International Approaches* (Wiley, 1997) 123–150; ABC's Four Corners reported that the trial against Wagner was discontinued when medical evidence about his heart condition was presented to the Court: Quentin McDermott, 'War Crimes: Calling Australia Home', *ABC's Four Corners* (2014) <http://www.abc.net.au/4corners/stories/s104149.htm>.

[500] Tobias Lock and Julia Riem, 'Judging Nuremberg: The Laws, the Rallies, the Trials', 6(12) German Law Journal 1819–1832.

[501] Polyukhovich (n 189).

The High Court dismissed Polyukhovich's application, but on a variety of grounds. The majority held that the ex post facto nature of the law was not a usurpation of judicial power.[502] Specifically, the basis of the law, albeit retrospective, did not breach any provision of the *Constitution of Australia*. While Polyukhovich attempted to liken the *War Crimes Act* to a bill of attainder, which is specifically made unlawful in the *Constitution of the United States*,[503] the High Court of Australia held that there was no equivalent provision in the *Constitution of Australia*.[504] Further, the analysis of the ability of the Australian Parliament to declare retrospective conduct criminal was reinforced by asserting that such conduct was doing nothing more than codifying existing unlawful conduct, and discharging Australia's obligations as a state to enforce an international obligation.[505] The High Court also held that Australia is able to domestically legislate in regard to obligations flowing from its treaty obligations and interpretation of customary international law. This relied on the premise that customary international law was central to completing Australia's international personality, specifically, its ability to 'punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order'.[506]

Consequently, Polyukhovich's appeal was dismissed and his trial was reinstated in Adelaide. Ultimately, Polyukhovich was acquitted by the Adelaide jury, due to a lack of evidence. However, this trial reinforced that the Australian Parliament has the authority to retrospectively legislate on conduct considered universally reprehensible.

Further to the *War Crimes Amendment Act*, Australia has since legislated to incorporate both its obligations under the *Geneva Conventions* and the *Rome Statute* provisions.[507] However, despite developing its domestic legislation to address expanded crimes under the guise of universal jurisdiction—such as genocide, war crimes and crimes against humanity—Australia's Special Investigations Unit was

[502] Ibid.
[503] Bills of Attainder and ex post facto Law are expressly unlawful under the US Constitution: *Constitution of the United States*, art I, s 9, para 3.
[504] The Court also held that on the basis the legislation did not make a declaration of guilt or punishment in relation to particular conduct of an individual, this legislation was not a bill of attainder: *Polyukhovich* (n 189).
[505] *Polyukhovich* (n 189) 37–41.
[506] *Polyukhovich* (n 189) 42.
[507] *International Criminal Court Act 2002* (Cth) and *International Criminal Court (Consequential Amendments) Act 2002* (Cth) and amendments to the *Criminal Code Act 1995* (Cth).

disbanded in 1992. There have been no prosecutions for war crimes offences in Australia in the past decade.[508]

5.4.2 The United States

The US has been plagued by transnational crime relating to drug trafficking crossing into US territory from international waters in the south of the country. The enforcement of laws relating to smuggling of controlled substances has been an issue for constitutional and jurisdictional law for the US for decades.[509] Original attempts to overcome this issue were made through artificial extension of customs and coast guard authorities to conduct boarding in the contiguous zone. However, this has resulted in more stringent application of the US's interpretation of customary international law pertaining to the Law of the Sea[510] by these authorities in attempts to regulate traffic beyond the territorial sea of the US.[511]

Peripheral criminal conduct, such as tax evasion and money laundering, are also transnational crimes with which the US is concerned. The *Swiss–United States Treaty on Mutual Assistance in Criminal Matters*, signed in 1973, although excising 'any offense of a political nature' at Article 5, provides a method for the US to obtain information from otherwise impenetrable Swiss banking institutions. This is done by applying to the 'central authority' for information necessary to support 'successful prosecution' that will have a 'significant adverse effect on the organised criminal group'.[512] While this concession was largely granted because of the US's international

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[508] Boas and Chifflet (n 470). Note, although the AFP has reportedly launched investigations into ADF personnel in respect of allegations of committing war crimes during the ADF's deployment to Afghanistan, at the time of writing, no personnel have been charged with any offences. The AFP Offshore and Sensitive Investigation Taskforce have been given responsibility for this investigation, given the disbanding of the AFP Special Investigations Unit in 1992: Nick McKenzie and Chris Masters, 'Police Investigate Ben Roberts-Smith over alleged war crimes', *The Sydney Morning Herald Online* (29 November 2019) <www.smh.com.au/national/police-investigate-ben-roberts-smith-over-alleged-war-crimes-20181126-p50ihb.html>.

[509] Liana Rosen, 'International Drug Control Policy: Background and US Responses', *Congressional Research Service* (16 March 2015).

[510] For discussion on this issue, see UNCLOSdebate, 'Argument: US Already Applies UNCLOS as a Matter of Customary International Law' <https://www.unclosdebate.org/argument/855/us-already-abides-unclos-matter-customary-international-law-and-domestic-policy>.

[511] Peter Clark, 'Criminal Jurisdiction over Merchant Vessels Engaged in International Trade' (1980) 11 *Journal Maritime Law & Commerce* 219, 227–230, 234–226; *United States v Emery*, 591 F.2d 1266 (9th cir 1978); MD Morin, 'Jurisdiction Beyond 200 Nautical Miles: A Persistent Problem' (1980) 10 *California Western International Law Journal* 514.

[512] James Kraska and Paul Pedrozo, *International Maritime Security Law* (Brill, 2013); *Swiss–United States Treaty on Mutual Assistance in Criminal Matters*, Switzerland–US, signed 25 May 1973, 3 November 1993, 27 ILM 480 (entered into force 23 January 1977); *Exchange of Letters*

political influence, this process has provided evidence to support other trials relating to universal offences (in particular, see the impact on the distribution of funds to victims in the Pinochet trial, discussed below).[513]

5.4.3 Observations

Closely linked to selection of forum is the requirement for universal jurisdiction cases to have regard to international legal developments and the application of competing international law obligations. This is particularly so when domestic courts apply international law principles when interpreting international criminal law. While this is arguably a task undertaken by domestic courts regularly, this interpretation is subject to the decision affecting citizens over whom that court is responsible for normally exercising its jurisdiction, amounting to an acceptable exercise of sovereign authority. Specifically, the basis of exercise of criminal jurisdiction by those courts is made by reference to national laws, which give effect to the public policy considerations of that state in how to effectively manage its citizens. However, in circumstances in which a court takes this decision effectively on behalf of another state, inconsistencies in approach by the prosecuting state may have the flow-on effect of breaching international criminal law principles such as *concursus delictorum* and *non bis in idem.*

5.5 Political Risk

Arguably the most prevalent concern of states in the application of universal jurisdiction[514] is the misapplication of the principle by states based on outwardly altruistic, but ultimately self-serving motivations. Accordingly, this consideration will be treated at length, with reference to experiences in Spain, the UK, the US, Israel, Germany and Belgium. Of particular note is the interaction between political motivations between states. In this regard, this section will also highlight how political motivations in supporting or limiting the use of universal jurisdiction by one state have influenced the use of the jurisdiction by other states. In some cases, this has even resulted in domestic legislative change to appease these political pressures.

Concerning the Treaty on Mutual Assistance in Criminal Matters, Switzerland–US, signed 3 November 1993, 33 ILM 168.

[513] See Section 5.5.1.

[514] See Table 2.

5.5.1 Spain

The Spanish use of universal jurisdiction can best be categorised as the most forward-leaning of the European nations in the late twentieth and early twenty-first centuries. Its courts have issued a number of controversial arrest warrants and asserted its jurisdiction in a number of controversial cases—the most prominent being the Pinochet case. This case demonstrates the difficulties in applying a criminal jurisdiction over nationals of other states, and the enforcement of extradition requests in regard to this attempt to prosecute under a permissive jurisdiction. Further, the discussion of this case will outline the difficulties faced by states where criminal jurisdictions may be instigated by non-government petitioners, and may force a prosecutor to deal with in a matter that does not advance international peace and security.

The Pinochet case echoes all concerns with the use of universal jurisdiction: political tensions, legal argument surrounding the selected forum, the human rights of the accused being balanced with the rights of the thousands of victims, and the application of procedural fairness for the accused in the proceedings brought against them. This case is also claimed to be one that 'is a wake-up call to tyrants everywhere', 'forging' new law in regard to ending impunity.[515] However, when analysed in detail, the Pinochet case does not represent the use of universal jurisdiction alone. In the manipulation of existing immunities, Pinochet escaped justice for a period, before the political system and international diplomacy enabled him to be returned to Chile.

This '500-day saga' was considered such a turning point in the use of universal jurisdiction that even decades on, the 'Pinochet effect' is still cited by international human rights organisations and some international humanitarian law jurists as an example of the end to modern impunity.[516] However, while this case brought enormous international attention to the crimes of Pinochet and those within his regime, the actual justice outcomes were fleeting, and even less so was the contribution of this matter to legal precedent relating to universal jurisdiction.

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[515] Reed Brody and Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International IX, 2000).
[516] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights,* (University of Pennsylvania, 2005).

Contrary to popular belief, the effect achieved by the arrest of Pinochet was not to demonstrate absolute defeat of impunity. Rather, it demonstrated that universal jurisdiction is another method by which international pressure can be levied against a state to consider acting against its previously untouched accused. The House of Lords jurisprudence relating to head-of-state immunity is a welcome development in this area of law. However, the value of the indictment issued by Spain was limited insofar as it relied on political decisions of others to act. The UK made a political decision to support the transmission of the request, albeit it was notionally obliged to do so as a consequence of the extradition treaty in force between the two states. Similarly, the UK made a political decision to retreat from its position some 18 months later.

The Pinochet case placed Spain and Spanish Judge Baltazar Garzon in the spotlight for their manner of application of universal jurisdiction.[517] It was only possible as a result of the careful selection of the time to act by the chief lawyer from the Spanish Public Prosecution Service. Juan Garces filed his own motion criminal complaint, and was subject to a number of circumstances best described as luck. This series of opportune events ultimately resulted in an outcome favourable to the exercise of pure universal jurisdiction through the arrest warrant of a third-party national executed by another state. The former Chilean dictator was brought before the Spanish Audencia Nacional (the Spanish High Court) to try.

The interview of Garces and Garzon by NGO Democracy Now outlined the competing practical and political considerations that resulted in the decision for an arrest warrant to be issued for Pinochet, which ultimately saw him arrested in the UK. Although he was later released by the UK, the arrest provided the basis for domestic and international political support and backing in Chile to investigate offences relating to fraud, embezzlement and tax evasion. Equally, the action of Garces in collecting evidence to support the application occurred over a number of years. Further, it was a key consideration in the ability of Judge Garzon being able to issue the arrest warrant for the 104 indictments in such a short time frame.

[517] Balthazar Garzon provides a detailed account of the arrest and the background work that led to it: Democracy Now, 'Spanish Judge Baltasar Garzon Tells the Story of the Arrest of Chiles's Augusto Pinochet', *Democracy Online Forum* (September 2013) <https://www.democracynow.org/2013/9/11/spanish_judge_baltasar_garzn_tells_the_story_of_the_arrest_of_chiles_augusto_pinochet>.

In recounting the circumstances surrounding the issuance of the arrest warrant, Garces, who was deposed Chilean President Allende's former advisor, noted that he waited for several decades before making his complaint. This complaint was presented by NGO Progressive Union of Prosecutors in Spain to the Audencia Nacional once the political climate was right to facilitate international support for Pinochet's trial. In particular, Garces noted that the end of the Cold War presented just such a time. He was then certain that there would not be any considerable international pressure to prevent Spanish political intervention in the process.[518] He also noted that the European Court of Human Rights (ECtHR) determinations regarding the application of the *Convention Against Torture* further supported his position. This was a consideration in his determination of when to issue the criminal complaint.[519]

The actual issuance of the arrest warrant was only resultant upon Garces being personally invested in the ongoing investigation of Pinochet's arrest, and his working relationship with Judge Baltazor Garzon, who was equally supportive of acting against the former dictator. When describing the events leading to the arrest of Pinochet by UK officials in London, Judge Garzon described how he acted beyond what his true authority should have been. He issued the arrest warrant on a Friday afternoon on the basis that he was seeking a deposition from Pinochet in relation to the aspects of the 'Operation Condor' trial that was running across two courtrooms, and for which he was the supporting judge. His authority in relation to Pinochet was limited to requests for interrogatories to support aspects of the case he was investigating.

Equally, the only practical reason Garzon was pressed to issue the warrant on a Friday afternoon was consequent upon his personal acquaintance with the UK ambassador following their interaction in previous trials. Further, he was notified of the potential movements of Pinochet from London back to Chile that day. He was informed by the British authorities that as Pinochet was leaving London the following day, they were unable to take his testimony. Accordingly, Judge Garzon decided to issue the arrest warrant, immediately consequent upon him receiving a telephone call from the British authorities advising him of these travel plans.

Once Pinochet was arrested in relation to offences linked to Operation Condor, a further 104 cases were added to the arrest order, which was subsequently issued on the

[518] Ibid.
[519] Ibid.

basis that the first arrest warrant was annulled and replaced by the second. Importantly, the first arrest warrant pertained to the alleged murder of Spanish citizens in Chile, where Spain would have had a traditional jurisdictional nexus to request the arrest and extradition of Pinochet. The second warrant related to the crimes of universal jurisdiction, only including conspiracy to commit acts of torture, hostage-taking and conspiracy to murder.[520] This action demonstrates the difficulties with processing an arrest warrant in the exercise of universal jurisdiction. In this case, the Spanish courts did not consider the full list of offences committed by Pinochet in the first instance. This was due to a combination of expediency and resource limitations and anticipated support for extradition where Spain had a strong basis for criminal trial based on the passive personality principle. Once it became apparent that efforts to arrest the former dictator would be supported, 18 translators worked over the weekend to complete and submit the warrant to the UK on time.

Following the arrest of Pinochet in London, several appeals were made by Pinochet's counsel (this is discussed in Section 5.5.2). He was ultimately released on medical grounds in 2000 by then-Home Secretary Jack Straw.

Despite this release, Pinochet's arrest marked a turning point in relation to the actions against him in other fora. While not directly resultant upon the exercise of universal jurisdiction, as a consequence of initiating criminal action against him, other associated litigation was able to be launched. For example, as a consequence of the commencement of a criminal investigation in relation to his conduct, details of Pinochet's assets and financial records were uncovered. These were later linked with information obtained by the US during its post-September 2001 Senate Commission investigation into terrorism funding. These revealed the location of Pinochet's hidden assets. This ultimately resulted in the house arrest of Pinochet in Santiago, on fraud and embezzlement charges, which continued until his death in 2006. As a consequence of the investigation, which identified how the US Riggs Bank continued to provide Pinochet with his money one $50,000 cashiers cheque at a time, Pinochet's assets were frozen.[521] This demonstrates how the exercise of universal jurisdiction can have a broader impact on ending impunity when dealing with conduct that has otherwise been

[520] Andrew Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10(2) *European Journal of International Law* 237–277.
[521] See Garces interview during the Garzon interview (n 487).

protected as a consequence of the political institutions surrounding that conduct, particularly in relation to dictatorial or failed states.

The cooperation between the US Senate Commission and the ongoing Spanish Court of Justice process resulted in this money being distributed across thousands of families whose relatives were identified as being 'disappeared' by the Pinochet regime. Further, this action, coupled with the Chilean trial regarding his fraud and money laundering offences, resulted in genuine reconciliation being more readily achieved in Chile. The tangible outcome was the end of a general amnesty issued by the Chilean president regarding the actions of the military.[522]

Although the case was alleged to represent an 'advancing of accountability for serious crimes under international law',[523] arguably, it brought with it a level of attention to Spain's use of universal jurisdiction that ultimately presaged its demise. Following the activism of Garcon, Spain's socialist government amended its universal jurisdiction laws, which had previously been in effect since 1985. The amendments limited the use of the jurisdiction to cases involving Spanish victims (or a similar 'traditional' jurisdictional nexus is satisfied), arrests occurring in Spain, and clarification of no competing trial of the matter in another state.[524]

In addition to Pinochet, Spain has successfully been furthering the fight for impunity in relation to heinous acts that states would not otherwise seek to punish. However, eventual overreach of investigating judges led to changes to the domestic legislation that would otherwise allow for the ongoing institution of proceedings in Spanish courts for international crimes.

After the eventual demise of Garzon's use of his judicial investigative role, and his resignation following attempts to investigate the Spanish Civil War and reopen the annals of Spanish history,[525] universal jurisdiction lost its champion and high ground in Spain. Further, the Spanish court was being used as a de facto international court for public interest advocacy groups, with unsuccessful attempts to arrest US officials

[522] Helen Zuber, 'Spain's World Court May Be Restricted', on Global Policy, *Spiegel Online,* (2 June 2009) <globalpolicy.com>.
[523] Madeleine Davis, 'Externalized Justice and Democratization: Lessons from the Pinochet Case' (2006) 54(2) *Political Studies* 245.
[524] Zuber (n 498).
[525] Naomi Roht-Arriaza, 'The Spanish Civil War Amnesty, and the Trials of Judge Garzon' (2012) 16 *American Society of International Law* 24.

for their involvement in Iraq conflicts,[526] Chinese authorities responsible for alleged atrocities regarding the Tibetan people,[527] and Israeli heads of state and military officials for targeted killings.[528] While the ongoing trials for less politically risky contexts—such as Salvadorian military personnel responsible for the massacre of Jesuit priests—continue, the use of the Audencia Nacional as a substitute international court was ceased by the Spanish government in 2006. In his publications on the release of Pinochet by the UK, human rights activist Geoffrey Robertson QC noted that in the case of Pinochet, justice lost out to diplomacy.[529] Arguably, the universal jurisdiction regime in Spain equally lost out.

5.5.2 The United Kingdom

The use of the universal jurisdiction crimes legislation in the UK has had limited successes, such as the jailing of a former Afghan 'warlord' for torture and crimes against humanity. However, such prosecutions were low in political risk, as they coincided with cooperation with the host state, in this case President Karzai, being consulted in relation to this during his visit to London at the time of the conviction.[530]

In the UK, the 'Livni incident' deeply embarrassed the British government, prompting suggestions that the law would change so that universal jurisdiction complainants could not bring their complaints directly to court. Rather, the Attorney-General or Director of Public Prosecutions should be the gateway for such private prosecutions.

The UN Fact-Finding Mission on the Gaza Conflict produced the Goldstone Report, which concluded that both Hamas and the Israeli Government committed war crimes during the rocketing and bombing campaign of December 2008 on the Gaza Strip.[531] Relying on the contents of this report, a request was made to UK prosecutors to issue an arrest warrant for former Foreign Minister Tzipi Livni for those alleged war crimes

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[526] Stewart Patrick, 'Spain's Welcome Retreat on Universal Jurisdiction', *Council on Foreign Relations Blog* (Web Blog, 14 February 2014) <https://www.cfr.org/blog/spains-welcome-retreat-universal-jurisdiction>.
[527] Ibid.
[528] Weill (n 457).
[529] Jennifer Byrne, 'Interview with Geoffrey Robertson', *World in Focus: Foreign Correspondent,* (16 February 1999) <http://www.abc.net.au/foreign/stories/s70237.htm>).
[530] Mevlut Katic, 'Former Afghan Warlord', *Euasianet*: *Global Policy Forum* (20 June 2005) <https://www.globalpolicy.org/intljustice/universal/2005/0720afghan.htm>.
[531] *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, United Nations Human Rights Council.

when she was visiting the UK to attend a conference.[532] A warrant was issued on 12 December 2009 at the request of lawyers acting for victims of the Gaza conflict. It was promptly withdrawn two days later once it was realised that Livni was not in the UK; she had cancelled her visit based on notice of the warrant being issued.[533] Israel condemned the action and considered it damaged the potential Middle East peace talks by limiting the ability for Israeli politicians to travel to engage in such negotiations. The ability for private citizens to commence such politically impactful international criminal proceedings relying upon universal jurisdiction caused embarrassment for the UK, which immediately engaged in diplomatic efforts to apologise for the issue of the warrant. It changed the legislative authority to commence criminal warrants based on private complaints.

The suggestions made following this incident were subject to strong opposition by the British Parliament and NGOs.[534] The eventual outcome of this pressure was a change to the authority for an application to commence proceedings under universal jurisdiction. Director of Public Prosecutions consent was now required before the issue of any arrest warrant.[535]

This 2011 change was followed by further restriction to the *Genocide Act* in the UK in 2016, requiring some kind of connection to the UK before commencing an action.[536] These changes represent the balancing—some would say in deference to diplomacy rather than justice—between political risk and acting against serious criminal offences. The UK's actions in relation to the use of universal jurisdiction have largely been marked by political risk rather than the influence of other gaps in the enforcement regime.

The support for the extradition request of Pinochet, in response to a Spanish arrest warrant seeking his extradition pursuant to their domestic universal jurisdiction, is perhaps the most contentious use of 'universal jurisdiction' by the UK in the

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[532] Ian Black, 'Tzipi Livni Arrest Warrant Prompts Israeli Government Travel "Ban"', *The Guardian* (online, 16 December 2009) <www.theguardian.com/world/2009/dec/15/tzipi-livni-arrest-warrant-israeli>.
[533] BBC Online, 'Fury at UK Attempt to Arrest Tzipi Livni', *BBC* (online, 15 December 2009) <http://news.bbc.co.uk/2/hi/middle_east/8413234.stm>.
[534] Dan Izenburg, 'Universal Jurisdiction Victory in Spain but Battle Goes On', *The Jerusalem Post* (online, 21 April 2010) <www.jpost.com/Landed Pages/Print Articles.aspx?id=173480>.
[535] Kenneth Clarke QC, *Universal Jurisdiction* (Media Release, 15 September 2011) <https://www.gov.uk/government/news/universal-jurisdiction>.
[536] Michael Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford University Press, 2017).

contemporary era. The appeal of the original Bow Street magistrate's decision to approve the arrest warrant resulted in the finding by a slim majority of the English High Court that a former head of state does not have immunity with respect to crimes against humanity, torture or genocide, despite the existence of immunities connected to their office or duties as head of state.[537]

However, when analysing the judgment of the Bow Street magistrate, it is apparent that the extradition proceedings were not based on grounds of universal jurisdiction. Rather, they were a result of a consideration of the extradition obligations placed on the UK. Two provisional arrest warrants were issued against Pinochet at the request of the Spanish Audencia Nacional (see Section Spain).[538] The warrants were issued due to the UK's domestic incorporation of the *European Convention on Extradition*.[539] Both were rejected on appeal by the Divisional Court of the Queen's Bench: the first for being a crime that was not the subject of the UK *Extradition Act*, and the second on the basis that Pinochet had immunity from these acts on the basis that they were official acts performed in his capacity as head of state.[540] However, the quashing of the second warrant was stayed and subject to appeal to the House of Lords, where the issue of head-of-state immunity was determined.

There was a *prima facie* offence for which Pinochet was answerable, and one that the UK had a domestic obligation to enforce under its various international human rights treaty obligations. However, the response of the UK magistrate, and subsequently the appeal of this decision to the Queen's Bench, related to the incompatibility of the request with Pinochet's status as a head of state.

The House of Lords held, by a majority of six to one, that Pinochet was not entitled to immunity for acts of torture or genocide.[541] There has been extensive literature analysing the House of Lords' decision.[542] The critical distinction regarding the impact

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[537] (n265).
[538] The first was issued by Nicholas Evans, Metropolitan Stipendary Magistrate, on 16 October 1998, relating to the murder of Spanish citizens in Chile. The second related to allegations of conspiracy to commit acts of torture, hostage-taking and conspiracy to murder, by Stipendary Magistrate Ronald Bartle. See n 255.
[539] *European Convention on Extradition,* opened for signature 13 December 1957, ETS 24 (entered into force 18 April 1980); incorporated in the UK by the *European Convention on Extradition Order 1990* (SI 1507 of 1990) as amended.
[540] *R v Bow Street Stipendary Magistrate and others, ex parte Pinochet Ugarte* (n 265).
[541] Ibid.
[542] See in particular Hazel Fox, Colin Warbrick and Dominic McGoldrick, 'The Pinochet Case No 3' (1999) 48(3) *The International and Comparative Law Quarterly* 3, 687-–702; and Nehal Bhuta,

of this decision in relation to the applicability of universal jurisdiction is that the basis for the arrest warrant being upheld was the House of Lords' reliance on the applicability of the provisions of the UK *Extradition Act.* This act required that the alleged offence constitute an offence in both the UK and Spain at the time of the alleged conduct. That is, the issue did not turn upon the *jus cogens* nature of the alleged offending, or when acts such as torture were recognised as universal jurisdiction offences under international law. Rather, it related to when such conduct was explicitly outlawed in a domestic statute in the UK for the purpose of dual criminality requirements.[543] Consequently, the Home Secretary issued an authority to proceed with the extradition proceedings connected to the offences listed on the second arrest warrant.[544]

Further, the Pinochet extradition serves as a prescient example of the lack of obligation implied in the enforcement of universal jurisdiction offences and the most relevant concern regarding the enforceability of universal jurisdiction: the ability of the government to influence how courts apply domestic criminal jurisdiction by enacting defeating legislation. Despite the authority to proceed with extradition, Pinochet remained in the UK under house arrest for 16 months before being permitted to return to Chile, without enforcement of the arrest warrant. Then-Home Secretary Jack Straw announced immediately after the departure of Pinochet's flight to Chile on a Chilean military plane from a Royal Air Force Base, that due to failing health, and a subsequent 'memory deficit', the general was unfit to stand trial.[545] Straw wrote to the Spanish mission that Pinochet 'would be unable to follow the process of a trial sufficiently to instruct counsel' and cited medical tests conducted earlier that year as the basis for this decision. Despite immediate objections made by Spain, France, Belgium and Switzerland, and requesting the medical tests be sent to their governments for analysis,

'*R v Evans and Bartle; Ex Parte Pinochet* Justice without Borders? Prosecuting General Pinochet', (1999) 23(2) *Melbourne University Law Review* 499.

[543] See the judgment of Lord Millett, dissenting in this respect by maintaining that UK courts should have jurisdiction over acts of torture from the date that they were recognised under international law: *Pinochet* (n 255).

[544] 'Back to Jack', *The Daily Telegraph* (London, 27 March 1999); 'UK Gives the Go-Ahead to Pinochet extradition case', *The Financial Times* (London, 16 April 1999); Robert Stevens, *The English Judges: Their Role in Changing the Constitution* (Hart Publishing, 2005) 110.

[545] Nicholas Watt, 'Pinochet to be Set Free', *The Guardian* (online, 12 January 2000) <https://www.theguardian.com/world/2000/jan/12/pinochet.chile3>.

the manner in which Pinochet was returned to Chile prevented them from challenging the decision.[546]

Thus, it is apparent that the interaction between the judicial and the executive arms influenced the commencement of universal jurisdiction offences to be tried in third-party states when there is an opportunity to prosecute a person for alleged universal jurisdiction offences. Spain, in this case, was subject to the discretion of the UK's government officials. Further, the enforcement of universal jurisdiction offences by Spain was subject to the limitations of the UK's domestic criminal procedure—and the discretion provided to the Home Secretary—even when the actions were supported by that state's highest judicial body.

Despite criticism for being part of a ploy to detract from Israel's capacity to meaningfully engage in peace talks,[547] the outcomes of the UN fact-finding mission into Operation Cast Lead—the bombing of Gaza by Israeli artillery—ultimately resulted in the issuance of arrest warrants against Shimon Peres, Livni, Ehud Olmert and Ehud Barak by the UK in 2008.[548] The UN fact-finding mission reported that the Operation caused unnecessary civilian casualties and breached the customary humanitarian law principle of proportionality.[549] The findings were sufficient for the ICC to commence an investigation into the alleged incidents.[550]

The UK Director of Public Prosecutions had received private requests for the issuance of an arrest warrant for Livni's involvement in this Operation, ostensibly for war crimes under the UK's *War Crimes Act* and invoking universal jurisdiction.[551] On two

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[546] Warren Hoge, 'After 16 Months of House Arrest Pinochet Quits England', *The New York Times* (online, 3 March 2000) <http://www.nytimes.com/2000/03/03/world/after-16-months-of-house-arrest-pinochet-quits-england.html>.
[547] Lenny Roth, 'Lawfare—A Menace to the Jewish State', *Washington Jewish Week* (online, 23 June 2011) <https://www.highbeam.com/publications/washington-jewish-week-p61798/june-2011>; Tamara Cofman Wittes, 'Israel Imperilled: An Overview of Threats to the Jewish State', *Lawfare* (Blog Post, 6 May 2016) <https://www.lawfareblog.com/israel-imperiled-overview-threats-jewish-state>.
[548] Sherwood (n 523).
[549] Human Rights Council, *Human Rights OHCHR, Report on the United Nations Fact Finding Mission on the Gaza Conflict', Human Rights in Palestine and Other Occupied Arab Territories,* 12th sess, item 7, UN Doc A/HRC/12/48 (25 September 2009).
[550] Ron Friedman, 'Experts Say Goldstone's Retractions Won't Change Legal Realities', *Jerusalem Post* (online, 4 April 2011) <http://www.jpost.com/Diplomacy-and-Politics/Goldstones-retractions-wont-change-legal-realities>.
[551] Harriet Sherwood, 'Israeli Minister Tzipi Livni Given Diplomatic Immunity for Visit to UK', *The Guardian* (online, 14 May 2014) <http://www.theguardian.com/world/2014/may/13/israel-tzipi-livni-diplomatic-immunity-uk>.

separate occasions, the Director of Public Prosecutions had arrest warrant requests submitted through private complaint, although no warrants were issued.

Former-Minister Livni cancelled her first visit planned to the UK in 2011 due to concerns that an arrest warrant might be issued during her visit. On her second visit in 2014, the British government issued former-Minister Livni 'special mission' status on her visit to meet with the Foreign Office in London in May 2014 to 'avoid confusion' and enable her to attend foreign ministry meetings linked to her duties as a serving Israeli politician.[552] The details of what 'special mission' status actually means and how it was granted was withheld by the UK Government on the basis that such information related to diplomatic activities. Some suggested that as the visit concerned facilitation of talks with Palestinian government officials, this supported the broader political interests of diplomatic activity over concerns for justice.[553]

In both of these high-profile cases, the ultimate outcome in relation to obtaining justice for universal jurisdiction offences has been the reversal or cancellation of action due to political concerns. The enforcement of universal jurisdiction offences affecting political relationships were ostensibly the reason for the amendment to UK law relating to the authority to issue arrest warrants under the *Police Reform and Social Responsibility Act*. This act necessitates that any actions purportedly relying on universal jurisdiction must first obtain the consent of the Director of Public Prosecutions. This change was claimed to have been enacted to ensure that 'the UK's justice system can no longer be abused for political reasons'.[554]

In speaking of the proposed amendments to the UK legislation, British Prime Minister Gordon Brown stated that the earlier cases in the UK indicated that their previous system was subject to 'significant danger' of 'being exploited by politically motivated organisations or individuals'. Further, the 'only question … is whether [their] purpose is best served by a process where an arrest warrant for the gravest crimes can be issued

[552] Sherwood (n 523). The existence of the arrest warrant was denied by the UK government, though some articles have referenced the warrant having been issued by a UK magistrate through a private application, hence the government's ignorance of its existence. See Mark S Ellis, 'Peace for All of Justice for One?', *International Herald Tribune* (online, 12 August 2011) <http://www.nytimes.com/2011/08/12/opinion/12iht-edellis12.html>.
[553] Ellis (n 524).
[554] Jonny Paul, 'UK Amends Law Exploited by Activist to Target Israeli Officials Over "War Crimes". Cameron Delivered on his Pledge, Ambassador Gould Says', *Jerusalem Post* (online, 16 September 2001) <http://www.jpost.com/Diplomacy-and-Politics/UK-amends-law-to-protect-Israelis-from-prosecution>.

on the slightest of evidence'.[555] However, the issuance of any arrest warrant under the UK domestic legal system requires that the magistrate consider the evidence and determine whether a *prima facie* case exists. The suggestion that the issuance of warrants does not adhere to this basic procedural requirement, represents an obvious difficulty in the attitudes of the state to the application of universal jurisdiction domestically. Here, Prime Minister Brown implied that there would be overarching political imperatives for the issuance of such a warrant that ignored the underpinning legal standard for judges to apply across its domestic jurisdiction, which incorporates international crimes. The changes to the UK legislation were allegedly made 'amid intense pressure from the US and Israel',[556] raising the question as to when a state can displace the enforcement of prescribed offences, supported by international legal obligations, in deference to political concerns.[557]

5.5.3 The United States

The US Constitution allows for the blocking of state enactment of penal statutes with extraterritorial application if that enforcement may conflict with the foreign relations of the US.[558] This principle is rarely relied upon, as states are reticent to apply criminal jurisdiction without a traditional jurisdictional nexus. Examples have demonstrated a revision of state authority to conduct criminal trials in county or district courts where offences have lacked a traditional nexus with the prosecuting state.[559] Further, the US Constitution allows for intervention by federal courts in the application of universal jurisdiction should a foreign nation complain about the assertion of territorial legislation and adjudicative powers within the US.[560]

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[555] Damien McElroy and Tom Whitehead, 'Gordon Brown to Stop Courts Issuing Arrest Warrants for Foreign Officials', *The Telegraph* (online, 3 March 2010) <http://www.telegraph.co.uk/news/politics/gordon-brown/7362228/Gordon-Brown-to-stop-courts-issuing-arrest-warrants-for-foreign-officials.html>; Andrew D Mitchell, ' Leave Your Hat On? Head of State Immunity and Pinochet' (1999) 25(2) *Monash University Law Review* 251.
[556] Ibid.
[557] Afua Jirsch 'Legal Affairs Correspondence: Hague Moves Quickly to Scrap International Crime Trials in UK', *The Guardian* (online, 31 May 2012) < https://www.theguardian.com/law/2017/dec/20/former-yugoslavia-war-crimes-tribunal-leaves-powerful-legacy-milosevic-karadzic-mladic>.
[558] *United States Constitution,* art 1, s 10, cl 3 and cl 18; see Colangelo (n68) at 136–151.
[559] *People v Buffu*, 40 Cal 2d 709, 256 P.2d 317 (1952); *People v Duffield*, 387 Mich 300, 197 NW 2d 25 (1972); *State v McCormick*, 273 NW 2d 624 (Minn 1978) cited in George Jnr, n 401; William Wirt Blume, 'The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue' (1944) 43 *Michigan Law Review* 59.
[560] *United States Constitution*, art 1, s 10, cl 1, 3; *Restatement of Foreign Relations Law of the United States* (revised) s 131(3) (Trent Draft No 1, 1980).

The US government has supported the application of extraterritorial jurisdiction in its so-called 'war on drugs'. In this 'war', the US has been accused of conducting international abductions,[561] in the same fashion as Israel. The most notable of these cases was the abduction of Humberto Álvarez Machaín for involvement in the alleged murder of a Drug Enforcement Administration (DEA) agent.[562] In particular, he was accused of extending the DEA officer's life so that his torture could be prolonged. In this case, although the resultant criminal outcome in the controversial trial was an acquittal for lack of evidence, the 'Ker-Frisbie doctrine' was reinforced. The 'Ker-Frisbie doctrine' maintains that a criminal defendant may be prosecuted in US courts regardless of how they were transported there.[563] This indicates that US courts support the principle that if a person is illegally abducted to be brought before them, this is not an issue that will be contemplated by the courts when considering guilt.[564] Echoing the reasoning of the Israeli Supreme Court in *Eichmann*, this decision reinforces that the political enforcement of offences, through bringing an accused to trial, is considered an action of the state and thus is beyond the reach of the judiciary.

Again, this conduct sits starkly against the US's increasing involvement in state-sponsored kidnapping. *United States v Alvarez-Machain* de facto approved this conduct over three decades ago in relation to US law enforcement. This case was touted as damaging to the US's standing as a 'moral leader of the Law of Nations' as well as being damaging to its long-term law enforcement interests.[565] The US's response to these criticisms was to dismiss them, despite the UN Commission on

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[561] Michael E Tigarand Austin J Doyle Jnr, 'International Exchange of Information in Criminal Cases' (1983) 4 *Michigan International Law Journal* 61–84.

[562] For background see *United States v Alvarez Machain* (91–712) 504 US 655 (1992).

[563] *Ker v Illinois* (1886) 199 US 436, specifically, that 'such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court'; *Frisbie v Collins* (1952) 342 US 519 (1952) applying *Ker*.

[564] In the cases of *Ker v Illinois* and *Frisbie v Collins* (n 534), the US court supported that the presence of the accused before the court is not relevant for consideration when contemplating the illegality of the acts before it. Although the basis for these trials did not relate to universal jurisdiction offences, and there were complicating *lex specialis* considerations at play (such as the application of criminal offences conducted during a time of war), these cases support the proposition that unlawful renditions and abductions do not prevent the ongoing conduct of a trial under US law. See Jacques Semmelman, '*United States v Alvarez-Machain*' (1992) 86(4) *The American Journal of International Law* 811–820; Mark S Zaid, 'Military Might Versus Sovereign Right—The Kidnapping of Dr Humberto Alvarez-Machain and the Resulting Fallout' (Spring 1997) 19 *Houston Journal of International Law* 3.

[565] Michael Abbel, 'The Need for US Legislation to Curb State-Sponsored Kidnapping' in Richard Atkins (ed), *The Alleged Transnational Criminal, The Second Biennial International Criminal Law Seminar* (International Bar Association Series, 1995).

Crime Prevention and Criminal Justice in Vienna being concerned with this issue, and supporting the cessation of this conduct.[566]

Although an example of competing interests with respect to forum selection, the case of Alverez-Machain also demonstrates the impact of political considerations in these kinds of prosecutions. *Machain* was determined on an implicit authorisation for Alvarez-Machain's abduction, premised on the absence of reliance on the extradition treaty between the US and Mexico. This is problematic at international law, as this analysis undermines one of the basic tenets of sovereign integrity found in the *Lotus Case*:

> first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its powers in any form in the territory of another State.[567]

In this case, Alvarez-Machain was wanted for extremely serious crimes committed in Mexico as part of a narcotics racketeering enterprise. Alvarez-Machain was forcibly removed from his workplace in Mexico and transported to, and detained in, the US for trial.

This case represents one of the most difficult issues facing states wishing to prosecute international criminals if the prosecution will continue: *male bene detentus.* Specifically, that a person wrongly captured but properly detained can be tried without prejudice, despite their presence being obtained through unlawful means. The application of the authority to challenge the unlawful abduction has been held by the US as belonging 'to the Government from whose territory he was wrongly taken'.[568] Moreover, this represents the height of US hypocrisy in relation to its staunch rejection of the jurisdiction of the ICC, and its limited approach to the application of universal jurisdiction only to civil redress.

This also sits in stark contrast to its application of the universal jurisdiction doctrine. While there remain bases under US domestic law to prosecute those guilty of international crimes, there is a differing standard applied to its own citizens. The corollary to the US's use of extraterritorial jurisdiction as a tool to support its 'war on

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[566] Hermann F Woltrin and Joanne Greig, 'State-Sponsored Kidnapping of Fugitives: An Alternative to Extradition?' in Richard Atkins (ed), *The Alleged Transnational Criminal, The Second Biennial International Criminal Law Seminar* (International Bar Association Series, 1995).
[567] *The Lotus Case* (n 69*)* 18.
[568] *Ker v Illinois* (n 534).

terror' and 'war on drugs', is that it US adopts an isolationist approach to extraterritorial jurisdiction when responding to allegations of criminal conduct by its own officials. Controversially, the US is not a signatory to the *Rome Statute*. Most issues raised by the US delegation during the negotiations related to the span and extent of the authority of the Court to deal with its own nationals, and further, the possibility of misuse of the Court's jurisdiction for ulterior political purposes.

As a permanent member of the UN Security Council, the US will remain in a position to veto any UNSCR that may place any of its citizens at jeopardy of arraignment by the ICC. However, it does not have any authority to deal with its citizens who are in another state, and who may be charged with universal jurisdiction offences. In 2003, a bill was tabled in Congress: *Universal Jurisdiction Rejection Bill.* This Bill sought to reject the application of universal jurisdiction upon any person in the US. This even extended to avoid any *Mutual Legal Assistance Treaty* obligations that may otherwise have been required of it if the assistance requested was associated with a 'universal jurisdiction act'.[569] While the Bill ultimately did not pass, it articulated the concerns of Congress in relation to the operation of universal jurisdiction with regard to its citizens and government officials. The preamble to the Bill outlined the concerns regarding the politicisation of acts, stating that universal jurisdiction represents 'an assault on the internationally recognized principle regarding the inadmissibility of prosecution under ex post facto legislations'. Further, it amounted to an 'assault on the internationally accepted concept of state sovereignty' due to the lack of connection between alleged offending and the prosecuting state.[570] In particular, the Bill relied on the examples of the use of universal jurisdiction by Belgium under its *Anti-Atrocity Law* of 1993, against Israel's Prime Minister Ariel Sharon and in regard to the suit filed in Belgian courts against then-President George W Bush, then-Vice-President Dick Cheney, Secretary of State Colin Powell and General Henry Schwarzkopf in relation to their involvement in the 1991 Persian Gulf War.[571]

In US Supreme Court case *Hamdan v Rumsfeld*, it was held that Common Article 3 of the 1949 *Geneva Conventions* applied to detainees captured in the 'war on terror' and thus to the Guantanamo Bay detainees.[572] The US Congress took measures to prevent

[569] HR 2050, 108th Congress, 1st sess, *Universal Jurisdiction Rejection Act of 2003* (US).
[570] Ibid.
[571] Ali Dayan Hasan, 'The Shrinking World of George W Bush', *The Express Tribune* (online, 11 August 2011) <https://tribune.com.pk/story/229312/the-shrinking-world-of-george-w-bush/>.
[572] *Hamdan v Rumsfeld* 548 US 557 (2006).

the application of its criminal jurisdiction in relation to offences that occurred off US soil.[573] This was achieved through the connection to the US through the protective principle being bolstered by the ongoing declaration by the US that it was in an ongoing conflict. Thus, the 'War on Terror' enables the *lex specialis* of the laws of armed conflict to continue to apply to its conduct in this regard. Since the *Military Commissions Act 2006* forbids the invocation of the *Geneva Conventions* when executing a writ of *habeus corpus* or other civil suits,[574] the US has taken active steps to limit the jurisdiction applicable to actions undertaken by the military or government officials relating to their conduct in and around armed conflict.[575] The impact of these actions in relation to the development of universal jurisdiction is that the US legal system continues to selectively apply the rules of international law to suit its domestic political interests.

The most concerning example of the influence of international relations power in the curbing of universal jurisdiction can be observed in the pressures that the US openly exerted against Belgium at the height of its use of the doctrine. Some claim the amendment of the legislation was the direct result of the political tactic of US threats to withdraw financial support for the Northern Atlantic Treaty Alliance Headquarters building in Brussels.[576] This pressure immediately coincided with Belgian courts accepting a number of complaints relating to the conduct of US officials who could then be tried in absentia under the Netherlands's universal jurisdiction laws (see Section 5.5.3).

Diplomacy by the US has consistently sent the message that US citizens should only be prosecuted by US authorities. This position has been consistently reflected in the reservations of non-participation of the US in international and regional agreements pertaining to the internationalisation of international criminal law. Henry Kissinger,

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[573] Linda Greenhouse, 'Supreme Court Blocks Guantanamo Tribunals', *The New York Times* (online, 29 June 2006) <http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html?mcubz=0>.
[574] HR 6166 *Military Commission Act 2006* (US).
[575] The executive order establishing Guantanamo Bay was originally reliant upon a 1942 Executive Direction signed by President Roosevelt in relation to German spies living in the US (see *Ex Parte Quirin*, 317 US 1 (1942) 63 S Ct 2; 87 L Ed 3; 1942 US LEXIS 1119), compared to the Guantanamo Bay system, which was noted by the American Bar Association as being a case that should support the contention that those in Guantanamo Bay should be entitled to rights to appear before courts, as opposed to the attempts by the Bush Administration to use it as a justification for detention.
[576] See Section 5.5.6; Human Rights Watch, 'Belgium: Universal Jurisdiction Law Repealed', *Human Rights Watch* (online, 8 January 2003) <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>.

former US Secretary of State, made clear the realpolitik concerns with the application of the doctrine of universal jurisdiction in contrast to Kenneth Roth's response. Kissinger claimed universal jurisdiction amounts to a 'dictatorship of the virtuous', whereas Roth labelled these claims as 'overblown' on the basis that Kissinger's focus on the political use of the jurisdiction entirely ignores the basis of the use of the jurisdiction in the first place—which is grounded in bringing to justice people who have committed egregious criminal offences that would otherwise be protected by misuse of political processes based upon perpetrator's positions of relative power.[577]

In this piece, Kissinger affirmed that the practice of universal jurisdiction was an affront to sovereignty and prone to political manipulation by states or third parties who disagree with the hegemon's use of power.[578] In dealing with extradition requests, such as the request by the Bosnian government to extradite former Ambassador Muhamed Sacirbey for 'financial irregularities', the US Court of Appeals for the Second Circuit noted in passing that even if Serbia were to issue an arrest warrant, 'for no reason at all', the US Department of State may decline extradition on grounds of his US citizenship.[579]

Several attempts have been made by international advocacy groups to have former-President Bush held to account for atrocities committed at his behest as President and Commander-in-Chief of the US Armed Forces. In 2001, the Center for Constitutional Rights announced its plans to file criminal complaints against him in Switzerland, when President Bush was scheduled to appear at a speaking event.[580] The Swiss enactment of domestic legislation of its obligations under the *Convention Against Torture* required the presence of the accused before proceedings could commence. Hence, the trip was cancelled.[581]

The French issuance of criminal complaints for an arrest warrant for former US Secretary of Defense Donald Rumsfeld and other high-ranking US officials (for their

[577] Roth (n 13); see discussion of Kissinger and Roth's arguments (n15).
[578] Kissinger (n 14).
[579] The extradition request was primarily rejected on grounds that the US did not recognise the jurisdiction of the Federation Cantonal Court in Sarajevo: 2009 US App LEXIS 26848, 49, cited in 'Second Circuit Finds Former Bosnian Ambassador to United Nations Not Extraditable' (2010) 104 *The American Journal of International Law* 123–124.
[580] Hasan (n 542).
[581] Kanya D'Almedida, 'US No More Immunity for George W. Bush—Abroad at Least', *Global Information Network* (7 February 2011) <http://www.ipsnews.net/2011/02/no-more-immunity-for-george-w-bush-ndash-abroad-at-least/>.

roles in the unlawful treatment of detainees in US-run facilities in Iraq), and the subsequent unlawful abduction of those classified as 'unlawful combatants' to the US offshore detention processing facility centre Guantanamo Bay, set the US diplomatic machine into action. A complaint lodged with the Paris District Prosecutor contained allegations relating to Iraqi citizens and a French citizen who had been held in Iraq. The General Prosecutor of Paris dismissed the appeal of the complainants—the European Center for Constitutional and Human Rights (ECCHR), Bourdon & Forestier, International Federation for Human Rights (FIDH), French League for Human Rights and the Center for Constitutional Rights. This dismissal was based on Rumsfeld's immunity from the acts of torture, which occurred during his period of office as the US secretary of defense.[582]

Equally, in response to the similar German criminal complaint filed against Rumsfeld regarding alleged endorsement of torture against Iraqis held in US-run detention facilities in Iraq, the US made several statements regarding the suit being 'frivolous' and likely to affect German–US relations.[583] Although the Federal prosecutor dropped the case the day before Rumsfeld's scheduled appearance at an event in Germany, Rumsfeld cancelled his attendance in an apparent act of caution.[584]

Separately, the US indictment of former Liberian President Charles Taylor's son, Charles Taylor Junior (Jr), under a domestic criminal law, represents somewhat of a change in the US's otherwise staunch objection to the expansion of universal jurisdiction to enable domestic courts to criminally prosecute persons for acts committed outside that state's jurisdiction. The *Extraterritorial Torture Statute* is a unique expansion of criminal legislation in the US. It created criminal liability for a person in the US who had committed an act without any connection to the US. In particular, the statute prohibits torture and creates legislative authority to punish not only US citizens, but also non-citizens present in the US.[585] Although this statute has been in effect since 1994, it was not used until the 2006 indictment against Taylor Jr.

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[582] Centre for Constitutional Rights, '*Rasul v Rumsfeld'*, *Centre for Constitutional Rights* <https://ccrjustice.org/home/what-we-do/our-cases/rasul-v-rumsfeld>.
[583] Scott Lyons, 'German Criminal Complaint Against Donald Rumsfeld and Others' (2006) 10 *American Society of International Law* 33.
[584] Katherine Gallagher, 'Universal Jurisdiction in Practice' (2009) 7 *Journal of International Criminal Justice* 1087–1116.
[585] *The Extraterritorial Statute,* 18 USC 2340 and 2340A. Taylor Jr has been misreported as being a US citizen, consequent to his birth in Boston: 'Ex-Liberian Dictator Charles Taylors Son Sentenced to 97 years in US Jail', *The Telegraph* (online, 9 January 2009)

This statute is in clear contrast to the US approach to other crimes considered universally cognisable, such as war crimes, where the domestic legislation relating to these offences only allows for punishment if the alleged victim or perpetrator is a US national or member of the US armed forces.[586]

Taylor Jr was Boston-born, though he did not hold US citizenship. He was head of the Anti-Terror Unit when his father was President of Liberia. There were numerous allegations against him regarding unlawful killings, rape, abduction, child soldier recruitment, torture and other human rights abuses.[587] Taylor Jr was convicted and sentenced to 97 years' imprisonment for his actions. This trial was conducted concurrently to the trial of his father for war crimes before the hybrid Special Court of Sierra Leone (SCSL).[588] The trial itself was largely instigated as a consequence of evidence having been obtained through an earlier trial in the US of Taylor Jr for arms trafficking (where the offending had a traditional jurisdictional nexus to the US). In this case, numerous witnesses included accounts of their torture by Taylor Jr in their testimony.

In this case, the political risk of proceeding with the trial was minimal, noting that the offender was already in US custody. Further, the international community's stance on the Sierra Leone conflict was self-evident through the establishment of the Special Court. Arguably, acting against Taylor Jr had no potential political risks.

5.5.4 Israel

Since *Eichmann*, the Israeli experience with the application of universal jurisdiction has not lessened in controversy. However, more recently, Israel has labelled attempts to apply universal jurisdiction to it as acts of 'provocation' rather than the pursuit of international justice.

The *Mavi Marmara* incident occurred in 2010. It related to a number of Israeli Defense Force (IDF) personnel boarding the vessel *Mavi Marmara* 150 nautical miles offshore from the Gaza blockade. This was an effort to halt and divert the ship manned by anti-

<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/4210623/Ex-Liberian-dictator-Charles-Taylors-son-sentenced-to-97-years-in-US-jail.html>.
[586] *The Telegraph* (n 549).
[587] Elise Keppler, Shirley Jean and J Paxton Marshall, 'First Prosecution in the United States for Torture Committed Abroad; The Trial of Charles 'Chuckie' Taylor, Jr' (2006) *Human Rights Watch* <https://www.hrw.org/sites/default/files/related_material/HRB_Chuckie_Taylor.pdf>.
[588] *The Telegraph* (n 549).

Israeli activists seeking to deliver aid to Gaza. Israel claimed that the ship was smuggling weapons into Gaza and was a known supporter of terrorist organisation Hamas.[589] The outcome of this raid was the death of nine ship passengers—eight Turkish nationals and one US citizen—and calls by numerous states to hold Israeli to account for its use of excessive force.

The EU held emergency meetings to discuss the incident. Mass protests were held on the streets of Turkey, and then-UN Secretary Ban Ki Moon condemned the action. Several independent investigations were launched in addition to a UN investigation. The UN report, published in 2011, noted that the raid was 'justified', but the use of force that resulted in the deaths was deemed 'excessive'.[590]

Following the release of this report, representatives of the Comoros government—the flag state of registry for the *Mavi Marmara*—requested that the ICC investigate the incident. The complaint listed, among others, the Israeli President, Minister for Defense, Head of Intelligence and military commander responsible for the incident, and was co-signed by Cambodia and Greece. However, the ICC Prosecutor declined to investigate on the basis that the incident was not of sufficient gravity to enliven the Court's jurisdiction.[591] As an isolated incident, this application of the ICC Prosecutor's discretion was aligned with previous considerations of complaints, in which the alleged events were not of sufficient gravity to warrant ICC investigation.[592]

This appears to provide a ground for the application of universal jurisdiction. There is a prima facie case of a crime that falls within the remit of universal jurisdiction, specifically the war crime of attacking civilians, the crimes were recognised as having been committed (through an independent UN investigation) and the nation state of the accused (Israel) refused to act. Despite Israel issuing an apology to Turkey over the

[589] Breffni O'Rourke, 'Bloody Israeli Convoy Raid Sparks Fierce International Reaction', *Radio Free Europe/Radio Liberty* (1 June 2010), <http://www.rferl.org/content/Casualties_As_Israeli_Ships_Attack_Aid_Flotilla/2057229.html>.
[590] Sir Geoffrey Palmer et al, 'Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident' (September 2011) <http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf>.
[591] RT, 'ICC: Israel's Killing of 9 Gaza Flotilla Protesters "Not of Sufficient Gravity" for War Crimes Probe', *RT online* (6 November 2014) <https://www.rt.com/news/202643-icc-israel-war-crimes-flotilla/>.
[592] Note the PTC instructing OTP to search again and Appeal Court refusing to change the PTC view. Kevin Jon Heller, 'The Pre-Trail Chamber's Dangerous Comoros Review Decision', *Opinio Juris* (online, 17 July 2015) <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/>.

incident in 2011, there has still been agitation by activist groups outside Turkey in relation to the incident.

Consequently, several states have responded to the agitation of these groups seeking that those responsible be brought to justice. Turkey commenced a trial in 2012 against four of the military personnel involved in the incident. This was justified on the passive personality principle—the victims of the offences being Turkish citizens. Thirty-three relatives of the victims lodged complaints against them in the criminal court. The Istanbul 7th Court of Serious Crimes issued arrest warrants in May 2014 on the basis that the defendants, who were being tried in absentia, neither attended the trial nor responded to an invitation sent to them through the related Department of the Turkish Justice Ministry.[593] South Africa registered these arrest warrants for enforcement domestically, much to the chagrin of Israel, which perceived this as another example of 'lawfare' against the Israeli state.[594] 'Lawfare' is using the rule of law to undermine a political objective of another state.[595] Reporting in Ankara in May 2014 indicated that the Israeli state was engaged in discussion with Turkey to pay compensation for the deaths in exchange for the cessation of the prosecution against its soldiers.[596] The outcome of these trials has largely been observed in the impact on reconciliation between Turkey and Israel. Numerous reports have stated that relations were strained as a result of this incident and its aftermath.

An investigation was also conducted by the Spanish prosecutor in response to a complaint filed by activist groups. This commenced in 2010 and was put on hold in June 2015, as the investigation could not proceed further without the cooperation of the Israeli government and access to the accused. In 2015, Spanish Judge Jose de la Mata issued an arrest warrant for four of the military personnel involved in the incident

[593] 'Turkish Court Orders Arrest of Four Israeli Generals over Mavi Marmara', *Hurriyet Daily News* (online, 26 May 2014) <http://www.hurriyetdailynews.com/turkish-court-orders-arrest-of-four-israeli-generals-over-mavi-marmara-.aspx?pageID=238&nID=66979&NewsCatID=510.>
[594] Major General Charles J Dunlap Jnr, 'Lawfare Today: A Perspective', (Winter 2008) 146 *Yale Journal of International Affairs* 146.
[595] Times of Israel, 'South African Police Deny Issuing Arrest Warrants for Israeli Generals', *The Times of Israel* (online, 17 November 2015) <http://www.timesofisrael.com/south-africa-we-never-issued-arrest-warrants-for-israeli-officials/>.
[596] David Makovsky, 'Israel's Calculus for Reconciliation With Turkey', *The Washington Institute* (online, 1 July 2016) <http://www.washingtoninstitute.org/policy-analysis/view/israels-calculus-for-reconciliation-with-turkey>.

following the filing of a complaint by an activist group. The response by Israel was to engage with Spain in an attempt to have the warrants cancelled.[597]

Additionally, the Turkish parents of the 18-year-old Turkish–American killed in the raid (Furkan Dogan) sued former Prime Minister Ehud Barak in October 2015 in the US civil court in Los Angeles. This was despite the 2013 US Supreme Court ruling to limit the use of universal civil jurisdiction by foreigners—in this case, the use of Dogan's US citizenship to enable civil prosecution.[598] This case is ongoing, though is likely to be affected by head-of-state immunity considerations, and notably, will suffer the same challenges regarding enforcement of any monetary sentence. The arrest warrants remain registered in Turkey, South Africa and Spain.

5.5.5 Germany

The complaints in the German *Reichsgardt* against Rumsfeld in 2004, 2005 and 2006 were rejected by the prosecutor on the contention that the alleged offenders were not then in Germany, or intending to be. Further, a successful investigation would require international cooperation in Iraq and the US, and obtaining legal assistance in Iraq 'would prove to be futile'.[599] While many argue that these reasons merely supported the political abhorrence at prosecuting the former Secretary of Defense of a great power, the prosecutor's position does highlight the challenges of providing procedural fairness in trials in the absence of international cooperation.

The general rule of procedure in German courts requires that a prosecutor must proceed in relation to every offence for which they have knowledge and a factual basis for prosecution.[600] However, the legislation authorising use of universal jurisdiction in Germany creates a provision under which the prosecutor may discontinue proceedings

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[597] 'Spain Issues Arrest Warrant for Israeli Prime Minister Netanyahu over Deadly 2010 Flotilla Raid', *The Independent* (online, 17 November 2015) <http://www.independent.co.uk/news/world/europe/spain-issues-arrest-warrant-for-israeli-prime-minister-benjamin-netanyahu-over-2010-gaza-flotilla-a6736436.html>.

[598] 'Ex-Israeli PM, Ehud Barak, Sued over Flotilla Raid that Killed Turkish-American', *Aljazeera America* (online, 21 October 2015) <http://www.todayszaman.com/anasayfa_ex-israeli-pm-sued-over-flotilla-raid-that-killed-turkish-american_402204.html>.

[599] Centre for Constitutional Rights, 'German War Crimes Complaint Against Donald Rumsfeld et al (filed 14, 2006) and Decision of the Federal Prosecutor', *Center for Constitutional Rights* (online, (2006) <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-germany>; Florina Jessberger, 'Universality, Commentary and the Duty to Prosecute Crimes Under International Law in Germany' in Wolfgang Kaleck et al (ed), *International Prosecution of Human Rights Crimes* (Springer, 2007).

[600] Langer (n 28); Strafprozessordnung ['StPO'] [Code of Criminal Procedure] s 153c(3).

if it is assessed that the trial would be 'detrimental to Germany or other important interests'.[601]

The exception listed in relation to universal jurisdiction offences is aggravated by another exception, which allows the prosecutor to refrain from proceedings if the offender is not currently and is not expected to be in Germany.[602] There is also a connection between the prosecutor and the Minister for Justice in relation to the decision to proceed to prosecution in matters that relate to the part of the *Criminal Code* that deals with offences committed abroad. This is the universal jurisdiction offences relating to grave breaches of the *Geneva Conventions* or genocide. This provision provides power for the federal minister for justice to dismiss a case purely based on the offence having been committed abroad. This dismissal is not subject to review or appeal even in the event that a civil plaintiff, private prosecutor or complaining victim raises the matter.[603]

A demonstration of the opposite kind of political pressure is clear in the 2009 arrest of two Rwandan war crimes suspects, whose alleged crimes occurred in the Democratic Republic of Congo. These arrests were a result of pressure levied against Germany by the UN and the Rwandan government.[604] It represents the first use of the German *Code of Crimes Against Humanity* since its passage into legislature in June 2002, jurisdiction for which is based upon universal jurisdiction.

The trial of Ignace Muwanshyaka and Straton Musoni, the president and vice-president of the FDLR, commenced in Stuttgart on 2 May 2011, with widespread public support from NGOs such as Human Rights Watch.[605] They were accused of war crimes and crimes against humanity, being convicted by the German Oberlandesgericht with Murwanashyaka being sentenced to 13 years imprisonment, and Musoni to eight years

[601] Langer (n 28); StPO (n 570) s 152.
[602] Langer (n 28); StPO (n 570) s 153f(1).
[603] Gerichtsverfassungsgeretz (GVG) [Law on Constitution of the Courts] s 142 a, 120 (1)(8); StPO (n 570) 153c(5).
[604] Horand Knaup, 'Germany Arrests Rwandan War Crimes Suspects', *Spiegel Online*, 18 November 2009 <htttp://speigel.de/internatonal/world/0,1515,druck-66195,00.html>.
[605] Human Rights Watch, 'Groundbreaking Trail for Congo War Crimes', *Global Policy* (online, 19 September 2015) <www.globalpolicy.org/interntaional-justice/universal - jurisdition06031/50146>.

in prison. Murwanashyaka subsequently appealed his conviction, and prior to the retrial ordered by the German Federal Court, passed away in a German hospital.[606]

The reporting of this case identified the common misconception that the trial of war criminals such as these is based upon obligations under the *Rome Statute* forcing the application of universal jurisdiction on domestic courts.[607]

The most prevalent political application of the jurisdiction in Germany was in the attempted arrest and trial of US Secretary for Defense Rumsfeld for his involvement in the 2003 Gulf War (see Section 5.5.3). The investigation was not pursued in the first instance by German prosecutors because there was no indication that the US would not deal with the allegations in the complaint.[608] However, the complaint filed addressed this dismissal by stating the *Military Commission Act*, passed by the US Congress in 2006, 'effectively blocks the prosecution in the United States of those involved in detention and interrogation abuses of foreigners held abroad in American custody'.[609]

Ultimately, the German courts rejected the application because the courts could not support the exercise of their jurisdiction when US authorities had capacity to act on the matter. The basis of this rejection was that there had been no demonstration that the US was either unwilling or incapable of addressing the matter. Thus, the grounds on which to prosecute the criminal offending on their behalf (on the basis of universality) was absent. Following this failure, the advocacy group moved its focus to other European states with equivalent jurisdiction (in particular, the Netherlands, discussed in detail above).[610]

In 2004, a 181-page criminal complaint was filed on behalf of four Iraqi petitioners with the Karlsruhe Federal prosecutor. These petitioners claimed to have been tortured in US-run detention facilities in Iraq.[611] The response of the US in relation to this

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[606] TRIAL International, 'Ignace Murwanshyaka' (20 December 2018) <www.trialinteranational.org/latest-post/ignace-murwashyaka/>.
[607] Edwin Bikundo, 'The International Criminal Court and Africa' (2012) 23(1) *Exemplary Justice, Law and Critique* 21–44, 3.
[608] Adam Zagorin, 'Time, Charges Sought Against Rumsfeld Over Prison Abuse', *Global Policy* (online, 10 November 2006) <http://content.time.com/time/nation/article/0,8599,1557842,00.html>.
[609] According to Michael Ratner, president of the Centre for Constitutional Rights, who brought the legal action in Germany. See Ratner (n 14).
[610] See Section 5.2.1.
[611] A Fischer–Lescano, 'Torture in Ab-Ghraib: The Complaint Against Donald Rumsfeld under the German Code of Crimes against International Law' (2005) 6 *German Law Journal* 689.

criminal complaint is outlined in Section 5.5.3.[612] Following the 2004 complaint, a further complaint was lodged in 2006, and was again rejected on grounds that the US had not yet been shown to be unwilling or unable to deal with the allegations made against Rumsfeld.

These trials are related to different conflicts and reliant on differing legal bases. However, they demonstrate that while there is a seemingly strong support system in place for the prosecution of universal jurisdiction offences in Germany, the enforcement of this doctrine is influenced by additional, non-judicial considerations, such as the creation of further procedural limitations to the exercise of the jurisdiction. This creation arguably reconciles the political risk elements in utilising the jurisdiction, with the more strictly legal concerns of *non bis in idem* and *concursus delcitorum* by the creation of an assessment of likely future political hurdles in securing extraditions before the trial commences. This test could equally be criticised as supporting a diplomatic excuse to avoid upsetting international relations. In particular, this presupposes a requirement to seek leave or de-conflict jurisdiction with states with geographic or passive personality jurisdictional bases for the trial, which, as discussed in Section 5.3.3, does not exist in the current German universal jurisdiction regime.

5.5.6 Belgium

Belgium was the first European state to legislate universal jurisdiction for offences other than piracy. Further, it has been one of the more active countries in its application in contemporary times, enacting its universal jurisdiction in 1993.[613] Proponents of its use of universal jurisdiction point to the jurisdiction having been executed with 'exemplary non-discrimination'.[614] However, this period of activism was checked by the legislature, after eventual political pressure forced legislative change.

Reydam observed the Belgian experience in relation to universal jurisdiction over gross human rights and serious breaches of international law with scepticism. While promising the ending of impunity for gross human rights violations, the application of in absentia judgments fails to address alleged perpetrators' due process rights. Reydam's assessment of the fall of universal jurisdiction in 2010, in which he noted

[612] Ibid.
[613] Peter Weiss, 'Run Rummy Run', *Global Policy Forum* (8 December 2006) <https://www.globalpolicy.org/about-gpf-mm.html>.
[614] Ibid.

that the fall of the international legal 'zeitgeist' of universal jurisdiction was resultant on the principle's largely political nature, reinforces the fact that central to the effective use of the doctrine is the full support of the executive branch of government.[615]

The application of universal jurisdiction in Belgium has been marked with transformation typical of the jurisdiction: from the euphoric support for the doctrine in the interventionist era of the 1990s, to the quiet retreat from the doctrine reflecting the change in political will supporting the doctrine in Europe and internationally. The application of the doctrine in Belgium was touted by Ratner as a 'textbook case of the intersection of law and power in the international arena'.[616]

The Belgian application of the jurisdiction was the forerunner of the doctrine's contemporary development in Europe, even ahead of Spain and the UK. It started with the 2001 trial of the so-called 'Butare 4', four Rwandans accused of war crimes with no connection to Belgium, heralding the use of universal jurisdiction in Europe.[617] The application of universal jurisdiction in this case was generally accepted on a number of identified bases: the accused were present in Belgium during the investigation; the atrocities for which they were accused were severe; there was a strong prosecution case against them; the prosecution was deemed to be apolitical insomuch as there was no seeming 'taking sides' in a political conflict; and there was no political opposition to the prosecution, even by the Rwandan government.

The trial of the 'Butare 4' was considered by Belgium's Attorney-General as a discharge of Belgium's international duty 'not to tolerate the commission of barbarous acts such as war crimes'.[618] There were concerns that the broad application of the *Genocide Act* was too wide. These resulted in the swapping of the domestic courts' criminal deterrent considerations with international concerns.[619] Specifically, accusations were levelled against the prosecutor for using domestic courts as a platform to further political imperatives. This was the first case in the decline of the

[615] Luc Reydams, 'Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium' (2010) 44(3) *International and National Prosecution of Crimes Under International Law*; Reydams (n 9).
[616] Steven Ratner, 'Editorial Comment: Belgium's War Crimes Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888.
[617] Tom Ongena and Ignace Van Dale, 'Universal Jurisdiction for International Core Crimes: Recent developments in Belgium' (2002) 15 *Leiden Journal of International Law* 687–701.
[618] Ongena (n 618) 687.
[619] Ibid 688.

jurisdiction that eventually led to limiting the jurisdiction to require a link with Belgium, specifically through nationality or residence of the victim or accused.[620]

This amendment eventuated as a consequence of the political influence of numerous states, including the US. Subsequent cases relying on universal jurisdiction in Belgium were not as well supported, as the above cases did not properly fit the criteria to support a universal jurisdiction trial. The authority to utilise universal jurisdiction for genocide in Belgium is derived in Article 7 of the *Genocide Act*, which provides a method for the prosecution of acts of genocide, devoid of any traditional jurisdictional nexus to the state of Belgium.[621]

It was the *Yerodia* case that built upon the concerns raised since the trial of the Butare 4, which was the tipping point in Belgium's approach to universal jurisdiction. The failed *Yerodia* case highlights the challenges in applying universal jurisdiction in Belgium. The ICJ held that the international arrest warrant failed because Yerodia was immune from prosecution while he was a Minister of Foreign Affairs for the Congo; its issuance amounted to an internationally wrongful act, as Belgium had failed to grant the immunity and inviolability enjoyed by Yerodia at international law.[622]

Belgium's universal jurisdiction pursuant to the *Genocide Act* draws some of its authority from the *Geneva Conventions*. The application of the universality of the act is considered irrespective of the nature of the conflict in which the alleged offence occurred. This is otherwise a jurisdictional consideration of international humanitarian law when dealing with grave breaches pursuant to *Geneva Conventions* obligations.[623] Specifically, Article 7 mirrors the definition of genocide in the 1948 *Genocide Convention*; unlike the 1993 *Act on the Punishment of Grave Breaches of International Humanitarian Law* containing a similar provision for prosecution of genocide, it does not link the conduct to conflict.[624] However, the act attempts to incorporate the

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[620] Ratner (n 516) 888.
[621] Belgian *Genocide Act 1993,* Belgium *War Crimes Act 1993*, Belgian Official Journal "Loi du 16 juin 1993 relateive a la pression des infractions graves aux conventions internaitonales de Geneves du 12 aout 949 et aux orotocoles I et II due 8 juin 1977, additionanels a ces conventions, moniteur belge, 5 August 1993 at 17751".
[622] See *Arrest Warrants Case* (n 284) 57, 71; Section 7.3.2.
[623] See 'ICRC Commentary on Humanitarian Law: Geneva Conventions I, II, III and IV'; 'ICRC Commentary on Humanitarian Law: Additional Protocol I and II'. The distinction between international armed conflict and non-international armed conflict is a well-defined determinant in relation to the application of international humanitarian law and the characterisation of the war crime alleged. See Belgium *Genocide Act*, art 7.
[624] Roermer Lemaitre, 'Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities' (2000–2001) *Jura Falconis* 37, 255–282.

codification of crimes against humanity, which were otherwise not codified in international law. The key provision of the *Genocide Act* that supports the discharge of human rights for victims in pursuit of justice for serious criminal offences is their direct access to a prosecutor to request the commencement of an investigation, under Article 5. The impact of such a broad articulation of the jurisdiction is the ability for the commencement of trials to be significantly influenced by political considerations. This will now be discussed.

In the 1999 amendment to the *Genocide Act*, the Belgian Government sought to amend its application of the universal jurisdiction construct to prevent any state official claiming immunity for their actions while fulfilling official state functions.[625] In 2003, the US announced it would not support funding the NATO Headquarters building in Belgium unless Belgium rescinded its universal jurisdiction laws. The basis of the US complaints was then-Secretary of Defense Rumsfeld's claim that Belgium 'appears not to respect the sovereignty of other countries'. [626] The US was previously nonplussed about Belgium's use of universal jurisdiction in relation to the early cases brought against Ariel Sharon, Yasser Arafat and a number of other well-known international leaders. However, in 2003, when Norman Schwarzkopf, George HW Bush, Dick Cheney, Colin Powell and Tommy Franks were accused of war crimes in relation to their involvement in the Gulf War, the US position on this issue changed.

Ratner considered the resulting status of Belgium's universal jurisdiction as a win for the pragmatist and a loss for the idealist.[627] This somewhat pessimistic summary was tempered, however, with a suggestion that the changes in Belgium's laws relating to universal jurisdiction mean that those laws are still able to deal with cases of universality plus. This is because the presence of the accused in Belgium's territory supports the use of the doctrine. The original, widely scoped jurisdiction of the *Genocide Act* was 'scuttled' in deference to US pressure.[628] The subsequent changes to the Belgian law now require the presence of the accused in Belgium at the time of the trial.[629]

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[625] Proposition de loi relative a la repression du crime de genocide, en application de la Convention intenrationale pour la repression du crime de genocide du 9 decembre 1948, Doc Parl Senat 1998-1999 no 1-749/2, 5.
[626] Martin Dixon, Robert McCorquodale and Sarah Williams, 'Sovereign Jurisdiction', *Cases & Materials on International Law* (Oxford University Press, 2016) 302.
[627] Ratner (n 516) 888.
[628] Ibid.
[629] Ibid 895.

5.5.7 Observations

The most contentious and hypocritical application of universal jurisdiction is observed when comparing the application of the jurisdiction between states with regard to political imperatives. The most antagonistic applications appear to be in cases in which criminal complaints may be instigated by third-party complainants, as compared to complaints initiated or pursued by state agencies, police or prosecutors. These cases are further complicated by the interjection of politics in the classification of conflicts or conduct amounting to differing interpretations of international humanitarian law. In many cases, the basis for the applications against state officials or visiting heads of state also draw in arguments about the applicability of immunities at international law and their differing domestic interpretations.[630] Finally, the greatest complaint regarding the politicisation of universal jurisdiction is the selectivity with which potential offenders have charges preferred: only for conflicts in which there is no vested political or international relations interests by the prosecuting state. An absence of compunction and absence of mandatory prosecutorial criteria in pursuing universal jurisdiction offences can absorb some of the blame for this phenomenon. However, the additional influences in determining whether to proceed with a prosecution—resources implications, public interest and the impact on international relations—tangibly affect determinations as to whether to pursue offenders for universal jurisdiction crimes.

5.6 Conclusion

Several themes can be drawn out in the development of state practice in the use of universal jurisdiction. This doctrine works in concert with other justice mechanisms, such as the use of immigration proceedings or civil litigation, to pursue outcomes regarding impunity for core crimes, while any use of the jurisdiction will necessarily be affected by the diplomatic concerns of the prosecuting state. In some states, this diplomatic concern has been written into the legislative enforcement measures available. In others, this diplomatic influence has been enacted through the amendment of the prescription of the jurisdiction.

Regardless, the practical problems facing states attempting to prosecute criminal offences that have no territorial nexus to their own territory results in difficulties in obtaining evidence. Further, it requires additional expense in managing the

[630] Immunities will not be discussed in detail in this thesis, as explained in Section 1.4.

prosecution of such trials. In some cases, it involves extending additional support to the defence counsel, such as inclusion in investigative phases and travel to other states. The preponderance of cases relying on the use of universal jurisdiction has not been assisted by the existence of mutual legal assistance arrangements. Rather, action has been taken in a unilateral fashion by prosecutors, utilising extant diplomatic missions as the base for their investigations in the state investigating the conduct.

Ratner suggested that forum selection in universal jurisdiction should be aided by the presence of the accused in the state exercising jurisdiction. This would avoid the requirement to divert resources to support international extraditions. In more extreme cases, it would avoid in absentia verdicts and complications in relation to jurisdictional challenges.[631]

The predominant influence in relation to the use of universal jurisdiction by states does not relate to the protection of the human rights of the alleged victim, or to the disposition of international criminal justice. Rather, it relates to the impact that the use of the jurisdiction may have on international relations. This trend reveals the key thematic issue pertaining to the significant influence of political considerations on the use of the jurisdiction. This appears to be of greater concern in the use of the doctrine by states; thus, it will be more likely to influence the enforcement jurisdiction relating to the conduct of trials relating to universal crimes. The seeming reliance on universal jurisdiction in the majority of successful cases appears to overcome political concerns by identifying an alternate or additional jurisdictional basis for trying the offender. Rather than relying on the pure form of the jurisdiction, this modification of the jurisdiction to the 'universal plus' construct also addresses some of the procedural difficulties in running a fair trial in absentia, which offers a methodology pertaining to a modification of the offences' prescription to address gaps in their enforcement.

[631] Ratner (n 516).

Chapter 6: Regional Practice in Prosecuting Criminals Under Universal Jurisdiction

Chapter 6 will analyse regional practice influencing the application of universal jurisdiction. Using the Hissene Habre case to assess the differences between the EU's and AUs approaches to universal jurisdiction, this chapter will identify how regional systems enhance or detract from the practice of the jurisdiction. It will also analyse how regional organisations can establish systems to close enforcement gaps. The Kosovo example of regional peacekeepers exercising domestic jurisdiction will be used as the case study to determine whether regionalism offers a solution to close enforcement gaps in the practice of universal jurisdiction.

6.1 Introduction

This chapter will analyse the regional influences in the application of universal jurisdiction. In particular, it will draw upon the AU and EU experiences in the establishment of cooperation measures and of mechanisms to enforce crimes subject to universal jurisdiction. Further, it will briefly analyse the regional security imperatives for this activity. The relative success of these systems will be drawn upon to identify the successful mechanisms in place to address issues of procedural fairness, forum selection, human rights obligations and the impact of political pressure in the application of the jurisdiction. The study of the Habre case will highlight the interaction between regional organisations, and in particular, the impact of politics in the pursuit of justice for universal jurisdiction offences.

Groups of states have worked together to grant jurisdiction over international crimes to international tribunals, through post-conflict agreements, a UNSCR or international treaty. Similarly, regional organisations such as the AU and the EU have exercised criminal jurisdiction on behalf of their member states through the establishment of semi-internationalised courts.[632] Further, these organisations purport to restrict or

[632] William W Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38(4) *Texas International Law Journal* 729.

enlarge national criminal jurisdictions through the application of various conventions or declarations that bind their member states. This influences how those states can purport to execute jurisdiction on universal grounds.

In its submissions to the Sixth Committee Working Group of the UNGA regarding the scope and application of universal jurisdiction, the EU stated that the support of the union for universal jurisdiction was a result of its 'long-term basis as a strong supporter of the principle that the most serious crimes of concern to the international community as a whole must not go unpunished'.[633] Further EU justification for supporting universal jurisdiction was based on victims' justice decreasing the desire for revenge. Thus, it supports international peace and security by criminal trial as a potential deterrent for future conflict.[634]

Furthering the goal of ending impunity is better achieved with collective action, as has been shown in the case studies for both the AU and EU. This is demonstrated by the reported increase in prosecutions pertaining to core international crimes. For example, as a result of pooling resources and sharing information, incorporating international crimes into domestic legislation, assisting in the establishment of specialised investigative units and providing support and protection for potential witnesses since the inception of the EU Genocide Network, there has been a marked increase in investigations across EU member states.[635]

The Council of the European Union on Justice and Home Affairs policy in relation to universal jurisdiction attempted to obligate EU states to prosecute genocide, crimes against humanity and war crimes against people within their territories, residents or those attempting to enter the EU.[636] The basis for the application of universal

[633] Council of the European Union, *The AU–EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09 rev 1.
[634] The EU Genocide Network, in its 2014 strategy to combat impunity, states: 'Member States should ensure that their respective legislation provides for the definition of core international crimes in accordance with international standards and for an exercise of extraterritorial, including universal, jurisdiction over those crimes', 41; Secretary-General (n 109).
[635] Eurojust, 'Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide and Crimes against Humanity across the European Union and its Member States', *Network for the Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes* (November 2014) <http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/strategy%20of%20the%20eu%20genocide%20network%20(november%202014)/strategy-genocide-network-2014-11-en.pdf>.
[636] *European Council Decision 2003/335/JHA of 8 May 2003*, L 118 [2003] L 118/12, preamble [1], [6].

jurisdiction, however, was caveated upon the adherence by EU member states to the ECHR and ECtHR jurisprudence. This jurisprudence has considered this principle and determined that the basis of universal jurisdiction finds its expression in both custom and treaty law.[637]

Conversely, the AU Assembly has adopted numerous decisions relating to the 'Abuse of the Principle of Universal Jurisdiction'.[638] The AU's perspective on international law asserts that the contemporary construct of international law is Eurocentric, and not reflective of international law for a post-colonial African continent.[639] Further, the concepts of universality are not reflective of universalist norms. Yet, the AU's *Constitutive Act* recognises that Africa also embraces the need for prevention of impunity for the worst crimes. The AU has acted to create parallel justice mechanisms to address impunity, such as the African Court on Human and Peoples' Rights, established in 2004.[640]

6.2 Due Process

The European arrest warrant framework created a system of acceptance of universal jurisdiction across States of the EU, with the adoption of the European Union Council's declaration on universal jurisdiction seeking to ensure that persons accused of genocide, crimes against humanity and war crimes 'must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation'.[641] These cooperation measures included the creation of national contact points for the purposes of sharing information concerning the investigation of these crimes.

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[637] European Court of Human Rights in *Jorgić v Germany, Application 74613/01* (12 July 2007).
[638] African Union, *(Draft) Model National Law on Universal Jurisdiction over International Crimes* EXP/MIN/Legal/VI, May 2012 <http://www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments/>; Developed following Decisions of the Assembly of Heads of State and Government of the Union, in Decisions Assembly/AU/Dec/199(XI), Assembly/AU/Dec.213(XII), Assembly/AU/Dec.233(XIII), Assembly/AU/Dec.292(XV) and Assembly/AU/Dec.355(XVI).
[639] Ibid.
[640] Chacha Murungu and Japhet Biegon, *Prosecuting International Crimes in Africa* (PULP, 2012) 53; E Burrows, *Flower in my Ear: Arts and Ethos on Ifaluk Atoll* (University of Washington Press, 1963) 421: 'We generally assume that we know, from … observation what is universally human. But little scrutiny will show that such conclusions are based only on experience with on culture, our own. We assume that what is familiar, unless obviously shaped by special conditions, is universal'.
[641] Council Decision (n 637) preamble [1],[6].

In 2002, the extradition system in Europe was replaced with the concept of a Europe-wide arrest warrant. The Framework Decision of the European Council imposed the obligation for the member states to surrender a person to another member state if an arrest warrant was produced 'for the purpose of conducting a criminal prosecution; executing a custodial sentence; executing a detention order'.[642] This process incorporated several procedural rules relating to the nature of the criminal offences to which this warrant could apply, and procedural limitations such as time bars. Importantly this process introduced a number of offences for which a person must be surrendered, even if the alleged conduct did not constitute an offence in the location from which the person is being extradited. These offences are 'terrorism, trafficking in human beings, corruption, participation in a criminal organisation, counterfeiting currency, murder, racism and xenophobia, rape, trafficking in stolen vehicles, and fraud'.[643] This principle recognised that the EU considered a number of offences significantly heinous to justify importing shared criminal jurisdiction over them.

However, in limiting the principle of the European arrest warrant, the EU Council Framework Decision specified a number of bars to extradition. These related to the *ne bis in idem* principle, the application of amnesty by the state in which the person is residing, or if the person is not to be extradited on the basis of their age.[644] Specifically, the Convention imported a mandatory requirement that extradition cannot occur against a person against whom a final judgment had been passed.[645] The Convention specifies that if a person is under the age of 18, then the requesting state and the requested state must take special account of this factor before approving the extradition.

Further, Article 2 of the Additional Protocol to the Convention provides that the person is entitled to an amnesty in whole or part in relation to a sentence for the offending for which they were sentenced.[646] In this case, some states have not acceded to the Additional Protocol, given the controversial nature of granting amnesties. The text of

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[642] European Union, 'European Arrest Warrant' (online, 10 April 2012) <http://europa.eu/leigaltion_summaries/justice_freedom_security/judicial_cooperation>.
[643] Council of Europe, 2002/584/JHA, *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States—Statements Made by Certain Member States on the Adoption of the Framework Decision* (13 June 2002).
[644] European Union (n 643).
[645] *European Convention on Extradition* (n 512) art 9, 675.
[646] *Additional Protocol to the European Convention on Extradition,* opened for signature 15 October 1975, ETS 86 (entered into force 20 August 1979).

the additional protocol contemplates that an amnesty amounts to a barrier to extradition, if the requesting state has jurisdiction over the offence concurrent with the state in which the alleged offender was granted an amnesty is present: the purpose of extraterritorial or universal jurisdiction would be deprived of its 'very essence if States could exercise only their jurisdictional competence and not apply their legislation'.[647]

The other aspect in which impunity is being addressed differently between the AU and EU can be observed in the application of criminal procedure. Specifically, the existence of Union-wide standards in the application of criminal justice is a prerequisite for membership in the EU. However, in the case of the AU, membership is based upon geography, again, reflecting the differences in establishing Charters of both organisations.

The AU has involved itself in making declaratory statements relating to the management of criminal matters subject to universal jurisdiction and to investigation into how to manage matters where the application of domestic jurisdiction would not be feasible.[648] The most prevalent example of this is the management of the *Hissene Habre case*.

On 24 January 2006, the AU made a declaration relating to the establishment of a Committee of Eminent Jurists to assess what the appropriate jurisdiction to try Habre would be.[649] The mandate given to the Committee was to consider 'all aspects and

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[647] With general aims to provide certainty in the application of international criminal law, this thesis considers that, while controversial, the issuance of an amnesty may have other, restorative or reconciliatory effects; the second-guessing of one state's application of such principles over another states is generally not in the interests of international justice. See (n 88); ECtHR '*Guide on Article 7 The European Convention on Human Rights: No Punishment Without Law: The Principle that Only the Law can Define a Crime and Prescribe a Penalty'*, 30 April 17, 15.

[648] However, compare with the December 1998 African Union Declaration, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction,* Doc Assembly/AU/14 (XI), which stated that the arrest warrants issued in relation to Rwanda in particular would not be executed by members of the African Union, 5(iv). This declaration was softened following engagement with the European Union prior to the Addis Ababa African Union Conference: African Union Declaration, *Decision on the Abuse of the Principle of Universal Jurisdiction,* Assembly/AU/Dec.292(XV) 1, Doc EX.CL/606(XVII). Assembly of the African Union, *Decision on the Hissene Habre Case and the African Union*, Seventh Ordinary Session, Doc Assembly/AU/3 (VIII, 1–2 July 2006) <www.africa-union.org/root/au/Coferences/Past/2006/July/summit/doc/Decisions.and.Declarations/Assembly-AU-Dec.pdf>.

[649] Human Rights Watch, 'Declaration on the Hissene Habre Case and the African Union' (2006) <http://www.hrw.org/print/news/2006/01/24/declaration-hiss-ne-habr-case-and-african-union>; see also Reed Brody, 'Bringing a Dictator to Justice: The Case of Hissene Habre' (2015) 13 *Journal of International Criminal Justice* 209–217.

implications of the... case as well as the options for his trial'.[650] This included specifically considering the legal basis of the appropriate jurisdiction, appropriate procedure, efficiency and accessibility. The Committee was empowered to make recommendations regarding how to deal with similar matters in the future, thus recognising the increasing prevalence and need to create mechanisms outside existing jurisdictional frameworks.[651]

The final task, issued to the Committee as a priority, was to make 'an African mechanism', highlighting the concerns of the AU regarding their frequent complaint that their jurisdiction has been usurped by the EU and European states, in particular levelling claims against the ICC for only pursuing matters against African defendants, rather than a more representative case list.[652]

The Committee's declaration on the *Hissene Habre case* was to 'mandate' that Senegal prosecute Habre 'on behalf of Africa'.[653] However, some commentators considered that this 'mandate', issued by the Committee and subsequently adopted by the AU Assembly, represented an erosion of national sovereignty in the determination of prosecution of national criminal law. The eventual result, however, was the Economic Community of Western African States (ECOWAS) Court in 2011, which made a determination that the Sengalese Court lacked jurisdiction, despite a period of domestic legal reform, and thus an ad hoc court of an international character would be the appropriate forum to try Habre.[654]

The response to the AU's Declaration on the *Hissene Habre* case by the EU was to issue a resolution noting the concerns of the European Parliament as they related to numerous African states' conduct being incompatible with the denouncement of impunity contained in the AU's Declaration.[655] Specifically, the EU pointed to the manner by which several African states had signed the Rome Statute. The *Constitutive*

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[650] Assembly of the African Union (n 648).
[651] Human Rights Watch (n 650).
[652] Assembly of the African Union (n 648).
[653] Frans Viljoen, *International Human Rights Law Africa* (Oxford, 2012); Assembly of the African Union Eighth Ordinary Session, Eighth Ordinary Session, Assembly/AU/Dec.134 – 164 (VIII) Assembly/AU/Decl.1 – 6 (VIII), 29–30 January 2007, <https://au.int/web/sites/default/files/decisions/9556-assembly_en_29_30_january_2007_auc_the_african_union_eighth_ordinary_session.pdf>.
[654] Viljoen (n 654).
[655] Brody (n 650).

Act of the AU 'expressly condemns and rejects impunity', but the EU Parliament went on to identify several instances where former dictators of African states known to have 'committed serious crimes' were 'living out their days in tranquillity, enjoying complete impunity'.[656] After highlighting the failures of the AU states to enforce the principles which they are obligated at international law to follow, the declaration went on to list examples of failures of the AU to deal with instances of human rights abuses. The European Parliament went on to recall the difficulties that the outside investigators, many of whom were European, had in relation to investigating the atrocities that were within the jurisdiction of the ICTR, as well as declaring that those responsible for the massacres in the Democratic Republic of Congo in the six-year civil war continued to 'enjoy impunity'.[657]

The European Parliament went on to call for the AU to support Hissene Habre's extradition to Belgium, where an arrest warrant had been issued, authorised under Belgium's *War Crimes Act*, importing domestic jurisdiction over war crimes.[658] This responsive resolution issued by the EU in 2006 was a powerful political statement regarding the European Parliament's position on the value of universal jurisdiction: it articulated the EU's member states support that universal jurisdiction provided valid authority for ordering extradition of war criminals, and further clearly articulated their support for the conception that action can be taken by other states in relation to criminals with no traditional jurisdictional nexus to the prosecuting state if the accused's domicile did not, or could not, act.

Contrastingly, the regional cooperation in support of the ICTY shows how regionalism can supplement and support international criminal law. Practically speaking, the support given by the North Atlantic Treaty Alliance, and consequently by EU nations, to the IFOR/SFOR (Implementation Force/Stabilisation Force), was the most significant in relation to the prosecution of war criminals in Bosnia, with the capabilities necessary for the conduct of investigations, evidence gathering, and arrest operations

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[656] *European Parliament Resolution on Impunity in Africa and in Particular the Case of Hissene Habre,* B6-0176/2006 (16 March 2006) <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2006-0176&language=EN>; reproduced on *Human Rights Watch*, <https://www.hrw.org/report/2006/03/16/european-parliament-resolution-impunity-africa-and-particular-case-hissene-habre>.
[657] Ibid.
[658] Ibid.

in a nascent state recovering from hostilities. The use of IFOR/SFOR intelligence capabilities supported arrest operations.[659] The evidence collection requirements necessitated an understanding of the legal obligations regarding chain of evidence, handling, storage, labelling and the like. Such an undertaking again, required resources and well-trained personnel with the requisite skills to obtain evidence in a manner that would be admissible in the eventual trial of the indictee.

The use of international peacekeepers in the arrest of criminals for the purposes of domestic prosecution requires an understanding of the domestic criminal procedure rules; while balancing with the domestic legal obligations of the peacekeepers themselves. This balance must also take into account limitations based upon the extent of their mandate and mission authorities; while complying with the international legal obligations relating to human rights obligations that are considered extraterritorial in effect by the sending state.[660] This is no easy task for a peacekeeper. Indeed, the obligation for states to ensure appropriate discharge of these duties by peacekeepers, and enforcement against peacekeepers who fall short of this standard is a matter of ongoing focus for the UN.[661]

For example, in the case of the Kosovo Force (KFOR) peacekeeping mission in Kosovo, there was contention as to the jurisdiction to deal with complaints regarding the conduct of peacekeepers during detention operations. The mission was expressly tasked with 'supporting, as appropriate, and coordinating closely with the work of the international civil presence',[662] though in response to complaints raised by Amnesty International regarding the standard of treatment of detained persons, the Secretary-General of NATO referred the complaints to the nation to which the peacekeepers belonged for action.[663] The alignment of responsibilities for detention, handling and

[659] Ibid.
[660] Rachel Opie, 'Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility' (2006) *New Zealand Law Review* 1–33.
[661] *Report of the Secretary-General: In Larger Freedom* (n 54) [113].
[662] Security Council Resolution 1244, UN SCOR, UN Doc S/RES/1244 (10 June 1999).
[663] Lord Roberston, quoted in Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Officials Flout International Law* (AI Index: EUR 70/008/2002, 1 September 2002), stated: 'I am quite clear that the existing legal framework allows KFOR, within its current mandate and, where appropriate, in coordination with competent civil authorities, to carry out detentions ... So far as the specific allegations [made in the Memorandum] are concerned, the NATO military authorities have reviewed these cases. However, further action lies with the individual nations involved in the detention operation and at Camp Bondsteel [where the men were detained]'; Security Council Resolution 1244 (n 631) [9(f)]. To compare, see outline of the detention practice of INTERFET in

transfer in such circumstances transcends several legal paradigms: crossing from the use of armed force to a civil law enforcement legal system.

More importantly, however, the status of deployed UN personnel and troops from contributing nations to the peacekeeping mission, creates a possible exception for peacekeepers from the provision of evidence and testimony in the prosecution of domestic criminal offences. In the case of the Kosovo conflict, the testimony provided by military officers in a domestic trial would have been voluntary, as the Status of Forces Agreements for the presence of these peacekeepers extended the privileges and immunities applicable under the *Convention on Privileges and Immunities.*[664] Although it was a UN mission, the mission authorities were devolved to the North Atlantic Council to establish processes and systems to support the deployment.

However, testimony was obliged in the case of the ICTY, and these hierarchical authorities became irrelevant, based upon the legal reasoning that the mandate that the peacekeepers were operating under was the same UN Security Council mandate applicable to the tribunal, and thus was not to be treated as an individual of the military structure of their own country.[665] Accordingly, despite the commonly held perception that peacekeepers are exempt from playing a role in the prosecution of international criminal law offences,[666] or offences subject to universal jurisdiction, there are measures that can be taken to work through jurisdictional challenges. Specific measures can include agreements of directions to cooperate in the implementing instruments for the peacekeeping mission, as well as training in facilitating the handoff of materials and evidence that might be subject to future criminal prosecutions.

Mike Kelly et al, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 849 *International Review of the Red Cross* 101–139. See also UN Office of Legal Affairs, 'Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, Regarding Immunities of Civilian Police and Military Personnel' (2004) *United Nations Juridical Yearbook* xix, 323–325.

[664] See discussion on *Convention on the Privileges and Immunities of the United Nations,* opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946); *Prosecutor v Blaskic (Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber of 18 July 1997)* (International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, IT-95-14, 29 October 1997) 50. See also Antonio Cassese, cited in Lousie Arbour, 'The International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda' (2000) 46 *McGill Law Journal* 195, 197.

[665] Cassese (n 665).

[666] Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Elgar, 2013).

Equally, in the case of the arrest of dangerous war criminals, the level of protective force that could be brought to bear in the execution of the arrest operations was significant—in the attempted arrest of the Prijedor Police Chief, Simo Drljaca, in addition to Drljaca being killed, a British soldier was wounded when Drljaca fired at the force during his attempted arrest.[667] The Rules of Engagement for deployed military forces, in the context of an armed conflict, authorise more permissive use of force than those authorised by a civil police force.[668] In addition to the different legal paradigm applicable, the threshold for the detention of a person in armed conflict is different (and based upon a lower threshold) than in law enforcement paradigms.[669] Accordingly, the information used as the basis of detention will differ from that required in the handling and potential prosecution of a criminal under the auspices of universal jurisdiction. The type of information that is gathered to give rise to a suspicion justifying detention in relation to the conflict, does not necessarily align with the suspicion of the commission of a criminal offence.[670]

The difficulties in Kosovo from a due process perspective can largely be attributed to the 'challenge of operating an international criminal justice system in "real time"'.[671] The use of peacekeepers as witnesses and enforcers presents challenges in reconciling the dual role of soldier and policeman. In the case of enforcement for war crimes and crimes against humanity, they are typically conducted in a state that has no functioning legal system, and in which the state is effectively incapable of conducting criminal prosecutions. Thus, the use of criminal jurisdiction will fall to third-party states—whether parties to multilateral operations, or singular state intervention. However, the corollary to this position is the benefit of use of military peacekeepers is that arrests can

[667] Ibid.
[668] For example, police are typically only authorised to use force in defence of themselves of others, using a standard of minimal force for the minimal time necessary, relying on the common law defence of self-defence. In the context of armed conflict, the standard is less stringent, based upon the laws of armed conflict and centred on a general construct of proportionality. See generally Gloria Gagglioli (ed), *ICRC Expert Report on the Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (International Committee of the Red Cross, 2013).
[669] That is, suspicion of connection with the conflict versus specific and reasonable suspicion of commission of a criminal offence.
[670] See discussion of ROLFF-A in Section 7.2.2.
[671] United Nations, *Yearbook of the International Criminal Tribunal for the Former Yugoslavia* (United Nations Publications, 2002).

occur, and the possibility of in absentia criminal trials by third-party states using universal jurisdiction, or international or ad hoc criminal tribunals is reduced.

6.3 Forum Selection and Concurrent Jurisdiction

The most contentious issue in relation to the application of universal jurisdiction by regional organisations is the impartiality and selectivity in its use. In the same way as the application of universal jurisdiction by states is subject to political partialities, regional organisations have expressed concerns regarding the selectivity of use of the jurisdiction. The AU in particular has stated its concerns about the abuse of the doctrine.[672] Ongoing discussion regarding the scope of universal jurisdiction by the UNGA was specifically requested on the basis of 'abuse in the resort to universal jurisdiction, particularly over African officials'.[673]

Recognising that the application of universal jurisdiction is not consistent, and reinforcing the importance of ensuring justice in respect of core international crimes, the EU has established a system of law enforcement cooperation among member states to prevent impunity for such crimes.[674] Specifically, it has established judicial cooperation measures through the exchange of information and evidence to support the prosecution of serious international crimes, such as those listed in the European Council's decision of 13 June 2002 (genocide, crimes against humanity and war crimes).

To ensure the appropriate forum is selected and utilised in the prosecution of cases of serious criminal conduct, in 1957, the Council of Europe drafted the *Extradition Convention* in 1957, which then gave rise to the establishment of the European arrest warrant framework.[675] This Convention imports an obligation on contracting parties to surrender to other parties of the Convention any person against whom an arrest warrant

[672] See Section 6.2 Due Process for discussion of AU response to Euro-centricity of international law.
[673] Kingsley Mamabolo, 'South African Representative Speaking for the African Group', *United Nations Press* (2014) <http://www.un.org/press/en/2014/gal3481.doc.htm>.
[674] *European Council Decision 2002/494/JHA of 13 June 2002, Setting up a European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes against Humanity and War Crimes* (2002) L 167.
[675] *European Convention on Extradition,* opened for signature 13 December 1957, ETS 24 (entered into force 18 April 1980).

has been issued, or who is wanted for the purposes of carrying out a sentence or detention order.

Importantly, the *Extradition Convention* carries no obligation to extradite a person if the offence the person is accused of occurred within the nation from which extradition is sought. In 1957, in the absence of an ICC that applied the concept of complementarity, this essentially provided an option to excise the application of universal jurisdiction. This was a result of the two competing views on the basis for the convention: first, the chief aim of the convention to repress crime, and second, consideration of the humanitarian implications of the extradition.[676] Further, this convention was a voluntary instrument, not mandatorily applicable across all European states or EC member states. Fifty states were signatory to the Convention, which included all member states of the Council of Europe, Israel, South Africa and South Korea. Of those 50 signatories, 28 only signed and ratified the Convention between 1990 and 2011, and the Convention was the subject of extensive declarations excising jurisdiction in respect of states' own nationals. It was subsequently replaced by the more robust European Arrest Warrant (EAW) framework, established pursuant to an EU framework decision in 2002. The EAW worked by creating an arrest warrant that is valid throughout all member states of the European Union, which then requires the other state to arrest and transfer the criminal suspect or sentenced person to the issuing state, and is limited to arrests related to conducting a criminal prosecution with a minimum sentence of one year imprisonment, or enforcing a custodial sentence of at least four months in length.

The AU has recognised that the principle of universal jurisdiction is a principle of international law, and has not rejected its application in entirety. However, it did propose a model law for AU member states to adopt, regarding the limitations of enforcement of universal jurisdiction to prevent the apparent abuse of the principle by the EU. This model law requires the presence of the accused in the state utilising universal jurisdiction. It provides that 'warrants of arrest issued on the basis of the abuse

[676] Council of Europe, *Extradition: European Standards: Explanatory Notes* (Council of Europe Publishing, 2006) <https://rm.coe.int/16804924cc>.

of the principles of universal jurisdiction shall not be executed in any Member State'.[677] Interestingly, this model law expanded the definition of genocide to include 'acts of rape that are intended to change the identity of a particular group' and an expansive definition of terrorism offences. However, the decision reinforced the AU's stance on the protection of head-of-state immunities and the perceived abuse by European states. The model law excluded in absentia trials and proposed a hierarchy of subsidiary that details that the jurisdiction is subordinate to any territorial claim of jurisdiction. However, it maintained that the principle of nationality is not subordinate to universality.[678]

The differing approach of both organisations with respect to forum selection demonstrates attempts to systemise state response to universal jurisdiction. This is attempted by establishing a hierarchy of jurisdictional claims among its member states, preferring to allow traditional jurisdictions over universal jurisdiction when available.

6.4 Harmonisation of International Law Principles

As one of the most powerful military strategic alliances, NATO has a significant influence on whether nations that are part of the organisation (as well as numerous other like-minded states)[679] will intervene militarily when civilians are subjected to war crimes and human rights violations. Although the basis for seeking justice for war crimes victims is a different objective from maintaining peace and security, a pillar of peacekeeping operations includes the re-establishment of the rule of law, and hence, criminal investigation and prosecution of offences committed during a conflict.[680] For instance, the ongoing presence of troops in the NATO-led multinational force in Bosnia

[677] *African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes* (2012) (AU *Model Law*), adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012.

[678] For discussion on the development and status of the AU Model Law, see Dapo Akande, 'The African Union, the ICC and Universal Jurisdiction: Some Recent Developments', *Blog of the European Journal of International Law* (29 August 2012) <www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments/>; see also A Dube, 'The AU model law on Universal Jurisdiction: An African response to Western prosecutions based on the universality principle' 18(3) *PER: Potchefstroomse Elektroniese Regslad* 450-486.

[679] For example, the United States has designated 'Major non-NATO allies' ('MNNA'), which include, among others, Australia, Egypt, Israel, Japan, Jordan, New Zealand, South Korea.

[680] UNDP, 'Rule of Law—A Key Pillar in the UN's Efforts to Prevent Conflict and Sustain Peace', *UNDP* (14 June 2017) <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/06/14/rule-of-law-a-key-pillar-in-the-un-s-efforts-to-prevent-conflict-and-sustain-peace.html>.

and Herzegovina is a result of the ongoing commitment of NATO states to the maintenance of peace and security in the region.

The participation of the multinational force was particularly important for the jurisdictional enforcement of the ICTY. Personnel allocated to the NATO mission were authorised to arrest people indicted by the ICTY.[681] Although the generally held view was that this power was lawfully authorised through the enabling resolution, this delegation of authority was not universally accepted. The Russian Federation's representative made a speech to the UNGA in 1997 that the 'armed capture' mission of the multinational forces of IFOR and SFOR were not authorised under the General Framework Agreement for Peace in Bosnia and Herzegovina, supported by Chapter VII UNSCR Number 1244.[682] However, the Annex to the Dayton Accords provides that:

> [T]he Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorised by the United Nations Security Council, including the International Tribunal for the form Yugoslavia.[683]

The power to arrest can be derived from the authorities provided to the IFOR to use force to carry out their responsibilities under the accord. This also applies to executing duties additional to those specified within the annex, coupled with a North Atlantic Council resolution issued on 16 December 1995.[684] Thus, the authority for IFOR to detain any person indicted by the ICTY has a lawful framework.[685] There is no express authority explicitly authorising the use of military force to track down the indictees of the International Criminal Tribunals of the Former Yugoslavia, or enabling authority

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[681] See art VI [4] of Annex 1-A to the *Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina,* Bosnia and Herzegovina–Croatia–Yugoslavia, opened for signature 21 November 1994 (entered into force 21 14 December 1994) ('*Dayton Accords'*).
[682] Security Council Resolution 1244, UN SCOR, UN Doc S/RES/1244 (10 June 1999). See Speech of the Representative of the Russian Federation to the Plenary Session of the United Nations Assembly on the Report of the International Tribunal for the Former Yugoslavia (item 49), 4 November 1997, as cited in Paola Gaeta, 'Is NATO Authorised or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia' (1997) 9 *European Journal of International Law* 174–181.
[683] Art I [2(b)] of Annex 1-A, the parties 'authorise the IFOR to take such actions as required, including the use of necessary force, to ensure compliance with the Annex', *Dayton Accords* (n 649).
[684] Joint North Atlantic Council and Western European Union Council Resolution, '*OPERATION SHARP GUARD*', adopted in Council of WEU/NATO Joint Session of 16 December 1995.
[685] See analysis of Gaeta (n 683); Opie (n 661).

for arrest functions.[686] The basis of the authority was derived from the Security Council resolutions authorising the mission.

However, this analysis indicates that states that comprise the troop-contributing nations of the multinational force do not have a right, *propio motu*, to arrest criminals suspected of committing offences within the competence of the ICTY, or otherwise falling within the category of offence recognised as universally cognisable, such as torture. The establishing authority for the ICTY is through UNSCR 827. The authority for troops operating under the auspices of an international body, such as KFOR, SFOR or the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES), is derived from relevant UNSCRs.[687] These mandates were largely limited to monitoring compliance with the military aspects of the *Dayton Agreements*. The authority to conduct detention operations came from subsidiary authority documents issued by the North Atlantic Council, or issued through NATO (eg, the express authority to detain was given to troops through the Rules of Engagement—an order from NATO, rather than a UNSCR).[688] Separately, states party to the *Dayton Agreement* had a general obligation to cooperate with the ICTY. Those states also had an obligation under Article 29 of the ICTY statute to cooperate with arresting indictees.[689] In this circular way, troops from KFOR/SFOR obtained authority to arrest indictees of the ICTY due to the failure of the State to act. This was coupled with the cascade of orders issued through NATO. However, the authority for the ICTY to order a member of KFOR/SFOR to cooperate was based on that person's 'membership of the international armed force responsible for maintaining or enforcing peace and not *qua* a member of the military structure of his own country'.[690] In *Simic*[691] and *Dokmanovic,*[692]

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[686] David Scheffer, 'Arresting War Criminals: Mission Creep or Mission Impossible?' (2012) 35 *Case Western Reserve Journal of International Law* 319, 322.
[687]Azlem Algen, 'The ICTY and Irregular Rendition of Suspects' (2003) 2(3) *Law and Practice International Court and Tribunals*.
[688] NATO, *North Atlantic Council Rules of Engagement* (16 December 1995).
[689] *ICTY Statute* (n 446) art 29; art IX *Dayton Accords* (n 649); David S Jones and Paul J McDowell, 'To Catch a War Criminal: The United Nations Apprehension of an Indicted War Criminal', *Center for Army Lessons Learned* (July–August 1998) <http://call.army.mil/products/nftf/ulaug98/criminal.htm>.
[690] *Prosecutor v Tihomir Blaskic* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, IT-95-14-AR108bis, 29 October 1997) 50 ('*Blaskic case'*).
[691] *Todorovic, Simo Zaric (Decision on Motion for Judicial Assistance to be Provided by SFOR and Others,* (International Criminal Tribunal for the former Yugoslavia, IT-95-9, 18 October 2000).
[692] Paust et al, *International Criminal Law: Cases and Materials* (Carolina Academic Press, 2000) 436.

the way the indictees were brought before the ICTY through the KFOR/SFOR troops detaining them was a central consideration in the tribunal's assessment of its authority to prosecute.

The SFOR forces made their first arrest pursuant to an ICTY arrest warrant on 17 December 1997, of Milan Kovacevic, in relation to his complicity to genocide. This arrest was swiftly followed by two additional arrests of people indicted by the ICTY.[693] These actions were arguably critical to the success of the ensuing peace process in Bosnia. Gow contended that '[w]ithout such action, international strategic momentum and credibility would not have been established, and Bosnia's peace agreement statis would probably have remained'.[694] These detention operations helped shape the strategic environment, but more relevantly in the context of wider international peace and security, they provided the space for other political issues to progress.

An assessment of the authorisation delegated to the SFOR troops by Gaeta suggests that this authorisation was limited in scope to only arrest warrants as issued. Further, the power vested in them was limited to the capacity of the troop contributors as NATO mission members, rather than by them as officials of their individual states.[695] This assessment was based on the fact that those authorities provided to the IFOR, additional to those particularised in the *Dayton Accords*, were and must be specified by the North Atlantic Council.[696]

Accordingly, this authorisation does not go so far as to allow IFOR personnel to collect evidence on behalf of, or support prosecutorial staff of, the ICTY in the conduct of their investigations. This limitation presents some practical difficulties, for example, in the matter of Blagoje Simic and others. The SFOR was ordered to provide evidentiary materials that related to the subject complainants' requests, on the basis that they were a duly authorised arresting power (regardless of whether their actions were characterised as detention operations). Thus, this would be in accordance with extant legal principles for the materials relating to its detention to be produced.[697] The

[693] *Blaskic case* (n 665) [50].
[694] James Gow, 'The ICTY, War Crimes Enforcement and Dayton: The Ghost in the Machine' (2006) 5(1) *Ethnopolitics* 49–65.
[695] Gaeta (n 683).
[696] Ibid 179.
[697] *Prosecutor v Blogoje Simic and Others (Trial Chamber Separate Opinion of Judge Robinson),* (International Criminal Tribunal of the former Yugoslavia, 18 October 2000) ('*Simic case'*).

difficulty that arose as a consequence of this issue was that it was unclear which legal regime, and thus evidentiary standards, were applicable to the arrests.[698] Arrests were conducted based on NATO standard operating procedures, compared with the procedures articulated in the ICTY rules of procedure.

This issue highlights the importance of the clear articulation of authorities delegated to regional institutions and multinational organisations, as compared with the domestic authority to exercise criminal jurisdiction. That is, despite recognition that offences may be prosecuted by an international tribunal and arrest warrants may be enforced by the multinational force deployed, such as the case in Bosnia/Herzegovina, there is no obligation for the multinational force to execute those arrest warrants. That obligation resides with the 'national authorities of the State in whose territory or under whose jurisdiction or control the accused resides',[699] as specified in the ICTY's Rules of Procedure and Evidence.

This distinction was relevant in the case of the ICTY, as the state of Bosnia and Herzegovina, established under the *Dayton Accords*, created two entities: the Federation of Bosnia-Herzegovina and the Republika Srpksa. These entities maintained separate governance authorities.[700] Here, the armed forces of troop-contributing countries are present subject to an authority of the UN Security Council as part of a multinational force. Their authority is subject to the basis upon which they are deployed. They are not an occupying force under international law;[701] rather, they are a peacekeeping force authorised by the UN Security Council to respond to a particular situation deemed a threat to international peace and security pursuant to the *United Nations Charter*.[702] Accordingly, the legal rules applicable to those troops relate to either the laws of armed conflict applicable to the particular conflict (if conflict is ongoing) or to the rules of the jurisdiction in which they are deployed. This is subject to any particular agreement between the troop-contributing state and the host state or transitional authority responsible for the territory in which they are deployed.

[698] Scheffer (n 687).
[699] *Simic case* (n 698).
[700] See Rule 55(B), as cited in Gaeta (n 683); Gow (n 695); *Dayton Accords* (n 682) preamble and art I.3.
[701] Bruce Oswald, 'The Law on Military Occupation: Answering the Challenges of Detention During Contemporary Peace Operations?' (2007) 8 *Melbourne Journal of International Law* 32.
[702] Ibid.

Consequently, there is a requirement of the deploying state to harmonise its domestic legal obligations with the duties and tasks asked of it in its deployment subject to the legal regime in which it is operating. Subject to the rules of international law, there will be particular domestic laws that will apply to the troops' conduct. However, these rules must align with the procedural rules of the domestic state within which the troops are discharging their duties. Criminal prosecutions relating to the conduct of individuals during the conflict will eventually be launched.

If considered today, this argument may no longer hold sway in some contexts, given the recent decisions of the ECtHR in relation to the extraterritorial application of human rights obligations.[703] As discussed previously,[704] certain human rights are *erga omnes,* which places a positive obligation on states to prevent or punish the breach of them—torture being the most obvious example. However, when considering further how these *erga omnes* obligations are applied in practice, there are regional limitations and jurisdictional conflicts that complicate the selection of forum. For example, the jurisprudence developed in relation to the *European Convention of Human Rights* has recognised the extraterritorial application of human rights obligations when a state has 'effective and overall control' of the territory in which they are present.[705] This obliges troop-contributing states to apply their standard of human rights protection irrespective of the human rights obligations to which the host state is subject.[706] Thus, a regional practice by European states, contributing to international military operations, results in their troops operating under a more restrictive human rights regime than others, with higher threshold enforcement obligations than others.

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[703] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011).
[704] See Section 1.2.
[705] See Milanovic, above (n 673); Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights: *Al-Skeini and others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011)' (2012) 28(74) *Utrecht Journal of International and European Law, Merkourios* 74, 57-–60.
[706] In *Bankovic*, the ECtHR found that extraterritorial application of human rights obligations will be met in exceptional circumstances. In cases in which the state exercises effective control, akin to occupation, in the state in which it is operating: *Bankovic and Others v Belgium and 16 Other Contracting States* (Admissibility) (ECtHR, App No 52207/99, 12 December 2001). However, this test was altered in the cases of Al-Skeini and Al-Jedda: 'the Court applied a *personal* model of jurisdiction to the *killing* of all six applicants, but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq. But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied': Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasborg' (2012) 23(1) *European Journal of International Law* 121–139.

Further, a state is not obliged to have control over a territory in the same way it would as an occupying power. As an occupying power, it would be obliged by law to assume the normal governance and civil functions of a functioning state before it is expected to enforce its normal human rights obligations.[707] According to the ECtHR, the *lex specialis* of international humanitarian law applicable in a state of armed conflict, a failed state or one subject to transitional administration as in the case of Bosnia and Herzegovina, does not displace a concurrent obligation to apply human rights laws.[708] Applying this analysis, states contributing to the multinational force that have domestic universal jurisdiction legislation would be obligated to arrest any person suspected of universal jurisdiction offences. This is by virtue of their effective and overall control requiring them to apply their domestic legal obligations that the ECHR requires the state to enforce extraterritorially while deployed.

This raises further complications and a somewhat circular argument in relation to the obligation of troop-contributing states to manage violations of crimes considered universal in scope. Most states maintain a strict separation of powers in relation to the operations of their military forces compared to their civil authorities to arrest individuals for criminal conduct. On this basis, a specific authorisation to arrest would be required. Here, the forces rely upon an arrest warrant issued by the ICTY and for which they have been given particular lawful authority to execute. Military forces are authorised to detain people under the applicable laws of war, dependent upon the status of the conflict. If, however, acting outside a conflict (eg, in a peacekeeping role such as IFOR/SFOR), the authorisation to deprive another person of their liberty is subject to strict requirements usually derived from the international legal basis for their deployment.

A state is considered responsible when the 'effective and overall' control test is met, and thus, extraterritorial application of its human rights obligations are triggered. However, in enforcing a universal jurisdiction offence, when the host state is unwilling or unable to act, through arrest or extradition of an offender, a state would be lawfully authorised to continue the detention of the individual subject to the *non bis in idem* rule.[709] While the state would be required to not violate the offender's human rights,

[707] Ibid.
[708] Ibid.
[709] Ryngaert (n 704).

they are equally obliged under competing international obligations to enforce universal jurisdiction against grave breaches of human rights committed by the offender (eg, in the case of prosecute or extradite obligations). There is no declared authority to derogate from these rights in the interests of international justice. Therefore, there must be an authority for peacekeepers to arrest the offender and a regime for their trial.[710]

Without the express authority of the North Atlantic Treaty, it would be unlikely that individual states could act unilaterally to arrest perpetrators of war crimes or gross human rights violations. It would be even more unlikely that they would be able to justify the extradition of the arrested person to their state for the purposes of criminal prosecution. This leaves a potential gap in the enforcement of universal jurisdiction, while balancing the principles of sovereign integrity and avoiding impunity for gross criminal conduct in peacekeeping missions that do not have the express authority of the UN or state if outside an international or non-international armed conflict.

Moving away from peacekeeping operations and considering domestic examples, general human rights activism has resulted in an increase in the use of universal jurisdiction across Europe. Regional institutions have furthered the domestic application of universal jurisdiction through the development of regional jurisprudence supporting domestic applications of the doctrine. The most relevant example of this is the development of 'Strasbourg law', which has reinforced universality throughout member states of the EU.

Forowicz's study in the reception of international law in the ECtHR provides an in-depth assessment of the areas in which various human rights norms have been reinforced as a consequence of the ECtHR jurisprudence in relation to cases dealing with egregious human rights breaches.[711] Forowicz determined that the European Court has taken a developmental approach to the interpretation of the *European Convention on Human Rights* to harmonise it with human rights law, aligning it with any similar international treaties. This approach has focused on an attempt to harmonise the varied human rights treaties with similar, but differing standards of human rights protection, to create a homogenous body of 'human rights law'. This methodology has resulted in

[710] See Opie (n 661) for a detailed breakdown of these competing obligations.
[711] Magdlena Forowic, *The Reception of International Law in the European Court of Human Rights*, (Oxford University Press, 2010).

the Court dealing with the otherwise lack of unity and the normative conflicts that exist in international law more generally.[712] This 'evolutive and dynamic' interpretation of human rights law by the Strasbourg bodies has also been deemed judicial activism. However, the ECtHR has recognised that in taking this approach, the rules of the *Vienna Convention on the Law of Treaties* (VCLT) can still be respected. This is insofar as Articles 31(3)(b) and (c) of the VCLT require that subsequent practice in the application of the treaty shall be considered in the context of the treaty when interpreting international law. In several cases, the ECtHR has enabled an interpretation of contemporary international law concepts to align with outdated legal instruments to ensure they reflect changing societal requirements.[713] These cases relate to:

- the right not be compelled to belong to a trade union[714]
- the requirement for legal systems to recognise transgenderism[715]
- the limitation of governmental ministers' roles in deciding on the release of prisoners[716]
- the removal of distinctions at law between 'legitimate' and 'illegitimate' children
- the corporal punishment of juvenile offenders.[717]

In the same way, regional bodies can influence the domestic application of universal jurisdiction offences. This was discussed previously, with the model law proposed by the AU expanding the universally accepted definition of genocide to include the use of rape as a method to change the identity of a people.[718] This was arguably responsive to the atrocities committed in Rwanda, where rape was frequently used as a method of furthering the conflict's aims, and with the underlying purposes of changing the racial

[712] See attempts to harmonise the ICCPR with the EHCR in the cases of *Reiner v Bulgaria* (App No 46363/99), judgment of May 2003, not reported; *Bartik v Russia* (App No 55565/00), judgment 21 December 2006, not reported, citied in Marek Korowicz, *Present Conceptions of International Law* (Springer Centre for Business & Media, 2013).
[713] Korowicz (n 680).
[714] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT'*); *Sigurdur A Sigurjonsson v Iceland* (App No 16130/90) judgment 30 June 1993, ser A, vol 264.
[715] *Christine Goodwin v UK* (App No 28957/95), judgment 11 July 2002, Reports 2002-VI, 1.
[716] *Stafford v UK* (App No 26295/99), judgment 28 May 2002, Reports 2002-IV, 115.
[717] *Tyrer v UK* (App No 5856/72), judgment 25 April 1978, ser A, vol 26.
[718] *African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes* (2012) (AU *Model Law),* adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012.

profile of the children in the area. The acceptance of the AU's Model Law on Universal Jurisdiction supports development in Africa to end impunity for this particular brand of crime, granting it universal status at least regionally.

There is an awareness that the application of the *European Convention on Human Rights* provides greater protections in relation to certain issues—refugee status and protection against torture being the most prevalent example in ECtHR case law—compared with other international law instruments. Despite this, the harmonisation of the ECtHR jurisprudence with these international instruments also identifies a method by which the selectivity of universal jurisdiction application could be improved.[719] International conventions have been used by the Court to assist in the interpretation of the ECHR's meaning,[720] affecting judgments which relate to its competence in directing the application of domestic law by member states. Accordingly, declaratory statements of regional institutions, or jurisprudence of regional courts, articulating how universal jurisdiction can be applied and aligned with competing international law obligations, can provide greater certainty in application of the principle across that region.

The use of such judicial guidance in the application of universal jurisdiction would enhance its consistent application within regions. The regional courts of the EU and the AU have a valuable opportunity to expand the meaning and approach in relation to universal jurisdiction through the ongoing development of declaratory resolutions and jurisprudence. A welcome contribution of the ICTY and ICTR to the prosecution of war crimes was the prosecution for sexual offences that occurred in the context of armed conflict. There were no such prosecutions in Nuremburg and Liepzig.[721] The similar expansion of universal jurisdiction using regional courts could be readily achieved through stricter subscription to model law processes as espoused by the EU and AU.

[719] See generally Ingi Isumen, *Child's Rights: Eastern Enlargement and EU Human Rights Regime* (Oxford University Press, 2015).
[720] Maša Marochini, 'The Interpretation of the European Convention Human Rights' (2014) *Zbornik radova Pravnog fakulteta u Splitu* 63–84.
[721] Jocelyn Campanaro, 'Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes' (2001) 89 *Georgetown Law Journal* 2557, 2889.

6.5 Political Risk

The support for, and use of, universal jurisdiction by regional judicial bodies is an example of the significant effect of regional bodies on the development of international law and practice. The ICTY was established under two Security Council resolutions (827 of 25 May 1993 and 857 of 20 August 1993) to apply the rules of international humanitarian law in the former Yugoslavia since 1991 (focused on the Bosnian conflict and mass atrocities taking place in Bosnia, Croatia and Herzegovina). However, the tribunal was also perceived to be playing a political role.[722] For example, the practical impact of the tribunal in facilitating peace talks was observed in the prioritisation of the indictment of both Bosnian Serb political leader Radovan Karadzic and Bosnian Serb military leader General Ratko Mladic, who were consequently excluded from peace talks.[723]

The EU's pro-human rights position in relation to the exercise of universal jurisdiction stands in stark contrast to the attempts of the AU to limit the application of the doctrine. However, as in the Hissene Habre case, this is a reflection of anti-colonialist sentiment of African states, rather than any real objection to the ending of impunity for gross human rights violations. The pragmatic approach of the AU seeks to ensure there is a prioritisation of domestic jurisdictions, and that the principle of head-of-state immunity is reinforced. In this way, the impact of political interference can most readily be observed.

Conversely, the EU is seeking to use its weight to pressure states into using universal jurisdiction in a more legalistic way. The application of universal jurisdiction is encouraged. When individual states are pressured to abandon such jurisdiction, the mechanism offered by the ECtHR enables a collective enforcement mechanism for the other states of the union,[724] which provides some measure to circumvent individual state pressures to desert universal jurisdiction trials.

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[722] Gow (n 662) 56. This refers to the ICTY being 'based on existing international humanitarian law and the laws of international armed conflict'. However, the Tribunal ultimately determined matters as being within its competence, as they related to the laws of war more generally, thus encompassing those rules of law applicable in international and non-international armed conflict—the *Tadic* case being the most prominent example.
[723] Gow (n 662).
[724] Bhuta (n 36).

As for the selection of appropriate fora, the AU's stance can again be described as pragmatic. It has established a regime for the prioritisation of jurisdictions to ascribe how conflicts and concurrency of jurisdiction can be resolved. Again, the EU takes a more purist approach, given the relative liquidity of the EU's borders compared to those of the AU. There is increased likelihood of alleged offenders being discovered in states with no traditional jurisdictional nexus to the offences alleged.

The ongoing pressure of political interference, however, can be undermined by such collective action if the institution purporting to influence its member states is economically and politically strong, and independent enough to enable justice to remain a high priority for the organisation. The disparity between the stability of the EU and the AU, from a state security and economic viability perspective, and the concomitant differences in approach to universal jurisdiction, demonstrates how significant political influences can affect the use and application of the doctrine. This also demonstrates the ability for political interference to positively or negatively influence forum selection, uniformity of procedural fairness and enforcement of human rights within such an organisation.

6.6 Conclusion

Regionalism provides a good framework through which to apply a consistent interpretation of universal jurisdiction in specific areas. An assessment of international jurisprudence and the existence of an international criminal system regarding the doctrine of universal jurisdiction might ultimately prove more successful in ensuring the consistent application of the doctrine. As discussed previously, tensions between different regional regimes highlight the need to resort to alternate international legal mechanisms to guide the differing legal approaches to international law across regions.

The open criticism and debate between the AU and EU in *Hissene Habre* demonstrates the influence and importance of regional organisations in either supporting or degrading the application of the doctrine. This potential for regional organisations to influence the application of universal jurisdiction should not be understated. However, the obvious need for a transnational and consistent international approach to the use of universal jurisdiction remains critical to the truly universal approach to ending impunity for serious international crimes. Cooperation between these regional fora could greatly

enhance the method by which universal jurisdiction can be understood and applied. Having these regional organisations apply their considerable political influence in addressing serious crimes at a regional level also ensures that the application of criminal proceedings are not perceived to represent former colonialist ideals. Rather, it ensures that applications are reflective of the need for respect of values fundamental to humanity as a whole, while appreciating local customs and needs to ensure the application of justice is appropriate to the circumstances.

Chapter 7: The Impact of the International Criminal Law Enforcement on the Application of Universal Jurisdiction for Universal Crimes

Chapter 7 will consider the gaps in the current international criminal law enforcement regime, in particular, in those times when universal jurisdiction has been exercised through the establishment of international frameworks supporting prosecutions. Specifically, this chapter will examine the model or global approach to combat modern-day piracy. Further, the application of international criminal law over international crimes will be assessed to determine how this body of jurisprudence influences the application of universal jurisdiction, or creates a viable alternative to the exercise of universal jurisdiction. Further, the chapter will also assess the extant mechanisms to ensure the bona fides application of the jurisdiction, when claims of overt politicking are alleged to result in a misapplication of the jurisdiction for purely political ends in the current international criminal law enforcement. Finally, this chapter will assess the application of universal jurisdiction against two examples: modern piracy and its application by international courts—the ICC and ICJ in particular.

7.1 Introduction

As Franck and Fox argued, there are synergies between the development of international criminal law and the implementation of criminal sanctions in domestic legal systems.[725] Specifically, the assertion is that the implementing and monitoring activities of the various international judiciaries inform the development of domestic law. Further, adjudication plays a key role in norm-implementation, which is aimed to achieve a common rule-based approach among states. Thus the 'objective of rule-uniformity can only be met by national courts deferring to one another and to relevant international tribunals when they interpret the constitutive instruments of the cooperative enterprise'.[726]

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[725] Thomas M Franck and Gregory H Fox, 'Introduction' in Thomas Franck (ed), *International Law Decisions in National Courts* (Irvington-on-Hudson,1996) 3.
[726] Ibid 9.

However, the competing observation of the US is that 'until international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law'.[727] Franck acknowledged this contradictory requirement by agreeing that the successful synergy between international tribunals and national courts in the development of international criminal legal principles is only effective if there is a 'firm' grounding in political integration.[728]

The basis of the international legal order is premised on the principle of non-intervention.[729] Supranational systems, however, have been the cornerstone of international criminal law since the Nuremburg military tribunals.[730] These have been premised upon consent, or on the authority of the UN Security Council. The Nuremburg tribunals recognised the need for individual accountability for the enforcement of international law. However, the international legal system in the enforcement of universal jurisdiction has remained ad hoc, and lacking in obligatory enforcement measures in relation to bringing individuals to account for their international crimes.[731] There has not been a systematic approach to the combat of impunity in international criminal law, despite the ongoing codification in this area.

The level of international cooperation and international recognition for the universal nature of the offence of piracy, particularly in response to the proliferation of pirates coming from the Horn of Africa, arguably make it the highest profile crime under the universal jurisdiction banner. In the submissions of member states to the UNGA Sixth Committee, the crime of piracy was only expressly accepted as being a universal jurisdiction offence by six of the 39 participating states. However, it was uncontroversially included in the UNGA's resolutions as a universal jurisdiction offence.[732] Further, the level of international codification in relation to enforcement mechanisms, and the attribution of financial and military support to combat piracy,

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[727] *First National City Bank v Banco National de Cuba,* 406 US 759, 775 (1971) (Powell J, concurring).
[728] Franck (n 687) 9.
[729] *Nicaragua* (n 32) 42.
[730] Burke-White (n 595) 729.
[731] Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford University Press, 2001) 291, 466, citing the International Military Tribunal of Nuremburg judgment: 'Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' from the *Trial of the Major War Criminals before the International Military Tribunal*, vol I, Nuremburg 1947, 223.
[732] See Table 1; see (n 7).

make it unique in comparison to the other crimes touted as universal by the Princeton Principles Project.[733]

As a consequence of the international cooperation regarding the creation of effective enforcement mechanisms regarding the crime of piracy, to date, there have been 23 trials, according to the UN's database of piracy occurring off the coast of Somalia.[734] Despite this apparent model enforcement regime that has been used to combat piracy, there remain hallmark problems associated with the enforcement of universal jurisdiction that must be overcome to have a fully functioning and effective enforcement regime. These are analysed below.

The regime against piracy is one area of international criminal law enforcement touted as successful. Less so is the fledgling ICC. However, the development of universal jurisdiction attributable to the ICC lies in its jurisprudence providing guidance on the interpretation of the offences subject to universal jurisdiction. As a body encompassed within the remit of Article 38(1)(d) of the *International Court of Justice Statute*, the ICC's decisions are arguably considered a 'judicial decision' as described in 38(1)(d);[735] indeed, the judgments of the ICC have been used by domestic courts to assist in interpreting the parameters of the criminal offences considered subject to universal jurisdiction. For example, *Lubanga* established the first international jurisprudence regarding the distinction between 'active' and 'direct' in the context of participation in hostilities of child soldiers.[736] The key outcome of this case, reinforced by the ICC in *Katanga*,[737] was to distinguish between the *jus in bello* crime of exposing child soldiers to harm in non-international armed conflict, and the broader obligation preventing the enlistment of children in armed forces more generally, as articulated in the language of the *Convention on the Rights of the Child.*[738] Equally, hybrid international courts established through UN auspices have added to the analysis of

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[733] *United Nations Division for Ocean Affairs and Law of the Sea*, 'Piracy Under International Law' <http://www.un.org/depts/los/piracy/piracy.htm>.
[734] United Nations Interregional Crime and Justice Research Institute (UNICRI), *Crimes Database* (January 2016) <http://www.unicri.it/topics/piracy/database/>. The database is a cooperative venture between UNICRI and the International Maritime Organisation.
[735] Andreas Zimmerman et al (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2012).
[736] *Prosecutor v Thomas Lubanga Dyilo (Decision),* (International Criminal Court, 14 March 2012, ICC-01/04-01/06); *Prosecutor v Thomas Lubanga Dyilo (Decision)* (International Criminal Court, November 2017, ICC-PIDS-CIS-DRC-01-016/17_Eng).
[737] Ibid.
[738] *Lubanga* (n 704); *Katanga* (n 121); *Prosecutor v Germain Katanga (Judgment)* (International Criminal Court, ICC-01/04-01/07, 7 March 2014).

universal jurisdiction on the basis of norm-development and jurisprudence pertaining to international criminal law and universal jurisdiction offences.

The ICJ jurisprudence as it relates to the doctrine of universal jurisdiction, focusing on breaking down the basis of the *Arrest Warrants* case, and the resultant determination relating to the Democratic Republic of Congo and Belgian legal positions, will be assessed to determine its impact on the modern application of the doctrine. An assessment of the ICJ jurisprudence as it relates to enforcement and international criminal jurisdiction more generally, including the relevance of the Bosnian Genocide case as it related to the ICTY jurisdiction, will be analysed to ascertain its impacts on the application of universal jurisdiction.

7.2 Due Process

Sections 7.21–7.22 will discuss the due process challenges faced in modern piracy trials, and challenges faced by the ICC pertaining to fair trial rights for accused during trials. Notably, the detailed analysis pertaining to the practical challenges faced in the actual domestic prosecution of pirates pursuant to an internationalised regime demonstrates well the difficulties in giving practical effect to universal jurisdiction, despite international regulation.

7.2.1 Due process in modern piracy

Modern-day piracy has witnessed the most well-practised and considered application of universal jurisdiction. The contemporary international law regime pertaining to the Law of the Sea makes clear the territorial neutrality of jurisdiction in the case of piracy offences committed on the high seas.[739] Accordingly, the regulation of piracy on the high seas is the most prevalent example of universal jurisdiction in contemporary international criminal justice. Accordingly, many of the practical considerations pertaining to the application of universal jurisdiction have been considered, such as detention location, costs of trial and domestic legislation.

7.2.1.1 Detention location

A key issue in relation to the use of universal jurisdiction as the basis for the arrest and prosecution of pirates in international waters relates to the physical ability to detain

[739] *UNCLOS* (n 169).

them. Further, it relates to capacity to ship them to a country prepared to accept them for prosecution within its specified procedural time limitations in regard to custody before an arraignment or charge.

A recognition of the interplay between international human rights obligations and the application of domestic criminal jurisdiction can be observed in the transfer of pirates from an international task force, such as TF150, responsible for detention of the pirates, to the domestic prosecution of the pirates. There has been considerable discussion relating to the obligations of handover, such as ensuring that the receiving state adheres to minimum detention treatment standards and provides assurances in relation to the treatment of the pirate after transfer. This includes an assessment that there is no real risk of torture or persecution, the receiving state will support the fair trial rights of the pirates, not impose the death penalty and not expose detainees to cruel, inhumane and degrading treatment.[740]

In the case of piracy operations, ongoing monitoring systems have been put in place by agreement between the detaining state and the prosecuting state to enable the detaining state to discharge its international law obligations.[741] Inspections of prison systems regularly occur. The use of UN Office on Drugs and Crime (UNODOC) to review the adequacy of local legal regimes to prosecute piracy offences has enabled a number of recommended improvements to the domestic law of holding states to be implemented.[742]

7.2.1.2 Costs of trial

[740] Ensuring adherence to international obligations such as art 3(1) *Convention Against Torture* (n 169) *Convention relating to the Status of Refugees 1951*, 189 UNTS 150 (entered into force 22 April 1954, art 33(1) (‘*Convention on Refugees’*); *European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and 14*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) arts 3, 5–6.
[741] Saoirse de Bont, ‘Prosecuting Pirates and Upholding Human Rights: Taking Perspective’ (One Earth Future Foundation, Working Paper, September 2010).
[742] Kenya, the Seychelles and Tanzania have been reviewed by the UNODC: ‘UNODC and Piracy’ <http://www.unodc.org/easternafricapiracy/index.html>; UNODC, *Counter Piracy Report* (February 2011) <http://www.unodc.org/documents/easternafrica//piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf>. See also Douglas Guilfoyle, ‘The Legal Challenges in Fighting Piracy’ in Bibi van Ginkel and Frans-Paul van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, 2010) 146.

The costs of detention and trial are exorbitant. Further, to reach trial, investigative and evidentiary collection regimes must be adhered to, as well as minimum standards to subscribe to in whichever prison facility the pirate is held in while awaiting trial.

As a consequence of international cooperation, and fiscal support for states that agree to take on the burden of prosecuting captured pirates in international operations, the penal systems of the prosecuting states have been gradually improved to ensure adherence to the basic human rights standards necessary for other states to satisfactorily cooperate with the prosecuting state in domestic prosecution for cases of piracy.[743] From very practical considerations, such as the provision of basic facilities, medical care, kitchens and bedding for prisoners, whole new court facilities are being built, and funded, by international initiatives. Staffing shortfalls are also being addressed, with a judiciary and prosecutors whose training is augmented through international support. Further, training is provided as a result of international cooperation and support for piracy convictions.[744]

In regard to the multinational nature of the operations to prevent piracy in Somalia, it is often naval personnel from a variety of troop-contributing nations who arrest and detain the pirates. Most domestic criminal procedures follow best evidence practices, which require evidence to be collected in a particular manner. The person who has the best evidence in relation to the chain of custody for the evidence is required introduce that evidence before the criminal tribunal that is hearing the case. Accordingly, the best evidence in piracy trials is direct evidence from the arresting sailors, who do not reside in the prosecuting state. The cost of recalling individual sailors in such cases, often years after the date of detention, to attend a trial in another country creates a fiscal and human resources burden on the arresting state. If this level of cooperation is not forthcoming, it diminishes the quality of the eventual prosecutorial case brought before the domestic criminal tribunal.

The decision-making of prosecutors to commence proceedings is influenced by not only the legal consideration of the reasonable prospect of success of the prosecution,

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[743] UNODOC, *Trust Fund to Support the Initiatives of States Countering Piracy off the Coast of Somalia Annual Report 2010,* <https://www.unodc.org/documents/easternafrica/piracy/Annual_Report_2010_Piracy_TF_eng_eBook.pdf>.

[744] Guilfoyle (n 743) 145.

but more pragmatic considerations such as the 'public interest'.[745] Accordingly, this allows decisions to be made with consideration to delay, cost and the practicalities of holding pirates and attempting domestic trial under universal jurisdiction.

7.2.1.3 Support to prosecutions through enacting domestic legislation

There are numerous examples of the international community cooperating to rid the high seas of pirates. However, there are notable examples in which a lack of corollary domestic legislation has resulted in detained pirates being returned to their home ports and immediately released. Two such examples are the depositing of 10 pirate suspects on the coast of Somalia by Danish authorities in 2008, and again in 2009, when 29 pirate suspects were held by the Russian navy while they determined whether they could or should be prosecuted in Russia.[746]

The ability to actually arrest and arraign pirates is not often contemplated in domestic legislation insofar as there have now been amendments to domestic legislation to overcome such embarrassment. For example, Japan legislated piracy laws in 2009 prior to participating in the international coalition against piracy.[747]

Guanabara is the first prosecution of Somali pirates under the new piracy policy in Japan.[748] In this case, a crude oil tanker flying a Bahamas flag was attacked in the highs seas in the Arabian Gulf. The vessel left from the Ukraine and was sailing for China. The US navy responded to the attack, along with the Turkish navy. Four pirates were captured. None of the crew was Japanese; however, the vessel was owned by Japanese company Mitsui OSK Lines Ltd.[749] A Japanese District Court issued arrest warrants for the four pirates, and a Japanese Maritime Self Defense Force destroyer, *Kirisame*, exercised the arrest warrant and the suspects were transferred from a port in Djibouti to Tokyo.[750] The defendants were issued arrest warrants, including advice

[745] Rod Harvey, 'The Independence of the Prosecutor: A Police Perspective' (Paper, Australian Institute of Criminology Conference: Prosecuting Justice, 18 April 1996); Kenny Yang, 'Public Accountability of Public Prosecutions' (2013) 20(1) *Murdoch University Law Review*.
[746] Guilfoyle (n 743) 47.
[747] Japan, *Act on Punishment of and Measures against Piracy* (No 55, 2009); Guilfoyle (n 743) 146; Security Council Resolution 1851 [*relating to Somalia*], UN SCOR, 6045th mtg, UN Doc S/Res/1851 (16 December 2008).
[748] Jun Tsuruta, 'The First Prosecution of Somali Pirates under the Japanese Piracy Act: The *Guanabara* Case' (2014) *Journal of East Asia and International Law* 243, 248.
[749] Yomiuri Shimbun, 'Japan to Try Suspects in Pirate Attack', *The Seattle Times* (online, 8 March 2011) <http://www.seattletimes.com/nation-world/japan-to-try-suspects-in-pirate-attack/>.
[750] The *Guanabara* Case (No 2012 (wa) No 77*)*, The Tokyo District Court of February 1, 2013.

about their rights to defence counsel, translated into Somali. As they were illiterate, they were briefed orally about those rights the following day.[751]

The defendants claimed that their transfer was unlawful on the basis that they would have received greater procedural fairness had they been tried by either the US or the Bahamas. They suggested that the proper forum in which to try them for their offences should be the jurisdiction with the highest procedural fairness and fair trial rights. The second ground raised by the defence was that this transfer was illegal because Japan had the death sentence, whereas the Bahamas did not. Thus, the defendants had their right to life under the *ICCPR* infringed upon. These claims were dismissed on grounds that while there may be states that can more properly ensure the rights of the defendants, this did not invalidate the right of the Japanese court to exercise universal jurisdiction over the defendants.[752] This trial has reinforced that there is no hierarchy among states or fora when dealing with universal jurisdiction offences.

7.2.2 Trial procedure under international regimes

President Sang-Hyun Song, the first president of the ICC, frequently noted that the most difficult aspects of ICC criminal trials were managing the people supporting, attending and influencing the conduct of these trials, to avoid or minimise semi-political outcomes in a criminal proceeding.[753]

The trial of Lubanga was a watershed in international criminal justice. President Sang-Hyun hailed this action as a warning to other perpetrators of such crimes that they will not escape with impunity. Further, he stated that these trials serve as a deterrent to others to prevent the commission of these serious crimes.[754] However, in practice, no-one wants to take custody of him. While officially, Austria, Belgium, Denmark, Finland, the UK and Serbia have indicated that they would willingly accept people sentenced by the ICC, Lubanga remains in one of the 12 cells hired by the ICC in the

[751] Ibid.
[752] Yurika Ishii, 'M/V Guanabara: Japan's First Trial on Piracy under the Anti-Piracy Act' (2015) 1 *Maritime Safety Law Journal* 45–55.
[753] International Criminal Court, 'Report of the Commission on Budget and Finance on the Work of its Seventh Session', fifth session, ICC-ASP/5/23/Corr.1, The Hague, 23 November–1 December 2006 <https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-23_Corr1_English.pdf>.
[754] United Nations Secretary-General, '2006 Statement—World Human Rights Day' (8 December 2006) <https://www.un.org/sg/en/content/sg/statement/2006-12-08/secretary-generals-address-mark-international-human-rights-day>.

Scheveningen 'Haaglanden Prison'.[755] The fees to house him amount to 'more than staying in a five-star hotel'.[756] The ability to overcome the enforcement issues in relation to practical aspects by the ICC demonstrate that any state that embarks upon the use of universal jurisdiction must be willing to foot the ongoing bill of enforcement.

A further concern in the application of domestic legislation by external agents relates to the standards of justice applied. In many cases, the troop-contributing countries in peacekeeping operations come from different legal traditions, and have vastly differing standards in relation to the defence of human rights or detainee treatment standards. The Afghan example demonstrates this well. The International Security Assistance Force (ISAF) has established a Rule of Law Field Force—Afghanistan (ROLFF-A), whose mandate is:

> to provide essential field capabilities, liaison and security to Afghan and international civilian providers of technical assistance supporting of building the Afghan criminal justice capacity, increasing access to dispute resolution, therefore helping to improve the efficacy of the Afghan Government.[757]

In its efforts to build the legal system of Afghanistan, certain deference was made to accepting the jurisdiction of Afghans' civil dispute resolution systems. These systems included punitive measures and systems that would not be accepted in the domestic legal systems of the troop-contributing nations, such as the splitting of the judicial system in official and unofficial law, and dismissal of cases based upon familial rather than legal grounds and discriminatory treatment of women.[758]

Further, in bolstering the domestic judicial system, the handover of alleged criminals required coordination and a strict understanding of the legal basis upon which the detainee was held or transferred. While this is further complicated by the discordant conflict categorisation—transitioning between international, non-international armed conflict and internal strife—the legal regimes that enabled this handover implied

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[755] ICC Now, 'Case and Situations, DRC The Lubanga Case' <http://www.iccnow.org/?mod=drctimelinelubanga>.
[756] ICC, *Understanding the Criminal Court* <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.
[757] NATO, *NATO Rule of Law Field Support Mission (NROLFSM)* <http://www.rs.nato.int/images/media/PDFs/110930rolbackground.pdf>.
[758] Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards* (International Commission of Jurists, 2014). See generally Paul Muggleton and Bruce Oswald, 'Counterinsurgency and Certain Legal Aspects: A Snapshot of Afghanistan' (2011) 5 *Asia Pacific Civil-Military Occasional Papers*.

different detention rights and obligations.[759] Irrespective of this complexity, the handling of potential core international criminal suspects by ISAF and their handover to the domestic judiciary is an example of the requirement to agree to common handling procedures to support the efficient prosecution of universal jurisdiction crimes.

The attempt to harmonise the procedures to be followed by the arresting force was to ensure alignment with the domestic needs of the host state. A key lesson learnt by ROLFF-A was the need to ensure that the handover of detainees was supported with evidence. This handover followed the detainee throughout detention pathways, and ensured a clear pathway for prosecution for that person—whether managed through the Afghan Court system by other ROLFF-A assets, or through transfer to an existing element of the Afghan justice sector—in relation to a clearly demarcated authority for trial. This ensures adherence to the transferring state's international human rights obligations.[760]

In the case of universal jurisdiction offences, this could be achieved by the adoption of an international agreement that enables mutual legal assistance to enable domestic investigative authorities and police to collect evidence in foreign states in accordance with the policy and procedure of the prosecuting state. This would obviously necessitate a training impost, though this could also be overcome through the use of liaison officers from the prosecuting state.

One of the justifications for the establishment of the ICC is that hybrid courts, such as the joint domestic and UN-founded SCSL, tend to lack resources, skills, political will and experience to address the kind of offences subject to their jurisdiction.[761] Further, the introduction of the ICC sought to establish a more efficient systematic approach to administering international criminal justice, by having an established court with a permanent status, as compared to the hybrid courts. Thus the ongoing and long-term

[759] Muggleton (n 759) 22. Distinctions such as the classification of the detainee, and the impact of holding periods as a result, influenced how detention operations occurred. These issues were generally overcome by the pragmatic agreement of Memoranda of Understanding as between ISAF, the troop-contributing nations and the host nation, or in some cases, on a more localised basis.

[760] United States Institute for Peace, 'Special Report—Establishing the Rule of Law in Afghanistan' <http://www.usip.org/sites/default/files/sr117.pdf>

[761] Sarah Nouwen, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' (2006) 2 *Utrecht Law Review* 190–214; Shahram Dana, 'The Sentencing Legacy of the Special Court for Sierra Leone' (2014) 42 *Georgia Journal of International and Comparative Law* 615.

status of the Court purportedly ensures delay reduction.[762] This enabled the creation of set, known and constant procedural rules, reinforced through precedent and practice, thus lending consistency to the due process of accused appearing before the courts. Similarly, arrest warrants for the ICTY have been left unfulfilled as like-minded states have ignored calls for the extradition of alleged perpetrators to face justice.[763]

In the establishment of the transitional authority in Timor Leste, under the auspices of the UN Transitional Authority East Timor (UNTAET), universal jurisdiction was recognised in the special panel established with the District Court in Dili.[764] Specifically, the crimes of genocide, war crimes, crimes against humanity, murder, sexual offences and torture were mandated as the exclusive jurisdiction of the District Court, but were in effect executed by international jurists, subject to the authority of UNTAET derived through UNSCR No 1272.[765] The regulation establishing the Court, promulgated by UNTAET, specified that the Court shall have universal jurisdiction over crimes of genocide, war crimes, crimes against humanity and torture.[766] In practice, the definition of universal jurisdiction contemplated those offences that were committed by Timorese citizens outside Timor Leste. That is, in Indonesia where the victim was East Timorese. or where the offence was committed in Timor Leste.[767]

While some scholars purport that this definition 'signifies international recognition of universal jurisdiction';[768] the definition of 'universal jurisdiction' contained in the regulation is far from this. The requirement to link territory, and passive or active personality to the offences result in the description of 'universal jurisdiction' being more like Slaughter's 'universality plus' construct. The regulation specifies that universal jurisdiction applies to jurisdiction irrespective of whether the serious criminal offence was committed in the territory of Timor Leste, by a Timorese citizen, or involving a Timorese victim. Thus, it purports to elevate universal jurisdiction over other jurisdictional authorities.[769]

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[762] Scott Harper, 'All the Missing Souls: Six Questions for David Scheffer' (7 February 2012) <https://harpers.org/blog/2012/02/_all-the-missing-souls_-six-questions-for-david-scheffer/>.
[763] United States Department of State (n 55).
[764] Security Council Resolution 1272 [*Timor*], UN SCOR, 4057th mtg, UN Doc S/RES/1272 (25 October 1999).
[765] Ibid.
[766] Ibid.
[767] UNTAET Regulation No 2000/15, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences,* 6 June 2000.
[768] Inazumi (n 13) 88.
[769] UNTAET (n 768) [2.2].

When considering the likelihood that the offences occurred during when the nation state of Timor Leste did not yet exist, a type of universal jurisdiction could be relied upon despite these qualifiers. However, it seems that such an offence would have triggered the later jurisdictional bases later described in the regulation, such as nationality of offender or victim. Thus, in this case, the regulation purports to establish universal jurisdiction in respect of serious criminal offences, but later caveats that jurisdiction by adding passive and territorial jurisdictional bases for the court of appeal to maintain jurisdiction over the offence. This application of universal jurisdiction echoes the basis of jurisdiction determined in *Eichmann*. Despite the state of Timor Leste not existing at the time of the alleged offending, the subsequent prosecution of offences subject to universal jurisdiction by Timor Leste are not barred by virtue of being ex post facto laws. This is because the 'crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations', despite occurring before the existence of domestic Timorese criminal law.[770]

In each of these cases, the trial procedure under international tribunals and the establishment of jurisdictional rules and rules of evidence and procedure, have been determined on a tribunal-by-tribunal basis. This determination considers the unique requirements of the conflict or culture and the context for the genesis of the particular tribunal in question. Accordingly, while there has been an increase in the practice of enforcement for international criminal law offences, there is not yet a guiding set of harmonised procedural rules relating to enforcement of these offences. Arguably, the efficacy of a singular system of rules of procedure may not achieve the best justice outcomes in every circumstance. Nonetheless, in the interest of comity, a set of normative principles guiding procedure to commence trials subject to universal jurisdiction would enhance collective acceptance of the minimum procedures necessary to give effect to the jurisdiction.

7.3 Forum Selection and Concurrent Jurisdiction

Concurrent jurisdiction is perhaps most prevalent a concern in cases in which there are overlapping international criminal jurisdictions available to deal with a matter pertaining to universal jurisdiction offences. In the case of piracy, the problem relates to an absence of an obvious jurisdiction available to state. In the case of international

[770] *Eichmann District Court* (n 9).

courts, there will be at least one competing jurisdiction for any crime prosecuted in an international forum. Sections 7.3.1–7.3.2 will describe how these opposite problems are addressed in current international criminal legal practice.

7.3.1 Forum selection and concurrent jurisdiction in modern piracy

Guanabara, discussed in Section 7.2.1.3, provides an example of the practical issues in respect of forum selection for modern-day piracy offences. Here, the issue turned upon who actively took measures to prosecute the pirates, despite the capacity of numerous states to equally claim jurisdictional claims to the prosecution. The US captured the pirates; the Bahamas was the flag nation of the assaulted vessel. The vessel last departed from the Ukraine and was destined for China. Article 105 of the *UNCLOS* provides that the courts of the state that carried out the seizure of a pirate vessel and arrest of persons associated with the piratical act may decide upon penalties to be imposed upon those detained individuals.[771] Notwithstanding the language of Article 100 of the same convention, requiring that all states cooperate in the repression of piracy, the permissive jurisdiction contained in Article 105 means that no state is compelled to detain or prosecute pirates. The additional UNSCR dealing with piracy off the coast of Somalia, equally, does not impose an obligation upon detaining states on the prosecution of pirates.[772] In *Guanabara*, it was Japan that eventually exercised jurisdiction, largely because of a request by the US government to do so.[773] Thus, a methodology for the allocation of jurisdiction in piracy cases turns more on expediency and the willingness of the prosecuting state to elect to prosecute, rather than any hierarchy of jurisdictional choice.

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[771] *UNCLOS* (n 90).

[772] United Nations Security Council Resolution 1816, UN SCOR, 5902nd mtg, UN Doc S/Res/1816 (2 June 2008) 11; United Nations Security Council Resolution 1846, UN SCOR, 6026th mtg, UN Doc S/Res/1846 (2 December 2008) [14]: '*Calls upon* all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators or piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution'.

[773] Shimbun (n 750).

7.3.2 Forum selection and concurrent jurisdiction in international courts

An ICC warrant has been issued seeking the arrest of Omar Al-Bashir since the Prosecutor sought his extradition from Sudan in 2008. While not a domestic application of universal jurisdiction, the key in analysing this case is the manner in which states have protected the immunity of Al-Bashir as a head of state. This is despite ICC statements that serving as a head of state does not make him immune from proceedings before the ICC.[774]

Notionally, the issuance of an ICC warrant for the arrest of Al-Bashir should reinforce or invigorate the ability of states hosting him to exercise universal jurisdiction over his offences. The preamble of the *Rome Statute* states:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes;
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[775]

However, Bashir has been free to move with impunity across numerous borders of states party to the *Rome Statute*. NGO 'Bashir Watch' plots Bashir's movements on a 'travel map', outlining states that Bashir has travelled to since the issuance of the ICC arrest warrant.[776]

In July 2015, following a visit to South Africa to attend the 25th AU summit, the South African High Court issued orders for Bashir's arrest. In March 2016, the South African Supreme Court of Appeal rejected the government's appeals regarding its conduct in allowing Bashir to flee South Africa despite the active ICC warrant.[777] This action raised the possibility of government officials being criminally charged for shielding Bashir and facilitating his escape from South Africa. While dealing with a treaty obligation specifying an extradition regime, this case does shed light on the

[774] International Criminal Court (n 12).
[775] *Rome Statute* (n 132).
[776] 'Bashir Travel Map', *Bashir Watch* (9 September 2017) <Bashirwatch.org>.
[777] Enough Project Blog, 'South African Court Rejects Impunity' (Blog Post, 3 April 2017) <http://www.enoughproject.org/blogs/south-african-court-rejects-impunity-"decision-not-arrest-bashir-inconsistent-law">.

development of obligatory measures for government officials involved in making decisions that do not accord with international legal obligations regarding enforcement against core crimes.

In this case, the South African High Court determined, on appeal, that the basis of the South African *Implementation Act* was to give effect to arrest warrants issued by the ICC.[778] It was not within the scope of the South African government's competence to determine whether Bashir had immunity from prosecution by the ICC. This was a matter for the ICC,[779] as the ICC had made an application to South Africa to seek the arrest and surrender of Bashir under Article 89 of its statute.[780] The South African government cited the jurisprudence of the *Arrest Warrants* case, as it related to head-of-state immunity.[781] The Court considered the general propositions of immunity at international law. The Court held that the current state of customary international law, while in flux, does not create an exception to head-of-state immunity when visiting foreign states, based upon their alleged commission of international crimes.[782] The Court, instead, relied upon its domestic incorporation of its *Rome Statute*'s obligation as the basis for displacing this head-of-state immunity. Head-of-state immunity was a procedural bar to prosecution in South Africa, but the head-of-state immunity was held not to apply to Bashir before the ICC. Thus, South Africa was obligated by its domestic incorporation of its *Rome Statute* obligations to give effect to the ICC's arrest warrant.[783]

The ICC provides some guidance in relation to the application of the principle of complementarity. Its Article 17(1) specifically provides that the Court shall determine that a case is inadmissible where the:

> case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution.[784]

Accordingly, for any case in which a state is genuinely attempting to investigate and prosecute a matter subject to universal jurisdiction, the ICC would not have

[778] South African *Implementation of the Rome Statute of the ICC Act 2002.*
[779] *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (876/15) [2016] ZASCA 17 (15 March 2016) Supreme Court of Appeal of South Africa.
[780] Ibid 58.
[781] *Arrest Warrants Case,* above (n 284) paras [51], and[54].
[782] *The Minister of Justice v The Southern African Litigation Centre* (n 780) 85.
[783] *The Minister of Justice v The Southern African Litigation Centre* (n 780) 100.
[784] *Rome Statute* (n 132).

jurisdiction to proceed with the investigation.[785] This issue has not yet been tested. However, analogous cases provide examples as to when national jurisdiction will be given deference over ICC jurisdiction. For example, the Court refused to accept that Kenya should be authorised to exercise its national jurisdiction in the case of senior members of the Kenyan administration. It rejected Kenya's argument that it was investigating the situation from the 'bottom-up' and had not yet reached any decision.[786] The traditionally held understanding of Article 17 is that it was drafted to 'negotiate the sovereign demands of the territorial state or the state of nationality, and the demands of international justice'.[787] However, the Court held that this does not amount to a presumption in favour of domestic jurisdictions.[788] Here, the Court maintained that definitive steps must be taken against the defendants to displace the Court's jurisdiction.

Further, it is possible that in the future, the ICC may provide a judgment that supports states in determining which variants of universal jurisdiction are considered lawful by state practice or customary international law. Though this decision would be more determinatively and relevantly decided by the ICJ or states themselves, a decision by the ICC in relation to this issue would assist in establishing principles relevant to the lawfulness of in absentia universal jurisdiction.[789]

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[785] Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice* 63 (2003) ICC <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>. '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'. For a more conservative approach, see Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions* (2008, Brill) 192–193.

[786] *The Minister of Justice v The Southern African Litigation Centre* (n 780) 102.

[787] Christine Bjork and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya,' (2011) 14(1) *Yale Human Rights and Development Journal* 1.

[788] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, (Case No. ICC-01/09-02/11-274, ICC Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011) ('Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute') 30 August 2011 [1], [40], [45].

[789] Based upon its status as a body relevant to the *ICJ* Statute Article 38(1), as a source of international law. See also Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction' (Working Paper No 46, Leuven Centre for Global Studies) March 2010 <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp41-50/wp46.pdf>.

The test of 'unwilling and unable' is a pre-determinative factor in considering whether the ICC has jurisdiction over a matter. Equally, it could be extended to when a state would be able to exercise universal jurisdiction in relation to a case. The politicisation of universal jurisdiction in states where criminal complaints may be lodged directly by interest and advocacy groups or 'overly zealous prosecutors' has been discussed in detail when addressing contemporary state practice in relation to the exercise of universal jurisdiction.[790] In certain cases, a state may become embroiled in dealing with a criminal complaint for which they are ill-equipped to properly investigate. Indeed, access to the accused and evidence in the state where the offences were committed are key practical requirements to support a successful criminal prosecution.

The Prosecutor of the ICC could intervene when such matters are deemed to be flailing. This is because international cooperation is unlikely when one state is investigating the conduct of officials of another.[791] This, however, has a limited impact in relation to the de-politicisation of the investigations. If a state has had the investigation removed from its jurisdictional competence as a result of its inability to prosecute, the interaction between the principles of complementarity (as described in the *Rome Statute* and the national domestic principles of *nes bis in idem*), no matter how espoused, would result in the complaint being dealt with to finality. Either the prosecution brief would not be supported by an appropriately resourced investigation or the complaint would be declared as without having basis. Hence, it would be withdrawn. This suggestion in relation to the influence of the ICC in the application of universal jurisdiction is again limited by the practicalities of the Court's gravity threshold test. Thus, in many circumstances in which universal jurisdiction has sought to be used to fill the impunity gap for those accused of war crimes, they would otherwise continue without trial.

Despite these limitations, the ICC may assist in the prosecution of lesser criminals by utilising its international cooperation mechanisms, pursuant to Article 93.10.a. of the *Rome Statute*, which specifies that:

> [t]he Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a

[790] See Section 5.5.
[791] Ibid.

> crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting state[792]

The court in Sierra Leone is a unique example of a hybrid court, as the resolution to create the tribunal originated from a request from the Sierra Leone government. Further, the unanimous UNSCR came days after this request was made and issued a mandate to investigate how such a court should be established. Just over a month later, a report was forwarded by the Secretary-General, which included a draft statute for the court. Following several amendments to the draft, Sierra Leone agreed to the document in 2001 and the hybrid court was established with authority to try only international offences. However, its jurisdiction was to be concurrent with that of its domestic courts.[793] The statute of the Special Court specifies that the competence of the Court extends universal jurisdiction in relation only to people whose nation state was 'unwilling or unable' to try the offender.

In relation to addressing human rights norms for accused, and rules of procedure, the Court was established with regard to the rules of evidence and procedure adopted by the ICTR. This created a system of fair and public trial rights, presumptions of innocence and protections against self-incrimination, as well as the right to be present and represented throughout trial. In the event that the rules provided for a certain circumstance, the Court was authorised to revert to the *Criminal Procedure Act* in force in Sierra Leone for guidance.[794] Sentencing procedure was equally to be derived from the ICTR in the first instance, and the domestic Sierra Leone laws in the second.

Despite its concurrent jurisdiction, the SCSL was only to deal with people who held 'greatest responsibility' for the crimes committed in Sierra Leone. This term was defined to assist the prosecutor in making determinations regarding the prioritisation of whom to try. This limitation on the Court's jurisdiction resulted in the unintentional outcome of enforcement of universal jurisdiction in the states surrounding Sierra Leone. As a consequence of the support provided by the UN, the main perpetrators of offences in Sierra Leone were dealt with by the Special Court. The large majority of rank-and-file criminals—still guilty of committing atrocious human rights violations,

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[792] *Rome Statute* (n 132).
[793] See Security Council Resolution 1315 [*on Establishment of a Special Court for Sierra Leone*], UN SCOR, 4186th mtg, UN Doc S/Res/1315 (14 August 2000); DA Mundis 'Current Developments: New Mechanisms for the Enforcement of International Humanitarian Law' (2001) 95 *American Journal of International Law* 934.
[794] See *Special Court of Sierra Leone Statute*, arts 17 and 14(1); as annexed to Security Council Resolution 1315 (n 794).

but not instrumental in the engineering or planning of the broader campaign of violence—did not have their conducted addressed by the SCSL. The result was a significant migration of people who were involved in the campaign of violence who moved from Sierra Leone when it was clear that they no longer enjoying political protection or immunity. They remained exempt from prosecution by the SCSL, as they were not sufficiently high ranking or of interest to the SCSL, immigrating to neighbouring states with no universal jurisdiction. Notably, Liberia was a safe haven for the criminals. Then-Liberian President Charles Taylor—who was eventually indicted by the Special Court—was running a proxy war into Sierra Leone and had command responsibility for a large proportion of the violence occurring in Sierra Leone, ensuring no political imperative by the neighbour state.[795]

Although Sierra Leone itself does not have a robust universal jurisdiction legislated domestically, the actions of the states surrounding the West African nations has indicated a strong regional support base to addressing the crimes committed in Sierra Leone. Thus, it is largely resultant upon the states own proactivity in seeking to ensure justice for the offences committed within its territory.[796]

Separately, the UN Security Council has a role to play in the enforcement of international criminal law through its ability to refer matters for investigation to the ICC. Through the provisions in Article 13 (b) of the *Rome Statute*, the UN Security Council may refer a situation in which a crime listed in the statute 'appears to have been committed' to the Prosecutor by virtue of a Chapter VII resolution. This in turn requires that there is a 'threat to the peace, breach of the peace or act of aggression'.[797]

Thus far, there have only been two such referrals. In 2005, the situation in Darfur was referred to the ICC, with a vote of 11 to zero, with four abstentions.[798] In 2011, by a unanimous vote, the situation in Libya was referred to the Prosecutor to commence an investigation into crimes against humanity occurring in Libya.[799]

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[795] Tom Perriel and Marieke Wierda, 'The Sierra Leone Court under Scrutiny: Hybrid Courts of Sierra Leone', *International Center for Transitional Justice* (March 2006) <https://www1.umn.edu/humanrts/instree/SCSL/Case-studies-ICTJ.pdf>.
[796] Thompson Bankile and John Rosolu, *Universal Jurisdiction: The Sierra Leone Profile* (Asser Press, 2015).
[797] *Rome Statute* (n 132) art 13(b); *United Nations Charter* (n 53) art 39.
[798] See n 53.
[799] See n 53.

Ongoing concern in relation to the reliance to regulate international conduct by falling back upon UNSCR is the noted double standard in handling disputes in the approach of the Council. These contradictions have been noted over the duration of the Council's operation and are rooted in the differing legal and political attitudes of the Council towards different international disputes. Over time, the Council has provided different approaches on how disputes should be regulated (eg, relying more regularly on collective self-defence arrangements rather than collective security arrangements).[800] At the height of the use of universal jurisdiction, the Council's approach was one of interventionism, as observed in the establishment of the ICTR and the ICTY. However, the shift in reliance upon collective enforcement measures has reduced with the current change in focus to security alliances attributable to numerous international political forces, such as decolonisation, ideological conflicts and discriminations that have 'bipolarised the political and legal balance of the international order'.[801] UN Security Council members are likely to continue to veto actions that will affect their increasingly isolationist approaches to international relations, which inevitably results in a decrease in regulation and the likelihood of intervention in other states' affairs. The internal focus of international relations policies, and use of military forces being less expeditionary in support of international peacekeeping has been cited by numerous political scientists as a hallmark of the new century's international relations.[802] The impact for universal jurisdiction is that it is increasingly unlikely that the UN will intervene to direct action or provide meaningful direction regarding the use of enforcement by one state to another.

7.4 Harmonisation of International Law Principles

Through the attempts by states to give effect to their agreed obligations pertaining to the prosecution of pirates with their other international law obligations, harmonisation of international law principles will be analysed in respect of modern piracy prosecutions. From the ICC perspective, its jurisprudential influence on the domestic application of international law principles will be discussed.

[800] Farhad Malekin, *The Monopolisation of International Criminal Law in the United Nations, A Jurisprudential Approach* (Akmqvist & Wiskell International, 1995) 200–205.
[801] Ibid.
[802] Robert M Cassidy, *Peacekeeping in the Abyss: British and American Peacekeeping Doctrine and Practice After the Cold War* (Greenwood Publishing Group, 2004).

7.4.1 Harmonisation of international law principles in modern piracy

In addition to the *United Nations Law of the Sea Convention's* provision regarding attempts to combat piracy, there have been numerous international agreements established to address the crime, including a General Assembly Resolution urging all states to adopt national legislation to actively combat piracy and armed robbery at sea.[803] Further, Security Council resolutions have been adopted to create a specific legal regime to deal with acts of piracy which had occurred on the high seas or in an exclusive economic zone off the Horn of Africa, largely originating from Somalia.[804] These extend to the issuance of numerous reports, and a UNSCR authorising the use of 'all necessary means' pursuant to Chapter VII of the *United Nations Charter* to combat this identified threat to international peace and security.[805] Through these resolutions, the authority for all states to arrest, detain and transfer pirates captured within the specified 'High Risk Area' was created in addition to the rights of states to detain pirates on the high seas.

Further, in addition to the previously discussed positive instruments of international law,[806] recent developments in relation to multinational naval operations to combat piracy, supported by UNSCR, limit the extent to which universal jurisdiction can be activated to combat piracy. There were further frustrations relating to the inconsistent criminal enforcement measures taken responding to this threat to international peace and security. Resolution 1918, sponsored by Russia and passed on 27 April 2010,[807] specifically called for states to institute domestic legislation to criminalise piracy and to seek to detain and then prosecute pirates seized off the Somali coast in accordance with international law principles. This Resolution was followed by a number of similar

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[803] *Oceans and the Law of the Sea,* GA Res 64/71, UN GAOR, 64th sess, 58th plen mtg, UN Doc A/RES/64/71 (4 December 2009).
[804] Ibid.
[805] See Security Council Resolution 2125, UN SCOR, 7061st mtg, UN Doc S/RES/2125 (18 November 2013); Security Council Resolution 2077, UN SCOR, 6867th mtg, UN Doc S/RES/2077 (21 November 12); Security Council Resolution 2039, UN SCOR, 6727th mtg, UN Doc S/RES/2039 (29 February 2012); Statement by the President of the Security Council, UN Doc S/PRST/2013/13 (14 August 2013); Statement by the President of the Security Council, UN Doc S/PRST/2012/24 (20 December 2012); UN Security Council, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, UN Doc S/2015/776 (12 October 2015); UN Security Council, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, S/2013/623 (21 October 2013).
[806] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 162; *High Seas Convention* (n 169) arts 14–19; *UNCLOS* (n 169) arts 100–107.
[807] Security Council Resolution 1918, UN SCOR, 6301st mtg, UN Doc S/RES/1918 (27 April 2010).

resolutions that called for the support of universal jurisdiction as a measure to combat piracy.[808]

Despite this regime, the enforcement of these rights to detain and prosecute Somali pirates by states has been limited. There have been numerous examples of states being reticent to arrest or detain pirates due to concerns about competing human rights obligations, pertaining to transfer to third-party states, possible rights to seek asylum or limitations on states to whom the detaining state could transfer the pirates to. In the case of a British Navy example, pirates were not detained in case they subsequently claimed asylum in Britain.[809] In a Danish example in 2007, instead of prosecution, the pirates captured and subsequently detained by the Danish navy ship *Absalon* were left on a beach in Somalia. The Danish authorities determined that the risk of abuse or exposure to the death penalty by the Somali authorities would breach Danish domestic and international human rights obligations. Further, based on concerns of possible abuses on transfer back to Somalia on completion of their sentences, the pirates were not taken to Denmark for prosecution and detention.[810]

Although there have been numerous intergovernmental and regional agreements to close this gap, in practice, the transfer of pirates for prosecution ends up being undertaken on case-by-case bases. An example of this is the Netherlands–Denmark agreement for the extradition of four Somali pirates captured on a Netherlands–Antilles ship by Danish forces, in the Gulf of Aden.[811] However, these agreements still do not mandate action.

These examples demonstrate that in seeking to utilise universal jurisdiction, states balance their desire to exercise the jurisdiction with other, concurrent and competing legal obligations. They seek to stop piratical acts, but not at the expense of retaining the pirates in their own prisons, or potentially being faced with a pirates' asylum

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[808] Security Council Resolution 1816, UN SCOR, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008); Security Council Resolution 1838, UN SCOR, 5987th mtg, UN Doc S/RES/1838 (7 October 2008); Security Council Resolution 1846, UN SCOR, 6026th UN Doc S/RES/1846 (2 December 2008). Several treaty obligations followed, creating prosecute and extradite provisions to deal with Somali pirates; numerous capacity building and criminal justice sharing provisions were also created to deal with the capacity-related issues associated with the prosecution and prevention of Somali piracy. The surrounding and complementary justice mechanisms developed to attempt to comprehensively address the Somali piracy issue are addressed in Chapter 7.

[809] David B Rivkin Jr and Lee A Casey, 'Pirates Exploit Confusion about International Law' (New York) *Wall Street Journal*, 19 November 2008.

[810] Tullio Treves, 'Piracy, Law of the Sea and the Use of Force: Developments off the Coast of Somalia' (2009) 2(20) *European Journal of International Law* 399–414.

[811] Ibid.

application after the prison term, which would then require them to discharge other international law obligations. The use of universal jurisdiction in modern piracy is a balance between the practical cessation of the act and hedging potential breaches of competing international law obligations.

7.4.2 Harmonisation of international law principles in international courts

In the lead up to discussion regarding the creation of an ICC, some states contended that the enforcement of international criminal law should be articulated through a treaty. The treaty would establish common criminal offences that are enforced nationally through the codification of universal jurisdiction principles. Proposals to implement universal jurisdiction at the ICC level were lodged by Germany and South Korea. However, these failed during the *Rome Statute* negotiations.[812] The eventual outcomes of the *Rome Statute* negotiations was the establishment of an supranational legal entity that discharged its jurisdiction either by agreement of the state party or through the referral of a situation by the UN Security Council. This utilised the devolved jurisdiction that it had inherited through the international system and the *United Nations Charter*.[813]

The ICC does not exercise universal jurisdiction, at least not in the strict sense of the word, as universal jurisdiction is notably domestic jurisdiction. Further, the jurisdiction of the ICC is strictly circumscribed.[814] It is based on the limitations agreed during negotiations for the *Rome Statute*, and is limited by *ratione territorii* and *ratione personae*, by agreement or by Security Council referral.

It is arguable that the ICC could exercise a form of universal jurisdiction on the basis that it exercises delegated jurisdiction and therefore can do anything its states parties could do, *ut singuli*. However, this possibility is not reflected in the reality of the strict limitations upon the Court's jurisdiction resultant upon balancing the positions of its numerous states parties.[815] This suggested exercise of universal jurisdiction would

[812] Preparatory Committee on the Establishment of an International Criminal Court, 16 March–3 April 1998, *Report of the Inter-Sessional Meeting from 19 to 30 January in Zutphen, Netherlands,* UN Doc A/AC.249/1998/L.13 (4 February 1998).
[813] Bernhard Graeforth, 'The International Law Commission Tomorrow: Improving its Organisation and Methods of Work' (1987) 85 *Australian Journal of International Law* 597.
[814] Ryngaert (n 790) 4.
[815] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56(1) *International & Comparative Law Quarterly* 49, 58–60.

only apply to offences relating to those states that are party to the ICC, or in relation to the prosecution of offences that have been referred to by the UN Security Council, on the basis that jurisdiction for the ICC is still limited by the procedural rules articulated in Articles 51 of the Statute.[816] Any prosecutions purported to be conducted under the premise of universal jurisdiction against an individual residing in a state that is not a party or has not been commenced through the power of the UN Security Council in respect of ensuring international peace and security, would necessarily require the cooperation of the target state. This cooperation would extend to the application to arrest the accused as well as to access evidence to support the ICC investigation and eventual trial. This is, in and of itself, an obvious problem as the circumstances in which universal jurisdiction is enlivened requires consideration of the principles of complementarity, which therefore means that the target state is unwilling or unable to act. In these circumstances, it seems unlikely that this state would practically agree to, or be able to support, the ICC investigation and prosecution.

Further, the jurisprudential principle of the 'gravity threshold' for the ICC reflects a dual issue with the application of universal jurisdiction by the ICJ. The Court does not have sufficient capacity to deal with less serious offences, nor does the jurisdiction agreed to by the international community support that the ICC should be used to displace the ordinary functions of domestic courts. The test espoused in the Article 17(1)(d) of the *Rome Statute* requires that the Court restrict its material jurisdiction to 'the most serious crimes of international concern'.[817] As discussed previously, this was subsequently elaborated upon to require that a case must be systematic, or large scale. In the event it was an isolated act considered of sufficient gravity, 'due consideration must be given to the social alarm such conduct may have caused in the international community'.[818]

The main contribution of the ICTY to the practice of universal jurisdiction has been in the development of international criminal law precedent that has assisted states' judicial organs in determining cases relating to crimes against humanity, human rights violations and breaches of the laws of war, in determining cases within the competence of the tribunal. Established by a UNSCR, the influence of the Tribunal on

[816] *Rome Statute* (n 132).
[817] Robinson D Von Hebel, 'Crimes within the Jurisdiction of the Court' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 104.
[818] Ibid 82.

contemporary jurisprudence has often been cited by other tribunals and organs determining matters relevant to international criminal law. In this regard, the most significant contribution of the Tribunal to the doctrine of universal jurisdiction has been in the enforcement sphere. It provides a jurisprudential basis for domestic courts to refer to when exercising universal jurisdiction.

The benefits of experience in the use of evidence collected by peacekeepers, fact finders and investigating prosecutors can also assist in the enforcement of universal jurisdiction offences through ensuring compliance with the appropriate evidentiary standards to support domestic criminal prosecutions. In the case of universal jurisdiction prescription, the Tribunal has also assisted in adding to the corpus of law in terms of which types of offences are universally cognisable. For example, in *Furundzija*, the Tribunal held that the state practice and *opinio juris* relating to the prohibition against torture created a *jus cogens* principle, not only in relation to the state obligation to punish the commission of such offending, but also in relation to the state's obligation to prevent its occurrence.[819] This principle was relied upon by a 'coalition' of international lawyers who commenced universal jurisdiction criminal actions against senior US officials in relation to the allegations of torture in Guantanamo Bay.[820]

Finally, the reliance upon international enforcement regimes can in some circumstances result in the arrest and detention of accused suspected of egregious crimes. Consider, for example, the arrest of General Aideed for his raid upon Pakistani peacekeepers in Somalia, or the obligation for peacekeepers to cooperate with the ICTY statute by virtue of UNSCR 827 (1993).[821] The authority to arrest Aideed was issued to UN Operation in Somalia (UNOSOM) II as a mandate on 6 June 1994. The result was the dispatch of additional US Ranges and Delta Force personnel to affect the raid to arrest him by force and the death of numerous faction members as well as 24 Rangers, made infamous in the novel and movie *Black Hawk Down*.

The ICJ has considered the interaction of state responsibility and individual criminal responsibility in several cases, when there has been a nexus between the conduct of

[819] *Furundzija (Judgment)* (International Tribunal for the Former Yugoslavia, IT-95-17/1-T, Trial Chamber, 10 December 1998) [147]–[157]; see also Gallagher (n 585) 1089.
[820] Gallagher (n 585) 819. See also Section 5.2.1.
[821] Lori F Damrosch, 'Comment: Connecting the Threads' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 95.

the individual and the responsibility of the state to act regarding that conduct.[822] There has also been consideration given specifically to the authority of another state to intervene in the enforcement of criminal jurisdictions and regard given to the scope and extent of universal jurisdiction.

The *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Serbia v Croatia)* 2015 judgment responded to a claim and counter-claim alleging acts of genocide committed by each party against the population of the other, couched in terms of failures to discharge obligations under the *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention*).[823]

The judgment was delivered on 3 February 2015, and the relevant jurisdictional matters were still in issue following the preliminary judgment of 2008 were disposed of. In particular, the claim made by Yugoslavia was that the Court did not have jurisdiction over it in relation to a breach of the *Genocide Convention* on the dual basis that it did not exist at the time of the acts, and thus could not be held responsible for prior acts. Further, it did not accede to the *Genocide Convention* until 27 April 1992, and the Convention did not operate retrospectively.

This aspect of the judgment is relevant for the purposes of this thesis because the Court established its jurisdiction on the entirety of Croatia's claim on the basis that the acts of the current state of Yugoslavia were encompassed by the International Law Commission's *Draft Articles on States Responsibility,* namely Article 10 (2). The Court took pains to highlight when discussing this matter, it had no jurisdiction other than that contained in the *Genocide Convention* to determine this issue. It reinforced its previous judgments that it is prevented from making further judgment on international law more generally, as it:

> has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.[824]

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[822] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Merits)* [2015] ICJ Rep 3.
[823] Ibid 20–29.
[824] Ibid 41; citing the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina. Serbia and Montenegro (Judgment) ('The Genocide Case'), [2007]* ICJ Rep 1, 104 [147].

Finally, the other relevant jurisprudence to come from this case was the reassertion of the distinction between state responsibility and individual criminal responsibility.[825] The Court expressly refrained from ruling, in general or esoteric terms, on the relationship between breaches of international humanitarian law, as it related to acts of genocide being determined to have been committed, as compared to the applicability of the convention.[826]

This judgment reinforces the strict separation between international legal obligations established by treaty and those that apply as a matter of general international law. The ICJ jurisprudence supports that there is a clear jurisdictional basis for the prosecution of crimes subject to universal jurisdiction based upon *erga omnes* obligations, as against individuals, regardless of whether those obligations have been articulated in international treaty obligations at the time of offending.

The *Arrest Warrants* case is the key ICJ case relating to the application of universal jurisdiction.[827] It represents the most relevant international jurisprudential statement on the applicability of universal jurisdiction. In addition to addressing issues regarding the existence of the jurisdiction at international law, this case discussed the interaction between the availability of universal jurisdiction and the privileges and immunities enshrined in the *Vienna Convention on Diplomatic Relations*.[828] The judgment handed down in this matter has been heavily relied upon in supporting arguments both for and against the use of the doctrine of universal jurisdiction.

Coming at the height of the Kingdom of Belgium's (Belgium) judicial activism in this field, the application by the Democratic Republic of the Congo (Congo) was filed with the ICJ on 17 October 2000. It sought to have the Court rule on a dispute relating to the international arrest warrant issued by Belgium against the Minister for Foreign Affairs then in office in the Congo, Abdulaye Yerodia Ndombasi. The arrest warrant alleged 'serious violations of international law' and sought the extradition of Yerodia for trial.

The warrant was directed against Yerodia for being the 'perpetrator or co-perpetrator' of crimes against humanity and crimes constituting grave breaches of Additional

[825] *Genocide Case* (n 825) 129.
[826] Ibid 153.
[827] *Arrest Warrants Case* (n 284).
[828] *Vienna Convention on Diplomatic Relations* 500 UNTS 95 (1961).

Protocols I and II of the *Geneva Conventions*. Specifically, the warrant alleged that his role in making public addresses to the media and various speeches, incited racial hatred and incited violence against Tutsi residents of Kinshasa. Conversely, the basis of the application by the Congo outlined the criteria that mark a matter as being the exercise of universal jurisdiction: Yerodia was not in Belgian territory at the time of the acts, was not a Belgian national, no Belgian nationals were affected by the violence said to be the result of Yerodia's actions, and the acts themselves were committed outside Belgian territory. The Congo also ran an immunity argument based upon Yerodia's status as a government official.[829]

The Congo argued that there is attributed to foreign officials a protection which creates an inviolability against criminal prosecution in a domestic court while discharging official duties. However, it noted that such immunity does not amount to impunity, and distinguished that such inviolability does not amount to exemption from criminal responsibility or sentence, merely an immunity from prosecution at that time and in that jurisdiction. The Court held that the issue relating to immunity of a Minister for Foreign Affairs must be determined on the basis of customary international law, given the treaties cited by both parties did not contain specific provisions relating to a minister of this kind. The Court held, by having regard to the purpose of the immunity from criminal prosecution afforded to a Minister of Foreign Affairs, that this immunity extends to acts that occurred in a private or public capacity, prior to or during the time that minister is fulfilling that official function. In this case, the Court made the pragmatic determination that the basis for the immunity is to allow a minister to travel freely in the performance of their official functions. The risk of legal proceedings in foreign states when travelling would deter the minister from completing official functions.

However, Belgium raised the provisions of certain instruments establishing international criminal tribunals as specifically excising this head-of-state immunity from their jurisdiction. Both Congo and Belgium sought to analyse the decisions in the House of Lords in Pinochet and the Court of Cassation in Qaddafi to support their competing perspectives, respectively that the immunity is a complete one, or that the immunity does not require respecting in the event of the commission of serious crimes under international law. The Court found against Belgium's proposition that any such

[829] *Arrest Warrants Case* (n 284).

exemption to immunity existed, but did note the immunity only lasted for the period that the incumbent held the office giving rise to that immunity, this immunity does not extend to the minister's domestic courts, nor does it maintain if the state wished to waive it or if the Court had explicit jurisdiction, such as in the case of the International Criminal Tribunals for the Former Yugoslavia or Rwanda.

Belgium argued that it had made attempts to provide the Congo opportunities to take steps to investigate and prosecute Yerodia. However, the Congo disputed that it had information relating to these offers for investigation, and that such offers were made after the arrest warrant was issued, at any rate.[830] Fundamentally, the Congo objected to Belgium's attempt to exercise universal jurisdiction on the basis that it offended the basic principle of sovereign integrity found in Article 2(1) of the *Charter of the United Nations*. During the time that the application was filed and its hearing, Yerodia was moved from the portfolio of Minister for Foreign Affairs to the portfolio of Minister for Education. He was subsequently removed from office altogether following the formation of a new government in the Congo in April 2001. On 14 February 2002, the Court issued its judgment in this case and ordered that the Kingdom of Belgium cancel the arrest warrant on the basis that they had failed to consider Yerodia's immunity in his capacity as a state official.[831]

As regards any judgment by the Court relating to universal jurisdiction, Belgium argued that the court was prevented from addressing whether or not the warrant was a valid exercise of the Belgian investigator's universal jurisdiction on the technical basis of the *non ultra petita* rule—if it is not in the Congo's final submissions, it cannot be ruled upon. The Court held that this does not prevent it dealing with this issue in its judgment should it be deemed as 'necessary or desirable'. Thus, the application was heard on the two grounds raised: Belgium's claim to universal jurisdiction and to the Congo's minister's immunity.

[830] Ibid [15]–[16].
[831] Argument was raised in relation to the jurisdiction of the Court in this matter, given Mr Yerodia ceased to hold office by the time the Court began hearing the application; however, the Court held that jurisdiction, rather than merits, was to be decided on the facts as they were at the time of the application (ie in 2000, the Court had jurisdiction and so it retained jurisdiction in 2001): *Arrest Warrants Case* (n 284).

The judgment did not, however, make any declaration in relation to the ability of Belgium to reissue the warrant at a later date on the basis of Yerodia's status as an ex-foreign affairs minister.

The majority judgment abstained from commenting on the lawfulness of Belgium's universal jurisdiction, on the grounds that although it could have commented on the issues were it necessary in its legal reasoning to do so, it was not necessary for the purposes of determining the issues that were brought before it. Specifically, in its final submissions to the Court, the Congo withdrew its first ground of challenge relating to the lawfulness of Belgium's exercise of universal jurisdiction, and sought only to rely on the grounds of 'the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers', and the majority opinion considered it was no longer necessary to address the issue of the lawfulness of universal jurisdiction for offences other than piracy.[832]

There has been ongoing contention that the discourse in the judgment leaps from establishing the foreign state immunity that covers serving heads of state and foreign ministers, to incorporate those former ministers seemingly extending the immunity for these acts indefinitely.[833]

Critically, the dissenting judgment of Judge Razek endorsed universal jurisdiction on a subsidiarity basis. That is, the 'State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national Sate of the prospective accused person the opportunity itself to act'.[834] It was suggested the in absentia universal jurisdiction would create difficulties from a policy perspective. Conversely, the joint separate opinion of Judges Higgins, Koojimans, Buergenthal and the dissenting opinion of Judge ad hoc Van der Wyngaert supported that universal jurisdiction in absentia is endorsed as a principle under international law. They also held a subsidiarity principle for universal jurisdiction when describing practical concerns in the enforcement of universal jurisdiction offences, which could resolve problems with the concurrent assertions of jurisdictions. This position was reached on the basis that there is no convention or customary law rule that prevents the application of

[832] *Arrest Warrants Case* (n 284) 41-43.
[833] Alberto Zuppi, 'Immunity v Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice' (2003) 63(2) *Louisiana Law Review*.
[834] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal) ('Arrest Warrants Case')* [2002] ICJ Rep 128, 80 [59].

extraterritorial jurisdiction, but states affected by the crime, typically being the territorial state and the suspect's domicile, would have a better right to prosecute than other 'bystander' states with a weaker nexus with the crime committed.[835] Further, they created a list of practical considerations required to enforce universal jurisdiction offences, such as:

- the necessity that prosecutors and judges are fully independent
- any applicable immunity must be respected
- the national state of the accused should be offered the opportunity to act upon the charges
- the accused should be present unless there are special circumstances to excuse their presence.[836]

Thus, while the core issue turned upon the extent of immunities for core crimes, the majority necessarily discussed the breadth and scope of universal jurisdiction. It concluded in the same way as state practice has evolved, in absentia trials are not an ideal manifestation of the doctrine. Further, to overcome some of the difficulties with concurrency of jurisdiction, a system of horizontal complementarity be established to enable the nation state of the accused to demonstrate an unwillingness or inability to deal with the matter before a third-party state intervenes.

7.5 Political Risk

The impact of political influences in the use of international criminal law in international tribunals would be seemingly less acute than in the case of individual domestic states exercising universal jurisdiction. Sections 7.5.1–7.5.2 will analyse the political risk in the use of universal jurisdiction in contemporary piracy trials and more generally in the application of general international criminal law through international criminal tribunals.

[835] Ibid 75–76. See also Pat Gibbons and Hans-Joachim Heintze (eds), *The Humanitarian Challenge: 20 Years European Network on Humanitarian Action* (Springer, 2015) 191.
[836] *Arrest Warrants Case [Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal]* (n 784); Matthias Goldmann, 'International Courts and Non-Appearance', *Oxford Encyclopedia of Public International Law* (Oxford University Press, 2006).

7.5.1 Political risk in modern piracy trials

In regard to the arrest of pirates, there is notionally a low political risk in nations acting. Indeed, the support for a multinational taskforce to support ongoing counter-piracy operations off the Gulf of Aden suggest quite the opposite—not cooperating with anti-piracy initiatives will leave a nation subject to adverse political pressure.[837]

While not a problem traditionally considered as falling afoul of the construct of victor's justice, the forcible participation of countries whose resources are diverted elsewhere, can be considered an analogous issue in the prosecution of Somali pirates in particular. The Somali government has been recognised as a failed state since 2002, which has affected international shipping in the Gulf of Aden, and the measures that are being taken by other states to bring Somali pirates to justice.[838]

7.5.2 Political risk in international courts

Similarly, the use of international criminal tribunals in attempting to mitigate the effects of victor's justice systems demonstrates the inherently political, and pragmatic, aspects of pursuing these offences. For example, the slaughter of half a million or more Tutsi civilians in Rwanda has remained the focus of the ICTR Prosecutor, based upon the limit scope and remit of the Tribunal, and has resulted in a strained relationship between Rwanda and the Tribunal.[839] In 2009, the ICTR Prosecutor announced that he would not take action against any members of the Rwandan Patriotic Front, who were responsible for the murder of approximately 25,000 Hutu civilians, but referred those matters to the Rwandan domestic courts to handle.[840] The Rwandan Government support was critical to the effectiveness of the ICTR trials. This action is one of the few, if only, examples of complementarity in practice, with oversight of a domestic criminal trial amounting to the only exercise of justice, but as being part of 'winning side', being the paramilitary group that subsequently formed the new Rwandan Government, there was only one trial referred to the courts by the ICTR undertaken against members of the RPF.

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[837] Stephanie Jones, 'Maritime Piracy—The Challenge of Providing Long-Term Solutions' (Working Paper 2013/15, 2013) Maastricht School of Management.
[838] Guilfoyle (n 743) 145.
[839] Lars Waldorf, 'Transitional Justice: War Crimes Tribunals and Establishing the Rule of Law in Post-Conflict Countries', 33 *Fordham International Law Journal* 1221-1277, 1222.
[840] UN SCOR, 64th Sess, 6134th mtg at 33 UN Doc S/PV 6134 (4 June 2009) cited in Lars Waldorf (n 840) 1224.

International criminal justice is an inherently political proposition, based upon the selection of trials in the absence of domestic action. This proposition relates to an external perception of pressure to act in the absence of sovereign action.[841] The ongoing complaint against the execution of international criminal justice is that the work of international criminal courts and tribunals—whether ad hoc or the ICC—is predicated on political influences, rather than a dispassionate triage of the worst atrocities for the purpose of addressing the worst breaches of the law.

The exercise of public authority by international institutions is not a new phenomenon. The use of state authority, divested in the UN Security Council is the most prevalent example of the abrogation of power traditionally within the purview of the state to international organs. The UN Security Council Al-Qaida and Taliban Sanctions Committee (the Committee) have been cited as examples of the creation of a protective regime in relation to ensuring international peace and security by the use of an international institution decision-making about individuals.[842] In this instance, the Committee derives its power from the basic premise of the *United Nations Charter*, drawing from Article 41, the focus of the Committee is grounded in seeking to maintain international peace and security by targeting international terrorism. The work of the Committee is further supported by definitive guidelines issued through mandate of a UNSCR.[843] Similar to the prosecution of those guilty of universal jurisdiction offences, in which their actions are not checked by domestic legal systems, the work of the Committee is aimed at ensuring that internationalisation of terrorism is combated through international institution of public authority.[844]

However, similar issues, such as the right to due process, and the concomitant requirement to adhere to human rights standards in making its decisions to list and de-list suspected terrorists, has been the subject of much debate.[845] The better view is that

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[841] Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21(4) *European Journal of International Law* 941–965.
[842] Clemens A Feinaugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' in Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2009) 104.
[843] Security Council Resolution 1390 [*on the situation in Afghanistan*], UN SCOR, 4452nd mtg, UN Doc S/Res/1390 (16 January 2002) [5(d)].
[844] Feinaugle (n 843) 107.
[845] Feinaugle (n 843) 108; August Reinisch, 'Developing Human Rights and Humanitarian Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851; Anna M Vradeburgh, 'The Chapter VII Powers of the United Nations Charted: Do They "Trump" Human Rights Law?' (1991) 14 *Loyola of Los Angeles*

member states are not able to have opted out of customary international legal obligations by creating the UN. Thus, even though the Sanctions Committee is exercising its power on behalf of nation states, it must still be bound to observe standards of due process.[846] Although this appears to be an issue pertaining to the observation of due process rights, these concerns are linked to the fear of politicisation of decision-making made within a UN body.

In practice, the listing and de-listing of individual's pursuant to the Security Council guidelines did not follow this process, insofar as an individual is not given reasons for addition or removal from the list. There is no compensation for mistaken addition to the list, or for achieving compensation that would otherwise have been available had that person not been on the list.[847]

Further, the de-listing process, on petition by someone on the list, was based upon a consensus decision of the Committee, made without any obligation to provide reasons, and with only a permissive review scheme available. This system comported to be 'opposite of the presumption of innocence', with complaints about a lack of impartiality having been raised. These analyses confused which rights should be protected. The sanction regime is an administrative and not a criminal one with sanctions issued as a protective principle, in the interests of collective security, rather than a criminal punishment being issued to the individuals involved.[848]

Thus, the standard of decision-making and system of review is confused by scholarly writers, which is similar to the general confusion surrounding the limits and application of universal jurisdiction, on the basis that many of the detracting commentaries are not based upon an accurate assessment of the law underpinning the principles being complained of.[849] In the exercise of its powers, the Committee can be guided, however, by other UN institutions and organs. The UN Office of Legal Affairs has stated that 'fair and clear procedures' to support the right of due process will include a right for remedy against the Committee as a minimum standard, which is

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International and Comparative Law Journal 175, 177, 186, 190; Gabriel H Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.

[846] Erika de Wet, *Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004); Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press, 2016).

[847] See discussion of the *Abdelghani Mzoudi* case in Feinaugle (n 843) 102.

[848] Feinagule (n 843) 125.

[849] Bassiouni (n 59).

derived from 'respective guarantees in international human rights treaties and national constitutional law'.[850]

The human rights standards applicable to the regime have been tested by regional legal systems, however, to provide an appropriate balance to the seemingly unchecked authority of the Committee. In these cases, however, the regional court was able to adjudicate over the lawfulness of EU Directive and Regulations giving effect to a Security Council Resolution in the case of a *jus cogens* infringement. In the case of *Yusuf* and *Kadi*, it was determined that subordinating the applicants' rights to property, a fair hearing and judicial review in deference to the prosecution of international criminal offences were not in violation of any *jus cogens* principle.[851] In the later case of *Hassan*, the European Court of First Instance developed a system of supranational fair trial principles, to 'assist guiding the decisions of Member States in relation to granting diplomatic protection' if a person requests they are removed from the sanctions list. These trials demonstrate that a system has developed, as between the actions of the European member states participants in General Assembly Sixth Committee and regional human rights courts. This in effect overcomes concerns of politicisation, unilateral *male fides* actions, and risks of breaching individual procedural rights.

Despite this confusion, this system represents a positive development in international enforcement mechanisms—a UN-level committee, established through Chapter VII Charter powers, makes decisions about individuals. Those individuals, however, can obtain justice insofar as they can appeal this decision through regional and domestic judiciary. Member states are then empowered by these domestic legal decisions to provide diplomatic protection for the individuals should there be a conflict between the committee and the human rights of the listed individual. This system thus demonstrates that there is a methodology to codify decision-making processes, and cooperate with domestic and regional legal systems to ensure protection for the higher international goal of peace and security. In the same way, universal jurisdiction could

[850] Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process' Rights' (2006) 3 *Irish Common Law Reports* 437, 446.
[851] *Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 2005 ECR-II 3533 (appealed to ECJ, C-415/05); *Kadi v Council and Commission*, 2005 ECR-II 3649 (appealed to ECJ, C-405/05); *Chafiq Ayadi v Council of the European Union*, 2006 ECR-II 2139 (appealed to the ECJ, C-430/06); *Fariq Hassan v Council of the European Union and Commission of the European Communities*, 2006 ECR-II 52 (appealed to the ECJ, C-399/06).

be enhanced by the creation of a committee to whom matters could be referred to make administrative decisions to commence trials—through reference to an international decision-making committee, which is then enforced by domestic and regional legal systems.

Unlike the Sanctions Committee, established by a UNSCR, the authority of the United Nations High Commissioner for Refugees (UNHCR), resides in the mandate flowing from treaty law. The Convention and accompanying protocol relating to the Status of Refugees, provides the framework for UNHCR staff to make 'Refugees Status Determinations'. [852] Similarly, this system identifies that an international administrative body can effectively discharge decision-making that would be the tradition bailiwick of the state, in ensuring an international issue—in this case the protection of refugees—is addressed.[853] Again, like universal jurisdiction, this system deals with matters that rest within the competence of the states. However, when refugee determinations are made in a cooperative fashion by an extranational body, such decisions provide options for states to support those decisions, when such support may have otherwise been difficult to justify domestically.

7.6 Conclusion

Despite the apparent limitations affecting the practical arrest of pirates, those working in the anti-piracy arena consider the incremental achievements in combating piracy as a great success of contemporary international law.[854] Arguably, the success in relation to the international response against piracy and the number of prosecutions in relation to this offence, do not rest in respect and operation of the principles of universal jurisdiction. Rather, there is a reliance on numerous other international legal

[852] *Convention on Refugees* (n 708)*; Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).
[853] Maja Smrkolj, 'International Institutions and Individualised Decision-Making: An Example of UNHCR's Refugee Status Determination' in A von Bogdanady et al (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010); Lauren Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2020) 14 *International Journal of Refugee Law* 238; Guy S Goodwin-Gil, 'The Language of Protection' (1989) 1(1) *International Journal of Refugee Law* 6–19.
[854] Ambassador Thomas Winkler (Chairman of the Legal Working Group of the Contact Group on Piracy off the Coast of Somalia, Under Secretary for Legal Affairs, Ministry of Foreign Affairs of Denmark): 'Foreword' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *The International Response to Somali Piracy: Challenges and opportunities* (Martinus Nijhoff Publishers, 2010).

instruments, and prosecute and extradite obligations, which support prosecution for the same conduct.

In most cases, the use of universal jurisdiction for the prosecution of piracy only occurs insofar as the arrest, detention and investigation of the offence results from specific UN Security Council resolution obligations, or specific treaty obligations, although the principle of universal jurisdiction has supported the prescription of the offence of piracy in domestic legislation. The generic problems associated with the enforcement of universal jurisdiction in the case of piracy are still readily apparent and present. The use of the international cooperation and support measures for anti-piracy measures show that reliance upon universal jurisdiction in and of itself to end impunity for a particular offence category is wholly unsustainable without an accompanying fiscal, political and policy support system, and other, more clearly articulated international legal obligations which result in actions by states.

The ICC's selectivity in application of its jurisdiction, remain one of the greatest challenges to its effectiveness in the fights against impunity.[855] Despite the work of international criminal tribunals and the advent of the ICC, an 'impunity gap' will remain 'unless authorities, the international community and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used'.[856]

[855] MC Bassiouni, *The Legislative History of the International Criminal Court* (Brill, 2005) 121.
[856] ICC, *Paper of Some Policy Issues Before the Office of the Prosecutor*, ICC-OTP (September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> 3.

Chapter 8: Guidelines to Overcome Gaps in Universal Jurisdiction Crimes Enforcement

Chapter 8 will be the final assessment of the analytical frame placed over the case studies. Gaps in the enforcement of the jurisdiction will be summarised, with reference to procedural fairness, political impacts, forum selection and international law conflicts. The use of the doctrine and guidelines to overcome these gaps will thus be proposed. When considering the likely future of the jurisdiction, trends in enforcement identified from earlier chapters in state, regional and international practice, will be cross-mapped against the summary of submissions to the UN Sixth Committee Working Group in regard to the application of universal jurisdiction. From this cross-mapping, model rules for the application of universal jurisdiction will be suggested.

8.1 Introduction

There have been numerous efforts to create guidelines for the use of universal jurisdiction, including the articulation of which offences are subject to the jurisdiction and the manner in which crimes should be prosecuted. These guidelines have been as simple as individual scholars' assessment of the topic,[857] or produced through projects with legal scholars with specialist expertise in international criminal law (eg, the Princeton Principles).[858] Various international organisations have written guidelines on its application,[859] and regional organisations, such as the AU, have attempted to regulate the practice of the jurisdiction through the issuance of model rules for national use.[860] While the UN Sixth Committee has been seized of defining this issue for over six years, in its case, these years of consultation between states have resulted in an impasse, without a successful list of guidelines produced. In anticipation of the Working Committee's release of such a paper, this chapter will also compare—to a more limited extent—the identified concerns of states against these other suggested protocols.

[857] See Inuzumi, above (n 13).
[858] Macedo et al (n 14); Surani (n 17).
[859] ICRC (n 94).
[860] *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States—Statements Made by Certain Member States on the Adoption of the Framework Decision* [2002] L 190/1, 20; AU *Model Law* (n 719).

This chapter will compare the identified gaps in enforcement of universal jurisdiction across the state, regional and international levels analysed previously in this thesis, against the commentary from contributing member states to the Sixth Committee's ongoing work to define the application of universal jurisdiction and its scope. As has been the case throughout this thesis, this discussion will be limited to application of universal jurisdiction. The ongoing debate regarding which offences purport to fall under the jurisdiction will be excised from this discussion.

8.2 Due Process

Due process rights were only given marginal consideration in the submissions of states to the Sixth Committee. Difficulties in collecting evidence against a perpetrator in another state to whom the prosecuting state has no access were referred to as 'obvious'.[861] Separately, practicalities—such as the form and location of trial, and the eventual incarceration for a suspect—were not considered in detail during state submissions.

The lack of legal consequences flowing from the illegal abduction of Adolf Eichmann suggests that, pursuant to some domestic regimes, irregularities in obtaining custody of alleged perpetrators does not affect the validity of the final judgment in the enforcement of universal jurisdiction offences. Although subject to much controversy, the concept of 'extraordinary rendition' demonstrates the contentious state of international law pertaining to the regulation of the use of force is considered by some states to include authority for forcible abductions, whereby interventions inevitably result in incursions into sovereign territories absent a geographically bounded armed conflict. This foreshadows that an enforcement mechanism that may become increasingly practised, although not considered lawful by the broader international community, could be the abduction of those suspected of committing universal jurisdiction offences.[862]

The Princeton Principles focus more upon the jurisdictional basis for the use of universal jurisdiction rather than implying procedural controls upon its use. Principle 4 (obligations to support accountability) seeks to create an obligation upon states to follow 'international due process norms' and cooperate in the sharing of evidence

[861] See Table 2.
[862] David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition and the Torture Convention' (2006) 46 *Virginia Journal of International Law* 585.

according to these same standards.[863] However, there are no clear guidelines as to what these 'norms' are, what conditions of minimum compliance look like, or how procedure should be implemented. The state submissions to the Sixth Committee pertaining to due process contained vague statements suggesting that states should comply with due process norms, but no specificity as to how that may be achieved.

The closest guide providing tangible procedures for states in implementing universal jurisdiction can be found in the *European Arrest Warrant Guidelines*, which although having entered into force with a large number of reservations between European states, provides several specific guides about the procedural issues relating to the implementation of transnational arrest warrants. These can be utilised in the application of universal jurisdiction. This includes articulating the procedure for rights to access lawyers, advising third parties of a person being deprived of their liberty, minimum treatment standards and other practical measures to level the application of arrest warrants across differing domestic jurisdictions.[864]

Given the years of disagreement from state submissions and deferral for subsequent sessions of the Sixth Committee to consider, the most likely outcome of the Committee in relation to due process rights in the case of universal jurisdiction could be a set of non-binding guidelines echoing the *European Arrest Warrant Guidelines*. If the outcomes of the Sixth Committee's work can provide a similarly prescriptive list of obligations in enforcement for universal jurisdiction offences, the ability for states to adopt these processes over time, albeit with reservations, will incrementally systemise the procedural application of universal jurisdiction. The provision of a framework through which states can exchange evidence, support witness testimony and provide procedural due process guarantees regarding the exercise of the jurisdiction, would be a significant improvement in the consistent and lawful enforcement of universal jurisdiction in domestic courts.

While more-lofty an ambition, the creation of an authority to rule a matter be discontinued if it has breached international legal obligations relating to the accused would also overcome any complaints to breaches of due process rights in the conduct of universal jurisdiction trials. Arguably, existing international legal systems allow for

[863] Macedo et al (n 14).
[864] *European Parliament Council Directive of 26 October 2016 on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings* [2006] 2016/1919.

such an action in limited circumstances. However, *La Grand* is a stark reminder of the binding nature of ICJ provisional measures. When dealing with individual liberties, the timelines of enforcement of ICJ decisions become more critical.[865] The ICJ would have jurisdiction to issue a judgment and order provisional measures when a state can identify a breach of an international legal obligation pertaining to the treatment of its citizen by a third-party state exercising universal jurisdiction. However, a more satisfactory solution to this issue could be the creation of a hierarchy of international criminal justice courts, with domestic courts exercising universal jurisdiction once other transnational judicial mechanisms have been exhausted.. Alternatively, an international agreement obliging states to cease punitive measures or detention under universal jurisdiction until dispute resolution measures have been undertaken would also support resolution of these issues. This proposition would be expected to attract resistance from domestic courts on the basis of an impingement on the sovereign integrity of their court systems, and subjecting prosecutorial or executive decisions to external judicial review. Equally, this proposition would not resolve the issue of due process if the nationality state of the accused did not demonstrate willingness to protect its citizens abroad. Recent examples pertaining to the treatment of Australian foreign fighters connected to the Islamic State in Syria and Iraq captured overseas by Turkey demonstrate that some states will defer to others when a citizen is alleged to have committed criminal offences that have a nexus to the security of the community (in

[865] The LaGrands were two German citizens who had grown up in the US, but had never taken up US citizenship, nor renounced their German citizenship. They committed a bank robbery in Arizona that resulted in the death of a man and serious injury of another. They were subsequently arrested and sentenced to death. At no time during their trial were they advised of their right to contact the German Consulate as a consequence of German citizenry, pursuant to arts 5 and 36 of the *Vienna Convention*. Germany eventually learnt of the incarceration of the brothers, though the *habeus corpus* application to the US Supreme Court was rejected as grounds to appeal the case on the basis that it was procedural in nature only; thus, Germany eventually raised the issue by applying to the ICJ to implement immediate measures to prevent the LaGrands' executions until such time as their rights are properly discharged under the Convention. Despite this application, the governor of Arizona proceeded with the sentences, and both brothers were executed. Germany proceeded with its application, but also requested assurances from the US that it would not proceed in such a fashion in relation to Germany's citizens in the future. This case provided a clear indication that the ICJ was not a forum to be used to determine matters relevant to appeal the criminal proceedings of another state when the outcome of those proceedings was not palatable to the other state, when dealing with their nationals.
More relevant, however, is the contention that in any action taken by a state utilising the doctrine of universal jurisdiction, it would be relevant to consider the obligation of that state to notify the state from which the perpetrator is national regarding their consular rights. This would assumedly give rise to the normal extradition processes available to a national under agreements between the prosecuting state and the state of citizenship. *LaGrand (Germany v United States) (Provisional Measures)* [1999] ICJ Reports 9, 103.

this context, pertaining particularly to terrorism offences).[866] There is an element of self-interest in allowing another state to shoulder the resource burden of a trial. More significantly, this is evident in allowing other states to manage the security of that person at the conclusion of their trial or period of incarceration.

8.3 Forum Selection and Concurrent Jurisdiction

Issues pertaining to forum selection in the Sixth Committee seemed to overwhelmingly arise from the impact of politicisation of the jurisdiction and whether the jurisdiction was a forum of last resort. The principle of complementarity and subsidiarity was oft-referred to, as was a recognition that the principle has been regularly confused with the prosecute or extradite obligation, and the jurisdiction created through state consent to trial before an international judicial body. In relation to the former issue, most states suggested that universal jurisdiction, as a forum of last resort, created additional requirements of states before they could prosecute an individual under domestic law for a universal jurisdiction offence. These suggested measures varied, and included a requirement to assess that states with a traditional jurisdictional connection to the offending are unwilling and unable to prosecute the offender, or that states with 'greater' claims to jurisdiction over the offending had to be consulted prior to the prosecution commencing.

Similarly, Principle 8 of the Princeton Principles (resolution of competing national jurisdictions) suggests that in the event that more than one state is asserting jurisdiction over a person solely on the basis of universality, a decision to prosecute or extradite should be considered with regard to a list of criteria. The criteria essentially listed were traditional jurisdictional nexus, considerations relating to availability of evidence and the good faith prosecution of the requesting state.

However, the case studies in this thesis identified that in most circumstances, issues pertaining to forum selection in the prosecution of universal jurisdiction offences revolved more around decisions to refuse extradition of residents to external states seeking to prosecute offenders.[867] They also related to whether any state would seek to commence a prosecution at all.[868] An independent or arbitrating system to determine

[866] Matt Brown, 'Neil Prakash Admits to Australian Terror Link in Turkish Court Appearance', *ABC News* (online, 26 September 17) <http://www.abc.net.au/news/2017-09-29/nei-lprakash-admits-australian-terror-link-apologises-trouble/8999556>.
[867] See above 'Section 5.5.3 The United States' in '5.5 Political Risk'.
[868] See Section 5.5.6.

whether a sheltering state is unwilling or unable to act, to support a prosecuting state's extradition request in the exercise of universal jurisdiction, remains the greatest gap in forum selection. With regard to the practical gaps in forum selection, and the Princeton Principles, universal jurisdiction could be enhanced by the creation of a committee or pre-trial chamber, to whom matters could be referred, which makes a procedural decision to commence proceedings.[869]

There has been a proliferation of prosecute and extradite treaty provisions for crimes that have international elements—such as drug trafficking. However, the criteria by which states should opt for universal jurisdiction, as compared with the utilisation of alternate jurisdictions, remains unclear and subject to prevailing practical or political considerations available to the prosecuting state at the commencement of trial or investigation. In practice, this decision is typically taken as a prosecutorial decision, sometimes with political influence or interference. Other times, it as an independent decision of a prosecutor, depending on the procedural rules of the domestic legal system. Despite these varied mechanisms to bring a universal jurisdiction matter to trial in the first instance, there is a commonality pertaining to the requirement for prosecutors to consider the more practical aspects, such as the likelihood of success, before any trial commences.

Drawing on the current model to address international piracy, the use of centralised agencies to facilitate the sharing of evidence, de-conflict jurisdictional conflicts, and standardise and synchronise the exercise of the jurisdiction are all essential elements to enhance the doctrine's consistent application. In particular, clear policies regarding which crimes are subject to be prescribed as universal, processes for ensuring that the *non bis in idem* principle is not breached by prosecutions, and limitations in relation to sentencing and criminal procedure would address most concerns raised by states regarding the enforcement of universal jurisdiction. The inclusion of a domestic legislative requirement that a third-party state may intervene that will enable the concerned state to intervene in the domestic trial of one of its citizens in a third party, could represent a simple, replicable and resource-neutral methodology to address any concerns of *non bis in idem*.

[869] The referral to an international decision-making body reinforces domestic, regional and international legal systems.

In the case of universal jurisdiction, the inherently state-centric approach to its development to date will prove a hindrance to the adoption of an international regime that might harmonise its application.[870] Critical in the development of any definition on scope and breadth of the doctrine is the creation of a system that appropriately balances tensions relating to state sovereignty control and political decision-making, against ensuring that the exercise of universal jurisdiction aligns with international human rights and criminal law standards. Accordingly, a mandatory pre-trial confirmation of jurisdiction could be one method to overcome the gaps in enforcement as they relate to forum selection. A sensible forum for this determination could be a pre-trial or subsidiary chamber of the ICC or similar international judicial organ.

For example, an international pre-trial chamber could be established by an amendment to the statute of the ICC. The amendment would articulate criteria by which the chamber could determine if the prosecutorial or executive discretion exercised to initiate criminal proceeding over another state's national complied with norms of international human rights law principles. Utilising the extant rules of evidence and procedure to guide this procedure and assessing the commencement of criminal action against the offender would effectively create guidance and precedent to guide the application of universal jurisdiction by domestic courts.

Such an application would be procedural in effect, referring to the *prima facie* admissibility standard accepted under international criminal law.[871] It would have the flow-on effect of protecting against procedural and technical arguments at a later stage within the domestic trial of unlawful or improper commencement of the prosecution. The assessment criteria would be limited to an assessment of compliance with human rights standards, and basic rights of procedure as agreed in the *Rome Statute*.

The application could be commenced by either the prosecuting state or the nationality state of the offender. A prosecuting state would take steps to protect itself from future political ramifications of claims against it of running a politically motivated trial; equally, nationality states could take advantage of this option prior to relying on less-

[870] See Maximo Langer, 'The Archipelago and the Wheel' in Martha Minow eds, *The First Global Prosecution* (University of Michigan Press, 2015) 223-228, for a discussion of the interrelationship between the ICC and universal jurisdiction.
[871] See discussion of prima facie standard above in Section 4.1.2 and n 292.

effective political or diplomatic efforts to complain about the legitimacy of a universal jurisdiction trial concerning one of its citizens.

The nature of such an application should be a binding decision to prevent the offender simply electing to be prosecuted in the sheltering state to avoid prosecution. However, the inclusion of an election during this application process for the accused to seek to be prosecuted in another jurisdiction could provide further support to the fairness of a universal jurisdiction trial.

Within the assessment of procedural fairness and process followed by the detaining and prosecution states, the chamber would necessarily have to consider the context in which the detention and the prosecution occurred. Such a procedure would be considered more favourable to developed countries given their more plentiful resources. However, such procedure would also have the benefit of protecting against or displacing the AU's complaint that international criminal justice is unfairly targeting Africa. It would provide an opportunity for the accused's state of nationality to challenge the status of the legal intervention of the prosecuting state.

The general enforcement regime against states in relation to international criminal law are:

> mechanism[s] by which the indirect enforcement scheme operates, whereby a state obliges itself under an international convention to include appropriate provisions in its national laws which would make the internationally proscribed conduct a crime.[872]

This leaves open the question of how a state can be forced to discharge its international criminal law obligations in circumstances in which it has previously agreed to an enforcement regime for an international crime. Reliance on the UN Security Council to direct legal enforcement mechanisms requires a nexus to 'threats to peace and security', which are the prerequisite for UN Security Council actions of a coercive nature.[873]

As observed in the preceding chapters, for many reasons, there is a general reticence of states to seek to commence the enforcement of criminal action against a third-party state's citizen. By creating a forum in which states exercising universal jurisdiction can have some independent confirmation of the lawfulness of their actions, while

[872] Bassiouni (n 52) 46.
[873] *United Nations Charter* (n 53).

providing assurance to states that they can challenge use of the jurisdiction in cases in which it is considered their citizens are being unfairly targeted, this proposal creates a safeguard for all relevant parties.

8.4 Harmonisation of International Law Principles

Another key concern in state submissions to the Sixth Committee pertaining to international law revolved around the need to respect the principles of the *United Nations Charter*. In particular, there was a call to respect the principle of sovereign equality and respect for sovereign integrity in the prosecution of nationals of other states with no traditional jurisdictional nexus to the prosecuting state. While linked to concerns relating to the politicisation of universal jurisdiction, there was some reference to domestic legislation being drafted with sufficient flexibility to enable the developments in international law to be incorporated into the domestic application of universal jurisdiction.

It is suggested that the jurisprudence of regional institutions, such as the ECtHR, regarding the actions of its member states in reliance upon the *European Convention on Human Rights* and other international law instruments, may 'result in the establishment of responsibility for states for acts of international organisations if these had to act because of the failure of states to act'.[874] That is, a state could be held liable in some manner for its inaction, if a regional institution had to utilise its jurisdiction to deal with criminal offences that lie within a domestic criminal system's competence. In this regard, application to the principle of universal jurisdiction could become obligatory in nature through reinforcement of the principle by an international commission.

The Princeton Principles have sought to address this issue of harmonisation of international legal obligations. They specifically provide for resolution of the *non bis in idem*/double jeopardy issues, and suggest that immunities should be outright disregarded when seeking to apply universal jurisdiction.[875] The principles do not go as far as to articulate how to resolve conflicts of international law obligations. However, principle 14 suggests that any such conflict should be resolved through reference to the ICJ for dispute resolution.

[874] Smrkolj (n 854) 193.
[875] Macedo et al (n 14), Principles 9 and 5, respectively.

The proliferation of treaty law would seemingly make this increasing codification creating mandatory prosecutorial obligations eliminate the jurisdictional gap for enforcement of universal jurisdiction. However, this proliferation actually necessitates that universal jurisdiction is more strictly adhered to by domestic courts. In reality, most states seek to apply universal jurisdiction by buttressing it against an alternative jurisdictional basis. This is typically a treaty obligation, rather than relying on the *erga omnes* nature of the offence as authority for the prosecution of the offender of *hostis humani generis* nature. However, the treaty obligations sought to be relied upon are not necessarily representative of customary international law, nor do they make suitable provisions within them for the scope of protection intended to be applied by the treaty when it relates to criminal punishment. These provisions are largely permissive in nature, or provide an option to the affected state to exercise alternate jurisdictions. Further, in some cases, the proliferation of treaty law creates conflicts in relation to which obligation should be enforced first. Again, it places domestic prosecutors at risk of making prosecutorial decisions based on practical considerations relevant to them, which may ultimately undermine international peace and security—an outcome that is divergent from the purpose of relying on universal jurisdiction.

In the case of the arrest and trial of General Manuel Noriega, the government of Panama provided no objection to the general's arrest by the US; he was captured in the context of military operations, as authorised by the US president. Accordingly, the introduction of an international agreement that balances the needs of these competing considerations seems the most relevant way forward. It is evident that the Sixth Committee of the UNGA is seeking to identify a coherent international position in regard to this balance. However, this endeavour appears to only go so far as to articulate the existence of universal jurisdiction in customary international law, and support discussions for a framework to further clarify the operation of the doctrine.

Existing dispute resolution mechanisms at international law, such as the jurisdiction of the ICJ in cases of disagreement between states claiming jurisdiction over a criminal offender, as occurred in the cases outlined in Chapter 7, remain the only current option to resolve conflicts of international legal principles with the application of universal jurisdiction.

There is currently no international process to assess the general fairness of a criminal trial under domestic rules of procedure that can be initiated by an external state. As a

matter of general legal principle, one state does not have standing to intervene in another state's domestic criminal trials. When exercising an inherently sovereign function—the punishment of a person for breaches of criminal offences described in domestic law—a state will utilise its own rules of evidence and procedure. These rules are not the same across international borders. Thus, there is an inherent tension in utilising a sovereign system to punish another state's citizen. The creation of an avenue of appeal through the ICC would necessarily be limited to the norms accepted at international law rather than the nuances of domestic procedural rules. However, this guarantee of basic international law procedural rights would introduce a level of uniformity in the enforcement of universal jurisdiction.

8.5 Political Risk

There are numerous existing systems that either relate directly to universal jurisdiction, analogous constructs regarding criminal prosecutions, or international regulatory schemes that can provide guidance for the further development, and usefulness and effectiveness across the spectrum, of universal jurisdiction. Despite the identification of these systems—which could be used to address current gaps in enforcement of universal jurisdiction and resolve some contentious issues regarding the concurrency of jurisdiction, procedural and due process requirements—the critical requirement for such a system to be instigated is broad international political support.

While there continues to be a prevalence of codification of the international rules-based order, this codification continues to be caveated by balancing the need to satisfy political imperatives with seeking justice in particular situations. For example, where the relative risk in seeking extradition or prosecution of a third state's national has been low (as in the Butare 4 case),[876] the use of universal jurisdiction has been less controversial and less likely to cause friction. This is unlike the calls by advocacy groups to hold to account state officials from states where the political risk in impeding upon sovereignty are greater. The attitudes and approaches of states such as Spain and Belgium to the amendment of their prescription of the jurisdiction, as outlined in Chapter 5, are clear examples of the ongoing impact of political pressures in applying universal jurisdiction.

[876] See Section 5.5.6.

The inherent risks in the use of domestic judicial organs to exercise interstate diplomacy has resulted in the decrease in the scope of prescription of universal jurisdiction across most states in recent years. Despite these political risks, universal jurisdiction remains in effect in a number of states, albeit in a form better described as 'universal jurisdiction plus'. That is, there is a requirement upon the exercise of the jurisdiction to have the accused present in the state prior to the issuance of proceedings or any arrest warrant in relation to their conduct. However, this political influence is not typically expressly acknowledged in legalistic and Utopian principles and guidelines, such as the Princeton Principles. Indeed, no principles address how to resolve jurisdictional disputes, based upon political concerns.

Equally, almost all the state submissions to the Sixth Committee included concerns about the potential abuse of universal jurisdiction through prosecutions being politically motivated.[877] No solutions to this political risk were offered other than in the case of Israel's submission. This contained a recommendation that the rights to commence prosecutions upon complaints initiated by citizens rather than public prosecutorial officials should be removed.

The case studies of this thesis identified that the key concern relating to the application of universal jurisdiction (which has resulted in its relative decline) is the potential for universal jurisdiction to be misused for political motives. Thus, there is a requirement to ensure that if it is *bona fides* willing and able to address the conduct being prosecuted, and the accused's state of nationality is equally unwilling to take these steps, the jurisdiction could be safely executed.

Similarly, a procedure by which jurisdiction could be tested by an external entity prior to the commencement of a state prosecution would enable other states to apply for competing claims, or counter any concerns about political motivations for the prosecution. However, any amendment to the existing ICC system is likely to be resisted by the persistent objectors to its extant jurisdiction (such as the US and China). If the Court could be used in a manner that reinforced the authority of such states to seek jurisdiction over matters relating to their nationals who might otherwise be prosecuted on the basis of universal jurisdiction, the creation of an international criminal appeal avenue may assuage concerns about the politicisation of use of the jurisdiction. Further, it may support the codification of the 'unwilling and unable' test

[877] See Table 2.

to create a subsidiary jurisdicitional option for universal jurisdiction to principles of nationality.

8.6 Conclusion

Although the subject of considerable academic consideration, the application of a consistent set of principles regulating the use of universal jurisdiction has not been adopted on either a regional or international scale with any great efficiency. The conclusion that can be drawn from the case studies assessed, from all three levels of international justice, reveal that the permissive nature of the jurisdiction makes it prone to misuse. This weakness relates to states' ability to selectively assess which jurisdiction it considers is relevant to be relied upon in seeking to prosecute an individual.

The suggested ways to overcome these shortcomings, borrowed from other, successful international legal systems, is to:

- grant standing to a state to enable it to make applications in the domestic trial of one of its citizens in a third party, thus addressing any concerns of *non bis in idem*
- create an international authority to direct that a matter be discontinued if the trial procedure has breached international legal obligations relating to the accused
- require that the exercise of jurisdiction only relate to matters in which the nation state with a traditional jurisdictional link to the alleged crimes is shown to be unwilling or unable to prosecute
- require that universal jurisdiction may only be exercised if the accused is present in the prosecuting state—that is, excise the application of universal jurisdiction to support the issuance of international arrest warrants and reduce universal jurisdiction to the widely accepted universal jurisdiction plus construct
- provide a framework for states to exchange evidence, support witness testimony and provide procedural due process guarantees in the exercise of universal jurisdiction
- facilitate the settlement of jurisdictional disputes regarding exercise of universal jurisdiction (eg, in a pre-trial chamber to the ICC or ICJ).

These mechanisms seem necessary to address the current jurisdictional conflicts and shortfalls regarding the application of universal jurisdiction. Their implementation would obviously require the cooperation of all states, rather than just those subject to a particular convention relating to the application of universal jurisdiction. However, the facilitation of a standalone convention that largely restated existing international legal principles would have a greater chance of faithful implementation. Alternatively, a convention that amounts to an additional protocol to the *Rome Statute* could satisfy this requirement. However, the likelihood of universal accession to this protocol would face the same challenges as the ICC did during its establishment, even if consideration was given to implement the guidelines agreed upon by the Sixth Committee.

The general trend in relation to the enforcement of universal jurisdiction has been a relative decline. States have succumbed to internal and external pressures to rely on the consistent and well-established international legal order premised upon territorial sovereignty and integrity, as compared to the seeking of justice. The ongoing work of the Sixth Committee of the UNGA has identified the need for a level of common understanding and codification of the scope and breadth of universal jurisdiction along with a trend to the acceptance of 'universality plus'. As observed in the largely effective measures implemented to combat international piracy, the effective implementation of enforcement measures through codification can increase the systematic and effective use of universal jurisdiction to combat impunity for heinous crimes.

Chapter 9: Conclusion

Chapter 9 will conclude by summarising the findings of the thesis and identifying trends in the enforcement of universal jurisdiction to prosecute universal jurisdiction crimes. It will describe how its use can become more meaningful to properly fill the void of existing international criminal mechanisms to ensure a balanced approach can be applied without undue political influence, with a focus on ensuring that the alleged perpetrators of the worst crimes are not left immune from justice.

9.1 Introduction

Universal jurisdiction is a meaningful legal mechanism to prosecute the most heinous of crimes. In this case, every state can or must exercise the jurisdiction even without a traditional jurisdictional link. However, in the exercise of this jurisdiction, there are many gaps in the ideal goals and actual practice of this doctrine, as witnessed by the wide variation in how this doctrine has been applied in the past. These gaps relate to due process rights, selection of forum, concurrent jurisdictions, harmonisation of international law and, the most compelling and difficult to circumvent, political risk. These are practical challenges for the actual implementation of universal jurisdiction. Even with efforts to address these gaps in enforcement, through unilateral intervention to abduct criminals, or using a peacekeeping mission for the exercise of universal jurisdiction, it remains difficult to diminish the impact of these issues to ensure a consistent application of universal jurisdiction.

This thesis has demonstrated that current state practice in relation to the application of universal jurisdiction is inconsistent, uncertain and greatly affected by considerations related more to political concerns than to criminal justice. This incoherent approach to universal jurisdiction is further compounded by the lack of a clear understanding of which crimes are universally punishable by domestic courts.

The very nature of universal jurisdiction influences this lack of consistency—that is, the application of a state's domestic criminal law and its interpretation of international law obligations are unique to the enforcing state. Further, concerns of regional organisations regarding these inherent inconsistencies, and the need to balance the

pursuit of criminal justice with the rights of the accused, have also brought challenges in relation to the practicalities of enforcement of universal jurisdiction. Claims by the AU of racism by Europe in its application of universal jurisdiction to African leaders is an example of this concern.

Competition between existing jurisdictions and international criminal law obligations, such as prosecute and extradite obligations under treaties, mutual legal assistance arrangements, or existing immunity and amnesty provisions under domestic laws, further complicates how states apply universal jurisdiction. Further, it affects how they interact with other states to enforce universal jurisdiction, as is necessary when dealing with transnational exchanges of intelligence, evidence and perpetrators.

9.2 Due Process

The absence of a shared view among nations, international judicial organs, international legal scholars and NGOs as to what amounts to a use of universal jurisdiction further reduces the capacity of states to regulate the methods by which universal jurisdiction crimes can be brought to trial. In particular, the capacity of courts to interpret cases under the premise of universal jurisdiction, but cross-reference the grounds for extradition, or issuance of an arrest warrant under an alternate authority, ultimately convolutes the enforcement measures applied by these courts.[878] The case studies demonstrated that a variety of justifications to trigger detention or authorise custody of a suspect did not require connection to the alleged universal jurisdiction offending: from Adolf Eichmann's abduction to CharlesTaylor's arrest.

Further, when making such pronouncements on the source of authority to prosecute, reliance on the authority for universal jurisdiction is not clear. Additionally, the basis for the court establishing jurisdiction is often reached through reference to existing treaty or passive personality obligations, which are not grounded in the principle of universality in the pure sense.

Equally, the absence of clear procedures and systems for investigation, evidence sharing, detention obligations (both pre-trial and punitive) makes enforcement of universal jurisdiction problematic.[879] The success of cooperative measures in analogous processes, such as those articulated in the European arrest warrants,

[878] See especially discussion of Spain's experiences in Section 5.3.1.
[879] See Section 5.2.5.

demonstrate that systems can be agreed to by multiple states to overcome the practical issues associated with criminal enforcement mechanisms of international crimes in domestic legal systems.

The institution of an avenue to challenge state jurisdiction in the event of allegations of non-adherence to due process would overcome the gap in relation to due process and procedural fairness rights. This avenue of appeal would necessarily have to only consider due process norms accepted at international law, rather than the nuances of domestic state procedural rules. However, this guarantee of basic international law norms would represent a level of uniformity of the jurisdiction.

9.3 Forum Selection and Concurrent Jurisdiction

The general development in relation to the reduction in scope of universal jurisdiction legislation over the previous decade has been to limit the authority of domestic courts to prosecute persons alleged to have committed universal jurisdiction crimes to those committed by individuals beyond the jurisdiction of any state when captured or arrested, or to those present in the prosecuting state.[880] The removal of authority to conduct trials in absentia through state practice, as recommended in the Princeton Principles, addresses the contentious aspect of the application of universal jurisdiction as it relates to concurrency of jurisdiction. The cases studies have revealed that in practice—although not endorsed by any legal principle—states are increasingly unwilling to exercise universal jurisdiction if there is a requirement to issue an international arrest warrant to support the prosecution, and a potentially contentious extradition request to seek to enforce.[881]

This practice does not, however, remove considerations such as extradition obligations, conflict of laws and jurisdictions, harmonisation of domestic and international legal process and obligations, or questions relating to the practical impacts of collection of evidence from a third-party state. This practice has largely accounted for the reservation of third states to cooperate with arrest warrants in relation a third-party national passing through their territory. This removes any political uncertainty by providing surety in a political sense that a state will not execute warrants upon a citizen of another state, based upon the request of a third. However, in cases of

[880] See Section 5.3.5.
[881] See generally and discussion of Bashir case in particular in Section 7.3.2.

universal jurisdiction, all three parties have equal concern for the universal jurisdiction crime allegedly committed by the accused, and this practice undermines international justice.

The unfortunate legacy of the Pinochet precedent has not been to strengthen the resolve of the international community to combat impunity. Rather, it was the winding back of universal jurisdiction in most of the more active jurisdictions. This trend has been reinforced by state practice beyond the enforcement of universal jurisdiction, as best illustrated by the disappointing case of Al-Bashir. Al-Bashir, despite being subject to an arrest warrant issued by the Prosecutor of the ICC, has continued to travel internationally with impunity, through states party to the *Rome Statute*.

9.4 Harmonisation of International Law Principles

In the case studies across all three levels of international jurisdiction—domestic, regional and international—the harmonisation of international legal principles typically amounted to an internal conflict in the assessment of prosecuting states' obligations relating to the accused, balanced against a desire to prevent impunity for the most heinous of criminal offences.[882] Noting the increased codification of international law, these internal tensions in the prosecution of international crimes in domestic legal fora, are likely to increase.

The harmonisation of international legal obligations with a state applying domestic law against a third-party national, represents the crux of the tension in the application of universal jurisdiction. A state exercising universal jurisdiction is acting on behalf of the international community. Accordingly, to properly exercise this function, it should be limited to the application of international legal obligations. However, a state will be bound by its domestic laws and procedures. The very nature of international law and respect for sovereignty means that universal jurisdiction will create tensions between one state's interpretation and application of international legal principles and another's. Indeed, the application of universal jurisdiction would be wholly unnecessary if all states were to apply international criminal law in a consistent fashion. Typically, the failure of a state—be it because it is unwilling or unable—to prosecute an offender suspected of committing a crime subject to universal jurisdiction

[882] See Section 8.4.

can be attributed to political alignment, apathy, domestic legal constraint or an inability of states with a stronger jurisdictional link to action and prosecute the alleged culprit.

However, the establishment of a hierarchy of international criminal law jurisdiction, coupled with an ability for states to test a third-party state's claim to jurisdiction when they consider they have a stronger jurisdictional link for prosecution, will overcome these anomalies. Thus, the establishment of a competent, standing authority to which to refer jurisdictional decisions, can wholly displace the legal risks associated with a state commencing an action under the guise of universal jurisdiction.[883]

A consistent theme in complaints levied by external parties against states purporting to apply universal jurisdiction was the contention that trials in absentia somehow represent an overstep in authority. By seeking to intervene in the sovereign integrity of a functioning state, the application of universal jurisdiction is not appropriate. Properly articulating a test as to when a state becomes unwilling or unable to prosecute an offence, enables universal jurisdiction to be relied upon without risk of exercising jurisdiction when a traditional jurisdictional nexus, based upon subsidiarity or complementarity if the offence is a universal crime, could otherwise be relied upon. The jurisprudence of the ICC and the ICJ about when universal jurisdiction may be relied upon has contributed to the development of the doctrine.[884] However, this could be better established and understood through the agreement of a threshold to determine when a prosecution could occur, as proposed by the Princeton Principles. A referral process to enable states to challenge the exercise of universal jurisdiction by a state in cases of concern would also assist.

9.5 Political Risk

Despite the detractors from the application of universal jurisdiction, its continued existence in the international legal order, continued attempts of its use by states, and ongoing attempts at clarification by the UN, indicates that it is necessary to fill an existing jurisdictional gap in holding individuals to account for core international and universal crimes. Ratner's assessment that the anomalous jurisdiction is one of necessary exceptionalism holds true.[885]

[883] See Section 5.4.
[884] See Section 7.4.2.
[885] Ratner (n 37).

The existing legal regime has now created an ICC, which although not heralded as a panacea to end impunity, was considered a significant step in reducing the circumstances in which grave atrocities went unpunished.[886] However, this has been revealed to be an untruth, regarding both the proper use of such a Court, and in the level of practical support the Court can expect from the international community in addressing the criminal conduct of individuals.[887] This is starkly evident when reflecting on the number of successful trials conducted to date in the Court's decade-long history, and its strict threshold test, which has been outlined and reinforced in its recent jurisprudence.[888] Equally, the use of ad hoc international criminal tribunals and hybrid courts have added to the necessary mix of judicial organs that assist in ending impunity. Particularly, they have assisted vulnerable populations seek rehabilitation and justice following atrocities committed in conflict. However, these bodies are again faced with resourcing and threshold limitations.

Despite the interaction of these entities, those who have committed universal jurisdiction crimes that do not reach the current threshold to trigger the jurisdiction of the ICC, or cannot be connected to a conflict with which the attention of the international community is currently seized, are likely to escape with impunity. Rank-and-file offenders in a conflict will escape justice if they have fled the jurisdiction of the state in which the offence was committed, as is often the case at the conclusion of conflict. Accordingly, the sharing of responsibility for the prosecution of such offences, on the basis that their commission offends humanity, enables a suitable method for states to self-regulate behaviour that is considered abhorrent, while also balancing the practical considerations necessary to support a criminal trial and respecting the integral components of the existing international legal order. For example, the case studies discussed in Chapter 5 demonstrated that in practice, states will not prosecute universal jurisdiction offences when there is another, traditional

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[886] Fatou Bensouda, 'Our Resolve to Create a More Just World Must Remain Firm', *International Centre for Transitional Justice* (3 September 2015) < https://www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm>.
[887] See Section 7.5.2.
[888] Three people have been convicted before the ICC: Kutanga, (Case Information Sheet: Situation in the Democratic Republic of the Congo, *The Prosecutor v Germain Katange*, ICC-PIDS-CIS-DRC-03-014/17_Eng, 27 March 2017); Lubanga (Case Information Sheet: Situation in the Democratic Republic of the Congo, *The Prosecutor v Thomas Lunage Dyilo* ICC-PIDS-CIS-DRC-01-016/17_Eng November 2017) and Gombo (subject to appeals): 'ICC Trial Chamber III Declares Jean-Pierre Bemba Gombo Guilty of War Crimes and Crimes against Humanity' (Media Release ICC-CPI-20160321-PR1200, 21 March 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1200>.

jurisdictional nexus available to them. They will largely defer prosecutions to a state with a traditional jurisdiction as a matter of policy. The retributive and preventative aspects of justice for these offences will then be sufficiently discharged.

Further, this sharing of the prosecutorial load provides a more robust mechanism for states who accept large numbers of refugees to provide a level of reassurance to their existing citizens of the maintenance of criminal law standards and community safety within their own jurisdiction. This action also discharges the broader interests of their community by ensuring that the commission of such offences is firmly condemned. While this seems like an unnecessary position for states acting in relation to such obviously outlawed criminal conduct, it is an extremely relevant consideration for a state that is itself, as a legal personality, subject to human rights abuse complaints, or liable to suffer from instability (and thus, an ability to rely on having a functional criminal justice system). This is either as a consequence of being proximate to, and similarly vulnerable to, the instability of the affected state, or consequent to holding large migrant populations from the state in which the atrocities were committed.

9.6 Final Observations

The trial of Adolf Eichmann in 1962 demonstrated that the world would accept temporary transgressions of the principle of territorial integrity to ensure that egregious criminal wrongs were addressed. The development of the doctrine of universal jurisdiction in the later part of the twentieth century and the early twenty-first century seemed to follow a pragmatic approach to support the higher-order interest of global justice. Despite considering the increasing codification of international criminal law and specifying those breaches of international law for which individuals can be held to account, state, regional and international practice has demonstrated that enforcement jurisdiction in relation to such offences represents a practical bar to the effective prosecution of these otherwise universally condemned actions.

Despite ongoing rhetoric to the contrary, the lack of harmonisation of domestic practice to mirror the increasing international legal principles building around universality has resulted in an increasing gap between the ideal goals and actual practice in enforcing universal jurisdiction. The use of universal jurisdiction creates the criminal justice tool to fill the gap in the existing hierarchy of legal orders to address serious breaches of international criminal law. However, in practice, as a

consequence of the interaction of principles such as the ICC's complementarity and threshold for subject matter jurisdiction, jurisdictional immunities and permissive prosecutorial processes, offenders who should be held to account for their serious breaches tend to escape justice.

This thesis has identified procedural gaps in the enforcement of universal jurisdiction. These gaps are largely resultant upon a lack of regulation, enforceable guidelines or the ability for states and individuals to challenge the exercise of jurisdiction by third-party states in circumstances in which the underlying bases for prosecution are politically motivated rather than in the interests of international justice. The greatest risk, however, remains the absence of transparency in the election of a state to commence proceedings in the first instance, with numerous case studies demonstrating that universal jurisdiction trials have been tarred with claims of ulterior political objectives.

The proliferation of principles and guidelines purporting to determine how and when universal jurisdiction can be applied have not resulted in the widespread adoption of such standards. Given there is still no international consensus on the application of universal jurisdiction and its scope, it remains likely the adoption of a convention or international agreement purporting to articulate that scope will not be forthcoming in the near future. Accordingly, any solution to refine and enhance the successful application of universal jurisdiction must be founded in existing international legal principles and regimes, or created through minor amendment to existing processes.

To overcome these gaps, the examination of successful regimes in analogous areas of international criminal law, suggest that leveraging off existing international criminal law enforcement systems, such as the ICC or ICJ, to create a binding pre-trial application procedure would effectively legitimise a state's use of universal jurisdiction before proceeding with a domestic trial. This would remove allegations of politicisation of trials; and reduce the political risk in running a domestic prosecution. Second, the application of minimum due process rights to be assessed during such a trial procedure would further broader international justice principles. Finally, the agreement of arrest guidelines, not dissimilar to the effective European arrest warrant regime, would support the effective commencement of prosecutions. Further, it would facilitate the resolution of forum selection in the likely event of concurrent jurisdictions being available to deal with the alleged offending. The inclusion of an

appellate regime in such decisions further removes the prospect of political discontent in the use of universal jurisdiction; and reduces complaint avenues to an accused during the trial proceedings. This could have reduced the four-month long submissions of Adolf Eichmann rehashing complaints about the circumstances of his arrest.

The effective use of universal jurisdiction to protect against impunity is critical. However, the international legal order is based on state sovereignty and any detractions from sovereign integrity must be established through consent, and balanced against the broader civilising mission of international law. The doctrine has demonstrated its ongoing utility. However, to retain this utility as a meaningful mechanism to ensure the end of impunity for those responsible for the most heinous of crimes, its use requires bounding to produce consistency and impartiality in its application. Thus, the gradual codification in international law of the application of universal jurisdiction and its scope will increase its use and value in ending impunity for universal jurisdiction offences.

"'Jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him'

Stroud's Judicial Dictionary, 1379 (Sweet & Maxwell, 9th ed, 2017)

Table 1: Scope of Universal Jurisdiction Offences by State or Organisation, based on UNGA 6th Committee Submissions.

Country	Belarus	Belgium	Bulgaria	Cameroon	Colombia	Costa Rica	Council of Europe	Cuba
Submission Reference	A/68/181	A/68/181	A/68/181	A/68/181	A/68/113	A/68/181	A/68/113	A/71/111; A/68/113; A/67/116
Piracy	X			X				
Slavery					X			
War Crimes	X	X	X			X	X	
Crimes Against Humanity	X		X			X	X	X
Genocide	X				X	X	X	
Torture					X		X	
Other	Crimes against peace; Ecocide; human trafficking.	Fiscal interest and acts of corruption; human trafficking; human trafficking.	Crimes against peace; apartheid.	Fiscal offences; terrorism; money laundering; offences against the personality of the state; narcotic drugs and psychotropic substances; offences relating to toxic waste.	Terrorism; trafficking; enforced disappearances.			

Country	Cyprus	Czech Republic	El Salvador	Estonia	Ethiopia	Finland	France	Georgia
Submission Reference	A/68/181	A/68/181	A/67/116	A/68/181	A/68/181	A/71/111; A/67/116; A/68/181	A/68/181	A/71/111
Piracy	X							
Slavery								
War Crimes		X		X		X		X
Crimes Against Humanity		X	X	X		X		X
Genocide				X		X		X
Torture		X	X			X	X	X
Other	Fiscal offences; Offences against international security or State security; narcotic drugs and psychotropic substances	Fiscal offences; attacks on humanity; preparation for aggressive war; apartheid; crimes against peace; offences against the personality of the state	Commission of a crime that impairs the rights that are internationally protected by specific agreements or rules of international law, or entailed a serious breach of universally recognized human right.	Aggression; violation of measures necessary for application of international sanction; crimes against peace	Participation of illegal associations; narcotic drugs and psychotropic substances; human trafficking; human trafficking	Terrorist crimes; aggravated trafficking in human beings; Use, Stockpiling, Production and Transfer of Anti-Personal Mines; fiscal offences; proliferation of weapons of mass destruction; offences relating to chemical weapons; offences against UN personnel; narcotic drugs / psychotropic substances.	Terrorism; fiscal interests and corruption; enforced disappearance; certain road offences	

Country	Germany	Ghana	Greece	Hungary	ICRC	Iraq	Islamic Republic of Iran	Israel
Submission Reference	A/68/181	A/67/116	A/68/113	A/68/113	A/71/111; A/68/113	A/68/181	A/67/506; S/2012/752	A/68/181
Piracy		X						
Slavery		Trafficking in women or children; slave trade	X					
War Crimes					X		X	
Crimes Against Humanity				X	X		X	
Genocide		X			X			
Torture					X			
Other	Fiscal offences; proliferation of weapons of mass destruction; terrorism; subsidy fraud; attacks against air/sea; human trafficking; trafficking narcotic drugs and psychotropic substances.	Offences against property of the Republic; hijacking; offence against security, territorial integrity or independence of the Republic; unauthorised disclosure of official secrets of the Republic; traffic in obscene publication; other offence authorized or required by a treaty or convention to which the Republic is a signatory to be prosecuted and punished in Ghana wherever committed.	High treason, terrorism, perjury, crimes considering military service, crimes against the currency, child sex tourism, drug trafficking, trafficking obscene materials, crime to which signed an international convention.	Any crime to be prosecuted under an international treaty.	Protection of cultural property.	Offences against international security or State security; narcotic drugs and psychotropic substances; human trafficking.		

Country	Italy	Kuwait	Lebanon	Malaysia	Malta	Moldova	Netherlands	Norway
Submission Reference	A/68/181	A/67/116	A/68/113	A/68/181	A/68/181	A/68/113	A/68/181	A/68/181
Piracy							X	
Slavery		X						
War Crimes		X	X		X	X		X
Crimes Against Humanity		X			X	X		X
Genocide		X			X	X		X
Torture		X						
Other	Fiscal offences; offences against the personality of the state	Offences specified in Rome Statute		Terrorism		Drug trafficking; trafficking narcotic and psychotropic substances; terrorism		Offences against the personality of the state; human trafficking

Country	Panama	Portugal	Spain	Sweden	Switzerland	Tunisia	Viet Nam
Submission Reference	A/71/111; A/67/116	A/68/181	A/71/111	A/68/113; A/67/116	A/68/181	A/68/181	A/67/116
Piracy			X (including unlawful seizure of aircraft)				
Slavery							
War Crimes	X			X	X		
Crimes Against Humanity	X			X			
Genocide			X	X			X
Torture				X			
Other	Protection of cultural property; drug trafficking; money laundering; human trafficking; terrorism.	Fiscal offences; offences against the personality of the state; computer and communication fraud; offences against the course of the rule of law; offences relating to toxic waste.	Terrorism; counterfeiting of foreign currency; crimes related to prostitution; trafficking in psychotropic, toxic or narcotic drugs.	Crimes against international law.		Fiscal offences; crimes against peace; terrorism; offences against the personality of the state.	

Note: This table canvasses the submissions of states over the course of the 6th Committee's hearings on the scope and application of universal jurisdiction (that is Sessions 68 to session 72); and includes an entry against a State if that State had made submission in respect of which specific offences they consider are subject to universal jurisdiction.

Table 2: Application of Universal Jurisdiction, based on United Nations General Assembly 6th Committee Submissions.

Country	**Algeria**	**Bangladesh**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		
Forum Selection	Universal jurisdiction should be a complementary mechanism and a measure of last resort; it could not override the right of a State's national courts to try crimes committed in the national territory.	
Harmonisation with International Law		
Political Risk	Algeria was concerned about the selective, politically motivated and arbitrary application of universal jurisdiction without due regard for international justice and equality. The International Criminal Court had focused exclusively on African States while ignoring unacceptable situations in other parts of the world; that selectivity had been the main reason for holding the extraordinary session of the Assembly of the African Union in Addis Ababa in October 2013. Furthermore, the Movement of Non-Aligned Countries, at its 17th Ministerial Conference in 2014 and during its 2016 Summit, had stated that the abusive exercise of universal jurisdiction could have negative effects on international relations.	Any attempt by the Court to exercise its jurisdiction with scant regard for the jurisdiction of national courts would make it susceptible to the vagaries of international and domestic politics, as demonstrated by some of its recent cases. Similarly, if national courts applied the principle of universal jurisdiction too extensively and in an extraterritorial manner, they could become open to international and domestic political influence, thus complicating relations between the executive and judiciary organs of States at the international and national levels. Arbitrary judgments concerning the competence of national judicial processes in the application of universal jurisdiction must be avoided, and certain national jurisdictions should not be seen as more equal than others in that regard. Doing so would undermine the objectives of justice and fairness that the principle of universal jurisdiction was intended to achieve.

Country	**Belarus**	**Bolivian Republic of Venezuela**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	The current tendency to use universal jurisdiction to circumvent other international legal obligations, such as those relating to refugees, was a matter of concern. Respect for due process and other guarantees of the legal rights and interests of the individuals concerned were of particular significance in that regard.	
Forum Selection		Universal jurisdiction should always be considered supplementary to the jurisdiction of national courts with a jurisdictional link of nationality or territoriality. Consequently, universal jurisdiction could be exercised only in those cases where the courts corresponding to the territory where the crime was committed or the nationality of the perpetrator or victim were unable or unwilling to exercise their jurisdiction.
Harmonisation with International Law		The principle of universal jurisdiction should only be invoked by a country on the basis of a rule of international law, such as an international treaty; reference to domestic legislation was not sufficient in such cases.
Political Risk		Universal jurisdiction is an incipient principle. Unrestricted application of universal jurisdiction might tempt prosecutors with domestic political ambitions to institute proceedings against State officials of other countries. In order to prevent the politicisation of the application of the principle... it should not be applied without regard for the immunity granted to State officials.

Country	Brazil	Canada (also on behalf of Australia and New Zealand) (CANZ)
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		Noted that national courts should exercise universal jurisdiction in a manner consistent with the rule of law, including the obligation to ensure an impartial, expeditious and fair trial for all parties.
Forum Selection	Universal jurisdiction should be exercised only in full compliance with international law; it should be subsidiary to domestic jurisdiction and limited to specific crimes; and it must not be exercised arbitrarily or in order to fulfil interests other than those of justice. At the appropriate time, it should also consider whether the formal consent of the State where the crime had taken place and the presence of the alleged criminal in the territory of the State wishing to exercise jurisdiction were required.	
Harmonisation with International Law		Noted the primary responsibility for prosecution should rest with the State in which the crime was committed. When States with jurisdiction to prosecute based on territoriality or nationality were unable or unwilling to do so, universal jurisdiction provided a complementary framework to ensure that persons were held accountable for grave crimes of universal concern and could not enjoy sage havens.
Political Risk		

Country	**China**	**Croatia**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		
Forum Selection	Universal jurisdiction was complementary to national jurisdiction. The primacy of territorial, personal and protective jurisdiction must be respected in order to prevent overlap and conflict and to maintain the stability of the international legal system and inter-State relations. A distinction should be drawn between universal jurisdiction and the obligation of States to extradite or prosecute, as well as the jurisdiction explicitly granted to existing international judicial bodies by specific treaties or other legal instruments.	
Harmonisation with International Law		
Political Risk	Discussions at the current time should therefore focus on ways to ensure that States applied universal jurisdiction prudently and refrained from violating the principles of international law, pursuing unilateral claims or exercising universal jurisdiction in a manner not explicitly permissible under the existing international legal framework.	States that the 2003 Serbian Law on Organization and Competences of State Authorities in War Crimes Proceedings flatly contradicted the basic principles of universal jurisdiction, but also misapplied the concept for political purposes. The Serbian Law, was neither universal, since it applied only to neighbouring States, including Croatia, nor subsidiary, since instead of serving as a last resort or "safety net" in the fight against impunity, it constituted an arbitrary, a priori indictment and verdict against other sovereign States, selected at the discretion of Serbia, and violated the principle of complementarity. The international community must prevent the manipulation of the concept of universal jurisdiction for political purposes.

Country	**Cuba**	**Dominican Republic on behalf of the Community of Latin America and Caribbean States**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	A/C.6/71/SR.13 - Summary Record of the 13th meeting.
Due Process		
Forum Selection	Exercise of universal jurisdiction should be exceptional and supplementary in its nature, and should be restricted to crimes against humanity and only invoked in exceptional circumstances where there was no other way to bring the proceedings against the perpetrators and prevent impunity. The prior consent of the State in which the crime had been committed or of the State or States or which the accused was a national, should also be obtained as a matter of the utmost importance.	Supports that universal jurisdiction should not be confused with international criminal jurisdiction or with the obligation to extradite or prosecute, being different but complementary legal institutions with a common goal of ending impunity.
Harmonisation with International Law		Considers that universal jurisdiction was an institution of international law of exceptional character for the exercise of criminal jurisdiction, which served to fight impunity and strengthen justice.
Political Risk	Main concern was the unwarranted, unilateral, selective and politically motivated exercise of universal jurisdiction by the courts of developed countries against natural or legal persons from developing countries, with no basis in any international norm or treaty. It also condemned enactment by States of laws directed against other States which had harmful consequences for international relations.	

Country	**El Salvador**	**Finland**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	A/771/111 *Report of the Secretary General - Seventy First Session Item 85 The scope and application of the principle of universal jurisdiction*
Due Process		
Forum Selection	The exercise of universal jurisdiction can only be legitimately exercised if a State in which the crime was committed, or which had jurisdiction by virtue of one of the other principles of criminal law, in particular the principle of territoriality, was unwilling or unable to prosecute the crime.	Pretrial stage requires that court proceedings cannot proceed unless there are more substantial grounds for handling the case in another State.
Harmonisation with International Law		
Political Risk		

Country	India	Islamic Republic of Iran
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		
Forum Selection	The bases for criminal jurisdiction included territoriality, which related to the place of commission of the offence; nationality, which related to the nationality of the accused and, in the practice of some States, the nationality of the victim; and the protective principle, which related to the national interests affected. The common feature of those jurisdictional theories was the connection between the State asserting jurisdiction and the crime committed. In the case of universal jurisdiction, there was no link between the State claiming jurisdiction and the offence or the offender; its rationale lay in the fact that certain offences affected the interests of all States	Universal jurisdiction was considered as a treaty-based exception in the exercise of criminal jurisdiction. The prevailing principle remained that of territorial jurisdiction, which was central to the principle of sovereign equality of States.
Harmonisation with International Law		States that the principles enshrined in the Charter of the United Nations, particularly the sovereign equality and political independence of States and non-interference in their internal affairs, should be strictly observed in any judicial proceedings.
Political Risk		The invocation of universal jurisdiction against officials of some States members of the Non-Aligned Movement raises both legal and political concerns. Considered that it was necessary to clarify a number of questions to prevent its misapplication, including the range of crimes applicable. The invocation of universal jurisdiction against officials of some States members of the Non-Aligned Movement raises both legal and political concerns. Considered that it was necessary to clarify a number of questions to prevent its misapplication, including the range of crimes applicable.

Country	Israel	Lebanon
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		
Forum Selection	Criminal jurisdiction should be asserted by States with limited or no jurisdictional links. Clear jurisdictional links were important not only to facilitate effective prosecution but also to promote the interests of justice and reconciliation, which could be best served by the prosecution of an alleged offender in his or her own community or in the jurisdiction with the closest links. Furthermore, the exercise of universal jurisdiction was subject to the principle of subsidiarity. Universal jurisdiction, both in principle and in practice, was never intended to be an independent system of justice or a system of first resort; rather, it was a mechanism of last resort. The very nature of the principle was that it should be applied in exceptional circumstances, if necessary, when the State with closer jurisdictional links refused to act.	Consider that it should be consistent with the principle of complementarity, primary responsibility for the prosecution of alleged perpetrators law with the States concerned, by way of either territorial or personal jurisdiction.
Harmonisation with International Law		
Political Risk	All too often, however, universal jurisdiction was being used primarily to advance a political agenda or attract media attention, rather than genuinely to advance the rule of law. Appropriate safeguards should therefore be established in national legal systems, or other relevant entities, to ensure the responsible exercise of universal jurisdiction in appropriate exceptional cases. Such safeguards could, for example, include the requirement that prosecution based on universal jurisdiction should be conducted by public prosecution officials rather than initiated by private actors; that approval should be sought from high-level legal officials before a decision was made to open a case; that the accused should be present in the territory; and that he or she should have additional relevant jurisdictional links to the forum State.	

Country	**Morocco**	**Nigeria**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		
Forum Selection	Moroccan law was based on the principles of territorial jurisdiction or personal jurisdiction and did not recognize universal jurisdiction, whether as a technical device or as a basis for jurisdiction. Nonetheless, Moroccan legislation contained provisions governing acts and offences giving rise to universal jurisdiction, but did not contain any provisions that prevented the application of such principle or that promoted impunity. Morocco adopted that approach because it considered universal jurisdiction to be an optional principle and not a binding rule; it also considered that national courts had such jurisdiction a priori but were not bound to exercise it. For Morocco, universal jurisdiction was also a preventive principle, in that it was used to make up for shortcomings in national judicial systems with regard to the prosecution of serious crimes.	Nigeria believed that immunity of State officials should not be sacrificed for the sake of the principle of universal jurisdiction; that the primary responsibility for investigating and prosecuting serious international crimes lay with the State that had territorial jurisdiction; and that universal jurisdiction provided a complementary mechanism to ensure that accused persons could only be held accountable where the State was unable or unwilling to exercise its jurisdiction.
Harmonisation with International Law		
Political Risk		

Country	Norway	Paraguay
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	Given that the way in which universal jurisdiction would be applied by States that incorporated the principle into their national frameworks in the future would also largely be determined by their national judicial entities, the Committee should focus on how national jurisdictions organized their prosecutorial offices and applied the principle of universal jurisdiction. It was important to identify appropriate mechanisms to ensure that prosecutorial offices were independent and free from political interference, and to examine how prosecutorial discretion was applied in universal jurisdiction cases. Discussion of those issues would enhance the common understanding of how independent prosecutors should apply the principle of universal jurisdiction in a responsible and predictable manner. Progress in that regard would require States to share their experiences and best practices.	
Forum Selection		
Harmonisation with International Law		Considers that the principles of universal jurisdiction go beyond the usual rules of jurisdiction in order to serve the interests of justice. Paraguay considers that the Universal Declaration of Human Rights enshrines fundamental human rights which has taken on a supranational dimension. Its Criminal Code has legislated for universal jurisdiction in cases of genocide, human trafficking and illicit drug trafficking.
Political Risk		

Country	Peru	Singapore
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	Considers that it would be helpful to establish a regime on the cooperation and assistance mechanisms available to facilitate its exercise.	There was also room for discussion on its interaction with other elements, such as good faith, due process, transparency, separation of powers and prosecutorial discretion, as well as practical matters involving the collection and preservation of evidence, availability and attendance of witnesses, and rules of procedure.
Forum Selection		The principle of universal jurisdiction was one of several tools that might be used to fight impunity and to maintain international peace and security; it was not and should not be the primary basis for the exercise of criminal jurisdiction by States. It was complementary in nature and should be applied only when no State was able or willing to exercise jurisdiction on the basis of territoriality or nationality to prevent alleged perpetrators from continuing to act with impunity.
Harmonisation with International Law		
Political Risk		

Country	**Serbia**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	
Forum Selection	National jurisdiction, which must be complementary to international jurisdiction, could be effective in fighting impunity for those grave breaches of international humanitarian law, in particular when the State of nationality of the alleged perpetrator had no manifest will to prosecute. In 2003, Serbia had adopted the Law on Organization and Competences of Government Authorities in War Crimes Proceedings, which provided for jurisdiction over war crimes committed in the territory of the former Yugoslavia, regardless of the nationality of the accused or the victim. The defendants in the trials conducted under the 2003 law had been present in the territory of Serbia and had not been indicted by neighbouring countries. No such proceedings thus far had been conducted in absentia. The Law did not contravene the 2006 bilateral agreement between Serbia and Croatia on cooperation in the prosecution of war crimes or their 2005 memorandum of understanding on prosecutorial cooperation. Cooperation under those instruments had continued unimpeded until 2011, when Croatia had adopted a law declaring null and void certain legal documents of the judicial bodies of the former Yugoslav People's Army, the former Socialist Federal Republic of Yugoslavia and the Republic of Serbia. The law enabled the Croatian judiciary to refuse to act in matters that were contrary to the legal order of Croatia and detrimental to its sovereignty and security. As a result, all cooperation had ceased and 75 cases involving persons suspected of war crimes remained pending.
Harmonisation with International Law	

Country	Serbia (Cont'd)
Political Risk	The Serbian Law on Organization and Competences of State Authorities in War Crimes Proceedings had been prepared in cooperation with international legal experts and had been praised by the Organization for Security and Cooperation in Europe, the International Criminal Tribunal for the Former Yugoslavia and other international bodies monitoring war crimes trials. It was interesting to note that Croatia had not challenged that Law until very recently, in order to exploit it for domestic political purposes. The representative of Croatia had implied that Serbia had been involved in a genocide, but with its abysmal track record for trying war crimes, Croatia was the last country that had a right to lecture others, let alone Serbia. Croatia had not asked Serbia to amend its Law on Organization and Competences of Government Authorities in War Crimes Proceedings until January 2015, which indicated that its current calls for changes to the Law were motivated by political considerations and a desire to ensure impunity for Croatian nationals guilty of the most serious crimes. Serbia would neither amend nor repeal the Law, as that would constitute a failure to respect its international obligation to prosecute persons suspected of committing war crimes, regardless of their nationality. Although the representative of Croatia claimed that Serbia was misusing the principle of universal jurisdiction for political purposes or to rewrite history, it was, in fact, Croatia that was attempting to rewrite history and to gloss over the crimes it had committed against the Serbian people during the conflict of the 1990s and those committed by the fascist regime of the Independent State of Croatia during the Second World War. It was worth noting that only one person had been sentenced by the Croatian judiciary in relation to crimes committed during Operation Storm, in which 2,500 Serbs, primarily civilians, were brutally killed and 250,000 were forcibly displaced. Furthermore, of the 3,584 indictments for war crimes issued by Croatia as at the end of 2015, only 119 concerned members of the Croatian armed forces, and the rehabilitation of the country's war criminals continued unabated. Serbia did not need the controversial portions of that Law, nor did it need to encroach on the sovereignty of neighbouring States in order to prosecute the heinous violations of international humanitarian law that had occurred in the former Yugoslavia. It was perfectly possible for Serbia to prosecute the perpetrators of crimes such as the genocide in Srebrenica and war crimes in the Croatian city of Vukovar under its existing Criminal Code, in particular article 9 of that Code; besides, the country had the necessary institutions in place to conduct the trials. It was true that there had been some international support for the Law during the early stages of its development, before the hopes that Serbia would fulfil its responsibilities with regard to the prosecution and punishment of war crimes had faded and it had become evident that the Law was being misused for political purposes. However, even at that early stage, reputable international experts had expressed concerns. For example, the International Bar Association had stated that the issue of jurisdiction was not entirely clear and suggested the inclusion of a complementarity clause in the Law. The representative of Serbia had incorrectly stated that the Venice Commission had adopted a positive opinion of the Law. The Venice Commission had in fact considered not that Law but rather a 2008 law concerning the organization of courts and the 2013 amendment thereto.

Country	**Slovenia**
Submission reference	A/C.6/71/SR.14 *Summary Record of 14th meeting 13 October 2016*
Due Process	Prosecution under the third paragraph of article 13 was possible only with the approval of the Minister of Justice, while prosecution under the second paragraph thereof was subject to approval by the Minister of Justice in the absence of double criminality and with the proviso that, according to the general principles of law recognized by the international community, the offence in question had constituted a criminal act at the time it had been committed. The inclusion of such safeguards reflected an understanding that a degree of caution was needed in order to prevent the principle of universal jurisdiction from being applied too extensively. Its application under article 13, paragraph 2, was further limited by provisions specifying that perpetrators should not be prosecuted if they had served the sentence imposed on them in the foreign country or if it had been decided in accordance with an international agreement that the sentence imposed in the foreign country was to be served in Slovenia; if according to foreign law, the criminal offence concerned could be prosecuted only upon the complaint of the injured party and such a complaint had not been filed; or if the perpetrators had been acquitted by a foreign court, their sentence had been remitted or the execution of the sentence had fallen under the statute of limitations. The Slovenian Criminal Procedure Act laid down procedural rules that were also applicable in the context of the principle of universal jurisdiction, ensuring recognized standards of due process, including for the accused. For example, a procedural rule on trials in absentia in effect prohibited trials in the complete absence of a defendant, since a trial was allowed to be held when a duly summoned defendant failed to appear at the main hearing only if his or her presence was not indispensable, the defence counsel was present and the defendant had already been heard. With regard to rules on immunities, article 6 of the Criminal Code prohibited the application of Slovenian criminal law to the acts of persons who benefited from immunity from criminal liability pursuant to the provisions of the Constitution or rules of international law. It was well accepted that the application of the principle of universal jurisdiction entailed specific challenges, including with respect to evidence collection in the context of inter-State cooperation. In that regard, Argentina, Belgium, the Netherlands and Slovenia were actively engaged in efforts to improve inter-State cooperation for the prosecution of atrocity crimes, in particular by working towards the negotiation of a new international instrument on mutual legal assistance and extradition between States for genocide, crimes against humanity and war crimes.
Forum Selection	
Harmonisation with International Law	
Political Risk	

Country	South Africa on behalf of the African Union	Spain
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	Considers that it would be helpful to establish a regime on the cooperation and assistance mechanisms available to facilitate its exercise.	Organic Act No. 1/2014 introduced the procedural restriction according to which the legal standing to initiate proceedings is limited to the victim and the Public Prosecution Service.
Forum Selection	Considers the abuse of universal jurisdiction could undermine efforts to combat impunity; and it is vital to ensure respect of the norms of international law, including sovereign equality of States, territorial jurisdiction and the immunity of State officials under customary international law. Notes that arrest warrants issued on the basis of the abuse of universal jurisdiction should not be executed in any State member of the African Union, and noted that the African Union had urged its members to use the principles of reciprocity to defend themselves against the abuse of universal jurisdiction.	The cases before the Spanish courts did not progress very far because of three circumstances: 1) the accused enjoyed immunity from jurisdiction by virtue of their status of head of state; 2) Spanish Government extradited the accused to their own countries where criminal proceedings against them were already underway; and 3) a third country decided not to comply with an extradition request issued by Spain. Spain introduced the requirement for a link with Spain which had no previously been stipulated; and introduced the principle of subsidiarity: Spanish courts may not exercise jurisdiction if the offences are under investigation or being prosecuted effectively by another country or international court. This includes temporarily staying proceedings if proceedings are connected with the same offences initiated by a court in another country or international court.
Harmonisation with International Law	Under the Constitutive Act of the African Union, the Union had the right to intervene at the request of any of its member States, in situations of genocide, war crimes and crimes against humanity.	Spain would cede jurisdiction where proceedings to investigate and prosecute an offence initiated by an international court established in accordance with a treaty or agreement to which Spain is a party.
Political Risk		

Country	**Sudan**	**Togo**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process		
Forum Selection	Reinforced the need to have universal jurisdiction remained a complementary mechanism rather than a substitute for national jurisdiction.	
Harmonisation with International Law		The principle of universal jurisdiction should not serve as a pretext to undermine such fundamental principles of international law as non-intervention and the sovereign equality of States, nor should it allow certain external jurisdictions to usurp domestic jurisdiction.
Political Risk	It was applied in a manner consistent with its original objectives and not in the service of particular political agendas or as a pretext for intervening in the internal affairs of States.	The current abusive or politicized use of universal jurisdiction could lead to unacceptable interference in the sovereign exercise of the jurisdiction of national courts.

Country	**Trinidad and Tobago (on behalf of the Caribbean Community)**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	Considers that it would be helpful to establish a regime on the cooperation and assistance mechanisms available to facilitate its exercise.
Forum Selection	Noted that the International Criminal Court had jurisdiction only when a State was unwilling or unable to prosecute the perpetrators under its domestic law. The application of universal jurisdiction was therefore necessary and justifiable in instances where crimes committed affected the international community and where national legal systems allowed the perpetrator to continue to act with impunity, and in cases of mass atrocity crimes.
Harmonisation with International Law	The extraterritorial application of domestic law by a State was contrary to the principles of universal jurisdiction to do so over one of its own nationals. Considered that care must be taken to ensure that the exercise of universal jurisdiction did not general abuse or conflict with international law.
Political Risk	

Country	**United Kingdom**
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).
Due Process	While rare, establishing universal jurisdiction before the courts of the United Kingdom was not legally complex. Parliament had legislated to confer such jurisdiction on the courts in relation to certain offences, and experience had demonstrated that the relevant legal framework could be applied with clarity. Difficulties were more likely to arise in relation to practical, evidential matters or, in some cases, whether the accused person enjoyed any immunity under international law. Scrutinizing offences alleged to have been committed thousands of miles away was likely to present challenges. That had been the recent experience of the United Kingdom during a prosecution for torture alleged to have taken place outside the United Kingdom. While there had been few legal problems with establishing universal jurisdiction pursuant to the domestic legislation implementing the obligations of the United Kingdom under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, obtaining evidence and dealing with practical issues such as translation had proved to be problematic. Difficulties might also arise in relation to whether the principle of autrefois convict prevented criminal proceedings in the United Kingdom in circumstances where the same facts had been subject to criminal proceedings in another jurisdiction, albeit for a lesser offence.
Forum Selection	However, the exercise of territorial jurisdiction was not always possible or appropriate. In such cases, while it was not an option of first resort, universal jurisdiction could be a tool to ensure that the perpetrators of serious crimes did not escape justice.
Harmonisation with International Law	
Political Risk	

Country	ICRC	Observer for the Holy See
Submission reference	*The Scope and Application of the principle of universal jurisdiction: Report of the Secretary- General,* UN GAOR, 72nd sess, Agenda Item 86, UN Doc A/72/112 (22 June 2017).	A/C.6/71/SR.15 - Summary Record of the 15th Meeting, 14 Oct 16.
Due Process	The new ICRC commentaries flagged that there are time limits associated with the fulfillment of the obligation to investigate those alleged to have committed a grave breach and either prosecuting or extraditing those individuals.	
Forum Selection		Considered that the application of universal jurisdiction is a jurisdiction of last resort.
Harmonisation with International Law	The ICRC has flagged in its updated commentaries on the Geneva Conventions it contains commentary on Articles 49 and 50 of the First Geneva Convention regarding how states can fulfil their obligation to enact the legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches listed in the Conventions. The commentaries considered that some states have made the prosecution of war crimes conditional on the presence - temporary or permanent - of the alleged offenders on their territory. The Committee stated that while states may attach conditions to the application of universal jurisdiction to "grave breaches" or other war crimes, such conditions must, in every context, seek to increase the effectiveness and predictability of universal jurisdiction and just not unnecessarily restrict the possibility of prosecuting suspected offenders. Considers the effective implementation of the obligations under the four Geneva Conventions and additional protocol I require grave breaches to be to be brought before their own courts, regardless of nationality, or hand them over for trial by another State party concerned. The effective implementation of those obligations requires each State party to extend universal jurisdiction to the list of grave beaches in national jurisdiction.	
Political Risk		

Note: This table only canvasses the relevant parts of the contribution made by 46 States in support of the Secretary-General's report regarding the Scope and Application of the principle of universal jurisdiction during the 72nd session of the 6th Committee to the UN General Assembly. It does not include the preliminary submissions of States in response to the lead up to this Report during the period 2009-2017 (in 6th Committee Sessions 64 to 71 inclusive). Although more States made submissions than are included in the below table, only submissions containing content directly relevant to the four assessment criteria of this thesis are included below.

Bibliography

A *Articles/Books/Reports*

Abbel, Michael, 'The Need for US Legislation to Curb State-Sponsored Kidnapping' in Richard Atkins (ed), *The Alleged Transnational Criminal, The Second Biennial International Criminal Law Seminar* (International Bar Association Series, 1995)

African Union-European Union Report, *AU–EU Expert Report on the Principle of Universal Jurisdiction* (16 April 2009)

Ajevski, Marjan, 'Serious Breaches, The Draft Articles On State Responsibility And Universal Jurisdiction' (2008) 2(1) *European Journal of Legal Studies*

Algen, Azlem, 'The ICTY and Irregular Rendition of Suspects' (2003) 2(3) *Law and Practice International Court and Tribunals*

Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Officials Flout International Law* (Al Index: EUR 70/008/2002, 1 September 2002)

Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (August 2011)

Amnesty International, *Universal Jurisdiction, A Preliminary Survey of Legislation Around the World* (2012)

Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (September 2001)

Annual Human Rights Report Submitted to Congress by the US Department of State, Vol 25b

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, rev and enlarged ed, 1994)

Australia Red Cross, *Topic 2(a)—The Principle of Universal Jurisdiction*, Principles of International Humanitarian Law (3 September 2010)

<http://www.redcross.org.au/files/2010_The_Principle_of_Universal_Jurisdiction.pdf>

Baade, Hans, 'World Law—The Eichmann Trial: Some Legal Aspects' (1961) 3 *Duke Law Journal* 400

Bankile, Thompson and John Rosolu, *Universal Jurisdiction: The Sierra Leone Profile* (Asser Press, 2015)

Barnett, Lauren, 'Global Governance and the Evolution of the International Refugee Regime' 14(2–3) *International Journal of Refugee Law* 238

Barnett, Michael, *The Star and the Stripes* (Cambridge University Press, 2016)

Baslar, Kemal, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers, 1998)

Bassiouni, M Cherif, 'Appendix II in Human Rights in Context of Criminal Justice: Identifying International Procedural Protections' in National Constitutions' (1992-1993) 3 *Duke Journal of Comparative International Law* 32

Bassiouni, M Cherif, 'Crimes Against UN Personnel', in *International Criminal Law Conventions* (Oxford, 1997)

Bassiouni, M Cherif, 'The History of Universal Jurisdiction and Its Place in International Law', in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

Bassiouni, M Cherif, *International Extradition: United States Law and Practice* (Oxford University Press, 3rd ed, 1996)

Bassiouni, M Cherif, 'International Crimes: *Jus Cogens* and *Obligiatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 4

Bassiouni, M Cherif, *International Criminal Law and Human Rights* (Nijhoff, 2013)

Bassiouni, M Cherif, ed, *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008)

Bassiouni, M Cherif, ‘International Recognition of Victims' Rights’ (2009) 6 *Human Rights Law Review*

Bassiouni, M Cherif, *The Legislative History of the International Criminal Court* (Brill, 2005)

Bazyler, Michael, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford University Press, 2017)

Beale, Sara Sun, ‘Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control’ in Michele Caianiello (ed), *Discretionary Criminal Justice in a Comparative Context* (Carolina Academic Press, 2015)

Beaulac, Stephane, ‘The Westphalian Model in Defining International Law: Challenging the Myth’ (2004) 8(2) *Australian Journal for Legal History*

Beccaria, Cesare, *On Crimes and Punishments* (republished online 3 September 1997, originally published 1764)

Bederman, David, *International Law in Antiquity* (Cambridge University Press, 2001)

Bekou, Olympia and Robert Cryer, ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’ 56(1) *International & Comparative Law Quarterly* 49

Bennett, Allyson, ‘That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Tracking Vessel Interdiction Act’ (2012) 37 *Yale Journal of International Law* 433

Besson, Samantha, ‘The Authority of International Law—Lifting the State Veil’ (2009) 31(3) *Sydney Law Review* 343

Bhuta, Nehal, ‘*R v Evans and Bartle; Ex Parte Pinochet* Justice without Borders? Prosecuting General Pinochet’ (1999) 23(2) *Melbourne University Law Review* 499

Nehal Bhuta et al, *Universal Jurisdiction in Europe: The State of the Art,* Human Rights Watch Report, 27 June 2006 <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art>

Bianchi, Andrew, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10(2) *European Journal of International La*w

Bikundo, Edwin, 'The International Criminal Court and Africa' (2012) 23(1) *Exemplary Justice, Law and Critique* 21–44

Bjork, Christine and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14(1) *Yale Human Rights and Development Journal*

Black, Ian, 'Tzipi Livni Arrest Warrant Prompts Israeli Government Travel "Ban"', *The Guardian* (online, 16 December 2009) <www.theguardian.com/world/2009/dec/15/tzipi-livni-arrest-warrant-israeli>.

Blackstone, William, *Commentaries on the Law of Nations* (Clarendon Press, 2nd ed, 2003, first published 1765–69)

Blume, William Wirt, 'The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue' (1944) 43 *Michigan Law Review* 59

Boas, Gideon, 'War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations' (2010) 21 *Criminal Law Forum* 313

Boas, Gideon and Pascale Chifflet, 'Suspected War Criminal in Australia: Law and Policy' (2016) 40(1) *Melbourne University Law Review* 46

Boon, Kristen E (ed), *Piracy and International Maritime Security: Developments Through 2011* (Oxford University Press, 2012)

Bottini, Gabriel, 'Universal Jurisdiction After the Creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Policy* 503

Brody, Reed and Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International IX, 2000)

Buoye, Thomas, 'Filian Felons: Leniency and Legal Reasoning in Qing China' in Robert E Hegel and Katherine (eds), *Writing and Law in Late Imperial China* (University of Washington Press, 1984)

Burke-White, William W, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 *Texas International Law Journal* 4

Burrows, E, *Flower in my Ear: Arts and Ethos on Ifaluk Atoll* (University of Washington Press, 1963)

Butler, A Hays, 'The Growing Support for Universal Jurisdiction' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

Byron, Christine, 'Armed Conflicts: International or Non-International' (2001) 6(1) *Journal of Conflict and Security Law* 63

Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes, Ninth Annual Report, 2005–2006* (2006) <http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html>

Cassese, Antonio, *International Criminal Law* (Oxford University Press, 3rd ed, 2013)

Cassese, Antonio et al, *International Criminal Law Cases and Commentary* (Oxford University Press, 2011)

Cassese, Antonio, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009)

Cassese, Antonio (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002)

Cavanagh, Edward, 'Prescription and Empire From Justinian to Grotius' (2016) 60(2) *The Historical Journal*

Cicero, MT, 'Flaccus' in *Three orations on the Agrarian law, the four against Catiline, the orations for Rabirius, Murena Sylla, Archias, Flaccus, Scaurus, etc.* (HG Bohn, 1856)

Clark, Peter, 'Criminal Jurisdiction over Merchant Vessels Engaged in International Trade' (1980) 11 *Journal Maritime Law & Commerce* 219

Colangelo, Anthony J, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law', 48 *Harvard International Law Journal* 121

Colangelo, Anthony J, 'The Legal Limits of Universal Jurisdiction' (2006) 47 *Virginia Journal of International Law* 149

Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (AGPS, 1992)

Condorelli, Luigi and Annalisa Campi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3(3) *Journal of International Criminal Justice* 590

Costi, Alberto, 'Problems with Current International and National Practices Concerning Extraterritorial Abductions' (2003) 9 *The New Zealand Association for Comparative Law Yearbook*

Council of the European Union, *The AU–EU Expert Report on the Principle of Universal Jurisdiction,* 16 April 2009, 8672/1/09 REV 1

Cowles, Willard B, 'Universality of Jurisdiction over War Crimes' (1945) 33(2) *California Law Review*

Crane, Glen, 'The Bangalore Principles and the Internationalisation of Australian Law' (2002) *Australian International Administrative Law Forum* 1

Crowe, Jonathan and Kylie Weston-Scheuber, *Principles of International Humanitarian* Law (Elgar, 2013)

Cryer, Robert, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2014)

Cullen, Anthony, *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (Cambridge University Press, 2010)

Damrosch, Lori F, 'Comment: Connecting the Threads' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

Dana, Shahram, 'The Sentencing Legacy of the Special Court for Sierra Leone' (2014) 42 *Georgia Journal of International and Comparative Law* 615

Davis, Madeleine, 'Externalized Justice and Democratization: Lessons from the Pinochet Case' (2006) 54(2) *Political Studies*

De Greif, Pablo, 'Comment: Transition to Democracy' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

Del Pizzo, Lisa, 'Not Guilty—But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and its Impact on the Future of Nazi War Crimes Trials' (1995) 18(1) *Boston College International and Comparative Law Review*

De Vattel, Emerich, *The Classics of International Law*, tr James Brown Scott (Carnegie Institute of Washington, 1916)

De Vattel, Emerich, *The Law of Nations, Or, Principle of the Law of Nature* (GG and J Robinson Paternoster-Row, 1794)

de Wet, Erika, *Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004)

Dhyani, SN, *Jurisprudence: A Study of Indian Legal Theory* (Metropolitan Book Co, 1985)

Dinstein, Yoram, 'International Law as a Primitive Legal System' (1986) 19(1) *New York University Journal of International Law and Politics*

Dixon, Martin, Robert McCorquodale and Sarah Williams, 'Sovereign Jurisdiction' in *Cases & Materials on International Law* (Oxford University Press, 2016)

Donnedieu de Vabres, Henri, *Les Principles modernes du droit penal international* (Librarire du Recuiel Sirey, 1928)

Donovan, Nick, *The Enforcement of International Criminal* Law (Aegis Trust, 2009)

Douglass, Lawrence, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trials* (Princeton University Press, 2016)

Dunlap Jnr, Charles J, 'Lawfare Today: A Perspective' (Winter 2008) *Yale Journal of International Affairs* 146

Edwards, R Randle, 'The Tao-Kuang Emperor, 1830—Ch'Ing Legal Jurisdiction Over Foreigners' in Alan Jerome et al (eds), *Essays on China's Legal Tradition* (Princeton University Press, 1980)

Fassbender, Bardo, 'Targeted Sanctions Imposed by the UN Security Council and Due Process' (2006) 3 *Irish Common Law Reports* 437

Fawcett, JES, 'The Eichmann Case' (1962) 27 *British Yearbook of International Law* 181

Feinaugle, Clemens A, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' in Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2009)

'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences' presented to the International Law Association, *Committee on International Human Rights Law and Practice*, London Conference 2000

Fischer–Lescano, A, 'Torture in Ab-Ghraib: The Complaint Against Donald Rumsfeld Under the German Code of Crimes Against International Law' (2005) 6 *German Law Journal* 689

Forowic, Magdlena, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010)

Fowler, Jeaneane, *The Bhagavad Gita: A Text and Commentary for Students* (Sussex Academic Press, 2012)

Fox, Hazel, Colin Warbrick and Dominic McGoldrick, 'The Pinochet Case No 3' (1999) 48(3) *The International and Comparative Law Quarterly*

Franck, Thomas M and Gregory H Fox, 'Introduction' in Thomas Franck (ed), *International Law Decisions in National Courts* (Irvington-on-Hudson, 1996)

Franck, Thomas M, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 705

Franck, Thomas M, *Fairness in International Law and Institutions* (Oxford, 1995)

Friedman, John S, ‘Genocide Trial in Kansas’ (2011) 292(18) *The Nation*

Gaeta, Paola, ‘Is NATO Authorised or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia’ (1997) 9 *European Journal of International Law* 174

Gaeta, Paola and Andrew Clapham (eds), *The Oxford Handbook of International Law In Armed Conflict* (Oxford University Press, 2014)

Gagglioli, Gloria (ed), *ICRC Expert Report on the Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (International Committee of the Red Cross, 2013)

Gallagher, Katherine, ‘Universal Jurisdiction in Practice’ (2009) *Journal of International Criminal Justice* 7(5)

Gaurier, Dominique, ‘The Enemy of Mankind, in Piracy’ in Charles Norchi and Gwenaelle Proutiere-Maulion (eds), *Comparative Perspective: Problems, Strategies and Law* (Hart Publishing, 2012)

George Jnr, BJ, ‘Jurisdictional Bases for Criminal Legislation and its Enforcement, Transnational Aspects of Criminal Procedure’ (1983) 3 *Michigan Yearbook of International Legal Studies* 42

Geraghty, Anne H, ‘Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World’s Most Pervasive Problems’ (2004) 16 *Florida Journal of International Law* 371

Gibbons, Pat and Hans-Joachim Heintze (eds), *The Humanitarian Challenge: 20 Years European Network on Humanitarian Action* (Springer, 2015)

Ginibi, RL, ‘Aboriginal Traditional and Customary Law’ (1994) 1 *Law Text Culture* 8–12

Glaser, Steffan, *Infraction Internationale* (Libraire Generale De Droite et De Jurisprudence, 1957)

Gluck, Jonathan A, 'The Customary International Law of State-Sponsored International Abduction and United States Courts' (1994) 44 *Duke Law Journal* 612

Goldflam, Russell, 'The (Non-)Role of Aboriginal Customary Law in Sentencing in the Northern Territory' (2013) 17(1) *Australian Indigenous Law Review*

Goldmann, Matthias, 'International Courts and Non-Appearance' in *Oxford Encyclopedia of Public International Law* (Oxford University Press, 2006).

Goodwin-Gil, Guy S, 'The Language of Protection' (1989) 1(1) *International Journal of Refugee Law* 6–19

Gordon, Gregory, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law* (University of North Dakota, 2012)

Gow, James, 'The ICTY, War Crimes Enforcement and Dayton: The Ghost in the Machine' (2006) 5(1) *Ethnopolitics*

Graeforth, B, 'The International Law Commission Tomorrow: Improving its Organisation and Methods of Work' 85 *Australian Journal of International Law* 597

Graeforth, Bernhard, 'Universal Jurisdiction and an International Criminal Court' (1990) 1 *European Journal of International Law* 67

Greppi, Edoardo, 'The Evolution of Individual Criminal Responsibility Under International Law' (1999) *International Review of the Red Cross* 835

Grotius, Hugo, *The Law of War and Peace* (reprinted by The Lonang Institute, 1625) <http://lonang.com/library/reference/grotius-law-war-and-peace/gro-307/>

Grutzner, H, 'International Validity of Criminal Judgments, Summary of Problems' in *Criminology Research, the International Validity of Criminal Judgments* (Council of Europe Strasbourg, 1968)

Guilfoyle, Douglas, 'The Legal Challenges in Fighting Piracy' in Bibi van Ginkel and Frans-Paul van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, 2010)

Harel, Isser and Shlomo J Shpiro, *The House on Garibaldi Street* (Frank Cass Publishers, 1975)

Harvey, Martin, 'Grotius and Hobbes' (2006) 14(1) *British Journal for the History of Philosophy* 27

Hathaway, Oona, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469

Hauser, Gideon, *Justice in Jerusalem* (Thomas Nelson and Sons, 2nd ed ,1966)

Hernandez, Gleider I, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community" ' (2013) 83(1) *British Yearbook of International Law*

Hesenov, Rahim, 'Universal Jurisdiction for International Crimes—A Case Study' (2013) 19(3) *European Journal on Criminal Policy and Research*

Higgins, Rossalyn, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995)

Holloday, AJ and MD Goodman, 'Religious Scruples in Ancient Warfare' (1986) 36 *The Classical Quarterly* 150

Homer, *The Odyssey,* XV, verse 427 (reprinted Prestwick House, 2006)

Hongju Koh, Harold, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599

Hovell, Devika, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press, 2016)

Hulsman, L, 'The Role of Sentences Passed in the Absence of the Accused in Arrangements for the Enforcement of Foreign Criminal Sentences' in *Aspects of the International Validity of Criminal Judgments* (Council of Europe Strasbourg, 1968)

Human Rights Council, *'Human Rights OCHR, Report on the United Nations Fact-Finding Mission on the Gaza Conflict', Human Rights in Palestine and Other Occupied Arab Territories,* 12th Session, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009)

Human Rights Council, *Right to the Truth, Report of the Office of the High Commissioner for Human Rights, UN Doc A/HRC/5/7* (2007)

Hyde, Charles, *International Law, Volume 1* (Little, Brown and Company, 2nd ed, 1945)

Inazumi, Mitsue, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (School of Human Rights Research/Intersia, 2005)

International Committee of the Red Cross, *General Principles of International Criminal Law*, ICRC Advisory Service on International Humanitarian Law (October 2013) <https://www.icrc.org/en/document/general-principles-international-criminal-law-factsheet>

International Committee for the Red Cross, *Universal Jurisdiction over War Crimes* (ICRC, March 2014) <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>

International Law Commission, 'Comment to Article 13' (1956) 2 *Yearbook of the International Law Commission* 25

International Law Commission, 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare),* Final Report of the International Law Commission' (2014) II(2) *Yearbook of the International Law Commission*

International Law Commission, 'Summary of the Meetings of the Forty-First Session (2 May–21 July 1989), Part 2 and 3 of the Special Rapporteur's Report' (1989) I *Yearbook of the International Law Commission*

Ireland-Piper, Danielle, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law' (2012) 13(1) *Melbourne Journal of International Law* 122

Ireland-Piper, Danielle, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9(4) *Utrecht Law Review*

Ishii, Yurika, 'M/V Guanarbar: Japan's First Trial on Piracy under the Anti-Piracy Act' (2015) 1 *Maritime Safety Law Journal* 45

Isumen, Ingi, *Child's Rights, Eastern Enlargement and EU Human Rights Regime* (Oxford University Press, 2015)

Janis, Mark, 'Sovereignty and International Law: Hobbes and Grotius' in Ronald St J Macdonald and T'ieh-ya Wang (eds), *Essays in Honour of Wang Tieya* (Oxford University Press, 1994)

Jeng, Abou, *Peacebuilding in the African Union: Law Philosophy and Practice* (Cambridge University Press, 2010)

Jennings, Robert (ed), *Oppenheim's International Law* (Oxford University Press, 9th ed, 2008), vol I

Jessberger, Florian and Gerhard Werle, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law' (June 2002) 13(2) *Criminal Law Forum*

Jessberger, Florian ,'Universality, Commentary and the Duty to Prosecute Crimes Under International Law in Germany' in Wolfgang Kaleck et al (eds), *International Prosecution of Human Rights Crimes* (Springer, 2007)

Jordan, B, 'Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime' (2000) 9(1) *Michigan State Journal of International Law*

Kantorovich, Eugene, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law Journal* 197

Kantorovich, Eugene, 'The Inefficiency of Universal Jurisdiction' (2008) *University of Illinois Law Review* 390

Kash, Douglas, 'Abducting Terrorists' (1999) 13(1) *American University International Law Review* 139

Kaul, Hans-Peter, 'Nuremberg Legacy and the International Criminal Court—Lecture in Honor of Whitney R Harris, Former Nuremberg Prosecutor' (2013) 12 *Washington University Global Studies Law Review* 637

Kelly, Mike, Tim McCormack, Paul Muggleton and Bruce Oswald, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) *International Review of the Red Cross* 849

Kelsen, Hans, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London Institute of World Affairs, 1966)

Kim, Hunjoon and Kathryn Sikkink, 'Do Human Rights Trials Make A Difference?' *Minnesota International Relations Colloquium* <http://www.polisci.umn.edu/~mirc/paper2007- 08/fall/Kim&Sikkink.pdf>

King Jnr, Henry J, 'Without Nuremburg? What?' (2007) 6(3) *Washington University Global Studies Law Review* 653–661

Kirby, Michael, 'Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points"' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

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

Kohen, Ari, 'The problem of Secular Sacredness: Ronald Dworkin, Michael Perry, and Human Rights Foundationalism' (2006) 5 *Journal of Human Rights* 235–256

Korowicz, Marek, *Present Conceptions of International Law* (Springer Centre for Business & Media, 2013)

Koskenniemi, Martii, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company, 1989)

Kraska, James and Paul Pedrozo, *International Maritime Security Law* (Brill, 2013)

Kummer, Luke Jerod and Anna Gawel, 'New Era for International Justice, Though Verdict Still Out on ICC', *The Washington Diplomat* (online) (30 November 2011)

Lafontaine, Fannie, 'The Unbearable Lightness of International Obligations: How and When to Exercise Jurisdiction under Canada's Crimes against Humanity and War Crimes Act' (2001) 23(2) *Review Quebecoise de Droit International*

La Haye, Eve, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008)

Langer, Maximo, 'The Archipelago and the Wheel' in Martha Minow eds, *The First Global Prosecution* (University of Michigan Press, 2015)

Langer, Maximo, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105(1) *The American Journal of International Law*

Langer, Maximo, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforce" to "No Safe Haven" Universal Jurisdiction' (2015) 13(2) *Journal of International Criminal Justice* 245

Langford, Ian, 'Fair Trial: The History of an Idea' (2009) 8(1) *Journal of Human Rights* 37

Lasok, D, 'The Eichmann Trial' (1962) 11(2) *The International and Comparative Law Quarterly*

Lau, Martin, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards* (International Commission of Jurists, 2014)

Lauterpacht, Hersch, 'Insurrection et piraterie' (1939) 4(2) *Revue Generale de Droit International Public*

Lauterpacht, Hersch, *An International Bill of the Rights of Man* (Columbia University Press, 1945)

Lauterpacht, Hersch, 'The Law of Nations, the Law of Nature and the Rights of Man', *Transactions of the Grotius Society* vol 29 (Cambridge University Press, 1943)

Lemaitre, Roermer, 'Belgium Rules the World: Universal Jurisdiction Over Human Rights Atrocities' (2000–2001) 37 *Jura Falconis*

Lindley, Jade, *Somali Piracy: A Criminological Perspective* (Routledge, 2016)

Llewellyn, KN and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1992)

Lock, Tobias and Julia Riem, 'Judging Nuremberg: The Laws, the Rallies, the Trials' (2019) 6(12) *German Law Journal*

Longo, Michael, 'Reconceptualising Public International Law: Convergence with the European Union Model?' (2002) 25(1) *University of New South Wales Law Journal* 71

Lorton, David, *The Juridical Terminology of International Relations in Egyptian Texts through Dyn. XVII* (John Hopkins University Press, 1974)

Lyons, Scott, 'German Criminal Complaint Against Donald Rumsfeld and Others' (2006) 33(10) *American Society of International Law*

Ma, Yue, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12(1) *International Criminal Justice Review* 22

Macedo, Stephen, 'The Princeton Principles on Universal Jurisdiction' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004)

Macedo, Stephen et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

Maine, Henry, *Ancient Law, its Connection with Ancient History of Society and its Relation to Modern Ideas* (John Murray, 1861)

Malekin, Farhad, *Monopolization of International Criminal Law* (Almqvist & Wiksell International, 1995)

Maša Marochini, 'The Interpretation of the European Convention Human Rights' (2014) 1 *Zbornik radova Pravnog fakulteta u Splitu* 63–84.

Matas, David, 'The Case of Imre Finta' (1994) 43 *University of Brunswick Law Journal* 281–300

McCormack, Timothy LH and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997)

McGonigle Leyh and Brianne Nora, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011)

McKinnon, Michael G, '*United Stated v Alvarez-Machain*: Kidnapping in the "War on Drugs"—A Matter of Executive Discretion or Lawlessness?' (1993) 20(4) *Pepperdine Law Review*

Meron, Theodore, *Internal Strife: Their International Protection* (Cambridge University Press, 1987)

Milanovic, Marko, '*Al-Skeini* and *Al-Jedda* in Strasborg' (2012) 23(1) *European Journal of International Law*

Milanovic, Marko, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011)

Mills, Zachary, 'Does the World Need Knights Errant To Combat Enemies of All Mankind?: Universal Jurisdiction, Connecting Links, and Civil Liability' (2009) 66 *Washington and Lee Law Review* 1315

Mitchell, Andrew D, 'Leave Your Hat On? Head of State Immunity and Pinochet' (1999) 25(2) *Monash University Law Review*

Morin, MD, 'Jurisdiction Beyond 200 Nautical Miles: A Persistent Problem' (1980) 10 *California Western International Law Journal* 514

Morris, Madeline, 'Universal Jurisdiction in a World Divided' (2001) 35 *New England Law Review* 420

Muggleton, Paul and Bruce Oswald, 'Counterinsurgency and Certain Legal Aspects: A Snapshot of Afghanistan' (2001) 5 *Asia Pacific Civil-Military Occasional Papers*

Mullins, Claud, *The Leipzig Trials, an Account of the War, Criminals Trials and a Study of German Mentality* (Forgotten Books, 2012)

Mundis, DA, 'Current Developments: New Mechanisms for the Enforcement of International Humanitarian Law' (2001) 95 *American Journal of International Law* 934

Murungu, Chacha and Japhet Biegon, *Prosecuting International Crimes in Africa* (PULP, 2012)

Niemann, Grant, *Foundations of Intentional Criminal Law* (Lexis, 2014)

Norbert, Elias, *The Civilizing Process*, *State Formation and Civilization* vol II (Blackwell, 1982)

Notari, Tamas, *Killing a Tyrant—Remarks on Cicero's Miloniana* (Annals Faculty of Law Belgrade International Ed, 2012)

Nouwen, Sarah, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' (2006) 2(2) *Utrecht Law Review* 160

Nouwen, Sarah and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (November 2010) 21(4) *European Journal of International Law*

Opie, Rachel, 'Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility' (2006) 1 *New Zealand Law Review*

O'Keefe, Roger, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice*

Oliver, Covey, 'Judicial Decisions—Jurisdiction of Israel to try Eichmann—International Law in Relationship to the Israeli Nazi Collaborators (Punishment) Law' (1962) 56 *American Journal of International Law* 805

Onate Santiago et al, 'Lessons Learned: Chemical Trader Convicted of War Crimes' (2008) 1 *Hague Justice Journal* 38

Ongena, Tom and Ignace Van Dale, 'Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium' (2002) 15(3) *Leiden Journal of International Law* 687

Oosthuizen, Gabriel H, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549

Orakhelashvili, Alexander, 'Between Impunity and Accountability for Serious International Crimes: Legal and Policy Approaches' (2008) 55(2) *Netherlands International Law Review* 207

Orentlicher, Dianne, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1(1) *International Journal of Transitional Justice* 10

Orentlicher, Dianne, 'Universal Jurisdiction: A Pragmatic Strategy in Pursuit of a Moralist's Vision' in Michael Scharf (ed), *The Theory and Practice of International Criminal Law Essays in Honour of M. Cheri Bassiouni* (Brill, 2003)

Orentlicher, Dianne, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92 *Georgetown Law Journal* 1057–1134

O'Shea, Sheila, 'Chapter 11. Interaction Between International Criminal Tribunals and National Legal Systems' in Thomas Franck (ed), *International Law Decisions in National Courts* (Irvington-on-Hudson, 1999)

O'Sullivan, Aisling, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony* (Routledge, 2017)

Oswald, Bruce, 'The Law on Military Occupation: Answering the Challenges of Detention During Contemporary Peace Operations?' (2007) 8(2) *Melbourne Journal of International Law* 32

Paige, Tamsin, 'Piracy and Universal Jurisdiction' (2013) 12 *Macquarie Law Journal* 17

Palmer, Sir Geoffrey et al, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident,* September 2011, <http://www.un.org/News/dh/infocus/middle _east/Gaza_Flotilla_Panel_Report.pdf>

Paust, Jordan J et al, *International Criminal Law: Cases and Materials* (Carolina Academic Press, 2000)

Peskin, Victor, *International Justice in Rwanda and the Balkans, Virtual Trials and The Struggle For State Cooperation* (Cambridge, 2008)

Phillipe, Xavier, 'The Principles of Universal Jurisdiction and Complementarity' (2006) 88 *International Review of the Red Cross* 862

Phillipson, Coleman, *The International Law and Customs of Ancient Greece and Rome* (MacMillan, 1911)

Pictet, Jean Simon et al, *Commentary on the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987)

Pinker, Steven, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking, 2011)

Pollock, Ernest, 'The International Court of the League of Nations' (1921) 1 *The Cambridge Law Journal*

Powers, Samantha, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002)

Raanan Rein, 'The Eichmann Kidnapping: Its Effect on Argentine–Israeli Relations and the local Jewish Community' (2001) 7(3) *Jewish Social Studies* 101–130

Ratner, Steven, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy* (Oxford University Press, 2001)

Ratner, Steven, 'Editorial Comment: Belgium's War Crimes Statute: A Postmortem', (2003) 97 *American Journal of International Law* 888

Ratner, Steven, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2016)

Rauschenbach, Mina and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 *International Review of the Red Cross* 878

Rech, Walter, 'Rightless Enemies: Schmitt and Lauterpacht on Political Piracy' (2012) 32(2) *Oxford Journal of Legal Studies* 235–263

Reydams, Luc, 'Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium' (2010) 44 *International and National Prosecution of Crimes Under International Law* 3

Reydams, Luc, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2004)

Rivkin Jr, David B and Lee A Casey, 'Pirates Exploit Confusion about International Law', *Wall Street Journal* (New York), 19 November 2008.

Robinson, Piers, 'The CNN Effect: Can the News Media Drive Foreign Policy' (1999) 25(2) *Review of International Studies*

Roht-Arriaza, Naomi, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 *New England Law Review* 312

Roht-Arriaza, Naomi, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania, 2005)

Roht-Arriaza, Naomi, 'The Spanish Civil War Amnesty, and the Trials of Judge Garzon' (2012) 24(16) *American Society of International Law*

Roht-Arriaza, Naomi, 'The Trial of Rios Montt' (December 2013) 18(6) *Aportes DPLF*: *Magazine of the Due Process of Law Foundation* 41–44, <http://www.dplf.org/sites/default/files/aportes_18_english_web_final_6_0.pdf>

Rosen, Liana, 'International Drug Control Policy: Background and US Responses', *Congressional Research Service* (16 March 2015)

Rosoff, Robert, 'The Quantum of Evidence Required to Extradite from the United States, Transnational Aspect of Criminal Procedure' (1983) *Michigan Yearbook of International Legal Studies* 123

Roth, Kenneth, 'The Case for Universal Jurisdiction' (September/October 2001) *Foreign Affairs*

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

Ryngaert, Cedric, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights: *Al-Skeini and others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011)' (2012) 28 *Utrecht Journal of International and European Law, Merkourios* 74

Ryngaert, Cedric et al (eds), '*Prosecutor* v *Dusko Tadic'*, *Judicial Decision on the Law of International Organisations* (Oxford University Press, 2016)

Sands, Phillipe, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'* (Knopf Doubleday Publishing Group, 2016)

Sands, Phillipe (ed), *Justice For Crimes Against Humanity* (Hart Publishers, 2003)

Saul, Ben, 'Prosecuting War Crimes at Balibo Under Australian Law: The Killing of Five Journalists in East Timor by Indonesia' (2009) 31(1) Sydney Law Review 83

Schabas, William, 'The Contribution of the Eichmann Trial to International Law' (2013) 26(3) *Leiden Journal of International Law* 667

Scheffer, David, 'Arresting War Criminals: Mission Creep or Mission Impossible?' (2012) 35 *Case Western Reserve Journal of International Law* 319

Schmitt, Carl, 'Wesen und Werden des faschistischen Staates' (1929) 9(1) *Schmollers Jahrbuch fur Gesetzgebung, Verwaltung und Volkswirtschaft* 107–115

Schwöbel-Patel, Christine, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood' (2016) 4(2) *London Review of International Law*

Semmelman, Jacques, '*United States v Alvarez-Machain*' (1992) 86(4) *The American Journal of International Law*

Shaw, William, 'Traditional Korean Law and Its Relation to China' in Alan Jerome et al (eds), *Essays on China's Legal Tradition* (Princeton University Press, 1980)

Shearer, Ivan, *Extradition in International Law* (Manchester University Press, 1971)

Sikkink, Kathryn, *The Justice Cascade* (WW Norton & Co, 2011)

Simma, Bruno, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3(1) *Oxford Journal of International Dispute Settlement*

Simms, Brendan, *Unfinest Hour: Britain and the Destruction of Bosnia* (Penguin, 2001)

Simpson, Gerry, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity Press, 2007)

Slaughter, Anne-Marie, 'Defining the Limits' in Stephen Macedo et al (eds), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004)

Slyz, George, 'International Law in National Courts' (1995–1996) 28(1–2) *New York University Journal of International Law and Policy* 65

Smeulers, Alette et al, 'The Selection of Situation by the ICC: An Empirically Based Evaluation of the OTP's Performance' (2015) 15 *International Criminal Law Review* 1–39

Smrkolj, Maja, 'International Institutions and Individualised Decision-Making: An Example of UNHCR's Refugee Status Determination' in A. von Bogdanady et al (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010)

Sorensen, Christina E, 'Comment: Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law' (1990) 4 *Emory International Law Review* 207

Stephens, Dale and Michal Lewis, 'The Law of Armed Conflict—A Contemporary Critique' (2005) 6(1) *Melbourne Journal of International Law* 55

Stephens, Tim, 'International Criminal Law and the Response to International Terrorism' (2004) 27(2) *University of New South Wales Law Journal* 454

Stigen, Jo, *The Relationship Between the International Criminal Court and National Jurisdictions* (Brill, 2008)

Stuckenburg, Carl-Friedrich, 'Multiplicity of Offences: *Concursus Delictorum*' (2001) *International and National Prosecution of Crimes under International Law Current Developments* 44

Surani, Raji (ed), *The Principle and Practice of Universal Jurisdiction: PCHR's work in the Occupied Palestinian Territor*y (April 2010) Palestinian Centre for Human Rights, <http://pchrgaza.org/en/?p=2266>

Taylor, Greg, 'Retrospective Criminal Punishment Under the German and Australian Constitutions' (2000) 23(2) *University of New South Wales Law Journal* 196

Thomson, Janice E, *Mercenaries, Pirates and Sovereigns: State Building and Extra-Territorial Violence in Early Modern Europe* (Princeton University Press, 1996)

Thucydides, *History of the Peloponnesian War* vol I, 5 (reprinted Penguin, 1974)

Tigar, Michael E and Austin J Doyle Jnr, 'International Exchange of Information in Criminal Cases' (1983) 4 *Michigan International Law Journal* 61

Treves, Tullio, ‘Piracy, Law of the Sea and the Use of Force: Developments off the Coast of Somalia’ (2009) 20(2) *European Journal of International Law*

Triggs, Gillian, ‘Australia’s War Crimes Trials: All Pity Choked’ in Timothy LH McCormack and Gerry J Simpson, *The Law of War Crimes: National and International Approaches* (Wiley, 1997)

Tsuruta, Jun, ‘The First Prosecution of Somali Pirates under the Japanese Piracy Act: The *Guanabara* Case’ (2014) 7(1) *Journal of East Asia and International Law* 243

United Nations Office on Drugs and Crime, *Manual on Mutual Legal Assistance and Extradition* (United Nations, 2012)

United Nations Office on Drugs and Crime, ‘Mogadishu Prison and Major Crimes Complex Programme’ in *United Nations Office on Drugs and Crime Maritime Crime Programme Annual Report 2014* (2015)

United Nations Office on Drugs and Crime, ‘Mogadishu Prison and Major Crimes Complex Programme’ in *United Nations Office on Drugs and Crime Maritime Crime Programme Annual Report 2016* (2017)

United Nations Office of Legal Affairs, ‘Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, Regarding Immunities of Civilian Police and Military Personnel’ (2004) *United Nations Juridical Yearbook* xix

United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* vol 1 (United Nations War Crimes Commission by His Majesty’s Stationery Officer, 1947) <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf>

United States Department of State, *US Department of State Country Report on Human Rights Practices 2000 –Croatia* (26 February 2001) <http://www.refworld.org/docid/3ae6aa990.html>

United States Institute for Peace, *Special Report—Establishing the Rule of Law in Afghanistan* (2012) <http://www.usip.org/sites/default/files/sr117.pdf>

Van den hole, Leo, ‘Towards a Test of the International Character of an Armed Conflict: *Nicaragua* and *Tadic’* (2005) 32 *Syracuse Journal of International Law and Commerce* 269

Van der Oije, Pita and Steven Freeland, 'Universal Jurisdiction in the Netherlands—The Right Approach But the Wrong Case? Bouterse and the "December Murders"' (2001) 7(2) *Australian Journal of Human Rights* 20

Van der Sprenkel, Sybille, *Legal Institutions in Manchu China: A Sociological Analysis* (Athlone Press, 1962)

Van Schaack, Beth et al, *International Criminal Law and Its Enforcement, Cases and Materials (University Casebook)* (Foundation Press, 2007)

Van Steenberghe, Raphäel, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9(5) *Journal of International Criminal Justice* 108

Vinjamuri, Leslie and Jack Snyder, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) 7 *Annual Review of Political Science* 345

Vlijoen, Frans, *International Human Rights Law Africa* (Oxford, 2012)

Von Hebel, Robinson D, 'Crimes within the Jurisdiction of the Court' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999)

Vradeburgh, Anna M, 'The Chapter VII Powers of the United Nations Charted: Do They "Trump" Human Rights Law?' 14 *Loyola of Los Angeles International and Comparative Law Journal* 175

Walker, Thomas A, *A History of the Law of Nations* (University Press Cambridge, 1899)

Watson, Geoffrey, 'The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadic*' (1996) 36 *Virginia Journal of International Law* 687

Weill, Sharon, 'The Targeted Killing of Salah Shehadeh: From Gaza to Madrid' (2009) *Journal of International Criminal Justice* 7

Weissbrodt, David and Amy Bergquist, 'Extraordinary Rendition and the Torture Convention' (2006) 46 *Virginia Journal of International Law* 585

Weissman, Kristin Berdan, 'Extraterritorial Abduction: The Endangerment of Future Peace' (1994) 27 *University of California Davis Law Review* 459

Whatley, AT, 'Historical Sketch of the Law of Piracy' (1874) 3 *Law Magazine and Review Monthly*

Wheaton, Henry, *Elements of International Law* (London, Stevens & Sons, 1944)

Woltrin, Hermann F and Joanne Greig, 'State-Sponsored Kidnapping of Fugitives: An Alternative to Extradition?' in Richard Atkins (ed), *The Alleged Transnational Criminal, The Second Biennial International Criminal Law Seminar (*International Bar Association Series, 1995)

Wood, Michael, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 *Indian Journal of International Law* 345–367

Yang, Kenny, 'Public Accountability of Public Prosecutions' (2013) 20(1) *Murdoch University Law Review*

Zaid, Mark S, 'Military Might Versus Sovereign Right—The Kidnapping of Dr Humberto Alvarez-Machain and the Resulting Fallout' (Spring 1997) 19 *Houston Journal of International Law* 3

Zegveld, L, 'The Bouterse Case' (2001) 32 *Netherlands Yearbook of International Law* 97–118

Zemanek, Karl, 'New Trends in the Enforcement of Erga Omnes Obligations' (2000) 1 *Max Planck Yearbook of United Nations Law*

Zimmerman, Andreas et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2012)

Zgonec-Rožej, Miša et al, *International Criminal Law Manual* (International Bar Association, 2010)

B *Cases*

Aleksovski, Trial Judgment (Dissenting Opinion of Judge Rodrigues) (International Criminal Tribunal for the Former Yugoslavia, IT-95-14/1-T, 25 June 1999)

Adolf Eichmann v Attorney-General of the Government of Israel [1962] Case No 336/61, 36 ILR 227 (Israeli Supreme Court)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v *Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 1

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Merits) [2015] ICJ Rep 3

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal) [2002] ICJ Rep 128

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Merits Case) [2002] ICJ Rep 128

Attorney-General v Adolf Eichmann [1961] File 40/61 (District Court of Jerusalem)

Attorney-General of Israel v Adolf, son of Karl Adolf, Eichmann [1961] 36 ILR 1 Case No 40/61, Israeli District Court)

Bankovic and Others v Belgium and 16 Other Contracting States (European Court of Human Rights, Application No 52207/99, 12 December 2001)

Bartik v Russia (European Court of Human Rights, Application No 55565/00, 21 December 2006)

Case No 07/10742, 2009 Nederlande Jurisprudentie 481 <http://zoeken.rechtspraak.nl/default.aspx>

Chafiq Ayadi v Council of the European Union (2006) ECR-II 2139 (appealed to the European Court of Justice, C-430/06)

Christine Goodwin v UK (European Court of Human Rights, Application No 28957/95, 11 July 2002), Reports 2002-VI, 1

Fariq Hassan v Council of the European Union and Commission of the European Communities (2006) ECR-II 52 (appealed to the European Court of Justice, C-399/06)

First National City Bank v Banco National de Cuba, 406 US 759, 775 (1971)

Frisbie v Collins, 342 US 519 (1952)

Gallina v Fraser, 278 F.2d at 78–79 (1960)

Hamdan v Rumsfeld, 548 US 557 (2006)

In re Piracy Jure Gentium [1934] AC 586

Jorgić v Germany (2007) Application No 74613/01 (European Court of Human Rights)

Kadi v Council and Commission (2005) ECR-II 3649 (appealed to European Court of Justice, C-405/05)

Ker v Illinois, 199 US 436 (1886)

Kononov v Latvia (Judgment) (2008) Application No 36376/04 (European Court of Human Rights)

Kupreskic et al v Prosecutor (Trial Judgment) [2000] IT-95-16-T (International Criminal Tribunal for the former Yugoslavia)

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 8

In Matter of Extradition of Demjanjuk (*'Demjanjuk'*), 612 F Supp 544 (ND Ohio)

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

Minister of Justice and Constitutional Development v The Southern African Litigation Centre (876/15) [2016] ZASCA 17 (15 March 2016)

M/V Guanabara Case [2012] (wa, No. 77) Tokyo District Court (1 February 2013)

Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion No 4) [1923] PCIJ (ser B) No 4.

Neely v Henkel 180 US 190, 122 (1901)

Nulyarimma and Others v Thompson and Others (1999) FCA 1192

People v Buffu, 40 Cal 2d 709, 256 P.2d 317 (1952)

People v Duffield, 387 Mich. 300, 197 NW 2d 25 (1972)

Polyukhovich v Commonwealth (1991) HCA 32; (1991) 172 CLR 501 (14 August 1991)

Prosecutor-General of the Supreme Court v Desire Bouterse (Decision) (Court of Appeal of Amsterdam, 3 March 2000)

Prosecutor v Anto Farundzija (Trial Judgment) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, IT-95-17/1-T, 10 December 1998)

Prosecutor v Akayesu (*Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber, ICTR-96-4-T, 2 September 1998)

Prosecutor v Blogoje Simic and Others (Separate Opinion of Judge Robinson) (International Criminal Tribunal of the former Yugoslavia, Trial Chamber, 18 October 2000)

Prosecutor v Delalic et al. (Sentencing Judgment I) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, IT-96-21-T, 6 November 1998)

Prosecutor v Drazen Erdemovic (Judgment, Separate and Dissenting Opinion of Judge Stephen) (International Tribunal for the Formal Yugoslavia, IT-96-22-A, App Ch, 7 Oct 1997)

Prosecutor v Dusko Tadic (Decision on Defence Motion on the Form of the Indictment) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, IT-94-1-T, 14 November 2014)

Prosecutor v Duško Tadić (Judgment in Appeal) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, IT-94-1-A, 15 July 1999)

Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (International Criminal Court, ICC-01/09-02/11-274)

Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Decision on the Confirmation of Charges Pursuant to Article 61(1)(a) and (b) of the Rome Statute) (International Criminal Court, Pre-Trial Chamber II, ICC-01/09-02/11-382-Red, 29 January 2012)

Prosecutor v Germain Katanga (Decision on Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber I, ICC-01/04-01/07-717, 13 October 2008)

Prosecutor v Germain Katanga (Judgment) (International Criminal Court, ICC-01/04-01/07, 7 March 2014)

Prosecutor v Lubanga (Decision on Manner of Questioning Witnesses by Legal Representatives of Victims) (International Criminal Court, Trial Chamber I, ICC-01/04-01/06-2127 16 September 2009)

Prosecutor v Thomas Lubanga Dyilo (Decision) (International Criminal Court, ICC-01/04-01/06, 14 March 2012)

Prosecutor v Thomas Lubanga Dyilo (Decision) (International Criminal Court, ICC-PIDS-CIS-DRC-01-016/17_Eng, November 2017)

Prosecutor v Tihomir Blaskic (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, IT-95-14-AR108bis, 29 October 1997)

Prosecutor v Uhuru Muigai Kenyatta (Defence Response to the 'Prosecution's Submission on the ne bis in idem *Principle')* (International Criminal Court, Trial Chamber, ICC-01/09-02/1-899, 10 February 2014)

Prosecutor v Uhuru Muigai Kenyatta (Defence Response to the 'Prosecution's Submission on the ne bis in idem *Principle')* (International Criminal Court, Trial Chamber, ICC-01/09-02/1-899, 17 February 2014)

Public Committee Against Torture Israel v State of Israel, The Targeted Killings Case, 23 Kislev 5767 HCJ 769/02 (13 December 2006) (2007) 46 ILM 375

Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte [1998] 3 WLR 1456 (H.L.), reprinted in 37 ILM 1302 (1998)

Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, [1999] 2 WLR. 272 (H.L.), reprinted in 38 ILM 430 (1999)

Regina v Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), *Ex Parte Pinochet* (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) House of Lords (24 March 1999)

Reiner v Bulgaria (European Court of Human Rights, Application No 46363/99, May 2003)

Sigurdur A Sigurjonsson v Iceland (1993) 264 EU Court HR (ser A).

Situation in the Republic of Cote D'Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) (International Criminal Court, Pre-Trail Chamber III, ICC-02/11-14, 3 October 2011)

Situation in the Republic of Kenya (Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) (International Criminal Court, Pre-Trial Chamber II, ICC-01/09-19-Corr, 31 March 2010)

SS Lotus (France v Turkey) ('The Lotus Case') [1928] PCIJ (ser A) No 10

Stafford v UK (Application No 26295/99, 28 May 2002), Reports 2002-IV, 115

State of Israel v Ivan (John) Demjanjuk, [1987] Criminal Case 373/86 (District Court of Jerusalem)

State v McCormick, 273 NW 2d 624 (Minn 1978)

Tadic Jurisdiction Appeals Judgment (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Tribunal for the Former Yugoslavia, IT-94-I-AR72, 2 October 1995)

Todorovic, Simo Zaric (Decision on Motion for Judicial Assistance to be Provided by SFOR and Others) (International Criminal Tribunal for the former Yugoslavia, IT-95-9, 18 October 2000)

Tyrer v UK (1978) Eur Court HR (Ser A) 26

United States v Alvarez-Machain (91-712) 504 US 655 (1992)

United States v Baker, 609 F 2d (5th Cir, 1980)

United States v Emery, 591 F 2d 1266 (9th Cir, 1978)

Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, 2005 ECR-II 3533 (appealed to ECJ, C-415/05)

C *Legislation*

Act on Punishment of and Measures against Piracy (Act No. 55, 2009) Japan

British State Papers 1856 Vol LXI

Code of Criminal Procedure of Timor-Leste, Law No 15/2005

Constitution of the United States of America

Crimes Against Humanity and War Crimes Act 2000 (Canada)

Criminal Code Act 1995 (Cth)

Criminal Code Amendment (War Crimes) Bill 2016 (Cth)

Extraterritorial Statute, 18 USC 2340 and 2340A

Genocide Act 1993 (Belgium)

Gerichtsverfassungsgeretz (GVG) [Law on Constitution of the Courts]

International Criminal Code Act of 2001 (UK)

International Criminal Court Act 2002 (Cth) (Australia)

International Criminal Court (Consequential Amendments) Act 2002 (Cth)

Military Commission Act 2006 (US) HR 6166

Piracy Act 1819 (Great Britain)

Rome Statute of the ICC Act 2002 (South Africa)

Strafprozessordnung [StPO] [Code of Criminal Procedure]

Universal Jurisdiction Rejection Act of 2003 HR 2050, 108th Congress, 1st Session, (US)

Völkerstrafgesetzbuch (Code of Crimes Against International Law) 2002 (Germany) ('CCAIL')

War Crimes Act 1993 (Belgium)

War Crimes Act 1993, as amended in 1999 by the Act of 10 February 1999 (Belgium) (Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire, *Moniteur belge* 23 March 1999)

War Crimes Amendment Act 1988 (Cth)

Wartimes Offences Act of 1952 (Cth)

D *Treaties, UN, EU and AU Documents*

Additional Protocol to the European Convention on Extradition, opened for signature 15 October 1975, ETS 86 (entered into force 20 August 1979)

African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, UNTS 1520 (entered into force 21 October 1986)

African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes (2012) (AU *Model Law),* adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012 in Addis Ababa, Ethiopia

Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (Framework Agreement), opened for signature 1 April 2005, 2329 UNTS 117 (entered into force 29 April 2005)

American Convention on Human Rights, opened for signature 22 November 1969, (entered into force 18 July 1978)

Assembly of the African Union, 8th Ordinary Session, Assembly/AU/Dec.134–164 (VIII) Assembly/AU/Decl.1–6 (VIII) (29–30 January 2007)

<https://au.int/web/sites/default/files/decisions/9556assembly_en_29_30_january_2007_auc_the_african_union_eighth_ordinary_session.pdf>

Axis ('London Agreement') signed on 8 August 1945

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, UN GAOR, GA Res 147, UN Doc A/RES/60/147, 13 IHRR 907 (21 March 2006)

Charter of the International Military Tribunal—Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Convention on Extradition, 1957

Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment ('Convention Against Torture'), opened for signature 10 December 1984, UNTS 1465 (entered into force 26 June 1987)

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ('SUA Convention'), opened for signature 10 March 1998, UNTS 1678 (entered into force 10 March 1992)

Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, UNTS 1973 (entered into force 14 October 1971)

Convention on the High Seas, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962)

Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'), opened for signature 9 December 1948, 78 UNTS 227 (entered into force 12 January 1951)

Convention on the Privileges and Immunities of the United Nations, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946)

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States—Statements made by certain Member States on the adoption of the Framework Decision [2002] Official Journal L 190/1

Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, Bosnia and Herzegovina–Croatia–Yugoslavia, opened for signature 21 November 1994 (entered into force 21 14 December 1994)

Decision on the Abuse of the Principle of Universal Jurisdiction, African Union, Assembly/AU/Dec.292(XV)

Decision on the Hissene Habre Case and the African Union, African Union, 7th Ordinary Session, Doc Assembly/AU/3 (1–2 July 2006) <www.africaunion.org/root/au/Coferences/Past/2006/July/summit/doc/Decisions.and .Declarations/Assembly-AU-Dec.pdf>

Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, African Union Declaration, Doc Assembly/AU/14 (XI) (December 1998)

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN GAOR, GA Res 40/34, UN Doc A/CONFI.21/22/Rev (29 November 1985)

Declaration Respecting Maritime Law (France–United Kingdom) signed 16 April 1856

Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session, UN GAOR, 51st sess, UN Doc A/CN.4L.532 (1996), revised by UN Doc A/CN.4L.532/Corr.1 and UN Doc A/CN.4l.532/Corr.3

European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and 14, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)

European Convention on Extradition, opened for signature 13 December 1957, ETS 24 (entered into force 18 April 1980)

European Convention on Extradition Order 1990 (SI 1507 of 1990)

European Convention on Human Rights, opened for signature 13 June 2004, CETS 195 (entered into force 1 June 2010), as amended by *Protocol No 14*

European Council Decision 2003/335/JHA of 8 May 2003 [2003] L 118/12, 14

European Council Decision 2002/494/JHA of 13 June 2002, Setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes [2002] L 167

European Parliament Council Directive of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2006] EU 2016/1919

Exchange of Letters between the European Union and the Government of Kenya on the condition and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya for their treatment after such transfer, European Union–Kenya, signed 6 March 2009, L79 (entered into force 25 March 2009)

Exchange of Letters Concerned the Treaty on Mutual Assistance in Criminal Matters, Switzerland–United Stated, signed 3 November 1993, 33 ILM 168 (1994), (entered into force 3 November 1993)

Extradition: European Standards: Explanatory Notes, Council of Europe, Strausbourg, 2006

Geneva Convention for the Amelioration of the Condition of Wounded, Sick in Armed Forces in the Field (First Geneva Convention), opened for signature 12 August 1949, 75 UNTS (entered into force 21 October 1950); [1958] ATS 21

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked of Armed Forces at Sea (Second Geneva Convention), opened for signature 12 August 1949, 75 UNTS (entered into force 21 October 1950)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950)

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); [1958] ATS 21

Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978)

'Historical Survey of the Question of International Criminal Jurisdiction—Memorandum submitted by the Secretary-General, Question of international criminal jurisdiction', *International Law Commission*, UN Doc A/CN.4/7/Rev.1 (1949) <http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf>

In Larger Freedom: Towards Development, Security and Human Rights for All, UN GAOR*,* UN Doc A/59/2005 (21 March 2005)

International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), reprinted in 6 ILM 369 (1967)

Joint North Atlantic Council and Western European Union Council Resolution, '*OPERATION SHARP GUARD'*, adopted in Council of WEU/NATO Joint Session of 16 December 1995

Kenya to the UNGA Sixth Committee: The Scope and Breadth Of Universal Jurisdiction: A/64/452-RES 64/117, Comments from Kenya <http://www.un.org/en/ga/sixth/65/ ScopeAppUniJuri_StatesComments/Kenya.pdf>

Letter Argentina to President of Security Council S/4336 (15 June 1960)

Letter from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General (29 June 2009), UN Doc A/63/237/Rev 1 (23 July 2009)

London Charter of the International Military Tribunal Nuremburg Rules of Procedure; Charter of the International Military Tribunal for the Far East Rules of

Procedure; *International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence*, IT/32/Rev 44 (adopted 10 December 2009)

Moscow Declaration in *United Nations Documents 1941–1945*, Oxford University Press for the Royal Institute of International Affairs, 1946

Notes of the Oral Report of the Chair of the Working Group on the Scope and Application of Universal Jurisdiction, UNGA, GAOR 6th Comm, 28th mtg, UN Doc A/C 6/69/SR 28 (7 November 2015)

Nyon Agreement, signed 14 September 1937, 181 UNTS 137 (entered into force 14 Sep 1937)

Oceans and the Law of the Sea, GA Res 64/71, UN GAOR, 64th sess, 58th plen mtg, UN Doc A/RES/64/71 (4 December 2009)

Office of the High Commissioner of Human Rights, 'Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016–28 February 2017', Conference paper of the *Independent International Commission of Inquiry on the Syrian Arab Republi*c, UN Doc A/HRC/34/CRP 3

Peace of Westphalia, France–Holy Roman Empire–Sweden, signed 24 October 1648

Preamble to the *Resolution adopted by the General Assembly on 13 December 2016 [on the report of the Sixth Committee (A/71/516)], The Scope and Application of the Principle of Universal Jurisdiction ('Report on the Scope and Application of Universal Jurisdiction')*, UN Doc A/RES/71/149 (13 December 2016)

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ('*SUA Convention'*), opened for signature 24 February 1988, UNTS 1990 (entered into force August 1989)

Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)

Report of the International Commission of Inquiry on Darfur to the Secretary-General, S/2005/60 (1 February 2005)

Report of the Secretary General on the Sudan, Security Council Resolution 1564, UN SCOR, 5040th mtg, UN Doc S/Res/1564 (18 September 2004)

Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia, UN Doc S/2015/776 (12 October 2015)

Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia, S/2013/623 (21 October 2013)

Resolution adopted by the General Assembly on 13 December 2016 [on the report of the Sixth Committee (A/71/516)], The Scope and Application of the Principle of Universal Jurisdiction, UN Doc A/RES/71/149 (13 December 2016)

Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001)

Responsibility of States for Internationally Wrongful Acts, GA Res 56/82, UN GAOR, UN Doc, A/RES/56/82 (18 January 2002)

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, UNTS 2187 (entered into force 1 July 2002)

Scope and Application of the Principle of Universal Jurisdiction, UN GAOR, 6th comm, 70th sess, item 87 of the preliminary list, UN Doc A/70/125 (1 July 2016)

Scope and Application of Universal Jurisdiction, GA Res 64/117, UN GAOR, 6th comm, 64th sess, 64th plen mtg, UN Doc A/RES/64/117 (16 December 2009)

Scope and Application of Universal Jurisdiction, GA Res 65/33, UN GAOR, 6th comm, 65th sess, 57th plen mtg, UN Doc A/RES/65/33 (6 December 2010)

Scope and Application of Universal Jurisdiction, GA Res 66/103, UN GAOR, 6th comm, 66th sess, 82nd plen mtg, UN Doc A/RES/66/103 (9 December 2011)

Scope and Application of Universal Jurisdiction, GA Res 67/98, UN GAOR, 6th comm, 67th sess, 56th plen mtg, UN Doc A/RES/67/98 (14 December 2012)

Scope and Application of Universal Jurisdiction, GA Res 68/117, UN GAOR, 6th comm, 68th sess, 68th plen mtg, UN Doc A/RES/68/117 (16 December 2013)

Scope and Application of Universal Jurisdiction, GA Res 69/124, UN GAOR, 6th comm, 69th sess, 68th plen mtg, UN Doc A/RES/69/124 (10 December 2014)

Scope and Application of Universal Jurisdiction, GA Res 70/119, UN GAOR, 6th comm, 70th sess, 75th plen mtg, UN Doc A/RES/70/119 (18 December 2015)

Security Council Resolution 138, UN SCOR, 868th meeting, UN Doc S/RES/138 (23 June 1960)

Security Council Resolution 808, UN SCOR, 48th sess, 3175th mtg, UN Doc S/RES/808 (22 February 1993)

Security Council Resolution 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/Res/827 (25 May 1993)

Security Council Resolution 1272 [*Timor*], UN SCOR, 4057th mtg, UN Doc S/RES/1272 (25 October 1999)

Security Council Resolution 1315 [*on Establishment of a Special Court for Sierra Leone*], UN SCOR, 4186th mtg, UN Doc S/Res/1315 (14 August 2000)

Security Council Resolution 1390 [*on the situation in Afghanistan*], UN SCOR, 4452nd mtg, UN Doc S/Res/1390 (16 January 2002)

Security Council Resolution 1816, UN SCOR, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008)

Security Council Resolution 1838, UN SCOR, 5987th mtg, UN Doc S/RES/1838 (7 October 2008)

Security Council Resolution 1846, UN SCOR, 6026th UN Doc S/RES/1846 (2 December 2008)

Security Council Resolution 1851 [*relating to Somalia*], UN SCOR, 6045th mtg, UN Doc S/Res/1851 (16 December 2008)

Security Council Resolution 1877, UN SCOR, 6155th mtg, UN Doc S/Res/1877 (7 July 2009)

Security Council Resolution 1918, UN SCOR, 6301st mtg, UN Doc S/RES/1918 (27 April 2010)

Security Council Resolution 2022, UN SCOR, 6673rd mtg, UN Doc S/Res/2202 (2 December 2011)

Security Council Resolution 2039, UN SCOR, 6727th mtg, UN Doc S/RES/2039 (29 February 2012)

Security Council Resolution 2077, UN SCOR, 6867th mtg, UN Doc S/RES/2077 (21 November 12)

Security Council Resolution 2125, UN SCOR, 7061st mtg, UN Doc S/RES/2125 (18 November 2013)

Security Council Resolution 2303 [*On the Situation in Burundi*] UN SCOR, 7752nd mtg, UN Doc S/RES/2303 (29 July 2016)

Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo, signed 26 April 1946, Treaties and Other International Acts Series 1589

Statement by the President of the Security Council, UN Doc S/PRST/2012/24 (20 December 2012)

Statement by the President of the Security Council, UN Doc S/PRST/2013/13 (14 August 2013)

Statute of the International Tribunal for the Former Yugoslavia, UN SCOR, 48th sess, 3217th mtg, at 1, UN Doc S/RES/827 (1993)

Statute for the International Tribunal for Rwanda, UN SCOR, 49th sess, 3453rd mtg, at 1, UN Doc S/RES/955 (1994)

Summary record of the 14th meeting: 6th committee, held at headquarters, New York, UN Doc A.C6/71/SR.14 (13 October 2016)

Summary record of the 28th meeting: 6th committee, *Scope and Application of the Principle of Universal Jurisdiction*, UN GAOR, 6th comm, 70th sess, Item 86, UN Doc A/C.6/70/SR.28 (16 November 2015)

Swiss–United States Treaty on Mutual Assistance in Criminal Matters, Switzerland–United States, signed 25 May 1973, 3 November 1993, 27 ILM 480 (entered into force 23 January 1977)

Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), signed 28 June 1919, 225 CTS 188 (entered into force 10 January 1920)

Trinidad and Tobago Request to the UN General Assembly, letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General, UN Doc A/44/195 (1989) and UN General Assembly, UN Doc A/44/49 (1989)

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 21 ILM 1261 (entered into force 16 November 1994)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)

UNMIK/EULEX *Courts in Kosovo, UNMI Regulation* 1999/24

UNTAET *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* (6 June 2000)

UNTAET *Regulation 2000/30 on Transitional Rules of Criminal Procedure*

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entry into force 27 January 1980)

E *Other*

'A Historic Verdict in Guatemala: Genocidal General', *The Economist* (online, 11 May 2013) <https://www.economist.com/blogs/americasview/2013/05/historic-verdict-guatemala>

Aidid, Abdi, 'Piracy, Sovereignty, and International Violence: The Pirate as an Anti-Sovereign in International Law' (Paper, Yale Law ASA 2014 Annual Meeting, 26 March 2014)

Allen, Craig H, 'The International Law of the Sea: A Treaty for Thee; Customary Law for Me?' *OpinioJuris* (online, 14 June 2012) <http://opiniojuris.org/2012/06/14/the-international-law-of-the-sea-a-treaty-for-thee-customary-law-for-me/>

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, §404

Avalon Project: Documents in Law, History, and Diplomacy, *The International Military Tribunal for Germany,* Yale Law School, Lillian Goldman Law Library <http://avalon.law.yale.edu/subject_menus/imt.asp>

Barnett, Lisa, 'The International Criminal Court: History and Background' (Canadian Parliamentary Paper Background Paper No PRB 02-11-E, Canada, November 2008)

Baumruk, Petra, 'The Still Evolving Principle of Universal Jurisdiction' (Doctoral Thesis, Charles University, 2015)

Bensouda, Fatou, 'Our Resolve to Create a More Just World Must Remain Firm', *International Centre for Transitional Justice* (Debate Response, 3 September 2015) <https://www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm>

Borger, Julian, 'Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria', *The Guardian* (online, 18 March 2015) <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>

Boyle, Peter, 'War Criminal Rajapaksa to Visit Perth', *Green Left Weekly* (online, 21 October 2011) <https://www.greenleft.org.au/content/war-criminal-rajapaksa-visit-perth>

Brown, Matt, 'Neil Prakash Admits to Australian Terror Link in Turkish Court Appearance', *ABC Online* (26 September 17) <http://www.abc.net.au/news/2017-09-29/nei-lprakash-admits-australian-terror-link-apologises-trouble/8999556>

'Brussels Principles Against Impunity and for International Justice', adopted by the Brussels Group for International Justice, following the colloquium 'The Fight Against Impunity: Stakes and Perspectives' (Brussels, 11–13 March, 2002)

Byrne, Jennifer, Interview with Geoffrey Robertson, *World in Focus: Foreign Correspondent* (Australian Broadcasting Corporation, 1999) <http://www.abc.net.au/foreign/stories/s70237.htm>

Canada Border Services Agency, *12th Report on Canada's Program on Crimes Against Humanity and War Crimes, 2008–2011* (2011) <http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html>

Centre for Constitutional Rights, 'German War Crimes Complaint Against Donald Rumsfeld et al (filed 14, 2006) and Decision of the Federal Prosecutor', *Center for Constitutional Rights* (online, 2006) <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-germany>

Centre for Constitutional Rights, '*Rasul v Rumsfeld'*, *Centre for Constitutional Rights Historic Cases* <https://ccrjustice.org/home/what-we-do/our-cases/rasul-v-rumsfeld>

Centre for Justice and Accountability, 'CJA Case Summary—*Doe v Ali*', Centre for Justice and Accountability <http://cja.org/what-we-do/litigation/amicus-briefs/>

Center for Justice and Accountability, 'Foreign National Court: Spain', *Litigation/The Guatemala Genocide Cases* <http://cja.org/what-we-do/litigation/the-guatemala-genocide-case/foreign-national-court-spain/>

Cofman-Wittes, Tamara, 'Israel Imperiled: An Overview of Threats to the Jewish State', *Lawfare* (Blog Post, 6 May 2016) <https://www.lawfareblog.com/israel-imperiled-overview-threats-jewish-state>

D'Almedida, Kanya, 'US No More Immunity for George W. Bush—Abroad at Least', *Global Information Network* (online, 7 February 2011) <http://www.ipsnews.net/2011/02/no-more-immunity-for-george-w-bush-ndash-abroad-at-least/>

Democracy Now, 'Spanish Judge Baltasar Garzon Tells the Story of the Arrest of Chiles's Augusto Pinochet', *Democracy Online Forum* (online, 11 September 2013), <https://www.democracynow.org/2013/9/11/spanish_judge_baltasar_garzn_tells_the_story_of_the_arrest_of_chiles_augusto_pinochet>

Doyle, Kate, 'Summary of Genocide Proceedings before the Spanish Federal Court; Round One February 4–8, 2008', *National Security Archive,* Greater Western University <http://nsarchive.gwu.edu/guatemala/ genocide/round1/summary1.pdf>

ECtHR, '*Guide on Article 7 The European Convention on Human Rights: No punishment without law: the principle that only the law can define a crime and prescribe a penalty'*, 30 April 2017

Ellis, Mark, 'The Decline of Universal Jurisdiction—Is It Reversible?' (Speech, 10th Annual Ruth Steinkraus-Cohen International Law Lecture, 22 February 2012) <http://www.unawestminster.org.UK/pdf/grot12_mark_ellis_lecture.pdf>

Ellis, Mark, 'Peace for All of Justice for One?', *New York Times* (online, 12 August 2011) <http://www.nytimes.com/2011/08/12/opinion/12iht-edellis12.html>

Enough Project, 'South African Court Rejects Impunity', *Enough Project Online* (Blog Post, 3 April 2017) <http://www.enoughproject.org/blogs/south-african-court-rejects-impunity-"decision-not-arrest-bashir-inconsistent-law>

Eurojust, 'Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide and Crimes against Humanity across the European Union and its Member States', *Network for the Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes* (November 2014) <http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/strategy%20of%20the%20eu%20genocide%20network%20(november%202014)/strategy-genocide-network-2014-11-en.pdf>

'European Parliament Resolution on Impunity in Africa and in Particular the Case of Hissene Habre', *Human Rights Watch* <http:hrw.org/legacy/English/docs/2006/03/16/chad120976)txt.htm>

Federal High Court of Germany, 'Federal High Court Makes Basic Ruling on Genocide' (Media Release 39, 30 April 1999) <http://www.preventgenocide.org/punish/GermanFederalCourt.htm>

FIGBAR Baltazar Garzon Project on Universal Jurisdiction, *Principles of Universal Jurisdiction*, adopted at the 'II Congress of Universal Jurisdiction', held in Argentina in September 2015 <http://en.fibgar.org/publicaciones/revista-academica>

Foran, Katharine, 'Conviction of FDLR Leaders by German Court', *Armed Groups and International Law* (28 September 2015) <https://armedgroupsinternationallaw.org/2015/ 09/28/conviction-of-fdlr-leaders-by-german-court/>

Geller, Doron, 'Israel Military Intelligence: The Capture of Nazi Criminal Adolf Eichmann', *The Jewish Virtual Library* (November 2014) <http://www.jewishvirtuallibrary.org /jsource/Holocaust/eichcap.html>

Giles, Ciaran, 'Spain Throws out Tibetan Abuse Probe', *Global Policy Forum* (February 2010) <https://www. globalpolicy.org/international-justice/universal-jurisdiction-6-31/48783.html>

Government of Canada, *Canada's Program on Crimes Against Humanity and War Crimes, 2011–2015* (2015) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/wc20112015-cdg20112015.pdf>

Greenhouse, Linda, 'Supreme Court Blocks Guantanamo Tribunals', *The New York Times* (online, 29 June 2006) <http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html?mcubz=0>

Hague Institute for the Internationalisation of Law, *General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework*
<http://www.hiil.org/data/sitemanagement/media/IEF_Brochure_241011.pdf>

Hansell, Herbert J, 'Administration Recommends Senate Approval of Genocide Convention', 76 *Department of State Bulletin* (27 June 1977)

Harper, Scott, 'All the Missing Souls: Six Questions for David Scheffer' (7 February 2012) *Global Policy* <https://harpers.org/blog/2012/02/_all-the-missing-souls_-six-questions-for-david-scheffer/>

Harvey, Rod, 'The Independence of the Prosecutor: A Police Perspective' (Paper, Australian Institute of Criminology Conference: Prosecuting Justice, 18 April 1996)

Hasan, Ali Dayan, 'The Shrinking World of George W Bush', *The Express Tribune* (online, 11 August 2011) <https://tribune.com.pk/story/229312/the-shrinking-world-of-george-w-bush/>

Heaphy, Edmund, 'Vietnamese Abduction Suspect is Extradited to Germany', *The New York Times* (online, 24 August 2017) <https://www.nytimes.com/2017/08/24/world/europe/vietnam-germany-abduction-suspect-extradite.html>

Hedges, Stephen J et al., 'Kidnapping Drug Lords', *US News and World Report* (online, 14 May 1990) <http:usnews.com/news>

Heller, Kevin Jon, 'The Pre-Trail Chamber's Dangerous Comoros Review Decision', *Opinio Juris* (online, 17 July 2015) <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/>

Hoge, Warren, 'After 16 Months of House Arrest Pinochet Quits England', *The New York Times* (online, 3 March 2000) <http://www.nytimes.com/2000/03/03/world/after-16-months-of-house-arrest-pinochet-quits-england.html>

Houreld, Katharine, 'Somali Opens Prison for Pirates, More Planned', *The San Diego Union-Tribune* (online, 29 March 2011) <http://www.sandiegouniontribune.com/sdut-somalia-opens-prison-for-pirates-more-planned-2011mar29-story.html>

Human Rights Watch, 'Belgium: Universal Jurisdiction Law Repealed', (online, 8 January 2003) <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>

Human Rights Watch, 'Declaration on the Hissene Habre Case and the African Union' (4 April 2012) <http://www.hrw.org/print/news/2006/01/24/declaration-hiss-ne-habr-case-and-african-union>

Human Rights Watch, 'Groundbreaking Trail for Congo War Crimes' (19 September 2015) <www.globalpolicy.org/interntational-justice/universal-jurisdition06031/50146>

Human Rights Watch, *Rwanda: Justice After Genocide—20 Years on* (28 March 2014) <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years>

Human Rights Watch, *Universal Jurisdiction the State of the Art in Europe* (June 2006) <https://www.hrw.org/sites/default/files/reports/ij0606web.pdf >

International Committee of the Red Cross, *Declaration Respecting Maritime Law. Paris, 16 April 1856,* ICRC Treaties, State Parties and Commentaries < https://ihldatabases.icrc. org/ihl/INTRO/105?OpenDocument>

International Criminal Court, *Case Information Sheet: The Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 (6 April 2017) <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>

International Criminal Court, *Paper of Some Policy Issues Before the Office of the Prosecutor*, ICC-OTP (September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf>

International Criminal Court, *Report of the Commission on Budget and Finance on the Work of its Seventh Session*, ICC-ASP/5/23/Corr.1, The Hague, 23 November–1 December 2006 <https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-23_Corr1_English.pdf>

International Criminal Court, 'Understanding the Criminal Court' <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

International Criminal Court Now, 'Case and Situations, DRC The Lubanga Case' <http://www.iccnow.org/?mod=drctimelinelubanga>

International Justice Resource Centre, 'UNGA Sixth Committee Advances Discussion of Universal Jurisdiction' (17 November 2014) <http://www.ijrcenter.org/2014/11/17/unga-sixth-committee-advances-discussion-of-universal-jurisdiction/>

Izenburg, Dan, 'Universal Jurisdiction Victory in Spain but Battle Goes on', *The Jerusalem Post* (online, 21 April 2010) <www.jpost.com/Landed Pages/Print Articles.aspx?id=173480>

Jones, Captain David S and Captain Paul J McDowell, 'To Catch a War Criminal: The United Nations Apprehension of an Indicted War Criminal' *Center for Army Lessons Learned* (July–August 1998) <http://call.army.mil/products/nftf/ulaug98/criminal.htm>

Jones, Stephanie, 'Maritime Piracy—The Challenge of Providing Long-Term Solutions', *Working Paper No. 2013/15* (2013) Maastricht School of Management

'Judgment of the Nürnberg Tribunal: History and Analysis Appendix II' [1949] *International Law Commission*, A/CN.4/5

Kantorovich, Eugene, 'Penalties for Piracy: An Empirical Study of National Prosecution of International Crime' (Faculty Working Paper No 211, North Western University, 2012)

Katic, Mevlut, 'Former Afghan Warlord', *Euasianet*: *Global Policy Forum* (20 June 2005) <https://www.globalpolicy.org/intljustice/universal/2005/0720afghan.htm>

Keppler, Elise, Shirley Jean and J Paxton Marshall, 'First Prosecution in the United States for Torture Committed Abroad; The Trial of Charles 'Chuckie' Taylor, Jr', *Human Rights Watch* (2006) <https://www.hrw.org/sites/default/files/related_material/HRB_Chuckie_Taylor.pdf >

Knaup, Horand, 'Germany Arrests Rwandan War Crimes Suspects', *Spiegel Online* (18 November 2009) <htttp://speigel.de/internatonal/world/0,1515,druck-66195,00.html>

Leposo, Lillian, 'Kenya Ends Agreement with EU to Prosecute Suspected Somali Pirates', *CNN International Edition* (online, 4 October 2010) <http://edition.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/index.html>

Macedo, Stephen, 'Foreword by Project Chair, Stephen Macedo', *Princeton Project on Universal Jurisdiction* (2001) <https://lapa.princeton.edu/hosteddocs/unive_jur.pdf>

MacLean, Emma and Sophie Beaudoin, 'Eighteen Months After Initial Conviction, Historic Guatemalan Genocide Trial Reopens but is Ultimately Suspended', *International Justice Monitor* (6 January 2015) <http://www.ijmonitor.org/2015/01/eighteen-months-after-initial-conviction-historic-guatemalan-genocide-trial-reopens-but-is-ultimately-suspended/>

Maillart, Jean-Baptiste, 'Article 12(2)(a) Rome Statute: The Missing Piece of the Jurisdictional Puzzle', *EIJL Talk!* <http://www.ejiltalk.org/articule-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/>

Makovsky, David, 'Israel's Calculus for Reconciliation With Turkey', *The Washington Institute* (1 July 2016) <http://www.washingtoninstitute.org/policy-analysis/view/israels-calculus-for-reconciliation-with-turkey>

Mamabolo, Kingsley, 'South African Representative Speaking for the African Group', *United Nations Press* (2014) <http://www.un.org/press/en/2014/gal3481.doc.htm>

McElroy, Damien and Tom Whitehead, 'Gordon Brown to Stop Courts Issuing Arrest Warrants for Foreign Officials', *The Telegraph* (online, 3 March 2010) <http://www.telegraph.co.uk/news/politics/gordon-brown/7362228/Gordon-Brown-to-stop-courts-issuing-arrest-warrants-for-foreign-officials.html>

Montomgery, Sue, 'War Crimes Trial First Test', *The Montreal Gazette* (reproduced on *Global Policy Forum*, 25 March 2007) <https://www.globalpolicy.org/component/content/article/163/29431.html>

Murphy, Damien, 'Cabinet Papers 1988–89: Nazi War Crimes Trials: Rise of Extreme Racism', *Sydney Moring Herald* (online, 1 January 2015) <http://www.smh.com.au/federal-politics/political-news/cabinet-papers-198889-nazi-war-crimes-trials-rise-of-extreme-racism-20141219-12atsu.html>

NATO, *NATO Rule of Law Field Support Mission* <http://www.rs.nato.int/images/media/PDFs/110930rolbackground.pdf>

Nizkor Project, 'Eichmann Appeal Trial transcripts: Appeal-Session-07-08 and Appeal-Session-07-07: Israel's Criminal Procedure (Trial Upon Information) Ordinance' <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Appeal>

Nizkor Project, Telegram Ribbenstrop to Veesenmayer (N/85 of 10 July 1944) referenced in 'Eichmann Appeal Trial Transcripts, Appeal-Session-07-09', <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-07-09>

Office for Public Integrity, 'What is a Reasonable Suspicion?', *Independent Commissioner Against Corruption* <https://icac.sa.gov.au/content/what-reasonable-suspicion>

Office of the Prosecutor, ICC, *Informal Expert Paper: The Principle of Complementarity in Practice*, 63 (2003) <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>

Onishi, Norimitsu, 'Omar al-Bashir, Leaving South Africa, Eludes Arrest Again', *The New York Times* (online, 15 June 2015) <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html?_r=0>

O'Rourke, Breffni, 'Bloody Israeli Convoy Raid Sparks Fierce International Reaction', *Radio Free Europe/Radio Liberty* (online, 1 June 2010) <http://www.rferl.org/content/Casualties_As_Israeli_Ships_Attack_Aid_Flotilla/2057229.html>

Padmanabhan, Aishwarya, 'Origin, Development and Evolution of the Principle of Universal Jurisdiction: A Study of Its Application in National Courts and Practical Obstacles Facing Its Implementation' (Working Paper Series, West Bengal National University of Juridical Studies, June 2010)

Patrick, Stewart, 'Spain's Welcome Retreat on Universal Jurisdiction', *Council on Foreign Relations* (Blog Post, 14 February 2014) <https://www.cfr.org/blog/spains-welcome-retreat-universal-jurisdiction>

Perriel, Tom and Marieke Wierda, 'The Sierra Leone Court under Scrutiny: Hybrid Courts of Sierra Leone', *International Center for Transitional Justice* (March 2006) <https://www1.umn.edu/humanrts/ instree/SCSL/Case-studies-ICTJ.pdf>

Piracy: *Preliminary Draft Project and Various Previous Drafts,* Issue 2 (1930, Harvard Law School)

Policante, Amedeo, *Hostis Humani Generis: Pirates and Empires from Antiquity until Today* (Doctoral Thesis, Goldsmiths College, University of London, 2012)

Reydams, Luc, *The Rise and Fall of Universal Jurisdiction (*Working Paper 37, Leuven Centre for Global Governance Studies, January 2010)

Robert H Jackson Centre, 'The Influence of the Nuremberg Trial on International Criminal Law' (2012) <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/>

Roth, Kenneth, 'Guatemala: Events of 2016', *Human Rights Watch* (2017) <https://www.hrw.org/world-report/2017/country-chapters/guatemala>

Roth, Lenny, 'Lawfare—A Menace to the Jewish State', *Washington Jewish Week* (online, 23 June 2011) <https://www.highbeam.com/publications/washington-jewish-week-p61798/june-2011>

Rozene, Michael, 'Keynote Address: Prosecutorial Discretion in Australia Today', (Prosecuting Justice: Australian Institute of Criminology Conference, 19 April 1996)

Ryder, David, 'The Seychelles Anti-Piracy Model: Adopting a Pre-Emptive Approach', *Maritime Security Review* (23 October 2015) <http://www.marsecreview.com/2015/10/the-seychelles-anti-piracy-model/>

Ryngaert, Cedric, 'The International Criminal Court and Universal Jurisdiction', (Working Paper No 46, Leuven Centre for Global Studies) March 2010 <https://ghum.kuleuven.be/ggs/publications/working_papers/ new_series/wp41-50/wp46.pdf>

Rulac, Geneva Academy, *Non-International Armed Conflicts in Iraq* (12 September 2017) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq#collapse2accord>

Schabas, William (ed), 'General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework', (International Criminal Procedure Expert Framework, Hague Institute for the Internationalisation of Law and the Amsterdam Center for International Law, October 2011) <http://www.hiil.org/data/sitemanagement/ media/IEF_Brochure_241011.pdf/>

Sesay, Alpha, 'Court of Appeals Judges Uphold Charles Taylor Jr.'s (Chuckie Taylor) Convictions and 97 Years Jail Sentence', *IJ Monitor* (21 July 2010) <http://www.ijmonitor.org/2010/07/united-states-court-of-appeals-judges-uphold-charles-taylor-jr-s-chuckie-taylor-convictions-and-97-years-jail-sentence/>

Shany, Yuval, 'The International Struggle Against Terrorism—The Law Enforcement Paradigm and the Armed Conflict Paradigm', *The Israel Democracy Institute*, <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-3/universal-jurisdiction-spanish-court-initiates-an-inquiry-of-the-targeted-killing-of-salah-shehadeh-in-gaza/>

Sherwood, Harriet, 'Israeli Minister Tzipi Livni Given Diplomatic Immunity for Visit to UK', *The Guardian* (online, 14 May 2014) <http://www.theguardian.com/world/2014/may/13/israel-tzipi-livni-diplomatic-immunity-uk>

Shimbun, Yomiuri, 'Japan to Try Suspects in Pirate Attack' *The Seattle Times* (online, 8 March 2011) <http://www.seattletimes.com/nation-world/japan-to-try-suspects-in-pirate-attack/>

Simons, Marlise, 'In Rare Case, Dutch Try Two Afghan Ex-Generals', *The New York Times* (New York) 29 September 2005

Skeen, Lisa, 'Universal Jurisdiction: Spain Steps Down', *Global Policy Forum* <https://www.globalpolicy .org/international-justice/48104-spain-steps-down-universal-jurisdiction-and-the-guatemalan-genocide-cases.html>

Speigel Online, 'The Long Road to Eichmann's Arrest: A Nazi War Criminal's Life in Argentina', *Speigel Online International* (1 April 2011) <http://www.spiegel.de/international/germany/the-long-road-to-eichmann-s-arrest-a-nazi-war-criminal-s-life-in-argentina-a-754486-2.html>

Tran, Mark, 'Inside Somaliland's Pirate Prison, the Jail No Country Wants', *The Guardian* (online, 24 August 2014) <https://www.theguardian.com/world/2012/aug/23/inside-somaliland-prison-pirates>

Trial International, 'Trial Watch: Frans Van Anraat' (7 June 2016) <https://trialinternational. org/latest-post/frans-van-anraat/>

Trial International, 'Jorge Vinicio Sosa Orantes', *Trial Watch* (14 July 2016) <https://trialinternational.org/ latest-post/jorge-vinicio-sosa-orantes/>

United Nations Division for Ocean Affairs and Law of the Sea, 'Piracy Under International Law' <http://www.un.org/depts/los/piracy/piracy.htm>

United Nations Interregional Crime and Justice Research Institute, *Crimes Database* (January 2016) <http://www.unicri.it/topics/piracy/database/>

UNODOC, *Trust Fund to Support the Initiatives of States Countering Piracy off the Coast of Somalia Annual Report 2010* <https://www.unodc.org/documents/easternafrica/piracy/Annual_Report_2010_Piracy_TF_eng_eBook.pdf>

UNCLOSdebate, 'Argument: US Already Applies UNCLOS as a Matter of Customary International Law', <https://www.unclosdebate.org/argument/855/us-already-abides-unclos-matter-customary-international-law-and-domestic-policy>

United Nations Office of Legal Affairs, 'Overview: Rome Statute of the International Criminal Court' (1998) Rome Statute of the International Criminal Court <https://www.legal.un.org/icc/general/overview.htm>

United Nations Secretary-General, '2006 Statement—World Human Rights Day, President of ICC Statement' (8 December 2006) <https://www.un.org/sg/en/content/sg/statement/2006-12-08/secretary-generals-address-mark-international-human-rights-day>

United to End Genocide, 'Raphael Lemkin and Creation of the Word "Genocide"', <http://endgenocide.org/learn/what-is-genocide/>

Van Schaack, Beth, 'African Heads of State Before International Criminal Court', *International Criminal Justice Today* (21 June 2015) <https://www.international-criminal-justice-today.org/arguendo/african-heads-of-state-before-the-international-criminal-court/>

'Wanted Sudan Leader Bashir Avoids South Africa Arrest', *BBC News* (online, 15 June 2015) <http://www.bbc.com/news/world-africa-33135562>

Watt, Nicholas, 'Pinochet to be Set Free', *The Guardian* (online, 12 January 2000) <https://www.theguardian.com/world/2000/jan/12/pinochet.chile3>

Weiss, Peter, 'Run Rummy Run', *Global Policy Forum* (8 December 2006) <https://www.globalpolicy.org/about-gpf-mm.html>

Zagorin, Adam, ‘Time, Charges Sought Against Rumsfeld Over Prison Abuse’, *Global Policy* (online, 10 November 2006) <http://content.time.com/time/nation/article/0,8599,1557842,00.html>