



universität
wien

MASTER-THESIS

Titel der Master-Thesis

“The Scope and Application of the Principle of
Universal Jurisdiction in Criminal Law:
Ensuring Accountability and Combating Impunity”

Verfasserin

Victoriya Zhun

angestrebter akademischer Grad

Master of Laws (LL.M.)

Wien, August 2015

Universitätslehrgang: International Legal Studies

Studienkennzahl lt. Studienblatt: A 992 628

Betreuer: Univ.-Prof. ret. Dr. Gerhard Hafner

Table of Contents

Introduction	1
Chapter I. Traditional types of jurisdiction	4
A. Evolution of the term “jurisdiction”	4
B. Territoriality principle	8
C. Personality (nationality) principle	11
i. Active personality principle	11
ii. Passive personality principle	13
D. Protective principle	14
Chapter II. Historical development of the principle of universal jurisdiction	16
A. The emergence of universal jurisdiction: universal jurisdiction and the crime of piracy	17
B. Universal jurisdiction in the post-World War II period	19
i. War crimes	19
ii. Genocide	22
iii. Protection of cultural property	24
C. The extension of universal jurisdiction in conventional international law since 1970s	26
i. Apartheid	27
ii. Torture	28
iii. Enforced disappearance	30
iv. Other crimes	32
Chapter III. Application of the principle of universal jurisdiction	33
A. Universal jurisdiction and customary international law	34
B. Universal jurisdiction: permissive or obligatory?	35
C. Universal jurisdiction: primary or subsidiary?	37
D. Universal jurisdiction <i>in absentia versus</i> presence requirement	39
E. Procedural conditions of exercising universal jurisdiction	42
Chapter IV. The principle of universal jurisdiction and related issues	45
A. Universal jurisdiction and <i>aut dedere aut judicare</i> principle	45
B. Universal jurisdiction and jurisdiction of international tribunals. Relationship between universal jurisdiction and the ICC	46
C. Universal jurisdiction and jurisdictional immunities	49

Chapter V. National laws and universal jurisdiction. Universal jurisdiction in the practice of the ICJ	52
A. Belgium	52
B. Spain	54
C. UK	58
D. Universal jurisdiction in the practice of the ICJ	59
Chapter VI. Obstacles to exercising universal jurisdiction over international crimes	62
Conclusions	64
Bibliography	67

List of Abbreviations

1954 Hague Convention	The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
1999 Second Protocol	Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999)
Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid
AU	African Union
Convention against Torture	The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DRC	Democratic Republic of Congo
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
Enforced Disappearance Convention	International Convention for the Protection of All Persons from Enforced Disappearance
EU	European Union
GA	General Assembly
Genocide Convention	The Convention on the Prevention and Punishment of the Crime of Genocide
Hostages Convention	International Convention Against Taking of Hostages
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICJ	International Court of Justice
IDI	Institut de Droit international
ILA	International Law Association
ILC	International Law Commission
LNTS	League of Nations Treaty Series
PCIJ	Permanent Court of International Justice
SC	Security Council
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN Charter	Charter of the United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNODC	United Nations Office on Drugs and Crime
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
US	United States of America

Today, we live in a world where a man has more chances to be judged if he kills only one person than if he kills 100 000

(Kofi Annan, former Secretary-General of the United Nations, December 1998)

Introduction

Historically, the exercise of criminal jurisdiction was limited to the existence of a certain link with the State that asserted jurisdiction. However, the twentieth and twenty-first century saw an awful rise in the amount of war crimes, crimes against humanity, cases of genocide and torture, where States, possessing jurisdiction based on the traditional links of territoriality or nationality, were not only unable to take the appropriate action, but some even took part in the commitment of those hideous crimes. Consequently, universal jurisdiction received a lot of doctrinal attention.

In fact, one of the most heated debates of recent years in modern international law has been the scope and application of the principle of universal jurisdiction, which has been on the agenda of the United Nations (“UN”) General Assembly (“GA”) and the Sixth Committee since 2009¹, after a group of African States voiced complaints that it was being used selectively and politically abused. However, Africa’s grave concern regarding the applicability of the principle of universal jurisdiction does not pertain to what is actually being done by the international community. African Union (“AU”) Member States consider that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European States is politically selective against them. While it is true that the practice of States in respect to the exercise of universal jurisdiction is very inconsistent, proceedings have still been instituted or sought against nationals of a variety of States worldwide. While no African State is known for exercising universal jurisdiction effectively, some European States have a rather wide universality practice, which happens to involve prosecutions against African States officials.²

The notion of universal jurisdiction is also extensively discussed within the Joint Africa-European Union (“EU”) Strategy, which was launched at the Africa-EU Summit in Lisbon in 2007³, confirming commitment to enhancing political dialogue on universal jurisdiction.⁴ The comments and statements made by governments in the course of the discussion of the universality principle illustrate that the main debate is the conflict between the two values of international law, namely

¹ The scope and application of the principle of universal jurisdiction, Res., UN GA, 16 December 2009, UN Doc. A/RES/64/117.

² Para 104, 109, The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 20 June 2011, UN Doc. A/66/93, pp.20-21.

³ The Africa-EU Strategic Partnership, A Joint Africa-EU Strategy, Council of the EU, Lisbon, 09 December 2007, 16344/07 (Presse 291), available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/97496.pdf (visited last: 15.08.2015).

⁴ Para 10, Fourth EU-Africa Summit, Declaration, Brussels, 02-03 April 2014, p.2, available at: http://www.africa-eu-partnership.org/sites/default/files/userfiles/2014_04_01_declaration_4th_eu-africa_summit_en.pdf (visited last: 15.08.2015).

preventing impunity and ensuring accountability, on the one hand, and protecting the principles of States' sovereignty and political independence, as well as immunities of incumbent State officials, on the other.⁵

The notion of accountability has no clear definition, nor exact equivalent translation in many languages, which often borrow the English word if they wish to indicate it. Since the term lacks a clear definition, Gerhard Hafner proposed to apply the approach developed by the influential Austrian philosopher Ludwig Wittgenstein, according to whom "the meaning of a word is its use in the language".⁶ Mark Bovens suggested that the word "accountability" is Anglo-Norman in origin and historically was closely related to accounting, in a literal sense of bookkeeping. In 1085 William I of England required all the property holders in his realm to render a count of what they possessed as a means to establish the foundation of his royal governance.⁷

However, by the nineteenth century the notion of accountability had evolved as a concept of public accountability of government officials and civil servants in the United States ("US"). The American citizens had a different relation to the State than Europeans. Whereas to the European citizens the State was a source of authority, superimposed on the individuals, the American civil servant was seen, in particular since the "Jacksonian Revolution" in the 1830's, as a person who simply happens to work for the government. Therefore, the American concept of the State followed the so-called "bottom-up approach" in contrast to the "top-down approach" prevalent in Europe.⁸ As a consequence, the Anglo-American terms "accountability" and "accountable" no longer relate to the financial administration, but have almost completely reversed in meaning: it is now the authorities themselves who are being held accountable by their citizens.⁹

The idea behind accountability is that citizens should enjoy effective redress against the government, but it does not apply against private persons. In addition, the topic of "accountability of international organizations" has recently gained wider attraction as a follow-up of the generally wider use of the term "accountability" in international relations and by several actors in this field (ranging from States to non-governmental organizations, and reaching to transnational corporations).¹⁰ It is thus accepted that accountability is linked to the authority and power. Power entails accountability,

⁵ Matthew Garrod, The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality, *International Criminal Law Review*, vol. 12 (2012), pp.820-821.

⁶ Gerhard Hafner, Accountability of International Organizations, Proceedings of the Annual Meeting, American Society of International Law (02-05 April 2003), vol. 97, p.236.

⁷ Mark Bovens, Analyzing and Assessing Accountability: A Conceptual Framework, *European Law Journal*, vol. 13, issue 4 (July 2007), p.448.

⁸ Gerhard Hafner, Accountability of International Organizations – A Critical View in Towards World Constitutionalism, Issues in the Legal Ordering of the World Community/ed. Ronald St. John Macdonald, Douglas M. Johnson, Martinus Nijhoff Publishers (2005), pp.586-587.

⁹ Bovens, *supra note* 7, pp.448-449.

¹⁰ Hafner, Accountability of International Organizations – A Critical View, *supra note* 8, p.585.

the duty to account for its exercise.¹¹ In contemporary political and scholarly discourse accountability often serves as a conceptual umbrella that covers various other distinct concepts, such as transparency, equity, democracy, efficiency, responsiveness, responsibility, integrity, and is closely interrelated with good governance.¹² It thus will be shown in this Thesis that the noteworthy development in terms of establishing accountability mechanisms for violations of international human rights standards has been the recognition of the principle of universal jurisdiction, which can extensively contribute to the process of making public sector officials more accountable for their decisions and actions in relation to their people. The accountability of international organizations will not be the topic of discussion in this Thesis.

The lack of accountability leads to another important problem, *i.e.*, impunity. Accountability has been understood mainly as a commitment of the State to act in the interest and for the benefit of its citizen.¹³ However, if the State fails to ensure that governmental officials are accountable for their actions before individuals, then impunity is inevitable. Diane Orentlicher in her report submitted to the UN Human Rights Commission in 2005 (replaced by the UN Human Rights Council in 2006), defined impunity as the impossibility, *de jure* or *de facto*, of bringing the perpetrators of serious violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims. Impunity arises from the failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.¹⁴

The former UN Secretary-General Kofi Annan, in his influential report on Transitional Justice and the Rule of Law, acknowledged that: “[i]n the end, in post-conflict countries the vast majority of perpetrators of serious violations of human rights and international humanitarian law will never be tried, whether internationally or domestically”, but also underlined that the universality principle “stands as a potentially important reserve tool in the international community’s struggle against

¹¹ Accountability of International Organizations, Final Report, ILA, Berlin 2004, p.5, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9> (visited last: 15.08.2015).

¹² Bovens, *supra note* 7, p.449.

¹³ Hafner, 2005, *supra note* 8, p.592.

¹⁴ Diane Orentlicher, Report of the independent expert to update the Set of principles to combat impunity, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Commission on Human Rights, 08 February 2005, UN Doc. E/CN.4/2005/102/Add.1., pp.6-7.

impunity”.¹⁵ Doctrinally the rationale for universal jurisdiction is based on the idea that certain crimes are so serious that they affect the international community as a whole, are universally condemned and harmful to international interests, with the result that States can take appropriate action against the perpetrators.¹⁶ It must nevertheless be kept in mind that accountability is directed towards State organs by imposing duties on them, while universal jurisdiction, as will be illustrated in the following Chapters, only gives a right to prosecute, but not a duty to do so.

Universal jurisdiction holds out the promise of greater justice, but the jurisprudence of the principle of universality is disparate, disjointed, and poorly understood. As long as this is the case, this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice.¹⁷ Another issue is that the application of the principle of universal jurisdiction is a highly politicized question. Consequently, universal jurisdiction ends up in a battle between justice and realpolitik.

Although a great amount of work has been undertaken in recent years to clarify universal jurisdiction, there is neither a consensus on what universal jurisdiction is or should be, nor regarding the crimes covered by the concept, either in doctrine or State practice.¹⁸ Therefore, the aim of this Thesis is to identify the scope and application of the principle of universal jurisdiction in criminal law, distinguish it from other related concepts, and show that it offers a basis for ensuring accountability, addressing impunity gaps and providing justice to victims.

Chapter I. Traditional types of jurisdiction

A. Evolution of the term “jurisdiction”

Although the term “jurisdiction” is rather frequently used by international lawyers, its definition is still not apparent. As the Supreme Court of Virginia noted in *Ghameshlouy v. Commonwealth*, “jurisdiction is a word of many, too many, meanings”.¹⁹ Xiaodong Yang acknowledged that depending on the circumstances, jurisdiction may refer to the totality of the power or authority that a State has or exercises, in which case it is fully identifiable with “sovereignty”, another often-used but likewise never clearly defined term in international law, or the term may also simply denote the power or authority of a state in a specific field, such as the levy of taxes or the

¹⁵ Para 46, 48, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN SC, 23 August 2004, UN Doc. S/2004/616, pp.15-16.

¹⁶ Para 10, The scope and application of the principle of universal jurisdiction, Report of the Secretary-General prepared on the basis of comments and observations of Governments, UN GA, 29 July 2010, UN Doc. A/65/181, p.4.

¹⁷ The Princeton Principles of Universal Jurisdiction, Princeton Project on Universal Jurisdiction, Program in Law and Public Affairs, Princeton University, 2001, p.24, available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (visited last: 15.08.2015).

¹⁸ Garrod, *supra note 5*, p.764.

¹⁹ *Ghameshlouy v. Commonwealth*, 279 Va. 379, 689 S.E.2d 698, 25 February 2010, pp.11-12, available at: <http://www.courts.state.va.us/opinions/opnscvwp/1091120.pdf> (visited last: 15.08.2015).

adjudication of cases by courts or other judicial authorities.²⁰ In fact, the literature on the topic distinguishes between internal and external or outer sovereignty. The internal aspect of sovereignty may be seen as representing the supreme power of the State to formulate and uphold the laws in respect of its population, whereas the external aspect provides for *a priori* freedom, in accordance with international law principles, to act with regard to other States, which thus implies the principle of sovereign equality. Historically, internal sovereignty was seen as a prerequisite for external sovereignty, the former being a condition *sine qua non* for the latter.²¹

On 5 September 1931, the Permanent Court of International Justice (“PCIJ”) dealt with the question whether a customs union between Germany and Austria, which was provided by a Protocol of 19 March 1931, would be compatible with the obligations of Austria under Article 88 of the Saint Germain Peace Treaty of 10 September 1919 and the Geneva Protocol №1 of 4 October 1922.²² By a vote of eight judges to seven, the PCIJ held that the proposed “special regime” was incompatible with the 1922 Protocol and threatened Austria’s independence.²³ In his Individual opinion Judge Anzilotti held that the proposed union was in contravention of both the Treaty and the Protocol and made some interesting comments about the concepts of independence and sovereignty:

“Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.”²⁴

The Individual opinion of Judge Anzilotti in this case is usually viewed as the standard definition of “independence”, but much of the language employed concerns State equality, which requires the absence of formal superiority and subordination in the legal relations between States.²⁵

The notion of jurisdiction from the doctrinal point of view was first prominently discussed by Frederick A. Mann in his 1964 Hague Lectures, where it was underlined that:

“Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State’s sovereignty [...] If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty [...] Such a system seems to establish a satisfactory

²⁰ Xiaodong Yang, Jurisdiction, *International Law*, published online October 2012, available at: <http://oxfordindex.oup.com/view/10.1093/obo/9780199796953-0030> (visited last: 15.08.2015).

²¹ Gerard Kreijen, State failure, Sovereignty and Effectiveness, Martinus Nijhoff Publishers (2004), pp.30, 32-33.

²² Monika Vierheilig, Customs Regime Between Germany and Austria (Advisory Opinion) in Decisions of International Courts and Tribunals and International Arbitrations, Encyclopedia of Public International Law/ed. Rudolph Bindschedler, Thomas Buergenthal, Karl Doehring and others, North-Holland Publishing Company (1981), p.69.

²³ Customs Régime Between Germany and Austria, PCIJ, Advisory Opinion, 05 September 1931, Series A/B, № 41, p.53.

²⁴ Para 3, Individual opinion by M. Anzilotti, Customs Régime Between Germany and Austria, *Ibid.*, p.57.

²⁵ Gerry Simpson, Great Powers and Outlaw States, Unequal Sovereigns in the International Legal Order, Cambridge University Press (2004), p.28.

regime for the whole world. It divides the world into compartments within each of which a sovereign State has jurisdiction.”²⁶

It was thus asserted that, as a corollary of the principle of sovereignty, States are considered to have jurisdiction over their own territory. Mann saw jurisdiction as an inherent power of the State that is exclusively determined by public international law and reaffirmed his general doctrinal position in his subsequent work published in 1984.²⁷

Mann also discussed various instances in which a State can actually claim and exercise jurisdiction, as well as differentiated between executive, judicial (adjudicative), and legislative (prescriptive) jurisdiction.²⁸ This was later supported by another study regarding jurisdiction in international law undertaken by Michael Akehurst in the 1970s²⁹, followed by a certain shift from a purely theoretical to a more practical approach towards defining jurisdiction. At the beginning of the 1980s, Derek W. Bowett saw jurisdiction as a manifestation of State sovereignty and defined it as the capacity of a State under international law to prescribe or enforce the rule of law, while at the same time stressing the necessity to distinguish between prescriptive and enforcement jurisdiction.³⁰

Peter Malanczuk suggested that legislative or prescriptive jurisdiction relates to the power to legislate in respect of persons, property, or events in question; judicial or adjudicative jurisdiction refers to the power of States’ courts to hear cases concerning the persons, property or events in question; while enforcement jurisdiction encompasses the power of physical interference exercised by the executive, such as the arrest of persons, seizure of property, and so on.³¹ In fact, a separate reference to adjudicative jurisdiction, especially in an international criminal law context, is generally unnecessary as it is only common for the judicial practice in the US and is usually encompassed in the enforcement jurisdiction. The latter is restricted to the territory of the State. Performance of State acts on the territory of another State without its consent generally constitutes a violation of the principles of territorial integrity and non-intervention and is limited by State immunity. However, universal jurisdiction does not involve the exercise of a State’s jurisdiction to enforce, but only its jurisdiction to prescribe. In turn, legislative jurisdiction can be civil, criminal or administrative, but only criminal jurisdiction will be discussed for the purposes of this Thesis.

²⁶ Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, *Recueil des Cours de l’Académie de droit international*, vol. 111 (1964), p.30.

²⁷ Frederick A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, *Recueil des Cours de l’Académie de droit international*, vol. 186 (1984).

²⁸ Mann, 1964, *supra note* 26, pp.13-14.

²⁹ Michael Akehurst, *Jurisdiction in International Law*, *British Yearbook of International Law*, vol. 46 (1972-73).

³⁰ Derek W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, *British Yearbook of International Law*, vol. 53, issue 1 (1982), p.1.

³¹ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th rev. ed., Routledge, Taylor & Francis Group (2005), p.109.

The interpretation of the notion of “jurisdiction” is one of the most controversial and debated issues, which is also clearly reflected in the practice of the European Court of Human Rights (“ECtHR”). Some scholars argued that the term “jurisdiction” has to be broadly interpreted with reference to all forms of manifestation of State power relevant to international law and thus explained the possibility of the extraterritorial application of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).³² Others followed the “functional” approach to the interpretation, which takes into account the ability of the State power to affect the enjoyment of the rights protected by the ECHR.³³ In turn, Sarah Miller, in order to maintain a workable balance between the Convention’s regional identity and its universalist aspirations, and in line with the relative findings in the *Banković case*³⁴, proposed existing categories of extraterritorial jurisdiction as limited exceptions to the rule of the territorial jurisdiction because they all require some significant connection between a signatory State’s physical territory and the individual whose rights are implicated.³⁵

The major problem arises in the assertion of jurisdiction by the ECtHR in cases where acts were committed by a State Party within the territory of another State (which can also happen to be outside the European region), but in which the first State exercises effective control, whether over a specific geographic area or individuals.³⁶ The scope and criteria of the effective control are identified on a case-by-case basis. For instance, in *Pad and Others v. Turkey*, Strasbourg judges came to the conclusions that:

“[A] State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States, but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.”³⁷

There are two approaches, which are prevalent under public international law in respect to the question of jurisdiction. The first approach was taken by the PCIJ in 1927 in the famous *Lotus case*, the only international decision on the extent of a State’s extraterritorial jurisdiction under international

³² Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 04 November 1950, entered into force 03 September 1953, 213 UNTS 222.

³³ Raffaella Nigro, The Notion of “Jurisdiction” in Article 1: Future Scenarios for the Extra-Territorial Application of the European Convention on Human Rights, *The Italian Yearbook of International Law*, vol. 20 (2010), pp.11, 22.

³⁴ Para 61, *Banković and Others v. Belgium and Others*, Decision, ECtHR, Application №52207/99, 12 December 2001, available at: [http://hudoc.echr.coe.int/eng?i=001-22099#{"itemid":\["001-22099"\]}](http://hudoc.echr.coe.int/eng?i=001-22099#{) (visited last: 15.08.2015).

³⁵ Sarah Miller, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, *European Journal of International Law*, vol. 20, issue 4 (2009), p.1223.

³⁶ Nigro, *supra note* 33, pp.14, 16,

³⁷ Para 53, *Pad and Others v. Turkey*, Decision, ECtHR, Application № 60167/00, 28 June 2007, available at: [http://hudoc.echr.coe.int/eng#{"itemid":\["001-81672"\]}](http://hudoc.echr.coe.int/eng#{) (visited last: 15.08.2015).

law.³⁸ In 1926 a collision occurred on the high seas between the French steam-ship Lotus and the Turkish vessel Boz-Kourt. Eight Turkish passengers and crew members died and the Boz-Kourt sunk. After helping the survivors of the crash to get to safety, Lotus continued its voyage to Constantinople (currently - Istanbul), where the officer of the watch on Lotus was arrested and incriminated with involuntary manslaughter.³⁹ Consequently, after diplomatic discussions between France and Turkey, it was agreed to submit the case to the PCIJ, which came to the conclusion that States are allowed to exercise jurisdiction at their own discretion, unless there is a prohibitive rule to the contrary:

“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”⁴⁰

The second approach, which, according to Cedric Ryngaert, is more prevalent in practice, provides that States are not allowed to exercise jurisdiction, unless they could rely on one of the permissive principles, *i.e.*, territoriality, personality, protective, or universality principles.⁴¹

B. Territoriality principle

The most basic principle of jurisdiction in international law is the territoriality principle. Historically, however, the personality principle enjoyed certain primacy, while the territoriality principle was applied exceptionally. For instance, Classical Greece, which did not provide for legal redress for aliens in its early period, placed resident aliens under the jurisdiction of special magistrates (polemarchs), which prevalently applied Greek law in criminal suits. Additionally, the importance of the territoriality principle was already reflected in the first treaty between Rome and Carthage (509-

³⁸ The case of the S.S. “Lotus” (*France v Turkey*), PCIJ, Judgment, 07 September 1927, Ser. A, №10 (1927), reprinted in World Court Report, vol. 2 (1969), available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (visited last: 15.08.2015).

³⁹ Karen Janina Berg, *Universal Criminal Jurisdiction as Mechanism and Part of the Global Struggle to Combat Impunity with Particular Regards to the Crime of Torture*, Neuer Wissenschaftlicher Verlag GmbH Nfg KG (2012), p.118.

⁴⁰ *Lotus case, supra note 38*, p.19.

⁴¹ Cedric Ryngaert, *Jurisdiction in International Law*, OUP (2008), p.21.

08 B.C.), which stated that salesmen had to comply with territorial regulations. Although aliens in Rome were typically allowed to resort to their own laws, they were also subject to the *jus gentium*, a sort of Roman Empire common law, while the *jus civile* only extended to Roman citizens. These latter laws still were not applicable when the interest of State or public morality was endangered. In fact, the existence of this exception reflected the importance of territorial sovereignty in early European law.⁴²

The territoriality principle became gradually accepted in Europe and its importance was clearly emphasized in the seventeenth century, due to the need to affirm territorial sovereignty, which evolved in the aftermath of the Westphalian Peace (1648).⁴³ It basically means that a crime committed in a State's territory is justiciable in that State, irrespective of the nationality of the offender and/or the victim, and what matters is the law of the place where the act was performed. Although the principle sounds rather straight forward, its application is not as self-evident. The questions arise as to what constitutes the territory of the country or what territorial connections are decisive in case an offence has a territorial nexus with a number of States.

Malcolm N. Shaw recognized that such fundamental legal concepts as sovereignty and jurisdiction can only be comprehended in relation to territory.⁴⁴ Therefore, not only crimes carried out on dry land, but also those perpetrated in a State's territorial waters, on its ships or aircraft will be considered as committed in its territory. In contrast, crimes perpetrated in a State's embassy abroad are not considered as having been carried out on the sending State's territory.⁴⁵

However, the crime may begin in one State, continue in the other and be completed in a third. An example of this constitutes cybercrime. Which country can then assert jurisdiction? For instance, Article 6(2) of the Criminal Code of Ukraine stipulates that an offense shall be deemed to have been committed on the territory of Ukraine if it has been initiated, continued, completed or discontinued on the territory of Ukraine.⁴⁶ The general rule, which is applicable in such situation, provides that as long as the effects of the crime are felt in the territory, it is amenable to the State's jurisdiction (for example, in case drugs are manufactured outside the country, but then smuggled into the territory of the State).⁴⁷ There is a clear tendency in national legal systems to give priority to the place where the crime was committed or where its effects materialized, which is understandable from the practical point of view. Consequently, one can distinguish between the active or subjective territoriality

⁴² Ryngaert, *Ibid.*, pp.44-45.

⁴³ Ryngaert, *Ibid.*, p.47.

⁴⁴ Malcolm N. Shaw, *International Law*, 6th ed., Cambridge University Press (2008), p.475.

⁴⁵ Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, Alex Whiting, *Cassese's International Criminal Law*, 3rd ed., OUP (2013), p.275.

⁴⁶ Art. 6(2), Criminal Code of Ukraine, №2341-III, adopted 05 April 2001, entered into force 01 September 2001, available at: <http://www.legislationline.org/documents/action/popup/id/16257/preview> (visited last: 15.08.2015).

⁴⁷ Cassese, Gaeta, Baig, Fan, Gosnell, Whiting, *supra note* 45, p.274.

principle, when an offence is committed on the territory of the State, and the passive or objective territoriality principle, when neither the act, nor omission occurred on the territory of the State, but its effects are felt in the territory (also known as the “effects doctrine”).⁴⁸

Some scholars claim that objective territoriality is too vague and may cause some difficulties in classification. Thus, it is suggested to distinguish between constructive and *de facto* territoriality in order to accurately characterize a domestic event as such. Territoriality *de facto* refers to the physical occurrence of the factual event within the boundaries of a specific sovereignty. In turn, constructive territoriality refers to situations in which the factual event physically began to occur outside a given sovereignty, but this event was intended to continue its process within the boundaries of the given sovereignty. If the process continued within the boundaries of a given sovereignty, then it is the case of *de facto* territoriality. If the process ended prematurely outside the given sovereignty, but it was intended to be continued inside it, then domestic criminal law is applicable through constructive territoriality. In both cases, the event is considered to be a domestic matter.⁴⁹

The application of the territorial principle undoubtedly has a number of benefits. First of all, the place where the crime was committed is the easiest to collect evidence and interview witnesses. Secondly, as a matter of practice, the place, where an offence took place, is at the same time the place where the rights of the accused are claimed to be best safeguarded. Although *ignorantia non est argumentum*, it is generally presumed that if a person is residing in a certain territory, he or she is likely to know the criminal law of that particular State, as well as the rights he or she shall enjoy as a defendant and therefore ensure the observance of due process. In addition, it is also more probable that the person knows and speaks the language of the trial and there is no need for an interpreter, which can amount to additional costs and time implications on the conduct of the trial. Thirdly, it is also helpful for victims and relatives to relieve their grief from a psychological point of view, since they can attend the trial and make statements or hear the public apology in person, which can give the feeling of justice being served for the society at large. Finally, by administering justice over crimes perpetrated in its territory, the State affirms its authority and sovereignty to take action against any disturbances of peace and security, which occur within its boundaries.⁵⁰

However, at least one major shortcoming in the application of the territorial principle can be identified. In case one of the international crimes (crime against humanity, genocide, war crime) is committed in the State’s territory by the authorities of that State, domestic prosecution might prove to be ineffective due to the fact that the government will be unwilling or terrified to bring the case to

⁴⁸ Malanczuk, *supra note 31*, p.111.

⁴⁹ Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer-Verlag Berlin Heidelberg (2010), p.102.

⁵⁰ Cassese, Gaeta, Baig, Fan, Gosnell, Whiting, *supra note 45*, p.275.

trial. Moreover, domestic legislation can provide for specific amnesty laws or criminal law provisions in order to avoid criminal prosecution.

Nevertheless, as it can be seen, the territoriality principle still serves as a central principle of jurisdiction. At the same time, national laws may also be given extraterritorial application (some studies intentionally avoid the term “extraterritorial” by instead using “non-territorial jurisdiction”⁵¹), provided that such application is justified. However, the application of extraterritoriality varies dramatically in continental Europe in comparison to common law countries. While European countries reserve an important role for extraterritorial jurisdiction, common law countries heavily rely on the territoriality principle and only allow extraterritorial application in certain specific cases.⁵²

C. Personality (nationality) principle

Two types of the personality principle are usually distinguished – active and passive.

i. Active personality principle

The active personality principle allows the State to exercise jurisdiction over its nationals, in case they commit offences abroad. Asserting jurisdiction over military personnel is a common example, while it is also frequently relied upon in cases related to sexual exploitation of children in tourism and travel.⁵³ Active personality jurisdiction may cover all crimes committed abroad, although it may also be limited to serious offences only. The Harvard Research on International Law, conducted in 1935, came to the conclusion that limitations on the exercise of active personality jurisdiction are matters which each State is free to determine for itself, and this includes both the crimes for which it will punish its nationals and circumstances under which it will exercise jurisdiction.⁵⁴

Scholars identify two main forms, in which the principle of active nationality is implemented. First possible scenario relates to the situation, when a national carries out an act, which is punishable in the State of nationality, but not the State, where the offence occurred. In such a situation, the underlying motivation is the will of the State to control that its nationals comply with its laws, despite their geographical location, *i.e.*, at home or abroad. However, not all the countries follow this approach and provide prosecution based on the active personality principle only in case the crime is punishable both in the State of nationality and in the State, where the crime was committed. The

⁵¹ Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, INTERSENTIA (2005), p.23.

⁵² Ryngaert, *supra note* 41, p.86.

⁵³ Catherine Beaulieu, *Extraterritorial laws, Why They Are Not Really Working and How They Can Be Strengthened*, ECPAT International (September 2008), p.6, available at: http://resources.ecpat.net/worldcongressIII/PDF/Journals/EXTRATERRITORIAL_LAWS.pdf (visited last: 15.08.2015).

⁵⁴ Harvard Research on International Law, *Draft Convention on Jurisdiction with Respect to Crime*, *American Journal of International Law*, vol. 29, (1935), p.531.

rationale behind the second type of situation is the desire or an explicit prohibition, contained in domestic legislation, of the State of nationality not to extradite its nationals to the State, where the crime was perpetrated. Consequently, the State needs to have a jurisdictional basis for prosecution.⁵⁵

For example, Canada is a common law country and its Criminal Code contains a general prohibition of extraterritoriality in Section 6, paragraph 2:

“Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged [...] of an offence committed outside Canada.”⁵⁶

Nevertheless, Canada still provides for a certain number of exceptions in respect to the crimes committed by its nationals. Section 7 paragraph 4.1 provides that if a Canadian citizen or a permanent resident, outside of Canada, commits an act or omission that would be considered an offense if it was committed in Canada, especially in relation to sexual offences against children within the meaning of certain sections of Canada Criminal Code, such acts can be prosecuted in Canada.⁵⁷

A problem that might occur in the application of the active personality principle relates to the moment at which the nationality of the prosecuting State must be possessed: when the crime took place or when the proceedings were initiated. In practice, States tend to accept the fact that nationality can be possessed at either moment and even broad its jurisdiction by including residents (likewise in the case of Canada previously mentioned).⁵⁸ A prime example is Article 12(1) of the Criminal Code of the Russian Federation, which contains an explicit provision regarding the active nationality principle by stipulating that:

“Citizens of the Russian Federation *and stateless persons permanently residing in the Russian Federation*, which have committed a crime against the interests guarded by the present Code, outside the Russian Federation, shall be subject to criminal liability in accordance with the present Code, unless a decision of a foreign State's court exists concerning this crime in respect of these persons.”⁵⁹ [Emphasis added]

The aim of the active personality jurisdiction is to prevent nationals from engaging in criminal activity once they return to the State of their nationality, and from enjoying impunity, as well as provide forum for trying border cases, which are problematic in respect of establishing a certain territorial link to the particular State.⁶⁰ Moreover, the *aut dedere aut judicare* (“extradite or prosecute”) principle serves to ensure that countries, which laws prohibit extradition of their citizens,

⁵⁵ Cassese, Gaeta, Baig, Fan, Gosnell, Whiting, *supra note 45*, p.276.

⁵⁶ Sec. 6, para 2, Canada Criminal Code, R.S.C., 1985, c. C-46, available at: <http://laws-lois.justice.gc.ca/eng/acts/c-46/> (visited last: 15.08.2015).

⁵⁷ Sec. 7, para 4.1, Canada Criminal Code, *Ibid.*

⁵⁸ Cassese, Gaeta, Baig, Fan, Gosnell, Whiting, *supra note 45*, p.276.

⁵⁹ Art. 12(1), Criminal Code of the Russian Federation, №63-Fz, adopted 13 June 1996, entered into force 01 January 1997, available at: <http://www.russian-criminal-code.com/PartI/SectionI/Chapter2.html> (visited last: 15.08.2015).

⁶⁰ Ryngaert, *supra note 41*, p.90.

take effective action to ensure that the criminal does not go unpunished. However, application of this principle shall not jeopardize the basic principles of due process – *ne bis in idem* prohibition (a person cannot be tried twice for the same offence), double criminality requirement (in a majority of cases allegations must constitute an offence both in the country of nationality and where the crime was carried out, but in case of international crimes it is sufficient for the offence to be regarded as an international crime by customary international law or treaty provisions) and statutes of limitations or periods of prescription during which proceedings must be initiated.

ii. Passive personality principle

The passive personality principle allows a State to exercise jurisdiction over an act committed by an individual outside of its territory due to the fact that the victim is one of that country's nationals and, therefore, reflects the obligation of the State to protect its nationals abroad. Basically, this principle highlights the significance of the crime's effects, rather than the place, where it occurs.⁶¹

Originally several dissenting opinions in the *Lotus case* rejected the passive personality principle, while the 1935 Harvard Research on International Law did not include it in its Draft Convention because of the overlap between the passive personality and universality principles.⁶² It was severely criticized as it was considered to be in conflict with the way domestic judicial systems are organized, not being able to close the enforcement gap, but, in contrast, increasing competency clashes between States.⁶³ Mann believed that passive personality jurisdiction should be treated as an excess of jurisdiction.⁶⁴

Although the validity of the passive personality principle was the subject of controversy during the first half of the twentieth century, over the last decades the international community has increasingly accepted its use, in particular as a tool in the fight against international terrorism. Judges Higgins, Kooijmans and Buergenthal in their Joint Separate opinion in the International Court of Justice ("ICJ") *Arrest Warrant case (Democratic Republic of the Congo ("DRC") v Belgium)* underlined that:

"Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries [...], and today meets with relatively little opposition, at least so far as a particular category of offences is concerned."⁶⁵

⁶¹ John G. McCarthy, The Passive Personality Principle and Its Use in Combatting International Terrorism, *Fordham International Law Journal*, vol. 13, issue 3 (1989), pp.300-301, 307.

⁶² Harvard Research on International Law, *supra note* 54, p.579.

⁶³ Ryngaert, *supra note* 41, p.93.

⁶⁴ Mann, 1964, *supra note* 26, p.92.

⁶⁵ Para 47, *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports (2002), pp.76-77.

Application of this principle normally requires compliance with the double incrimination requirement in order to eliminate prosecution for an act that is not considered a criminal offence by the State where it has been performed. At the same time, as Cassese, Gaeta and others pointed out, in case international crimes are committed, it is only necessary to establish that the offence is considered as an international crime under international law. In fact, they argued that the prosecution of international crimes, such as crimes against humanity, genocide or torture, should not be based on the national link between the victim and the prosecuting State, but rather on such legal grounds as territoriality, universality, or active nationality. In their opinion, the passive personality principle shall only be resorted to if no other State is willing or able to administer international criminal law.⁶⁶

In addition, passive personality jurisdiction is usually limited to serious crimes (for example, murder, rape, and crimes with a certain minimum degree of punishment). Article 113(7) of the Penal Code of the French Republic stipulates that:

“French Criminal law is applicable to *any felony, as well as to any misdemeanour punished by imprisonment*, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.”⁶⁷
[Emphasis added]

In fact, Article 113(7) of the Penal Code of the French Republic is not only remarkably broad, but it also has been widely interpreted by French courts⁶⁸, while, for instance, Article 8 of the Criminal Code of Ukraine limits the application of the passive personality principle to specific grave offences.⁶⁹

Some countries also introduced procedural safeguards in order to reduce the risk of intrusion on the sovereignty of other countries.⁷⁰ One example would be Chapter 2 Section 5 of the Swedish Penal Code, which provides that “[p]rosecution for a crime committed outside the Realm may be instituted only following the authorization [...] of the Government or a person designated by the Government”.⁷¹

D. Protective principle

Under the protective principle, a State can claim jurisdiction over crimes, which threaten its national interests and security. Basically, this principle protects the State from acts perpetrated abroad, which may jeopardize the State’s sovereignty or its right to political independence. Some

⁶⁶ Cassese, Gaeta, Baig, Fan, Gosnell, Whiting, *supra note* 45, p.277.

⁶⁷ Art. 113(7), Penal Code of the French Republic, LOI №92-683, adopted 22 July 1992, entered into force 01 March 1994, available at: <http://www.legislationline.org/documents/section/criminal-codes> (visited last: 15.08.2015).

⁶⁸ Eric Cafritz, Omer Tene, Article 113-7 of the French Penal Code: The Passive Personality Principle, *Columbia Journal of Transnational Law*, vol. 41 (2003), p.588.

⁶⁹ Art. 8, Criminal Code of Ukraine, *supra note* 46.

⁷⁰ Cafritz, Tene, *supra note* 68, p.598.

⁷¹ Ch. 2, Sec. 5, Swedish Penal Code, SFS 1962:700, adopted 21 December 1962, entered into force 01 January 1965, available at: <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> (visited last: 15.08.2015).

continental European authors even considered this principle as having been derived from a State's inherent right of self-defense. However, this last assumption was rejected by common law authors since, according to Article 51 of the Charter of the United Nations ("UN Charter"), the inherent right of self-defense can only be exercised immediately if an armed attack occurs and until the UN Security Council ("SC") has taken measures necessary to maintain international peace and security⁷², while protective jurisdiction is exercised sometime after the criminal act has occurred.⁷³

Crimes, which can give rise to the protective jurisdiction usually include plots to overthrow governments, treason, espionage, forgery or the counterfeiting of foreign currency, making false statements in order to break immigration regulations, etc.⁷⁴ For example, Article 3 of the Criminal Code of Finland prescribes that:

"(1) Finnish law applies to an offence committed outside of Finland that has been directed at Finland.

(2) An offence is deemed to have been directed at Finland (1) if it is an offence of treason or high treason, (2) if the act has otherwise seriously violated or endangered the national, military or economic rights or interests of Finland, or (3) if it has been directed at a Finnish authority."⁷⁵

The protective principle has been criticized due to the fact that it provides a possibility of abuse by States. Some States might interpret the notion of "security" too broadly. The trials, involving the prosecution of crimes, which are usually amenable to the protective jurisdiction, are generally conducted in a politicized atmosphere, which is supported by the high condemnation from the side of the society, and therefore might have a dangerous influence on the fairness of the trial. The exercise of protective jurisdiction may also affect the diplomatic relationship between States, not only because of the concurrent jurisdiction over certain crimes, but also since crimes against the national security of a State may be supported by the foreign government.⁷⁶ At the same time, this principle must not be confused with diplomatic protection.

To sum up, the jurisdiction of a State is traditionally based on its sovereignty and generally requires a certain link to the prosecuting State, whether territorial, nationality-based or protective. However, as it will be shown in the following Chapters, universal jurisdiction is a special exception to this sovereignty-based, traditional rule in international law.

⁷² Art. 51, UN Charter, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI.

⁷³ Ryngaert, *supra note* 41, pp.96-97.

⁷⁴ Malanczuk, *supra note* 31, p.112.

⁷⁵ Ch. 1., Sec. 3, Criminal Code of Finland, ks. L 39/1889 s. 101, adopted 19 December 1889, entered into force 01 January 1891, available at: <http://www.legislationline.org/documents/section/criminal-codes> (visited last: 15.08.2015).

⁷⁶ Ryngaert, *supra note* 41, p.97.

Chapter II. Historical development of the principle of universal jurisdiction

“The question has [...] always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crime was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge.”⁷⁷

The aforementioned paragraph is taken from the Separate opinion of President Guillaume in the *Arrest Warrant case*, which suggests that intolerance towards impunity of perpetrators of the most serious crimes, which tried to avoid prosecution, has been the subject of doctrinal attention dating back to the 1600s. Already in the seventeenth century Hugo Grotius wrote that princes could offend “with more impunity than others” and impunity forever tempted sovereigns to deceive. Grotius dramatized a guaranteed international order in which faithful princes could share a “just Confidence in the Protection of Heaven” and in the face of which protection, unfaithful leaders ought to tremble.⁷⁸

Under the principle of universality, any State may exercise jurisdiction without the criminal conduct having any nexus to the prosecuting State. Judge Van den Wyngaert in his Dissenting opinion in the *Arrest Warrant case*, stated that:

“There is no accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways.”⁷⁹

Nevertheless, the Institut de Droit international (“IDI”) in its 2005 Resolution “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes” states that universal jurisdiction in criminal matters is an additional ground of jurisdiction, which means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.⁸⁰ Although it is clear that this Resolution is limited to crimes against humanity, genocide and war crimes, the definition contained in it reflects the prevailing view on what constitutes universal jurisdiction.

⁷⁷ Para 4, *Arrest Warrant case*, Separate opinion of President Guillaume, *supra note 65*, p.36.

⁷⁸ Christopher N. Warren, *Literature and the Law of Nations, 1580-1680*, OUP (2015), p.201.

⁷⁹ Para 44, *Arrest Warrant case*, Dissenting opinion of Judge Van den Wyngaert, *supra note 65*, p.165.

⁸⁰ Para 1, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Resolution of the Seventeenth Commission, IDI, Krakow, 26 August 2005, available at: http://www.idi-il.org/idiE/resolutionsE/2005_kra_03_en.pdf (visited last: 15.08.2015).

Similarly, principle 1(1) of the Princeton Principles on Universal Jurisdiction states that universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.⁸¹ At the same time, Judges Higgins, Kooijmans and Buergenthal in their Joint separate opinion in the *Arrest Warrant case* explained that the term “universal jurisdiction” is used to refer to “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events”.⁸²

It is difficult to identify with any precision when States first resorted to exercising universal jurisdiction. As early as 1912, the problems with the use of certain types of drugs were recognized as a matter of international concern, which led to the adoption of the first international instrument in this regard, the 1912 International Opium Convention.⁸³ Although it may be suggested that this Convention already pointed into direction of universality, it still only contained provisions prescribing States to take effective measures for the gradual and effective suppression of the manufacture of, international trade in, and use of prepared opium, as well as enact legislation, including pharmacy laws or regulations regarding the manufacture, sale, and use of morphine, cocaine and their respective salts, but did not contain any rules regarding the assertion of jurisdiction by States.⁸⁴

A. The emergence of universal jurisdiction: universal jurisdiction and the crime of piracy

Arguably the oldest and first widely acknowledged international offence where States applied universal jurisdiction is over the crime of piracy on the high seas, which has been traced back as early as the sixteenth century. The particular feature of pirates being able to escape territorial waters or commit serious crimes on the high seas – an area not belonging to any State’s jurisdiction based on the recognition of the principle of the Freedom of Seas – made it extremely hard to capture and prosecute them. Consequently, the common international interest to combat piracy lead States to extend their jurisdiction and piracy became punishable in domestic forums all over the world.⁸⁵ The experience and reality of international relations was such that it led to universal jurisdiction over the crime of piracy, perpetrated on the high seas, being established as a matter of customary international law.⁸⁶

⁸¹ Principle 1(1), The Princeton Principles, *supra note* 17, p.28.

⁸² Para 42, *Arrest Warrant case*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *supra note* 65, p.75.

⁸³ The International Opium Convention, adopted 23 January 1912, entered into force 11 February 1915, 8 LNTS 187.

⁸⁴ Art. 6, 9, The International Opium Convention, *Ibid.*

⁸⁵ Berg, *supra note* 39, pp.108-110.

⁸⁶ Inazumi, *supra note* 51, p.51.

In her research, Karen J. Berg suggests that the crime of piracy derives from municipal law. Prior to the 1958 Convention on the High Seas⁸⁷ and 1982 UN Convention on the Law of the Sea (“UNCLOS”)⁸⁸, which provided the framework for the repression of piracy under international law, it was considered to be solely a municipal crime, albeit on the basis of an extraordinary jurisdiction in every State. Indeed, piracy only obtained its international character, following the World War II with a gradual shift towards individual criminal responsibility in international law.⁸⁹

Following the general acceptance of the universality principle for piracy, States began to assert universal jurisdiction over slave trading. Slavery has been associated with piracy since 1815, when the Vienna Declaration of the Congress of Vienna equated traffic in slavery to piracy⁹⁰, although the 1926 Slavery Convention does not explicitly provide for universal jurisdiction, but expressly prescribes territorial jurisdiction.⁹¹ In addition, the 1935 Harvard Research on International Law argues that trafficking of women and children, counterfeiting and drug trafficking should also be subject to universal jurisdiction, being similar in gravity to the crime of piracy.⁹²

Mitsue Inazumi underlined that for crimes other than piracy universal jurisdiction was construed to be supplemental to traditional types of jurisdiction. For these crimes, the State could only choose to exercise universal jurisdiction if the State possessing jurisdiction based on the traditional link was unable to prosecute the criminal. Moreover, some States were of the view that a sufficient interest in the prosecution has to be shown under customary or conventional international law before exercising universal jurisdiction, and this may be understood as a right rather than an obligation of States (the so-called “permissive” jurisdiction). Inazumi further noted that this character of universal jurisdiction was understandable at that time due to its rather weak standing against other bases of jurisdiction.⁹³

Thus, it can be concluded that the exercise of universal jurisdiction over the crime of piracy at the beginning of the twentieth century was recognized as primarily permissive in character, while for all the other crimes, that were considered to fall under the universality principle, a permissive supplementary approach has been developed. As indicated, the legitimacy of universal jurisdiction

⁸⁷ Convention on the High Seas, adopted 29 April 1958, entered into force 30 September 1962, 450 UNTS 11.

⁸⁸ United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

⁸⁹ Berg, *supra* note 39, pp.110-114.

⁹⁰ M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*/ed. Stephen Macedo, University of Pennsylvania Press (2004), p.49.

⁹¹ Art. 2, 3, Slavery Convention, adopted 25 September 1926, entered into force 09 March 1927, 60 LNTS 254.

⁹² Harvard Research, *supra* note 54, pp.569-572.

⁹³ Inazumi, *supra* note 51, pp.52-54.

over piracy has been recognized and, according to Article 105 of the UNCLOS, to which 167 States are party⁹⁴:

“On the high seas, or in any other place outside the jurisdiction of any State, every State *may* seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure *may* decide upon the penalties to be imposed, and *may* also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”⁹⁵ [Emphasis added]

Even though Article 105 of UNCLOS clearly permits the assertion of universal jurisdiction for the suppression of piracy, the United Nations Office on Drugs and Crime (“UNODC”) in one of its Issue Papers devoted to the counter-piracy campaign off the coast of Somalia research, pointed out the fact that the amount of prosecutions of suspected pirates nowadays remains very low in comparison with the number of actual attacks. Of all cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent of cases.⁹⁶

B. Universal jurisdiction in the post-World War II period

i. War crimes

In the aftermath of the mass atrocities, which took place during World War II, the universality principle resurfaced in order to bring war criminals to justice. Already in 1945 Willard B. Cowles, who is regarded as coining the term “universal jurisdiction”, worked on answering the question whether the jurisdictional principle of universality was applicable to the punishment of war criminals. In fact, Cowles viewed war crimes as being very similar to the crime of piracy, except that they usually took place on land rather than at sea. Both crimes were similar due to the lack of any adequate judicial system operating in the place where the crime was perpetrated, either on the high seas or in the territory of the country at the time of war, which pirates and war criminals took advantage of, hoping to avoid prosecution. Consequently, relying on the *Lotus case*, Cowles reached the conclusion that under international law, any independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed.⁹⁷

⁹⁴ UNCLOS, Status, Website of the UNTC, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (visited last: 15.08.2015).

⁹⁵ Art. 105, UNCLOS, *supra note* 88.

⁹⁶ Combating Transnational Organized Crime Committed at Sea, Issue Paper, UNODC, March 2013, available at: http://www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf (visited last: 15.08.2015).

⁹⁷ Willard B. Cowles, Universality of Jurisdiction over War Crimes, *California Law Review*, vol. 33, issue 2 (June 1945), pp.178, 194, 218.

In turn, Matthew Garrod challenged the common understanding that universality jurisdiction emerged over war crimes after World War II. Garrod argued that war crimes, as well as crimes against peace and crimes against humanity carried out during World War II were different in character from piracy because they were committed as part of official State policy, and jurisdiction over war crimes is better explained as an important development of the protective principle of jurisdiction.⁹⁸

Some other authors were of the opinion that the prosecution of war crimes was the exercise of universal jurisdiction since the Allied States were neither the States in which the crimes had been committed, nor of which suspects were nationals. According to Inazumi, those trials were based on territorial jurisdiction or passive personality links as cases heard by military tribunals are usually related to offences against a country's own nationals. Inazumi suggested that it is difficult to presume that the application of universal jurisdiction over war crimes immediately after the War acquired the status of customary international law.⁹⁹ Berg acknowledged that relatively few judgments of that time actually referred to the concept of universality in an explicit or implicit manner, and most courts and tribunals exercised their jurisdiction based on various combinations of different types of jurisdiction and sometimes not specifying the jurisdictional basis at all.¹⁰⁰

Nevertheless, Articles 49, 50, 129 and 146 of all four 1949 Geneva Conventions contain the same paragraph 2, which prescribes the following:

“Each High Contracting Party *shall be under the obligation* to search for persons alleged to have committed, or to have ordered to be committed, such *grave breaches*, and shall bring such persons, regardless of their nationality, *before its own courts*. It *may* also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case”.¹⁰¹ [Emphasis added]

Three particular features of this provision are crucial. Firstly, it refers to the obligation to prosecute war crimes, while extradition of a war criminal in this particular case is considered as a right. Secondly, the obligation to prosecute extends only to grave breaches, but not all war crimes. Thirdly, this obligation to prosecute as such implies that the jurisdiction must be established, so that war criminals can be tried before the States' domestic courts. However, this last point has been

⁹⁸ Garrod, *supra* note 5, pp.763, 771.

⁹⁹ Inazumi, *supra* note 51, pp.56-57.

¹⁰⁰ Berg, *supra* note 39, p.126.

¹⁰¹ Para 2, Art. 49, (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 31; Para 2, Art. 50, (II) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85; Para 2, Art. 129, (III) Geneva Convention Relative to the Treatment of Prisoners of War, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 135; Para 2, Art. 146, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 287.

contested by a number of commentators who argue that since universal jurisdiction is not mentioned explicitly, it is not prescribed.¹⁰²

Nevertheless, this paragraph may be considered to place an obligation on High Contracting Parties to establish the necessary jurisdictional basis, enabling them to bring those responsible before their courts. In reaching this conclusion, the *travaux préparatoires* of the Geneva Conventions played a decisive role. At the Conference where the Geneva Conventions were concluded, the Russian delegate Mr. Morosov proposed an amendment to the aforementioned paragraph, referring to the Memorandum drawn by the United Kingdom (“UK”) Delegation, which was not disclosed at the time. Consequently, the UK delegate Ms. Gutteridge presented an explanatory note as follows:

“If the High Contracting Parties carry out their obligations, under the first paragraph of this Article, to enact any legislation necessary to provide effective penal sanctions for persons committing ...etc., grave breaches of the Convention, it necessarily follows that they will be able to bring before their Courts any such persons. In other words, if a specified act is penal offence under the law of any State (either because of express legislation or because of an international treaty, which has become part of the law of such a State), it is obvious that the Courts of such a State will have jurisdiction to try any person committing such an offence.”¹⁰³

Richard van Elst underlined that if States are able to prosecute all those responsible for grave breaches “regardless of their nationality”, universal jurisdiction is indispensable. The broad scope of the obligation to bring those responsible “before its own courts” means that it is only possible to meet this requirement by providing jurisdiction over everybody. Therefore, Elst also supported the idea that the Geneva Conventions contain an obligation to establish universal jurisdiction, which was included with the ultimate aim of ending the *de facto* impunity that existed with regard to violations of humanitarian law prior to the World War II.¹⁰⁴

Moreover, Article 85(1) of the I Protocol Additional to the Geneva Conventions, adopted in 1977, also prescribes universal jurisdiction by providing that “[t]he provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol”.¹⁰⁵ Consequently, based on all four Geneva Conventions together with the I Additional Protocol, as well as customary international law, it is nowadays accepted that States have the right to vest universal jurisdiction in their national courts

¹⁰² Inazumi, *supra note* 51, p.57.

¹⁰³ Joice A.C. Gutteridge, UK, Twenty-Second Meeting, 01 August 1949, Final Record of the Diplomatic Conference of Geneva of 1949, vol. 2, section B, Berne, Federal Political Department, p.364.

¹⁰⁴ Richard van Elst, Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions, *Leiden Journal of International Law*, vol. 13, issue 4 (December 2000), pp.821, 824, 850.

¹⁰⁵ Art. 85(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 08 June 1977, entered into force 07 December 1978, 1125 UNTS 3.

for war crimes committed in both international and non-international armed conflicts.¹⁰⁶ However, despite these promising developments, only few countries, parties to the Geneva Conventions, have, in practice, fulfilled their obligation to establish universal jurisdiction over grave breaches.

ii. Genocide

Following the mass atrocities committed during World War II, the UN GA Resolution 96(I) of 11 December 1946, affirmed that genocide is a crime under international law which the civilized world condemns¹⁰⁷, while the UN GA Resolution 180(II), adopted on 21 December 1947, recognized that genocide is an international crime, which entails the national and international responsibility of individual persons and States.¹⁰⁸ The Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), adopted one year later, was among the first UN Conventions addressing humanitarian issues. Particularly interesting for the research in question, is Article VI of the Genocide Convention, which stipulates that:

“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”¹⁰⁹

It is clear that the text of the Convention implies two possible options for the prosecution of genocide – territorial jurisdiction and the jurisdiction of a certain international criminal court, which was still not created at the time. However, perhaps most importantly, this raises the question as to whether this provision prohibits the exercise of universal jurisdiction?

Probably the most famous exercise of universal jurisdiction for genocide was the Israeli prosecution of Karl Adolf Eichmann for his part in the liquidation of the Jews during World War II. Eichmann, the former head of the Jewish Department in the Reich Security Main Office, was captured by a team of Israeli intelligence operatives in Buenos Aires, Argentina, in 1960 and taken to Israel to stand trial for his role in the Holocaust, crimes against Jewish people and against humanity.¹¹⁰ Eichmann is the first reported judgment based upon the provisions of the 1948 Genocide Convention. Although the trial had to deal with a number of difficult issues, such as exercise of jurisdiction where the accused person has been brought before the court unlawfully, and the prosecution of offences not

¹⁰⁶ Jean-Marie Henckaerts, Louise Doswald-Beck, *Jurisdiction over War Crimes, Rules of Customary International Humanitarian Law, Vol. I: Rules*, International Committee of the Red Cross, Cambridge University Press (2005), pp.604-605.

¹⁰⁷ *The Crime of Genocide*, Res. 96(I), UN GA, 11 December 1946.

¹⁰⁸ *Draft Convention on Genocide*, Res. 180(II), UN GA, 21 December 1947.

¹⁰⁹ Art. VI, *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 09 December 1948, entered into force 12 January 1951, 78 UNTS 277.

¹¹⁰ Neil Gregor, Bridget Heal, *The Eichmann Trial Fifty Years On*, *German History*, vol. 29, issue 2 (2011), p.265.

codified at the time they were perpetrated¹¹¹, for the purposes of this Thesis only the questions relating to the application of the principle of universal jurisdiction will be discussed.

The negotiating history of the Genocide Convention reveals that States failed to agree on the inclusion of the principle of universal jurisdiction in its Article VI, which was in particular driven by the strong opposition of the superpowers, being afraid of ending up at the receiving side of universal jurisdiction exercised by the other.¹¹² The *travaux préparatoires* of the Genocide Convention indicate that the US delegate in response to the Iran amendment proposing the inclusion of universal jurisdiction even referred to it as “one of the most dangerous and unacceptable of principles”, while the Soviet Union was of the opinion that universal jurisdiction violated State sovereignty and State equality.¹¹³ Consequently, Eichmann tried to challenge the Israeli jurisdiction by contesting:

“If the UN failed to give their support to universal jurisdiction by each country to try a crime of genocide committed outside its boundaries, but has expressly provided that, in the absence of an international criminal tribunal, those accused of this crime shall be tried by “a competent court of the country in whose territory the act was committed”, how may Israel try the Accused for a crime that constitutes “genocide”?”¹¹⁴

In dismissing this argument, the District Court of Jerusalem relied upon the conclusions of the 1951 Advisory Opinion of the ICJ case Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, which had declared that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligation” and “was therefore intended...to be definitely universal in scope”.¹¹⁵ As a result, the District Court of Jerusalem interpreted the territorial jurisdiction prescribed in Article VI of the Genocide Convention as being nothing more than a “compulsory minimum”, but not preventing the possibility of application of universal jurisdiction:

“It is consensus of opinion that the absence from this Convention of a provision establishing the principle of universality (and, with that, failure to constitute an international criminal tribunal) is a grave defect in the Convention which is likely to weaken the joint efforts for the prevention of the commission of this abhorrent crime and the punishment of its perpetrators,

¹¹¹ L.C.Green, The Eichmann Case, *The Modern Law Review*, vol. 23, issue 5 (September 1960), p.507.

¹¹² William A. Schabas, The Contribution of the Eichmann Trial to International Law, *Leiden Journal of International Law*, vol. 26, issue 3 (September 2013), p.689.

¹¹³ Hiram Abtahi, Philippa Webb, The Genocide Convention: The *Travaux Préparatoires*, Martinus Nijhoff Publishers (2008), pp.1721, 1725.

¹¹⁴ Para 20, *Attorney General of the Government of Israel v Eichmann*, Judgment of the District Court of Jerusalem, Criminal Case №40/61, 11 December 1961, p.15, available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf (visited last: 15.08.2015).

¹¹⁵ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, Advisory Opinion, 28 May 1951, ICJ Reports (1951), p.15.

but there is nothing to this defect to make us deduce any tendency against the principle of the universality of jurisdiction with respect to the crime in question.”¹¹⁶

Although such assumption did not seem illogical at first glance, it is inconsistent with the language and negotiating history of the Genocide Convention. However, supporters of the Israeli position in the legal community raised the argument that Eichmann himself was not entitled to contest the exercise of jurisdiction by Israel as, in their view, it could only be invoked by Germany, his State of nationality.¹¹⁷

On the other hand, it was argued that Israel did not exist as a State at the time the crime was committed, so the subject of the crime was not an Israeli or against the interests of Israel, and therefore it cannot exercise universal jurisdiction in this case. However, it is difficult to agree with such conclusions. The application of the passive personality jurisdiction or protective principle by Israel could have been contested as going beyond the scope of the relevant rules of jurisdiction, but universal jurisdiction is not limited to States that existed at the time the crime took place since all States have an interest in punishing crimes that are of international concern without any territorial or time limits.¹¹⁸

As William Schabas pointed out, the pronouncements on universal jurisdiction in the *Eichmann case* are probably the most influential finding of the judgments. The legal reasoning was flimsy, and yet it was almost immediately accepted as a precedent in international law.¹¹⁹ Notably, in the absence of an international criminal judicial body, this left the prosecution of genocide under the Genocide Convention to the traditional territorial jurisdiction. Some States hesitated to exercise universal jurisdiction despite the fact that the crime of genocide was condemned by the international community. More recently, acting under the principle of universal jurisdiction, domestic prosecutions took place for crimes committed in the former Yugoslavia and Rwanda. With the similar reasoning as the Jerusalem court in the *Eichmann case*, Austria’s Supreme Court in its judgment in the *Cvjetković case* (1994) held that Austrian courts were entitled to exercise jurisdiction over the accused under Article VI of the 1948 Genocide Convention.¹²⁰

iii. Protection of cultural property

Grave destruction of numerous historic monuments during World War II and the weakness of legal procedures in the post-war era for the protection of cultural property, including the absence of

¹¹⁶ Para 25, *Attorney General of the Government of Israel v Eichmann*, *supra* note 114.

¹¹⁷ Schabas, *supra* note 112, p.691.

¹¹⁸ Inazumi, *supra* note 51, p.66.

¹¹⁹ Schabas, *supra* note 112, p.693.

¹²⁰ *The Prosecutor's Office of Salzburg v. Duško Cvjetković*, Supreme Court of Austria, Verdict on Jurisdiction, 15Os99/94, 13 July 1994, available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Austria/Cvjetkovic_ObersterGerichtshof_Judgement_13-7-1994.pdf (visited last: 15.08.2015).

any such provisions in the 1949 Geneva Conventions, led to the adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”).¹²¹ According to Article 28 of the 1954 Hague Convention:

“The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.”¹²²

It is clear that Convention leaves it to States Parties to implement the obligations to protect cultural property by means of their national law. In addition, Article 28 of the 1954 Hague Convention imposes an obligation on States to prosecute and punish those persons, who commit breaches of the Convention, regardless of their nationality, although it does not specify the list of crimes or offences it applies to, nor sets the procedural aspects of sanctions.¹²³ As a consequence, the system of protection under the 1954 Hague Convention did not prove to be successful and it was not until the 1999 Second Protocol to the 1954 Hague Convention (“1999 Second Protocol”)¹²⁴, when a greater number of penal elements for the protection of cultural property was developed.

Unlike the 1954 Hague Convention, the 1999 Second Protocol distinguishes between “serious violations” and “other violations”. A “serious violation” occurs when a person intentionally and in violation of the Convention and the 1999 Second Protocol commits one of the acts prescribed in Article 15(1) of the 1999 Second Protocol, namely: a) making cultural property under enhanced protection the object of attack; b) using cultural property under enhanced protection or its immediate surroundings in support of military action; c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d) making cultural property protected under the Convention and this Protocol the object of attack; e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.¹²⁵ The so-called “other violations” are set in Article 21 of the 1999 Second Protocol.¹²⁶

Undoubtedly, an important achievement of the 1999 Second Protocol is that it clearly requires States to take the necessary steps to establish jurisdiction in case “serious violations” found in Article 15(1) take place. Accordingly, without prejudice to Article 28 of the 1954 Hague Convention, Article 16 of the 1999 Second Protocol provides that territorial jurisdiction shall be exercised when an offense

¹²¹ The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, entered into force 07 August 1956, 249 UNTS 240.

¹²² Art.28, 1954 Hague Convention, *Ibid.*

¹²³ Jan Hladik, Protection of Cultural Property: The Legal Aspects, *International Law Studies*, vol. 80 (2006), p.326.

¹²⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted 26 March 1999, entered into force 09 March 2004, 2253 UNTS 179.

¹²⁵ Art. 15(1), 1999 Second Protocol, *Ibid.*

¹²⁶ Art. 21, 1999, Second Protocol, *Ibid.*

is committed in the territory of that State, active personality jurisdiction – when the alleged offender is a national of that State, while universal jurisdiction is provided for in the case of offences set forth in Article 15 subparagraph (a) to (c), but on the condition that the alleged offender is present in the territory of the State asserting jurisdiction.¹²⁷

The 1999 Second Protocol is also quite specific in its articulation that the State Parties must either prosecute¹²⁸ or extradite¹²⁹ any person found in its territory that has violated Article 15 (a)-(c), which identifies the “serious violations” that allow for the exercise of universal jurisdiction. The Protocol establishes individual criminal responsibility for persons who violate its provisions¹³⁰, but, by virtue of the Protocol, neither individual members of the armed forces, nor nationals of a State that is not party to the 1999 Second Protocol incur individual criminal responsibility, nor does it impose an obligation to establish jurisdiction over such persons or to extradite them. However, nationals of a State that is not a party to the Second Protocol will incur individual criminal responsibility while serving in the armed forces of another State Party.¹³¹

The exercise of universal jurisdiction often takes the form of States adopting new laws assuming jurisdiction over specific offences regardless of the place where the crime was committed, nationality of the perpetrator or the victim.¹³² States under the 1999 Second Protocol are obliged to adopt whatever measures are necessary to establish “serious violations” as criminal offences under their national law and to make the offences punishable by appropriate penalties. Most importantly, Article 16 of the 1999 Second Protocol explicitly provides for States to exercise universal jurisdiction in the case of offences set forth under Article 15(a)-(c) and the alleged offender is present in the territory of the State asserting jurisdiction.

C. The extension of universal jurisdiction in conventional international law since 1970s

The period after World War II witnessed development in international treaty law substantiating the expanded use of universal jurisdiction in respect to terrorist activities and certain human rights violations. Kenneth C. Randall argued that:

“Terrorists and human rights offenders are comparable to pirates, slave traders, and war criminals because their offences involve particularly reprehensible acts that often indiscriminately endanger human rights and property interests. Terrorism and human rights

¹²⁷ Art. 16, 1999 Second Protocol, *Ibid.*

¹²⁸ Art. 17, 1999 Second Protocol, *Ibid.*

¹²⁹ Art. 18, 1999 Second Protocol, *Ibid.*

¹³⁰ Art. 16(2)(a), 1999 Second Protocol, *Ibid.*

¹³¹ M. Cherif Bassiouni, *International Criminal Law*, 3rd ed., vol. 1, Sources, Subjects, and Contents, Martinus Nijhoff Publishers (2008), pp.987-988.

¹³² Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Research in the Law of Armed Conflict, Routledge, Taylor & Francis Group (2011), p.7.

violations are thus the concern of the world's legal system rather than the sole province of individual States.”¹³³

i. Apartheid

With the adoption of the 1974 International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”)¹³⁴, the exercise of universal jurisdiction for the crime of apartheid received a solid foundation in international law. The Apartheid Convention declares that apartheid is a crime against humanity and that “inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination” are international crimes.¹³⁵ Although, as M. Cherif Bassiouni correctly points out, “apartheid is now a thing of the past in the land of its birth”¹³⁶, it is nevertheless necessary for the purpose of this Thesis to analyze how the principle of universal jurisdiction is espoused in the Apartheid Convention.

Article IV of the Apartheid Convention prescribes that the State Parties to the Convention “undertake to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in Article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons”¹³⁷. Furthermore, Article V of the Convention stipulates that:

“Persons charged with the acts enumerated in Article II of the present Convention *may* be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction”.¹³⁸[Emphasis added]

The Apartheid Convention therefore allows State Parties to prosecute non-nationals for a crime committed in the territory of a non-State Party where the accused is physically present within the jurisdiction of a State Party. It may be observed that the wording of the Apartheid Convention has certain interesting similarities and differences with the Genocide Convention discussed above. Both Conventions refer to the power of an international tribunal to prosecute, which was not yet in existence. However, if the Genocide Convention relies primarily on the territoriality principle, the Apartheid Convention proceeds on the basis of universality.¹³⁹ At the same time, the reference to

¹³³ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, *Texas Law Review*, vol. 66 (1988), p.815.

¹³⁴ International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, entered into force 18 July 1976, 1015 UNTS 243.

¹³⁵ Art. I, Apartheid Convention, *Ibid.*

¹³⁶ Referring to South Africa. Bassiouni, vol. 1, 2008, *supra note* 131, p.600.

¹³⁷ Art. IV, Apartheid Convention, *supra note* 134.

¹³⁸ Art. V, Apartheid Convention, *supra note* 134.

¹³⁹ Bassiouni, vol. 1, 2008, *supra note* 131, p.611.

“may” in the Apartheid Convention determines permissive universal jurisdiction, while most other Conventions, discussed in this Chapter, prescribe obligatory universal jurisdiction. However, as of August 2015, the Apartheid Convention has only been ratified by 109 States.¹⁴⁰

ii. Torture

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”)¹⁴¹ is the most comprehensive international treaty dealing with torture. According to Article 2(2) of the Convention, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.¹⁴² As a consequence, the UN Convention against Torture obliges States to ensure that all acts of torture are offences under their national criminal law, subject to appropriate penalties, as well as prescribes the rules for establishing jurisdiction over those alleged to have committed or attempted to commit torture.¹⁴³

The UN Convention against Torture establishes the basic principles of territoriality, active and passive personality for the prosecution of torture.¹⁴⁴ At the same time, the principle of universal jurisdiction constitutes one of the most important aspects of the Convention as it obligates States Parties to exercise jurisdiction over alleged perpetrators of the crime of torture, found in its territory, irrespective of any other links with the country asserting jurisdiction. Moreover, if the State is unable or unwilling to prosecute the offence, it is required to extradite the alleged perpetrator to a State which is able and willing to prosecute such a crime.¹⁴⁵

Although the presence requirement may seem rather straightforward at the first glance, it remains unclear at which particular stage of proceedings it would be necessary for the alleged offender to be present in the territory of the prosecuting State and whether the obligation of States Parties to initiate investigations arises with the presence of the alleged offender or as early as such presence can be anticipated, and, moreover, if it may be established by extradition. State practice varies dramatically in this respect. Berg points out that while Denmark is an example of a State with a very strict reading of the presence requirement, the Spanish authorities by contrast are willing to forcibly bring about an alleged offender’s presence through extradition as soon as they are informed

¹⁴⁰ Apartheid Convention, Status, Website of the UNTC, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&lang=en (visited last: 15.08.2015).

¹⁴¹ The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.

¹⁴² Art. 2(2), Convention against Torture, *Ibid.*

¹⁴³ Art. 4, Convention against Torture, *Ibid.*

¹⁴⁴ Art. 5(1), Convention against Torture, *Ibid.*

¹⁴⁵ Art. 5(2), 6(1), 7(1), Convention against Torture, *Ibid.*

about his or her presence in the country with which Spain has an extradition agreement.¹⁴⁶ The topic of the exercise of the universal jurisdiction *in absentia* will be discussed in more detail below.

Although the UN Convention against Torture entered into force in 1987, it was not until 7 April 2004 when the first ever judgment was rendered under universal jurisdiction provisions of the UN Convention against Torture by the Rotterdam District Court in the Netherlands, a country which initially opposed the inclusion of provisions on universality in the Convention for this particular type of crime. The case concerned Congolese national Sebastien N., prosecuted for complicity in acts of torture committed in the former Republic of Zaire (currently – the DRC) in 1996 and involving the ill-treatment of a man who was in charge of clearing goods through customs. Both the perpetrator and the victim were Congolese citizens and the crime was committed on the territory of Zaire as it was then known. However, Sebastien N. fled and sought asylum in the Netherlands; and, consequently, the Rotterdam Court could base its competence to prosecute the alleged offender on the universal jurisdiction provisions of the Dutch Torture Convention Implementation Act.¹⁴⁷

Nevertheless, M. Cherif Bassiouni emphasized an interesting aspect of the Sebastien N. case, *i.e.*, the extent to which the purpose of the perpetrator is a meaningful element in defining torture. The victim refused to clear the car of a friend of N. through customs without the payment of shipping costs and was thereupon imprisoned and tortured. Under such circumstances, it might be asserted that N. had apparently acted out of a desire to gain a certain financial benefit for his acquaintance. As a result, Bassiouni suggested that the actions of N. are an especially violent instance of extortion for private purposes committed with public means.¹⁴⁸ This raises the question as to whether such behavior falls within the definition of torture provided for in the UN Convention against Torture. The definition found in Article 1 of the Convention contains three major elements for an act to be considered as torture: 1) the intentional infliction of severe mental or physical suffering; 2) by a public official, who is directly or indirectly involved; 3) for a specific purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.¹⁴⁹

The Court in the Sebastien N. case did not directly address this issue of the private *versus* public goals, but nevertheless underlined the involvement of the State official and the feeling of helplessness and powerlessness suffered by the victim. This approach appears to be in conformity

¹⁴⁶ Berg, *supra note* 39, pp.174-175; 212-213.

¹⁴⁷ Menno T. Kamminga, First Convection Under the Universal Jurisdiction Provisions of the UN Convention Against Torture, *Netherlands International Law Review*, vol. 51, issue 3 (2004), pp.439-441.

¹⁴⁸ M. Cherif Bassiouni, *International Criminal Law*, 3rd ed., vol. 3, International Enforcement, Martinus Nijhoff Publishers (2008), p.387.

¹⁴⁹ Art. 1, Convention against Torture, *supra note* 141.

with the Convention's text, for which public officials shall be punished for coercing the victim.¹⁵⁰ In fact, this case demonstrates that universal jurisdiction can help to fill the impunity gap and bring torturers to justice even subject to some restrictions, such as the presence requirement, which will also be further analyzed below.

iii. Enforced disappearance

An increasingly widespread and particularly grave issue of enforced disappearance has for many years been on the agenda on the UN Human Rights Commission and subject of its numerous Resolutions, particularly following the establishment of the Working Group on Enforced and Involuntary Disappearances in 1980.¹⁵¹ Nevertheless, the absence of a legally binding instrument left a gap in the international framework for the protection of human rights, since there was no explicit right not to be subject to enforced disappearance, which was additionally frustrated by the absence of a criminal offence that reflected all of the elements that would comprise an enforced disappearance.¹⁵² It was the Report submitted by Manfred Nowak in 2002¹⁵³ which identified existing gaps in international protection of persons from enforced disappearances, one of the most serious human rights violations, which constitutes a crime against humanity, and prompted the work of the Commission on a legally binding normative instrument in this area, leading to the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006 ("Enforced Disappearance Convention").¹⁵⁴ Moreover, in his Report Professor Nowak concluded that:

"Since the protection of international criminal law will only apply in exceptional cases, universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future."¹⁵⁵

Article 4 of the Enforced Disappearance Convention places an obligation on each States Parties to criminalize enforced disappearance in domestic law¹⁵⁶, while Article 9(1) of the Convention provides for the assertion of jurisdiction based on principles of territoriality, active and passive

¹⁵⁰ Bassiouni, vol. 3, 2008, *supra note* 148, p.387.

¹⁵¹ Question of missing and disappeared persons, Res. 20 (XXXVI), UN Human Rights Committee, 29 February 1980, UN Doc. E/CN.4/RES/1980/20.

¹⁵² Susan McCrory, The International Convention for the Protection of all Persons from Enforced Disappearance, *Human Rights Law Review*, vol. 7, issue 3 (2007), p.547.

¹⁵³ Manfred Nowak, Report of the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances pursuant to paragraph 11 of Commission resolution 2001/46, 08 January 2002, UN Doc. E/CN.4/2002/71.

¹⁵⁴ International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entered into force 23 December 2010, 2716 UNTS 3.

¹⁵⁵ Para 96, Nowak, *supra note* 153, p.39.

¹⁵⁶ Art. 4, Enforced Disappearance Convention, *supra note* 154.

personality.¹⁵⁷ During the negotiating history of the Convention, a certain emphasis was placed on the role of individual States in prosecuting alleged offenders for acts of enforced disappearance:

“Some participants said that it was always preferable, especially for the victims, to hold trials in States where the enforced disappearance had occurred. The jurisdiction of other States was provided for only as an additional possibility. States should therefore be encouraged to take steps at the internal level with a view to investigation and prosecution”.¹⁵⁸

Certainly, there are many advantages for the prosecuting States based on traditional types of jurisdiction, as discussed above, but it would seem that States are often unwilling to prosecute persons for acts of enforced disappearance. For such situations, Article 9(2) of the Convention provides that:

“Each State Party *shall* likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.”¹⁵⁹ [Emphasis added]

Kirsten Anderson drew attention to the use of “shall” in this provision, which leads to the conclusion that Convention clearly provides for mandatory universal jurisdiction in contrast to customary international law relating to enforced disappearances, which establishes universal jurisdiction as permissive rather than mandatory. The problem is that there needs to be a distinction between a duty to establish jurisdiction and a duty to prosecute, which will also be discussed in more detail below. In addition, it may be noted that the Enforced Disappearance Convention effectively criminalizes enforced disappearance *per se* under international law, and may lead States to exercise jurisdiction even if acts do not constitute crimes against humanity or amount to torture.¹⁶⁰

Similar to the Convention against Torture, the provisions on universal jurisdiction contained in the Enforced Disappearance Convention establishes the presence requirement, and a duty to prosecute or extradite an alleged perpetrator.¹⁶¹ In the course of discussions that took place within the Commission on Human Rights prior to the adoption of the Enforced Disappearance Convention, the *aut dedere aut judicare* principle was raised in order “to eliminate access to sanctuaries for the

¹⁵⁷ Art. 9(1), Enforced Disappearance Convention, *supra note* 154.

¹⁵⁸ Para 59, Bernard Kessedjian, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, Civil and political rights, including the question of enforced or involuntary disappearances, UN Economic and Social Council, 12 February 2003, UN Doc. E/CN.4/2003/71, p.13.

¹⁵⁹ Art. 9(2), Enforced Disappearance Convention, *supra note* 154.

¹⁶⁰ Kirsten Anderson, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, *Melbourne Journal of International Law*, vol. 7 (2006), p.32.

¹⁶¹ Art. 11(1), Enforced Disappearance Convention, *supra note* 154.

perpetrators of enforced disappearances”.¹⁶² It is thus generally accepted that the duty to extradite or prosecute complements universal jurisdiction with the ultimate goal of preventing States from sheltering perpetrators of the crime of enforced disappearance.

iv. Other crimes

As has been seen under the aforementioned Conventions, it is apparent that the *aut dedere aut judicare* principle may give rise to the exercise of universal jurisdiction as similarly provided for, *inter alia*, under the following provisions:¹⁶³

- Article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents: “[t]he State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State”¹⁶⁴;

- Article 10(4) of the Convention on the Safety of UN and Associated Personnel¹⁶⁵, which provides that each State Party shall take such measures as may be necessary to establish its jurisdiction over certain crimes against UN and associated personnel listed in Article 9(1) of the Convention (murder, kidnapping or other attack upon the person or liberty of any UN associated personnel etc.)¹⁶⁶ in cases when the alleged offender is present in its territory and it does not extradite such person pursuant to Article 15¹⁶⁷ to any of the States Parties which have established their jurisdiction based on the traditional principles of territoriality, active and passive nationality, or in attempt to compel that State to do or to abstain from doing any act;

- Convention for the Suppression of Unlawful Seizure of Aircraft and Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation contain identical Article 7: “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution”¹⁶⁸;

- Article 6(4) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation: “[e]ach State Party shall take such measures as may be necessary to establish

¹⁶² Para 65, Kessedjian, *supra note* 158, p.14.

¹⁶³ This list is not exhaustive.

¹⁶⁴ Art. 7, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted 14 December 1973, entered into force 20 February 1977, 1035 UNTS 167.

¹⁶⁵ Art. 10(4), Convention on the Safety of UN and Associated Personnel, adopted 09 December 1994, entered into force 15 January 1999, 2051 UNTS 363.

¹⁶⁶ Art. 9(1), Convention on the Safety of UN and Associated Personnel, *Ibid.*

¹⁶⁷ Art. 15, Convention on the Safety of UN and Associated Personnel, *Ibid.*

¹⁶⁸ Art. 7, Convention for the Suppression of Unlawful Seizure of Aircraft, adopted 16 December 1970, entered into force 14 October 1971, 860 UNTS 105; Art. 7, Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation, adopted 23 September 1971, entered into force 26 January 1973, 974 UNTS 178.

its jurisdiction over the offences set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the State Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this Article”.¹⁶⁹

- Article 8(1) of the International Convention Against Taking of Hostages (“Hostages Convention”): “[t]he State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State”¹⁷⁰;

- Article 7(4) of the International Convention for the Suppression of the Financing of Terrorism: “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.”¹⁷¹

The purpose of this Chapter was to discuss the evolution of universal jurisdiction commencing with an examination of the crime of piracy under customary international law, followed by discussion on the reluctance of certain States to prosecute criminals under the heading of universal jurisdiction after World War II, to the most recent trend of extending the application of the universality principle in international law. Despite the gradual recognition of universal jurisdiction among members of the international community, application of the principle has been the subject of considerable debate and this will be the focus of the next Chapter.

Chapter III. Application of the principle of universal jurisdiction

As indicated above, the scope and application of the principle of universal jurisdiction is currently on the agenda of the UN Sixth Committee, which was preceded by a long discussion on whether or not the appropriate forum for this topic is within the International Law Commission (“ILC”) or the Legal Committee. In the course of discussions, most delegations affirmed that the principle of universal jurisdiction is enshrined in international law and constitutes an important tool in the fight against impunity for serious international crimes.¹⁷² However, there remain many ambiguities and inconsistencies in its application, which this Chapter aims to clarify.

¹⁶⁹ Art. 6(4), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted 10 March 1988, entered into force 01 March 1992, 1678 UNTS 221.

¹⁷⁰ Art. 8(1), International Convention Against Taking of Hostages, adopted 17 December, entered into force 03 June 1983, 1316 UNTS 205.

¹⁷¹ Art.7(4), International Convention for the Suppression of the Financing of Terrorism, adopted 09 December 1999, entered into force 10 April 2002, 2178 UNTS 197.

¹⁷² The scope and application of the principle of universal jurisdiction, Agenda item 84, Sixty-fourth session, Legal – Sixth Committee, UN GA, available at: <http://www.un.org/en/ga/sixth/64/UnivJur.shtml> (visited last: 15.08.2015).

A. Universal jurisdiction and customary international law

As discussed, under international law there are two approaches to the question of jurisdiction, which States can adopt. States may either exercise jurisdiction at their own discretion, unless there is a prohibitive rule to the contrary (as elaborated in the *Lotus case*), or States are prohibited from exercising jurisdiction at their own discretion, unless there is permissive rule to the contrary. *Prima facie* there are no limits imposed by customary international law on the extent of a State's criminal jurisdiction. As Inazumi correctly points out, apart from the need to abide by the obligations imposed by treaties or other rules under customary international law, States are free to determine the limitations of their own jurisdiction reflecting the principle of State sovereignty.¹⁷³

During the negotiation and drafting of multilateral Conventions mentioned above, a number of States were of the view that universal jurisdiction undermines State sovereignty and State equality. However, it is difficult to agree with such conclusions. In the case where a State asserts jurisdiction based on the principle of universality, it is the judicial body of that State which exercises jurisdiction over an alleged offender and this does not impair the sovereignty of the other State. The violation of State sovereignty can only take place if the State exercising jurisdiction conducts an investigation or arrests an alleged offender in the territory of another State without its consent. Nevertheless, there is still an open discussion about extraterritorial jurisdiction and impairment of sovereignty.

A difficulty with State equality is rooted in the perception that putting individuals on trial may be equated with judging the act of another State, especially if the accused is an agent of the State. However, it should be kept in mind that a consequence of State equality is that a State enjoys immunity in respect of itself and its property, from the jurisdiction of the courts of another State¹⁷⁴ and although the prosecution of individuals might indirectly relate to certain responsibilities of the State, it is not the State itself who is the actual defendant before the national courts exercising universal jurisdiction. As Inazumi concluded, it is the problem of the relationship with and adjustment to other rules of international law (like jurisdictional immunities) and the means of exercising universal jurisdiction which should be analyzed in each individual case, but it does not lead to the conclusion that universal jurisdiction is inherently in conflict with the principle of State equality.¹⁷⁵

In the absence of a specific rule prohibiting universal jurisdiction and given the wide discretion States enjoy in establishing rules for jurisdiction in their domestic law, it is considered that the approach developed in the *Lotus case* shall be applied to the notion of universal jurisdiction. In

¹⁷³ Inazumi, *supra note* 51, pp.132-133.

¹⁷⁴ Art. 5, UN Convention on Jurisdictional Immunities of States and Their Property, adopted 02 December 2004, not yet in force, available at: http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf (visited last: 15.08.2015).

¹⁷⁵ Inazumi, *supra note* 51, p.137.

practice, however, as Menno Kamminga has pointed out, States have been reluctant to provide for universal jurisdiction in the absence of specific permission in international law.¹⁷⁶

Paragraph 2 of the IDI Resolution stipulates that universal jurisdiction is primarily based on customary international law.¹⁷⁷ It is true for certain crimes. Nevertheless, it is hard to fully agree with such wording. Based on the approach developed in the *Lotus case*, it should be noted that universal jurisdiction is not excluded by customary international law. In this regard, the statement developed in the IDI Resolution does not seem to be correct.

Another aspect of the relationship between universal jurisdiction and customary international law concerns crimes under customary international law concerning which universal jurisdiction may be invoked. It is generally accepted that under customary international law universal jurisdiction applies to piracy, which was reaffirmed by the UNCLOS. At the same time, there is no common position as to whether customary international law also extends universal jurisdiction for other international crimes. In its 1996 Draft Code of Crimes against Peace and Security of Mankind, the ILC suggested that genocide, crimes against humanity, crimes against UN and associated personnel and war crimes are subject to universal jurisdiction.¹⁷⁸

Most States seem to support that universal jurisdiction extends to the most serious crimes of international concern such as genocide, crimes against humanity, war crimes, torture and piracy, while the exercise of universal jurisdiction in other cases is based on treaty obligations, and is accordingly only binding on the States Parties thereto. Certain States have also enacted domestic laws claiming extraterritorial jurisdiction over such crimes and premised the legality of such legislation on the basis of universal jurisdiction.¹⁷⁹ The topic of universal jurisdiction in national laws will be the focus of Chapter V of this Thesis.

B. Universal jurisdiction: permissive or obligatory?

As indicated in Chapter II, permissive universal jurisdiction can be traced back to the development of universal jurisdiction over the crime of piracy on the high seas. The word “permissive” means that it is the right of the State to either exercise the universal jurisdiction or not. Recently, however, States have started to express a preference in favor of an obligatory universal jurisdiction, *i.e.*, States are under an obligation to exercise jurisdiction and cooperate in trying those accused of committing international crimes.¹⁸⁰ As was made clear in the 2010 Report prepared by the

¹⁷⁶ Menno T. Kamminga, Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses, *Human Rights Quarterly*, vol. 23, issue 4 (November 2001), p.951.

¹⁷⁷ Para 2, IDI Resolution, 2005, *supra note* 80.

¹⁷⁸ Art. 8, 9, 17, 18, 19, 20, Draft Code of Crimes Against the Peace and Security of Mankind, Report of the ILC on the Work of its Forty-Eighth Session, 06 May-26 July 1996, UN Doc. A/51/10, *Yearbook of the ILC*, 1996, vol. I, (Part Two), pp.27, 30, 44, 47, 50, 53.

¹⁷⁹ Para 27, 28, Report of the Secretary-General, 2010, *supra note* 16, pp.8-9.

¹⁸⁰ Inazumi, *supra note* 51, pp.139, 141.

UN Secretary-General on the basis of comments and observations of Governments as to the scope and application of the principle of universal jurisdiction, it should be noted that universal jurisdiction is a basis for jurisdiction only and does not itself imply an obligation to submit a case for potential prosecution.¹⁸¹ The latter is mostly left to domestic law. For example, according to the legitimacy principle embodied in paragraph 2(1) of the Austrian Criminal Procedural Code, investigations in Austria have to be started once a crime has become known.¹⁸² However, this is not always the case. As will be illustrated in Chapter V, in some States this matter mainly depends on political considerations, unless there is an international legal obligation.

There is no customary rule obliging States to exercise universal jurisdiction. An obligation of this kind can only be derived from certain treaties, for example, the Geneva Conventions and the UN Convention against Torture, but as discussed this only extends to States Parties thereto, or customary international law, which is still characterized by a lack of international consensus as to what particular crimes fall within this group.

Another issue arising in this context is that some States are reluctant to incorporate universal jurisdiction in their national legal systems and those who do incorporate it mostly prescribe it as permissive. For instance, Article 689-1 of the French Code of Criminal Procedure provides that:

“In accordance with the international agreements referred to in the following articles, any person who has committed one of the crimes listed in these articles outside the territory of the French Republic *may* be prosecuted and convicted by the French courts if she/he is in France.”¹⁸³ [Emphasis added]

In the US Submission on the Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction submitted to the Sixth Committee, the US noted that when considering whether to exercise universal jurisdiction, even if customary international law or a treaty regime recognizes the State’s authority to assert jurisdiction over an offence, there are often prudential or other reasons why the US refrains from exercising such jurisdiction. The US acknowledged that they may defer asserting jurisdiction in favor of a State on whose territory the crime was committed, the bulk of evidence will usually be found in that territory, and in the opinion of the US, prosecution within the territorial State may contribute to the strengthening of rule of law institutions in that

¹⁸¹ Para 18, Report of the Secretary-General, 2010, *supra note* 16, p.6.

¹⁸² Para 2(1), Austrian Criminal Procedural Code, BGBl. No. 631/1975, adopted 09 December 1975, entered into force 31 December 1975, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326> (visited last: 15.08.2015).

¹⁸³ Art. 689-1, French Code of Criminal Procedure, LOI No. 58-1296, adopted 23 December 1958, entered into force 02 March 1959, available at: <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview> (visited last: 15.08.2015).

State.¹⁸⁴ In general, it would seem that the US is reluctant to exercise universal jurisdiction, which is also reflected in its statements in the *travaux préparatoires* of a number of multilateral conventions. Of course, there is a group of States, which, *inter alia*, includes Belgium and Spain, that adopted national legislation providing for a much more expansive application of universal jurisdiction, but overall the practice of States is uneven and inconsistent.

It seems reasonable to agree with the position of the UK expressed in its Submission on the topic to the Sixth Committee, according to which currently universal jurisdiction in international law is permissive in character, unless a mandatory treaty-based or customary international law obligation exists to provide for the prosecution of these crimes. In other words, under international law States are entitled, but not obliged, outside of those obligations, to assert universal jurisdiction over these crimes.¹⁸⁵

C. Universal jurisdiction: primary or subsidiary?

Historically, universal jurisdiction for the crime of piracy was recognized as primary, while for all the other crimes it was claimed to be supplemental or subsidiary. As universal jurisdiction is currently being discussed in the UN Sixth Committee, delegations have expressed differing views as to whether States currently enjoy freedom in taking the decision to exercise universal jurisdiction or it provides for a complementary mechanism to ensure that accused persons are held accountable. In this respect, paragraphs 3(c) and (d) of the 2005 IDI Resolution stipulate that:

“Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so.

Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.”¹⁸⁶

International law recognizes no hierarchy among the various bases of jurisdiction. As will be discussed further on, only recently has there been a tendency towards acknowledging certain primacy

¹⁸⁴ US Submission, Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction, UN Sixth Committee, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf (visited last: 15.08.2015).

¹⁸⁵ UK, Scope and application of the principle of universal jurisdiction, UK mission to the UN, UN Sixth Committee, 2011, available at: http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf (visited last: 15.08.2015).

¹⁸⁶ Para 3(c),(d), IDI Resolution, 2005, *supra note* 80.

of the territoriality principle. Nevertheless, the view prevails that universal jurisdiction is a form of jurisdiction, which is reserved for the prosecution of only a limited number of international crimes which can be exercised on condition that the justice system of the country, where the crime was committed, is unable or unwilling to prosecute. The subsidiarity character of universal jurisdiction has also been confirmed in the Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case*:

“A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned”.¹⁸⁷

The rationale behind such an approach is based not only on practical considerations (easier access to collecting evidence or examining witnesses) and those of procedural economy, but also on the recognition of a legitimate primary interest of those States that have a direct link with the crime.¹⁸⁸ Therefore, the State bears the primary responsibility for prosecuting international crimes, which were committed within its territory or by its nationals, but in case it fails to do so, another State can exercise universal jurisdiction. Some reports on the topic even refer to universal jurisdiction as “a measure of last resort”, which is necessary to ensure that perpetrators of serious crimes of international concern do not go unpunished.¹⁸⁹ For instance, in application of the principle of subsidiarity, the Spanish courts were found to lack jurisdiction to investigate allegations of torture and ill-treatment at the Guantánamo Bay detention center in 2012 since the US authorities had demonstrated that administrative and criminal proceedings had been, or were being, conducted to investigate the facts.¹⁹⁰ As was stressed by Cuba in the UN Sixth Committee, universal jurisdiction should be applied only under exceptional circumstances in which there is no other way to prevent impunity, and it should be seen as existing alongside domestic law and the jurisprudence of national courts.¹⁹¹

The principle of subsidiarity is similar to the principle of complementarity exercised in the practice of the International Criminal Court (“ICC”). However, there are practical difficulties in evaluating whether or not the holder of the primary right to adjudication is unwilling or unable to

¹⁸⁷ Para 59, *Arrest Warrant case*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *supra note* 65, p.80.

¹⁸⁸ Claus Kress, Universal Jurisdiction over International Crimes and the Institut de Droit international, *Journal of International Criminal Justice*, vol. 4 (2004), p.580.

¹⁸⁹ Para 39, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the EU, 16 April 2009, p.37, available at: http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf (visited last: 15.08.2015).

¹⁹⁰ Para 32, The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 26 June 2013, UN Doc. A/68/113, p.7.

¹⁹¹ Para 34, The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 28 June 2012, UN Doc. A/67/116, p.8.

prosecute the case. According to Article 17(2) of the Rome Statute of the ICC, in order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process as recognized by international law, whether: 1) the proceedings were or are being undertaken or the national decision was made for the purposes of shielding the person concerned from the criminal responsibility for international crimes within the jurisdiction of the ICC; 2) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; 3) the proceedings were not or are not being conducted independently or impartially.¹⁹² In turn, Article 17(3) of the Rome Statute stipulates that in order to determine inability in a particular case, the Court shall consider whether, due to the total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings.¹⁹³

At the same time, it is more problematic for the national courts of a State, which is willing to assert universal jurisdiction, to prove that the other State, which has territoriality or nationality jurisdiction, is unable or unwilling to bring the alleged offender to justice, as it can always be claimed by that other State that the principle of non-interference has been breached. That having been said, the exercise of universal jurisdiction over serious crimes which are a matter of international concern, would not be a violation of non-interference in the internal affairs principle as it can always be argued that the prosecution was conducted for the “greater good” and it is in the interest of the international community as a whole that the perpetrators of international crimes are brought to justice.

D. Universal jurisdiction *in absentia* versus presence requirement

The International Law Association (“ILA”) in its Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences reached the conclusion that under the principle of universal jurisdiction, a State is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, nationality of the perpetrator or the victim. It was also added that “the only connection between the crime and the prosecuting State that may be required is the physical presence of the alleged offender within the jurisdiction of that State”.¹⁹⁴ Nevertheless, scholars have distinguished universal jurisdiction *in absentia* (also known as “absolute” or “pure” universal jurisdiction) when a State seeks to assert jurisdiction over an international crime, even though the alleged offender is not physically present in the territory of the State asserting jurisdiction, which is usually done by investigating it and/or requesting extradition of

¹⁹² Art. 17(2), Rome Statute of the ICC, adopted 17 July 1998, entered into force 01 July 2002, 2187 UNTS 3.

¹⁹³ Art. 17(3), Rome Statute, *Ibid.*

¹⁹⁴ Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, Committee on International Human Rights Law and Practice, ILA, London 2000, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/20> (visited last: 15.08.2015).

the suspect.¹⁹⁵ It can also refer to the possibility of conducting trials *in absentia*, which is highly dependent on whether the national law permits such proceedings.

Some reason that universal jurisdiction *in absentia* approaches the ideal that every State in international community shall take all possible measures with the ultimate goal of ending impunity concerning gross violations of human rights.¹⁹⁶ However, it has to be distinguished whether it is a question of starting investigations in order to know about the existence of a crime or whether proceedings in the narrow sense are conducted. It is interesting to note that the Resolution on universal jurisdiction passed by the IDI in 2005 concluded that unless otherwise lawfully agreed, “apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other forms of control over the alleged offender”.¹⁹⁷ Claus Kress commented that the opening part of this statement is of the greatest importance as it contains the view that the power of States to exercise universal jurisdiction includes investigative acts *in absentia*, which can also lead to an extradition request to the State where the alleged perpetrator is present. A problem is that the commencement of an investigation against a suspect in continental legal systems is considered the start of criminal proceedings against the person concerned. Consequently, any acts undertaken as part of an investigation against a certain suspect would appear to constitute an exercise of adjudicative jurisdiction.¹⁹⁸ To a certain extent the Institute’s Resolution appears to mix questions of jurisdiction and whether alleged offenders can be tried *in absentia*. Currently, most States reject trials *in absentia*, which is supported by a number of international instruments. For instance, Article 14(3)(d) of the International Covenant on Civil and Political Rights¹⁹⁹, as well Article 6 of the ECHR²⁰⁰ provide for the right of the accused to be present during his/her trial.

Nevertheless, a few cases of trials *in absentia* took place worldwide. For example, in 2005, the French court sentenced Mauritanian General Ely Ould Dah to ten years’ imprisonment for the torture of African members of Mauritanian military from 1990 to 1991. Mr. Ould Dah arrived in France in August 1998 to attend a military training course, but shortly after the initiation of the proceedings against him was taken in custody by French authorities. He was later released on bail and took advantage of this to leave France. This conviction, the first of its kind in France, had led to

¹⁹⁵ Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press (2010), p.52.

¹⁹⁶ Inazumi, *supra note* 51, p.102.

¹⁹⁷ Para 3(b), IDI Resolution, 2005, *supra note* 80.

¹⁹⁸ Kress, *supra note* 188, pp.576-578.

¹⁹⁹ Art. 14(3)(d), International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

²⁰⁰ Art. 6, ECHR, *supra note* 32.

a dispute before the ECtHR since Mr. Ould Dah claimed the existence of a Mauritanian amnesty law making his conviction in France unforeseeable.²⁰¹ Nevertheless, the ECtHR in *Ould Dah v. France* has rejected the notion that amnesty can serve as such a shield in overriding universal criminal jurisdiction of a foreign State, jurisdiction of which is based on the absolute prohibition of torture as articulated in the 1984 Convention against Torture. Hence, the case was ruled inadmissible.²⁰²

An interesting example of prosecution, where a suspect was brought to the territory of the State asserting universal jurisdiction through an extradition request, was *Demjanjuk case*. John (Ivan) Demjanjuk, who was born in Ukraine and fought in the Russian Red Army during the first years of the World War II, but later became a prisoner of war, decades later stood trial as a Nazi collaborator accused of being an accessory to killing of at least 29,000 Jews in Nazi death camps in Poland. After the war Demjanjuk managed to immigrate to the US, where he lived for 30 years until Israel had issued an arrest warrant against him in 1983.²⁰³ Interestingly, the US District Court and the Court of Appeal, despite the US approach to universality, both recognized that Israel enjoyed universal jurisdiction under international law and accordingly executed the extradition request. In reasoning its decision, the District Court concluded that:

“International law provides that certain offenses may be punished by any State because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.” [...] Universal jurisdiction over certain offenses is established in international law through universal condemnation of the acts involved and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. [...] The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent State, not from the State’s relationship to the perpetrator, victim or act.”²⁰⁴

Moreover, the Court concluded that Demjanjuk did not provide proof that Israel violated international law, nor of any interference of the Israel’s assertion of jurisdiction with any other State’s jurisdiction since no other nation has requested respondent’s extradition.²⁰⁵ Consequently,

²⁰¹ *Ould Dah v. France*, Decision, ECtHR, Application №13113/03, 17 March 2009, available at: [http://hudoc.echr.coe.int/eng#{"itemid":\["001-113014"\]}](http://hudoc.echr.coe.int/eng#{) (visited last: 15.08.2015).

²⁰² Sonja C. Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes*, Springer-Verlag Berlin Heidelberg (2010), p.40.

²⁰³ Marouf Hasian, Vectors of traumatic memories and mass-mediated representations of the “last” Nazi trial of John Demjanjuk, *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, vol. 17, issue 4 (2014), pp.434-436.

²⁰⁴ In the Matter of the Extradition of John Demjanjuk aka John Ivan Demjanjuk, US District Court, 612 F.Supp.544 (N.D. Ohio, eastern Division), p.556, available at: <http://www.uniset.ca/other/cs4/612FSupp544.html> (visited last: 15.08.2015).

²⁰⁵ In the Matter of the Extradition of John Demjanjuk, *Ibid.*, p.558.

Demjanjuk was prosecuted in Israel and was sentenced to hanging for the alleged murderous crimes that he committed, but in the light of the new evidence about his identity he was released five years later and returned to the US. It took another twenty years before he was deported to Germany, where he again stood trial as a Nazi collaborator and has only been brought to justice at the age of 89, sixty years after the crimes were carried out.²⁰⁶

The *Audiencia Nacional*, a specified superior court in Madrid, Spain, delivered a decision on 10 January 2006 regarding a complaint, which was directed against the former President and Prime Minister of China for acts of genocide committed since the Chinese invasion on the autonomous province of Tibet in 1950. According to the *Audiencia Nacional*, the exercise of universal jurisdiction requires the accused to be present for the sole purpose of conducting the trial, but not for the issuance of acts of investigation or acts for extradition.²⁰⁷

Indeed, it seems impossible to envisage how the presence of a suspect can ever be established without any prior investigation. Moreover, criminals tend to settle in countries where it is considered less likely that a prosecution will be launched against them. Therefore, it seems reasonable to allow countries that are willing and able to prosecute alleged international offenders, particularly in cases where the exercise of universal jurisdiction is possible under international conventional or customary law, to conduct certain preliminary investigations aimed at establishing the location of the alleged perpetrator and collecting evidence, as well as preparing extradition requests. However, it is believed that trials *in absentia* based on the principle of universal jurisdiction would be a violation of the cornerstone principle of due process.

The problem with trials *in absentia* is a prominent example of the situation that can bring up a question of the relations between universal jurisdiction and impunity that is derived from human rights. Universal jurisdiction in such cases will have to be asserted by a State, which has access to the perpetrator, or replaced by another type of prosecution in the appropriate forum, which can both bring the alleged perpetrators to justice and secure their basic human rights. Impunity should still not be accepted as a final result even under such circumstances.

E. Procedural conditions of exercising universal jurisdiction

The fact that universal jurisdiction in criminal matters is not exercised without certain restrictions is clearly illustrated by Austrian domestic legislation. According to Section 64 of the Austrian Penal Code, Austrian courts have jurisdiction concerning certain crimes (e.g. extortive abortion, slave trade, trafficking in human beings, organized crime, drugs-related crime, air piracy,

²⁰⁶ Dominik J. Schaller, From the editor: the Demjanjuk case – final justice?, *Journal of Genocide Research*, vol. 11, issue 2-3 (2009), p.196.

²⁰⁷ Fulvio Maria Palombino, Universal Jurisdiction *in absentia* over genocide: some critical remarks in the light of recent Spanish jurisprudence, *Journal of Genocide Research*, vol. 9, issue 2 (2007), p.246.

terrorism-related acts) committed outside of Austria regardless of locally applicable law, if certain Austrian interests are affected. Recently, the number of crimes listed in Section 64 has been increased to include additional crimes, such as rape, sexual coercion and torture.²⁰⁸ Under this provision Austrian courts are also competent for other crimes committed outside of Austria regardless of the *lex loci delicti commissi* if Austria is under an obligation to prosecute under international treaties.²⁰⁹ Therefore, it is obvious that this provision is based either on the passive personality or protective principle, although it also covers crimes, which Austria is bound to prosecute under international law.

According to Section 65 of the Austrian Penal Code, Austrian courts have jurisdiction concerning other crimes committed outside of Austria if they are punishable under locally applicable law and if the perpetrator is caught on Austrian territory and cannot be extradited for a reason other than the nature or feature of this act²¹⁰ (for instance, if extradition was offered to the State where the crime was committed, and the latter did not take any action). The requirement of double criminality, enshrined in Austrian legislation, reflects the idea that both States must share a common concern of prosecution, represents a barrier against a possible misuse of such jurisdiction, as well as follows the idea expressed by the IDI in paragraph 3(d) of its 2005 Resolution mentioned previously in this Chapter.

Universal jurisdiction should be exercised in good faith and in accordance with the basic requirements of due process. In this respect, Paragraph 4 of the IDI Resolution stipulates that:

“Any State prosecuting an alleged offender on the basis of universal jurisdiction is bound to comply with the generally recognized standards of human rights and international humanitarian law”.²¹¹

At first, this paragraph seems not to add anything new to the existing legal order, in which States are obliged to respect human rights as outlined in numerous international instruments. However, as Claus Kress noted, the inclusion of this paragraph in the Resolution on the topic of universal jurisdiction gives reason to reflect about the possibility of a more prominent role for human rights standards in criminal proceedings, if those proceedings are based solely on the exercise of universal jurisdiction. A more prominent role, according to Kress, would exist where an international duty obliged the State exercising universality principle to adhere to a human rights standard exceeding the minimal requirements that exist under customary international law. In his opinion, the State

²⁰⁸ Para 7, The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 23 July 2014, UN Doc. A/69/174, p.2.

²⁰⁹ Permanent Mission of Austria to the UN, №66.000/2/2010, 15 April 2010, UN Sixth Committee, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Austria.pdf (visited last: 15.08.2015).

²¹⁰ Permanent Mission of Austria to UN, *Ibid.*

²¹¹ Para 4, IDI Resolution, 2005, *supra note* 80.

exercising universal jurisdiction represents a fundamental value of the international community and therefore must adhere to the same human rights standards in conducting proceedings as an international criminal court.²¹² In this regard, the relevant provisions contained in Articles 21(3) of the Rome Statute, which underlines that proceedings must be consistent with internationally recognized human rights²¹³, as well as Article 55 listing the rights of persons during an investigation²¹⁴, and Article 67 prescribing the rights of the accused²¹⁵, shall also be taken into consideration when conducting a trial based on the principle of universality.

The observance of the *non bis in idem* principle, which means 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, deserves a special attention in the context of universality. A person tried by a State on the basis of universal jurisdiction should be protected against another trial based on a different jurisdictional principle unless the proceedings in the other court were aimed at shielding the person concerned from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process as recognized by international law. As was made clear in the Princeton Principles, sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of the *non bis in idem* principle.²¹⁶

Another procedural requirement pointed out by the Princeton Principles requires States or their judicial organs to refuse to comply with the request for extradition if the alleged accused is likely to face a death penalty sentence or be subject to torture or any other cruel, degrading, or inhuman punishment or treatment.²¹⁷ Indeed, this provision reflects the universal prohibition of torture or cruel, inhuman or degrading treatment²¹⁸, as well the practice of many extradition treaties, which allow to refuse extradition in case the offense is punishable by capital punishment in the country requesting extradition. For instance, Article 8(1) of the Austria-US Extradition Treaty provides that:

“When the offence for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless the Requesting State provides an assurance that

²¹² Kress, *supra note* 188, pp.581-582.

²¹³ Art. 21(3), Rome Statute, *supra note* 192.

²¹⁴ Art. 55, Rome Statute, *supra note* 192.

²¹⁵ Art. 67, Rome Statute *supra note* 192.

²¹⁶ Principle 9, Princeton Principles, *supra note* 17, p.33.

²¹⁷ Principle 10, Princeton Principles, *supra note* 17, p.34.

²¹⁸ The most fundamental being the prohibition contained in Article 5 of the Universal Declaration of Human Rights. Art. 5, Universal Declaration of Human Rights, Res. 217 A(III), UN GA, 10 December 1948, UN Doc. A/810.

the death penalty will not be imposed (in the case of a person sought for trial) or carried out (in the case of a person already sentenced to death at the time extradition is requested).²¹⁹

Moreover, while exercising universal jurisdiction, States are required to respect relevant immunities under international law, in particular those accorded to the Heads of State, Heads of Government and Ministers for Foreign Affairs, which will be separately analyzed in the subsequent Chapter.

Chapter IV. The principle of universal jurisdiction and related issues

A. Universal jurisdiction and *aut dedere aut judicare* principle

The obligation to extradite or prosecute, which can be traced back to the writings of Hugo Grotius, plays a crucial role in the fight against impunity, is widely accepted by States and, as highlighted above, has been included in several international Conventions since 1970s.²²⁰

Delegations in the Sixth Committee and scholars have cautioned against confusing universal jurisdiction with the obligation to extradite or prosecute (*aut dedere aut judicare*). As was already discussed in the previous Chapter, universal jurisdiction is a basis for jurisdiction only and does not itself imply an obligation to submit a case for potential prosecution. The principle of universal jurisdiction involves a criterion for the attribution of jurisdiction, whereas the obligation to extradite or prosecute is an obligation that is discharged once the accused is extradited or once the State decided to prosecute an accused based on any of the existing bases of jurisdiction.²²¹

On the other hand, the obligation to extradite or prosecute is also linked to universal jurisdiction as it could also be an obligation as a result of a treaty. States Parties to a treaty that includes *aut dedere aut judicare* obligation should incorporate universal jurisdiction into their legislation, without prejudice to the possibility of judicial bodies in those States to exercise jurisdiction based on the traditional principles of jurisdiction. Depending on the facts of the case, if the State is not in a position to extradite an individual found in its territory and accused of certain crimes, then as the result of *aut dedere aut judicare* provision, it would be under an obligation to prosecute.²²² Consequently, as was pointed out in the Final Report of the ILC “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, in case the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect

²¹⁹ Art. 8(1), Austria-US Extradition Treaty, Signed at Washington on 08 January 1998, US Treaty Doc. 105-50, 1998 U.S.T. Lexis 191; TIAS 49 Stat. 2710.

²²⁰ Para 65.1(2), 2(3), The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the ILC, 05 May-06 June, 07 July-08 August 2014, UN Doc. A/69/10, *Yearbook of the ILC on the Work of its Sixty-Sixth Session*, 2014, vol. II (Part Two), pp.140-142.

²²¹ Para 18, 19, Report of the Secretary-General, 2010, *supra note* 16, pp.6-7.

²²² Para 21, Report of the Secretary-General, 2010, *supra note* 16, p.7.

the exercise of universal jurisdiction. At the same time, *aut dedere aut judicare* principle can also become applicable if there is no universal jurisdiction and the State exercises jurisdiction on another jurisdictional basis.²²³

In cases where more than one State has or may assert jurisdiction over a person and where the State that has custody of the person has no basis for jurisdiction other than the principle of universality, that State or judicial organ shall, according to Princeton Principles on Universal Jurisdiction, in deciding whether to prosecute or extradite, base their decision on the balance of the following criteria: (a) multilateral or bilateral treaty obligations; (b) the place of commission of the crime; (c) the nationality connection of the alleged perpetrator to the requesting State; (d) the nationality connection of the victim to the requesting State; (e) any other connection between the requesting State and the alleged perpetrator, the crime, or the victim; (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting State; (g) the fairness and impartiality of the proceedings in the requesting State; (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting State; and (i) the interests of justice.²²⁴ Although those criteria may seem rather broad, it is reasonable to assume that they can serve as general guidelines for the States and their judicial organs in deciding whether to extradite or prosecute the offender found in their territory, as well as point at certain primacy enjoyed by the territorial State in prosecuting the criminal.

B. Universal jurisdiction and jurisdiction of international tribunals. Relationship between universal jurisdiction and the ICC

Universal jurisdiction should be distinguished from the jurisdiction of international criminal courts and, in particular, the ICC, the world's first permanent international judicial institution designed to hold perpetrators of international crimes accountable and to end impunity for such crimes. In the past, the assertion of universal jurisdiction was the only way by which suspected perpetrators of serious crimes of international concern could be brought to justice in cases when the States possessing territoriality and nationality jurisdiction were unable or unwilling to prosecute. This changed with the establishment of international criminal courts and tribunals.

However, it should be remembered that universal jurisdiction relates to the competence of a State to prosecute persons before its own courts rather than to the prosecution of those same persons before an international judicial body. Moreover, temporal, geographical, personal and subject-matter limitations on the jurisdiction of international criminal courts and tribunals mean that universal

²²³ Para 18, Final Report, ILC, 2014, *supra note* 220, p.8.

²²⁴ Principle 8, Princeton Principles, *supra note* 17, p.32.

jurisdiction remains a vital element in the fight against impunity.²²⁵ For example, according to the Article 8 of the Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) the jurisdiction of the ICTY extended only to the period from 1 January 1991 and was restricted to the crimes that occurred on the territory of the former Socialist Federal Republic of Yugoslavia²²⁶, while the Statute of the International Criminal Tribunal for Rwanda (“ICTR”) in its Article 7 prescribed that the jurisdiction of the International Criminal Tribunal for Rwanda was limited to the period from 1 January 1994 to 31 December 1994 and the territory of Rwanda and neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.²²⁷ Both tribunals are currently in the process of transferring their mandates to the UN Mechanism for International Criminal Tribunals created by the UN SC in 2010.²²⁸ Similarly, jurisdiction of the ICC is limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that particular State.²²⁹

One of the key issues during the negotiations of the Rome Statute of the ICC was on what jurisdictional bases the ICC should exercise its jurisdiction. While Germany had argued that since all States may exercise universal jurisdiction over genocide, crimes against humanity, and war crimes, the ICC should not enjoy the lesser right than domestic courts. At the same time, the US maintained that the jurisdictional regime shall require the consent of both the State of nationality of the accused and the State, on which territory the crime was committed. In the end, Article 12 of the Rome Statute²³⁰ reflects an attempt to combine all views expressed in the course of negotiations and prescribes that where ICC jurisdiction is asserted on the basis of territoriality (provided that the crime was committed on the territory of a State Party), the Court will have jurisdiction regardless of whether the State of nationality of the accused is a State Party or not; where ICC jurisdiction is asserted on the basis of the nationality of the accused, the Court will have jurisdiction regardless of the territory where the crime occurred.²³¹

The ICC reiterated on many occasions that its jurisdiction is not based on the principle of universal jurisdiction, most recently in the Prosecutor’s Statement on the Situation in Palestine.²³² However, Article 13(b) of the Rome Statute provides for an additional ground for the jurisdiction of

²²⁵ Para 28, 29, The AU-EU Expert Report, *supra note* 189, pp.30-31.

²²⁶ Art. 8, Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, UN Doc. S/RES/827.

²²⁷ Art. 7, Statute of the International Criminal Tribunal for Rwanda, adopted 08 November 1994, UN Doc. S/RES/955.

²²⁸ Res. 1966, UN SC, 6463rd meeting, 22 December 2010, UN Doc. S/RES/1966.

²²⁹ Art. 126, Rome Statute, *supra note* 192.

²³⁰ Art. 12, Rome Statute, *supra note* 192.

²³¹ Carsten Stahn, *The Law and Practice of the International Criminal Court*, OUP (2015), p.142.

²³² Para 4, Situation in Palestine, The Office of the Prosecutor, ICC, 03 April 2012, available at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (visited last: 15.08.2015).

the ICC, a situation in which one or more international crimes, contained in Article 5 of the Rome Statute, appears to have been committed is referred to the Prosecutor by the SC acting under Chapter VII of the UN Charter.²³³ The ILC in the Draft Statute for an ICC “felt that such a provision was necessary in order to enable the Council to make use of the Court, as an alternative to establishing *ad hoc* tribunals and as a response to crimes which affront the conscience of mankind”.²³⁴

Bekou and Cryer argue that since the SC has no jurisdiction of its own to pass to the ICC, a strong case can be made that when the SC refers a situation, the ICC is exercising the delegated universal jurisdiction of State Parties.²³⁵ In such a case, the ICC will have jurisdiction even if the crimes occurred in the territory of a State which has not ratified the Rome Statute or was committed by the national of such State. Therefore, it often can be found in the literature on the topic that the Court’s jurisdiction is at least quasi-universal or conditionally universal²³⁶ in case SC refers it to the ICC under Chapter VII. For instance, the UN SC made use of Article 13(b) of the Rome Statute when it acted under Chapter VII of the UN Charter and referred the situation in Darfur, Sudan to the Prosecutor of the ICC in its Resolution 1593(2005).²³⁷

As Bekou and Cryer have pointed out, the refusal of the drafters of the Rome Statute to grant the ICC universal jurisdiction is criticized not only on the basis that the jurisdictional regime of the Statute means that some offences may go unpunished, but also that the creators of the ICC failed to endow it with the mandate it needs in relation to assisting in the maintenance of international peace and security. However, allowing ICC to exercise universal jurisdiction could have also led to considerable politically sensitive problems and investigations would be extremely difficult if States, opposing the exercise of universal jurisdiction, would not provide assistance by collecting evidence, serving documents, protecting victims and witnesses and alike.²³⁸ 123 countries are currently State Parties to the Rome Statute²³⁹, but the inclusion of the principle of universal jurisdiction could have led to the situation where fewer States would ratify the Statute and then the heavy burden of financing the ICC by a small number of State Parties could have limited its action. In fact, it could have also been an impediment to the establishment of the ICC at all.

²³³ Art. 13(b), Rome Statute, *supra note* 192.

²³⁴ Draft Statute for an ICC with commentaries, ILC, *Yearbook of the ILC*, 1994, vol. II (Part Two), p.44.

²³⁵ Olympia Bekou, Robert Cryer, The International Criminal Court and Universal Jurisdiction: A Close Encounter?, *International and Comparative Law Quarterly*, vol. 56, issue 1 (January 2007), p.51.

²³⁶ D.Dimitrakos, The Principle of Universal Jurisdiction & the ICC, 22 January 2014, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383587 (visited last: 15.08.2015).

²³⁷ Res. 1593, UN SC, 5158th meeting, 31 March 2005, UN Doc. S/RES/1593.

²³⁸ Bekou, Cryer, *supra note* 235, pp.52, 56, 60-61.

²³⁹ State Parties to the Rome Statute, Website of the ICC, available at: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (visited last: 15.08.2015).

Another question, which may arise in the context of universal jurisdiction and the ICC, is the relationship between the ICC and States exercising universal jurisdiction. Article 17(1) of the Rome Statute contains the inadmissibility criteria of the case to the ICC by providing that ICC should defer to any State that has jurisdiction over a case.²⁴⁰ This was further clarified in the Informal expert paper issued in 2003 on the topic of the principle of complementarity of the ICC in practice. Respectively, paragraph 63 of the aforementioned document reads as follows:

“It goes without saying that a State’s acknowledgment that it is not investigating or prosecuting does not affect the primacy of any other State that wished to investigate or prosecute. Thus, for example, even if a territorial State agreed to non-exercise of jurisdiction over certain crimes in favor of ICC prosecution, other States would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, *universal jurisdiction*) and admissibility could accordingly be challenged by such States or by the accused. It will therefore be prudent to consult with interested States before forming such arrangements.”²⁴¹ [Emphasis added]

Therefore, as has been seen, it is once again the primary responsibility of the States to prosecute international criminals based on any of the jurisdictional principles, which in this case also includes universality. The underlying rationale of this principle is that, on the one hand, it is the primary responsibility of States to prosecute international crimes, especially if committed on their territory; on the other hand, an international criminal court, even if willing, will never be able in terms of prosecutorial capacity to substitute for States in this task.²⁴²

C. Universal jurisdiction and jurisdictional immunities

“The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”.²⁴³ [Emphasis added]

The aforementioned paragraph is frequently cited by scholars and can be found in the Judgement in the *Arrest Warrant case*. The question of the category of persons possessing immunity *ratione personae* in criminal proceedings is still open and is currently being discussed by the ILC, which is in the process of preparing the draft articles on Immunity of State officials from foreign criminal jurisdiction. The Commission found that there are sufficient grounds both in practice and in

²⁴⁰ Art. 17(1), Rome Statute, *supra* note 192.

²⁴¹ Para 63, Informal Expert Paper: The Principle of Complementarity in Practice, Office of the Prosecutor, ICC, 2003, p.20, available at: <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF> (visited last: 15.08.2015).

²⁴² Wolfgang Kaleck, Michael Ratner, Tobias Singelstein, Peter Weiss, *International Prosecution of Human Rights Crimes*, Springer-Verlag Berlin Heidelberg (2007), p.65.

²⁴³ Para 51, *Arrest Warrant case*, Judgment, 14 February 2002, *supra* note 65, pp.20-21.

international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *rationae personae* from the exercise of criminal jurisdiction. Under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office. The ILC has also looked into whether other State officials could be included in the list of persons enjoying immunity *ratione personae* (for instance, a Minister of Defense or a Minister of International Trade) as some members of the Commission have supported the view that the use of the words “such as” in the Judgment in the *Arrest Warrant case* should be interpreted to extend the regime of immunity *ratione personae* to other high-ranking State officials. Nevertheless, the view in the ILC prevailed that other State officials do not enjoy immunity *ratione personae* for the purposes of the presently negotiated draft articles, without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when State officials are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.²⁴⁴

Immunity *ratione personae* means that Heads of State, Heads of Government and Ministers for Foreign Affairs benefit from full immunity for both private and official acts.²⁴⁵ Article 2 of the IDI Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law provides that in criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.²⁴⁶

However, as stated in the *Arrest Warrant case*, it does not mean that Heads of State cannot be brought to justice in any circumstances. Firstly, such persons enjoy no criminal immunity under international law in their own countries. Secondly, immunity from a foreign jurisdiction can be waived. Thirdly, former Heads of State will no longer enjoy immunity in respect of acts committed prior or subsequent to his or her period in office, as well as in respect of acts committed during that period in office in a private capacity. Finally, those persons are not protected from the jurisdiction of international criminal courts and tribunals.²⁴⁷ Article 27(2) of the Rome Statute explicitly provides that immunities of special procedural rules which may attach to the official capacity of a person,

²⁴⁴ Para 2, 7, 8, 12, Commentary to Art. 3 of the draft articles on Immunity of State officials from foreign criminal jurisdiction, Final Report of the ILC on the Work of its Sixty-fifth session (06 May-07 June and 08 July-09 August 2013), UN Doc. A/68/10, *Yearbook of the ILC*, 2013, vol. II (Part Two), pp.58, 62-63, 65.

²⁴⁵ Para 3, Commentary to Art. 4 of the draft articles on Immunity of State officials from foreign criminal jurisdiction, ILC, *Ibid.*, p.67.

²⁴⁶ Art. 2, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, IDI Resolution, Vancouver, 26 August 2011, available at: http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF (visited last: 15.08.2015).

²⁴⁷ Para 61, *Arrest Warrant case*, Judgment, *supra note* 65, pp.25-26.

whether under national or international law, shall not bar the Court from exercising its jurisdiction over such persons.²⁴⁸

Nevertheless, jurisdictional immunities can be a major obstacle in the assertion of universal jurisdiction. As was pointed out in Principle 5 of the Princeton Principles on Universal Jurisdiction, the official position of any accused person, whether as Head of State or government or as a responsible government official shall not relieve such person of criminal responsibility nor mitigate punishment.²⁴⁹ At the same time, paragraph 6 of the 2005 IDI Resolution prescribes that the provisions of the Resolution regarding the application of the principle of universality are without prejudice to the immunities established by international law.²⁵⁰

For instance, although *Arrest Warrant case* is believed by many to have made an important contribution to a clarification of the law of personal immunities of Foreign Ministers, it still failed to pronounce on Belgium's assertion of universal jurisdiction. This was severely criticized by a number of Judges in their separate and dissenting opinions, and well summarized by Antonio Cassese by stating that: “[i]t would have been logical for the Court to first address the question of whether Belgium could legitimately invoke universal jurisdiction and then, in case of an affirmative answer to this question, decide upon the question of whether the Congolese Foreign Minister was entitled to immunity from prosecution and punishment.”²⁵¹ However, it is clear that in this case the Foreign Minister would be immune from prosecution in Belgium, because he was still in office at that time and thus enjoyed full immunity. But the ICJ was blamed for losing the opportunity to make a pronouncement on such a controversial topic of universality.

Another problem is distinguishing the concept of jurisdictional immunities from jurisdiction, which is a particular problem for the African States. The Judgment in the *Arrest Warrant case* clearly indicates that “the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction”.²⁵²

Furthermore, in his Separate opinion in the *Arrest Warrant case* Judge Koroma explicitly emphasized that although immunity is predicated upon jurisdiction, whether national or international, the concepts are not the same: “[j]urisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and the exemption from the jurisdiction or competence of the courts and tribunals of a

²⁴⁸ Art. 27(2), Rome Statute, *supra note* 192.

²⁴⁹ Principle 5, Princeton Principles, *supra note* 17, p.31.

²⁵⁰ Para 6, IDI Resolution, 2005, *supra note* 80.

²⁵¹ Antonio Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, *European Journal of International Law*, vol. 13, issue 4 (2002), p.855.

²⁵² Para 59, *Arrest Warrant case*, Judgment, *supra note* 65, p.24.

foreign State and is essential characteristic of a State”. However, both must be in conformity with international law.²⁵³

Chapter V. National laws and universal jurisdiction. Universal jurisdiction in the practice of the ICJ

As seen in previous Chapters, the application of the principle of universal jurisdiction is particularly controversial. Above and beyond treaty obligations, States tend to prescribe the exercise of universal jurisdiction in a variety of ways, subject to different requirements. The International Committee of the Red Cross has identified more than 100 States that have established some form of universal jurisdiction over serious violations of international humanitarian law in their national legislation.²⁵⁴ In fact, in the course of the work on the topic of universal jurisdiction, the UN Sixth Committee kept receiving a variety of submissions from States identifying which other crimes and under which specific conditions may be subject to universal jurisdiction in their domestic legal systems. Therefore, it is believed that special attention must be paid to regulation of the principle of universal jurisdiction at the national level.

A. Belgium

Belgium is considered one of the pioneers in the establishment of universal jurisdiction in its national legislation. Under the Act on the Punishment of Grave Breaches of International Humanitarian Law, originally adopted on 16 June 1993 in order to implement Belgium obligations under Protocols I and II of the 1949 Geneva Conventions, but then amended on 10 February 1999²⁵⁵ to implement the 1948 Genocide Convention, Belgian courts possessed jurisdiction to try cases of war crimes, crimes against humanity and genocide committed by non-Belgians outside of Belgium against non-Belgians, without even the presence of the accused in Belgium. As Judge Oda concluded in his Dissenting opinion in the *Arrest Warrant case*, Belgium may well have been at the forefront of a trend expanding the exercise of universal jurisdiction.²⁵⁶

The *Butare Four case* was the first case heard in Belgium on the basis of the 1993 Act and probably the most well-known one prosecuted in the country based on the principle of universal jurisdiction, which concerned the trial for war crimes committed by four Rwandan citizens in the Butare region during the 1994 Rwandan genocide. None of the accused or victims were Belgian

²⁵³ Para 5, *Arrest Warrant case*, Separate opinion by Judge Koroma, *supra note 65*, p.60.

²⁵⁴ Para 63, Report of the Secretary-General, 2014, *supra note 208*, p.14.

²⁵⁵ Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, Belgium, adopted 16 June 1993, amended 10 February 1999, repealed 05 August 2003, available at: <http://www.refworld.org/docid/3ae6b5934.html> (visited last: 15.08.2015).

²⁵⁶ Para 12, *Arrest Warrant case*, Dissenting opinion of Judge Oda, *supra note 65*, p.51.

citizens and none of the crimes were committed on Belgian territory. In the end, all four defendants were found guilty and sentenced for 12 to 20 years in prison.²⁵⁷

Rwanda, in the absence of Extradition Treaty with Belgium, and several other countries lent their support in the *Butare Four case* and Belgian investigators were even allowed on their territory. It is interesting to note that neither the defendants, nor the Republic of Rwanda challenged Belgium's jurisdiction under international law. Belgium was not under an obligation to prosecute because the mandatory extradite or prosecute regime of the 1949 Geneva Conventions does not extend to the violations of common Article 3 and Additional Protocol II, which was the case. In fact, suspects had voluntarily come to Belgium and three of them actually received a college education there.²⁵⁸ The success of this case opened the way for a number of other suits.

However, certain provisions of the very far-reaching 1993 Act, namely, the possibility of initiating proceedings *in absentia* and of opening a case by instituting civil indemnification proceedings before an examining magistrate, as well as the exclusion of immunities as an obstacle to prosecution, coupled with the entry into force of the Rome Statute of the ICC and the outcome in the *Arrest Warrant case*, gave rise to a number of problems in the application of the principle of universality by Belgium in practice. Moreover, the public prosecutor soon came under political pressure after opening investigations against certain high-ranking officials from Israel, China and US (including against the former US President George H.W. Bush). Consequently, the Parliament of Belgium claimed that the law was politicized and under the pressure of the US Defense Secretary Donald H. Rumsfeld, who threatened Belgium that it risked losing its status as host to North Atlantic Treaty Organization's headquarters, repealed the Act on 5 August 2003.²⁵⁹ However, in order to fulfill the undertaken treaty obligations of Belgium, substantive provisions on the grave violations of international humanitarian law were included in the new Chapter I *bis* of the Penal Code of Belgium. This brought a lot of debate whether such amendments were a step towards or backwards for fundamental justice. Human rights groups contested that “[w]ith its universal jurisdiction law, Belgium helped destroy the wall of impunity behind which the world's tyrants had always hidden to shield themselves from justice; [i]t is regrettable that Belgium has now forgotten the victims to whom it gave a hope of justice”.²⁶⁰

²⁵⁷ Eric K. Leonard, Global Governance and the State: Domestic Enforcement of Universal Jurisdiction, *Human Rights Review*, vol. 16, issue 1 (2015), p.152.

²⁵⁸ Luc Reydam, Belgium's First Application of Universal Jurisdiction: the *Butare Four Case*, *Journal of International Criminal Justice*, vol. 1 (2003), pp.430, 434.

²⁵⁹ Act on Serious Violations of International Humanitarian Law, 05 August 2003, Belgium Law on Serious Violations, available at: http://iccdb.webfactional.com/documents/implementations/pdf/Belgium_Serious_Violations_of_International_Humanitarian_Law__2003.pdf (visited last: 15.08.2015).

²⁶⁰ Human Rights Watch, News, Belgium: Universal Jurisdiction Law Repealed, 01 August 2003, available at: <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed> (visited last: 15.08.2015).

Nevertheless, Belgium courts still possess extraterritorial competence, the ongoing cases were continued, but procedural rules of its further application were modified. Prosecutions can now be undertaken only at the request of the federal prosecutor, who assesses the complaints made, while the procedure of instituting civil indemnification proceedings was abandoned with certain exceptions where an offence was perpetrated wholly or partly in Belgium or the alleged perpetrator was Belgian or resided primarily in Belgium. Moreover, in order to bring the Belgian law in line with the ICJ Judgment in *Arrest Warrant case*, the 2003 Act included new provisions into the Code of Criminal Procedure in respect of immunity from jurisdiction and execution.²⁶¹

Therefore, based on the conclusions articulated in this Thesis, it may be observed that the amendments to the Belgian law were reasonable, especially in part of prohibiting trials *in absentia* and establishing respect for the jurisdictional immunities under international law in the national legislation. Moreover, the 2003 Act did not affect universal jurisdiction where it was already envisaged under domestic law for a number of offences or where required under international treaty or customary law, which includes sexual offences perpetrated against minors; procurement, trafficking in persons; sexual mutilation of females; non-respect for certain rules applicable to the activities of marriage bureaux; acts of corruption; acts of terrorism; or any offence in respect of which international treaty or customary law require that it should be suppressed regardless of the country in which it was committed and of the nationality of the perpetrator.²⁶²

B. Spain

Meanwhile the aforementioned amendments to the law on universal jurisdiction took place in Belgium in 2003, Spanish courts from the end of 1990s and up until recent reforms were known as the “temple of international justice” due to a rather extensive embracement of the universal jurisdiction doctrine.²⁶³ In Spanish domestic legislation universal jurisdiction was included as one of the bases of jurisdiction by the Judicial Power Organization Act, adopted in 1985. Article 23(4) of the 1985 Act attributed to the Spanish courts both universal jurisdiction and a special extraterritorial competence based on the principle of active nationality of the perpetrators of certain crimes listed in it. Competence to exercise universal jurisdiction has been attributed exclusively to the Criminal Chamber of the National High Court, subject to appeal before the Supreme Court. Originally, the application of the principle of universal jurisdiction was not subject to any conditions and was

²⁶¹ Para 14, 15, Observations by Belgium on the scope and application of the principle of universal jurisdiction, UN Sixth Committee, 2010, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf (visited last: 15.08.2015).

²⁶² Para 16, Observations by Belgium, *Ibid.*

²⁶³ Spain moves to curb legal convention allowing trials of foreign rights abuses, *The Guardian*, 11 February 2014, available at: <http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses> (visited last: 15.08.2015).

restricted only by the principle of *res judicata*, according to which Spanish judges and courts could not exercise jurisdiction if the perpetrator has been acquitted, pardoned or convicted abroad. The Act was amended several times over the years (in 2005 on extraterritorial prosecution for female genital mutilation, in 2007 in respect to human trafficking or smuggling of persons, and in 2009 the crime of counterfeiting foreign currency was removed) as a result of the developments in the interpretation of the concept by the National High Court.²⁶⁴

One of the most prominent Spanish cases based on the principle of universal jurisdiction involved the prosecution of those responsible for the massacre in Guatemala, which was at its peak at the beginning of 1980s. In December 1999, Nobel Peace Laureate Rigoberta Menchú, together with family members of the Guatemalan dead, Spanish labor unions and solidarity groups, filed a complaint charging eight people, among them General Efraín Ríos Montt, with genocide, terrorism and torture, involving the killing and disappearance of four Spanish priests. Although Guatemala had “original” territorial jurisdiction, it was still claimed to be not exclusive and in the absence of an effective exercise of jurisdiction, it was concluded that it must be replaced by other courts, such as Spain’s, that uphold the universal prosecution of international crimes.²⁶⁵

However, the public prosecutor appealed against the grant of jurisdiction and by the end of December 2000 *Audiencia Nacional* decided that Spanish courts had no jurisdiction. In reaching this conclusion, the court reasoned that the Genocide Convention implied the primary character of territorial jurisdiction and jurisdiction of international criminal court and subsidiary nature of any other jurisdiction for the prosecution of genocide²⁶⁶, even though Spanish law imposed no such subsidiarity or exhaustion of domestic remedies requirement. The 1996 amnesty law in Guatemala excluded cases of genocide, torture and disappearance, so it did not create any legal impediment to the prosecution of genocide in its national courts. Moreover, peace had only recently come to Guatemala, with the publication of the Truth Commission report, and there were no grounds at that moment to say that judges would reject to institute national proceedings.²⁶⁷

In light of the amendments that took place in Spain in the following years, the Guatemalan Genocide case was revisited by Spanish courts, but never reached the stage of trial. It was not until 19 March 2013, when the former President of Guatemala, General Efraín Ríos Montt, and his military intelligence chief, General José Mauricio Rodríguez Sánchez, stood trial before a national court in Guatemala City for genocide, crimes against humanity and war crimes committed in Guatemala in

²⁶⁴ Para 38, 39, 41, Report of the Secretary-General, 2011, *supra* note 2, pp.8-9.

²⁶⁵ Naomi Roht-Arriaza, Universal Jurisdiction: Steps Forward, Steps Back, *Leiden Journal of International Law*, vol. 17, issue 2 (June 2004), pp.378-379.

²⁶⁶ Art. VI, Genocide Convention, *supra* note 109.

²⁶⁷ Kaleck, Ratner, Singelstein, Weiss, *supra* note 242, pp.117-118.

1980s, making it the first conviction of a former Head of State for genocide in credible national proceedings.²⁶⁸

Another case involved Adolfo Scilingo, a former Argentinian navy captain who confessed to throwing prisoners alive from airplanes into the sea and giving insights into the criminal activities of the Military Junta, which held power in Argentina in 1976-1983, was detained in October 1997 after travelling to Madrid. He was eventually tried and sentenced in Spain on charges of crimes against humanity to 640 years in prison (21 years for each of the 30 killings and further five years each for torture and illegal detention) on 19 April 2005. The sentence was later altered and increased by the Supreme Court to 1084 years, although his actual imprisonment, based on the Spanish law, was automatically reduced to 30 years.²⁶⁹

As with any application of the universality principle, this case has attracted substantial attention as to whether Spain could exercise universal jurisdiction, which was coupled with the developing practice of the *Audiencia Nacional*, requiring additionally, albeit with some hesitation, some kind of actual connection with Spain. Christian Tomuschat correctly pointed out that among the victims of the dictatorship around 610 persons were of Spanish nationality, but no specific findings could be made regarding the nationality of 30 victims of the two death flights in which Scilingo participated. Yet, he voluntarily came to Spain. Even though it could be argued that he thought that he would only act as a witness, it was clear for him that he would be a key figure in the proceedings. Therefore, there was a sound jurisdictional basis for this conviction.²⁷⁰

Nevertheless, the 2009 reform of Article 23(4) of the 1985 Act profoundly changed the character of the universal jurisdiction in Spain and explicitly introduced certain restrictions in its application after universality was invoked by Spain to investigate six former Bush administration officials for allegedly giving legal cover to torture committed at the US detention center in Guantánamo Bay, Cuba, and seven top Israeli military and government officials for alleged crimes against humanity in the 2002 targeted assassination of Salah Shehadeh, the commander of the military wing of Hamas.²⁷¹

Accordingly, Spanish lawmakers, in order to put a stop to politically troublesome claims, restricted jurisdiction of Spanish courts to the cases when it has been duly shown that the alleged

²⁶⁸ Susan Kemp, Guatemala Prosecutes former President Ríos Montt, *Journal of International Criminal Justice*, vol. 12, issue 1 (2014), p.133.

²⁶⁹ Francisco J. Bariffi, Scilingo Case, Max Planck Encyclopedia of Public International Law, December 2006, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1795?rskey=CHUSIV&result=1&prd=OPIL> (visited last: 15.08.2015).

²⁷⁰ Christian Tomuschat, Issues of Universal Jurisdiction in the *Scilingo Case*, *Journal of International Criminal Justice*, vol. 3, issue 5 (2005), pp.1080-1081.

²⁷¹ Soeren Kern, Spain Rethinks Universal Jurisdiction, Gatestone Institute International Policy Council, available at: <http://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction> (visited last: 15.08.2015).

perpetrator is present in Spain, or victims are of Spanish nationality (the principle of passive nationality is not separately enshrined in Spanish domestic legislation), or that there is some relevant link with Spain, and there is no other competent State where proceedings have been initiated that constitute an effective investigation and prosecution.²⁷² Under this provision, the principle of universal jurisdiction was restricted by the existence of two major requirements: (a) the existence of a certain link with Spain; and (b) the subsidiary nature of Spanish universal jurisdiction in relation to the courts of third States or of an international court. Thus, the exercise of universal jurisdiction by Spanish courts became a “jurisdiction of last resort”, but without prejudice to the obligations of Spain under international treaties.²⁷³

At the same time, in March 2014, in light of the issuance of arrest warrants by a Spanish judge for former Chinese President Jiang Zemin and four senior Chinese officials over alleged human rights abuses committed decades ago in Tibet, a new law reforming universal jurisdiction was passed in Spain. According to the new wording of Article 23(4)(a) of the 1985 Act, jurisdiction of Spanish courts over genocide, crimes against humanity and war crimes will only be allowed in three cases: (a) when the alleged perpetrator is a Spanish citizen (active nationality principle); (b) when the alleged perpetrator is a foreigner with habitual residence in Spain (extended active nationality principle); (c) when the alleged perpetrator is a foreigner that happens to be in Spain and his or her extradition has been denied by the Spanish authorities (*aut dedere aut judicare* principle). Therefore, amended Article 23(4) does not prescribe passive personality jurisdiction, nor explicit possibility of exercising universal jurisdiction for genocide, crimes against humanity or war crimes. Although the Convention against Torture²⁷⁴, as well as Enforced Disappearance Convention²⁷⁵ allow States to extend their jurisdiction on the basis of universality principle, amended Spanish legislation only establishes jurisdiction in respect of torture and enforced disappearance on the basis of active or passive personality principle and on the condition that the victim was a Spanish national at the time the offense was committed and the alleged perpetrator is present in Spain. In fact, a variety of conditions concerning each specific offence are established by the amendment.²⁷⁶

Despite the fact that 2009 changes were negatively embraced by the public, to certain extent they were necessary in order to bring Spanish legislation in conformity with the practice of its own

²⁷² Ignacio de la Rasilla del Moral, The Swan Song of Universal Jurisdiction in Spain, *International Criminal Law Review*, vol. 9 (2009), p.804.

²⁷³ Para 13, The scope and application of the principle of universal jurisdiction: information provided by Spain, UN Sixth Committee, 2013, UN Doc. A/68/113.

²⁷⁴ Art. 5(2), Convention against Torture, *supra note* 141.

²⁷⁵ Art. 9(2), Enforced Disappearance Convention, *supra note* 154.

²⁷⁶ Rosa Ana Alija Fernández, The 2014 Reform of Universal Jurisdiction on Spain. From All to Nothing, *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 13 (2014), pp.719-720, 724, available at: http://zis-online.com/dat/artikel/2014_13_883.pdf (visited last: 15.08.2015).

courts, as well as to incorporate the main developments of the universal jurisdiction doctrine, discussed in previous Chapters. In contrast, it is considered that the 2014 reform went too far and basically removed universal jurisdiction from the Spanish legal system, which was famous for an extensive application of the principle of universality for over two decades.

C. UK

The UK is a common law country and according to its legal system, the authorities of the State in whose territory an offense was committed have priority in prosecuting the crime, in particular because of the availability of evidence and witnesses, as well as the visibility of justice to victims. However, UK also acknowledged that not always the exercise of territorial jurisdiction is possible and therefore universal jurisdiction can be resorted to in order to ensure that perpetrators of serious crimes do not escape justice, but only under specific conditions. First of all, UK prosecuting authorities would not usually seek to proceed against any suspect who was not present in the UK. Secondly, the initiation of proceedings based on the universality principle requires the consent of the Attorney General for England and Wales, a government-appointed position, or his equivalent elsewhere in the UK²⁷⁷. This means that any prosecution based on the principle of universality in the UK is linked to the political will of the State.

Although the practical use of the universality principle in the UK is rather limited, it was applied in one of the most famous cases concerning the application of the principle of universal jurisdiction. On 16 October 1998, General Augusto Pinochet, the former President of Chile, while recovering from back surgery in London Hospital, was arrested by the Scotland Yard police at the request of Spanish authorities charging the former dictator with genocide, torture and kidnapping in connection with the death or disappearance of more than three thousand Spanish and Chilean citizens in the period between 1973 and 1990.²⁷⁸ Extradition was also sought by a number of other European countries - Belgium, France, Italy, Luxembourg, Sweden and Switzerland - for alleged crimes committed against their own nationals in Chile.

The following day after Pinochet's arrest, the Chilean government protested on the ground that as a former Head of State, he had sovereign immunity. This was followed by numerous decisions in London as to whether Pinochet really enjoyed immunity and, if so, to what extent. For the first time at the international level a former Head of State has been arrested and indicted in a country other than his own for crimes allegedly committed during his time in office against both Chilean and other nationals. His immunity was denied by the Law Lords in the first judgment (later annulled) as,

²⁷⁷ UK, UN Sixth Committee, *supra note* 185, p.4.

²⁷⁸ David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: was Europe a Catalyst, Cause or Inconsequential?*, *Journal of Latin American Studies*, vol. 36, issue 3 (August 2004), p.481.

although a former Head of State enjoys immunity *ratione personae*, international crimes such as torture and crimes against humanity were not “functions” of the Head of State. In the second judgment, the Lords held that once the UK and Chile had ratified the 1984 UN Convention against Torture, Pinochet could not claim immunity for acts of torture. However, Pinochet’s extradition to Spain was still refused on the basis of a medical examination by British specialists concluding that he no longer had the mental capacity to stand trial. He then returned to Chile and was prosecuted there, but in 2001 proceedings against an 85 year-old Pinochet were suspended on health grounds.²⁷⁹ Although Pinochet has never been convicted, the main message of this case was clear – there is no safe heaven abroad for those who violate human rights in their home countries.

Although UK legislation consists of numerous Acts, which implement and explicitly prescribe the exercise of universal jurisdiction (Geneva Conventions Act of 1957, Aviation and Security Act of 1982, Terrorism Act of 2000 to name just a few), attempts to prosecute international crimes in the UK have nevertheless been relatively sparse. The only successful case, which took place after Pinochet, is the 2005 prosecution of Fayaradi Zardad, an Afghan national, militia leader prosecuted for committing torture and hostage-taking in Afghanistan in the 1990s. Zardad was charged under Section 134 of the Criminal Justice Act of 1988, which incorporated the provisions of the Convention against Torture into UK law, as well as Section 1 of the Taking of Hostages Act of 1982 giving effect to the Hostages Convention, and was subsequently sentenced to 20 years’ imprisonment.²⁸⁰

D. Universal jurisdiction in the practice of the ICJ

There are not many cases in the practice of the ICJ that pronounce on the principle of universal jurisdiction. In fact, as was reflected above, the ICJ was even criticized for deciding a case without analyzing it within the framework of the principle of universal jurisdiction. In the *Arrest Warrant case*, which was frequently cited in this Thesis, Belgium issued an arrest warrant on 11 April 2000 against Congo’s Foreign Minister Mr Abdulaye Yerodia Ndombasi, which was sent to the International Criminal Police Organization and to the Congolese authorities, accusing him of war crimes and crimes against humanity. In turn, Congo brought Belgium before the ICJ for the alleged violations of the immunity from prosecution granted by international law to the Congo’s Minister. Consequently, the Court decided that in issuing the arrest warrant, Belgium failed to respect the immunity enjoyed by the Minister under international law and therefore the arrest warrant must be cancelled.²⁸¹

²⁷⁹ Yves Beigbeder, *Judging Criminal Leaders. The Slow Erosion of Impunity*, Kluwer Law International Martinus Nijhoff Publishers (2002), pp.155-158.

²⁸⁰ Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, *Michigan Journal of International Law*, vol. 30 (Spring 2009), pp.940-941.

²⁸¹ Shiv R. S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing (2007), p.232.

The Court justified this decision by reference to the request of both parties to limit the discussion to the question of immunity. Therefore, according to the *non ultra petita* rule, the Court was precluded from ruling on this issue. However, Jan Wouters did not find this argumentation entirely convincing. In his opinion, the real reason may be that judges were very much divided on this controversial issue. No fewer than ten judges found it necessary to address it in a separate or dissenting opinion, and although most of them were of the view that the Court should have ruled on the issue of jurisdiction, they did not agree on the way in which the Court should have pronounced itself.²⁸²

Within a year after the decision in the *Arrest Warrant case*, a similar situation presented itself for the Court to address the questions of universal jurisdiction. French courts initiated criminal proceedings against certain Congolese governmental officials, including Denis Sassou Nguesso, the President of Congo, who were charged with crimes against humanity and torture. Consequently, in December 2002 the Republic of Congo instituted proceedings against France for the alleged abuse of universal jurisdiction and resulting failure to respect immunities of Congolese officials.²⁸³ However, in its Order of 17 June 2003, by fourteen votes to one, the Court found that the circumstances of the case were not as such to justify an indication of provisional measures under Article 41 of the Statute of the ICJ.²⁸⁴ On the point regarding France's exercise of universal jurisdiction, the Court was of the view that the Republic of Congo had again simply failed to demonstrate any possibility of irreparable prejudice to its rights, nor could provide any concrete evidence to support its allegations.²⁸⁵ Although many scholars had hoped that the ICJ would finally set out certain guidelines for the scope and application of the principle of universal jurisdiction, it has never happened and in November 2010 proceedings were discontinued.²⁸⁶

In fact, the closest ICJ ever touched upon universal jurisdiction was the recent case *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, which involved the *aut dedere aut judicare* obligation of Senegal under the Convention against Torture. This case concerned the prosecution of Hisséne Habré, a former President of Chad, for systematic acts of torture, murders and disappearances during his presidency, and who has taken refuge in Senegal since he was forcibly

²⁸² Jan Wouters, The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks, *Leiden Journal of International Law*, vol. 16, issue 2 (June 2003), p.263.

²⁸³ Kaitlin R. O'Donnell, Certain Criminal Proceedings in France (*DRC v. France*) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?, *Boston University International Law Journal*, vol. 26 (2008), pp.396-397.

²⁸⁴ Para 41, Certain Criminal Proceedings in France (*Republic of the Congo v. France*), ICJ, Request for the Indication of a Provisional Measure, Order, 17 June 2003, ICJ Reports (2003), p.112.

²⁸⁵ David Turns, Certain Criminal Proceedings in France (*Republic of the Congo v France*), Provisional Measures, Order of 17 June 2003, *International and Comparative Law Quarterly*, vol. 53 (2004), pp.750-751.

²⁸⁶ Case Concerning Certain Criminal Proceedings in France (*Republic of the Congo v. France*), ICJ, Order, 16 November 2010, ICJ Reports (2010), p.637.

removed from office at the end of 1990. In fact, according to some calculations, more than 40,000 people were victims of Habré's regime. Still Senegalese courts did not have the authority to exercise universal jurisdiction under national law, nor could extradite Habré to Belgium, which tried to assert jurisdiction pursuant to an international arrest warrant. As a result, Belgium claimed that Senegal failed to prosecute or extradite Habré in violation of the *aut dedere aut judicare* obligation enshrined in Article 5(2) of the Convention against Torture.²⁸⁷

The ICJ concluded that Senegal had violated its obligations under Convention against Torture and unanimously held that Senegal “must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him”.²⁸⁸ The Court reasoned that obligations within the Convention against Torture are “obligations *erga omnes partes*” in the sense that each State Party has an interest in compliance with them in any given case, which implies the entitlement of each State Party to the Convention to make a claim concerning the cessation of an alleged breach by another.²⁸⁹ In fact, this case involved two major issues: application of the principle of universal jurisdiction, on the one hand, and whether a State that is not injured or affected is entitled to raise claim and invoke the responsibility of another State, on the other. The latter is the revolutionary element in this decision, which was prominently discussed by the ILC. Under paragraph 1(a) of Article 48 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts, States other than the injured one may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest (such obligations have been referred to as obligations “*erga omnes partes*”).²⁹⁰

Perhaps the trial of Habré, which is the first time courts of one African country have started the prosecution of the former ruler of another African State for alleged human rights crimes²⁹¹, will turn into the first effective application of the principle of universal jurisdiction on the African continent.

²⁸⁷ Sangeeta Shah, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *Human Rights Law Review*, vol. 13, issue 2 (2013), pp.351-352.

²⁸⁸ Para 122, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Merits, 20 July 2012, ICJ Reports (2012), p.462.

²⁸⁹ Para 68, 69, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *Ibid*, pp.449-450.

²⁹⁰ Para 6, Commentary to Art. 48, Draft Articles on State Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC*, 2001, vol. II (Part Two), p.126.

²⁹¹ Former Chad dictator's war crimes trial opens in Senegal, *The Guardian*, 20 July 2015, available at: <http://www.theguardian.com/world/2015/jul/20/former-chad-dictator-hissene-habre-war-crimes-trial> (visited last: 15.08.2015).

Chapter VI. Obstacles to exercising universal jurisdiction over international crimes

Universal jurisdiction is considered to be an effective tool in combating impunity and bringing justice to victims. Therefore, action must be taken in order to eliminate obstacles to the successful investigation and prosecution of cases based on the principle of universality. Amnesty International in its preliminary survey of legislation around the world identified, *inter alia*, the following barriers in the way of effective prosecution, which were mostly reflected in this Thesis:

- failure to define crimes under international law as crimes under national law, coupled with disharmony among domestic judicial systems, which is reflected in various modes of implementing obligations under international instruments, as well as in incoherent procedural conditions for exercising universal jurisdiction;
- presence requirements in order to open an investigation or seek extradition;
- limiting universal jurisdiction to persons who are residents or who subsequently become residents or nationals of the State asserting jurisdiction;
- limiting universal jurisdiction to foreign nationals that are civil servants or members of the armed forces;
- even though international crimes, such as crimes against humanity and war crimes, should not be subject to the statute of limitations under international law since the responsibility for such crimes cannot lapse with time²⁹², the statute of limitations enacted in some countries is still a major problem in bringing perpetrators of serious crimes to justice;
- misuse of the *non bis in idem* principle through sham or unfair foreign proceedings;
- political control over decisions to investigate, prosecute or extradite:

“If used in a politically motivated manner or simply to vex and harass leaders of other States, universal jurisdiction could disrupt world order and deprive individuals of their basic rights. Even with the best intentions, universal jurisdiction could be used imprudently, creating unnecessary friction between States and abuses of legal processes”²⁹³;
- ineffective extradition laws or their absence;
- amnesty laws for particular crimes, which were claimed to be illegal by various regional and international bodies; for example, in respect to the crime of torture the UN Human Rights Committee declared the following:

²⁹² Dalila V. Hoover, *Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court*, *Cornell Law School Inter-University Graduate Student Conference Papers* (2011), Paper 52, p.12, available at: http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clap (visited last: 15.08.2015).

²⁹³ Bassiouni, 2004, *supra note* 90, p.39.

“[S]ome States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”²⁹⁴

- jurisdictional immunities, etc.²⁹⁵

The ILA has also addressed the issue that investigating and prosecuting crimes on the basis of universal jurisdiction requires special skills, both in terms of knowing how to investigate crimes committed abroad and in terms of the specialized knowledge of international criminal law. It is therefore necessary to establish specialized national institutions for this purpose. Moreover, one of the reasons for the frequent failure of States to implement their international obligations with respect to universal jurisdiction both in law and practice is the lack of systematic international supervision²⁹⁶, which is not considered as an “obstacle”, but rather as a “contributing factor” to the failure of States to implement their obligations with respect to universal jurisdiction.

For instance, the Convention against Torture is one of the few international instruments establishing its own supervisory body, the Committee against Torture.²⁹⁷ However, as Menno T. Kamminga reasonably concluded:

“Unfortunately, the Committee against Torture has long failed to pay more than perfunctory attention to compliance with the universal jurisdiction provisions of the Convention when reviewing implementation reports by States Parties. While it has given regular attention to the need to adopt enabling legislation for this purpose, the Committee has for many years shown little interest in the actual application of such legislation in individual cases.”²⁹⁸

It is constantly argued that the territorial State is the best place to obtain evidence, secure witnesses, enforce sentences, and deliver the “justice message” to the accused, victims and affected communities.²⁹⁹ In this respect the greatest difficulty in bringing proceeding on the basis of universal jurisdiction may be of practical nature relating to evidentiary problems. Of course, States shall cooperate with each other in the collection of information and evidence and certain treaties even oblige States Parties to provide mutual legal assistance in investigation and prosecution of these crimes.³⁰⁰ In reality, the picture is far from this ideal and rather often States asserting universal

²⁹⁴ Para 15, General Comment 20, Article 7, Human Rights Committee, Forty-fourth session (1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), p.30.

²⁹⁵ Universal Jurisdiction, A Preliminary Survey of Legislation Around the World – 2012 Update, Amnesty International, 09 October 2012, Amnesty International Publications (2012), p.11, available at: <https://www.amnesty.org/en/documents/IOR53/019/2012/en/> (visited last: 15.08.2015).

²⁹⁶ Final Report, ILA, 2000, *supra note* 194, pp.12, 18.

²⁹⁷ Art. 17, Convention against Torture, *supra note* 141.

²⁹⁸ Kamminga, 2001, *supra note* 176, p.961.

²⁹⁹ Para 7, Report of the Secretary-General, 2010, *supra note* 16, p.4.

³⁰⁰ ILA, Final Report, 2000, *supra note* 194, pp.16-17.

jurisdiction find themselves in a situation without any actual support from the territorial State. As a result, proceedings become extremely lengthy, costly and challenging.

Another practical obstacle arises in cases involving prosecution of pirates in relation to a number of human rights issues. How to detain pirates on board without breaching the basic obligations of due process? How to solve the problem of securing the presence of witnesses, who are often naval officers or seafarers, which end up in completely different parts of the world by the time of any trial?³⁰¹ Shall a judge be present on board to avoid all of the aforementioned problems? Solutions have yet to be found.

Conclusions

Jurisdiction is inherent to States for the purpose of protecting their own interests, while universal jurisdiction supports the idea that international crimes affect the international legal order as a whole. It follows from the universal nature of these crimes that the international community is empowered to prosecute and bring those responsible to justice, regardless of who was the offender or against whom the acts were undertaken.³⁰² International crimes are capable of affecting all States and peoples, but not all States, which can establish jurisdiction based on the traditional links of territoriality, active or passive nationality, are able or willing to prosecute the perpetrators of such crimes. Under these circumstances, universal jurisdiction offers an additional tool for ensuring accountability, combating impunity and providing justice to victims.

Universal jurisdiction began as a modest and rather narrow doctrine, which was applicable only to the crime of piracy, but has developed along with the international legal order and as new challenges arose in international law. Nevertheless, the list of crimes, which may be subject to universal jurisdiction, still remains under discussion. The majority of States seem to accept that under customary international law universal jurisdiction extends to the most serious crimes of international concern such as genocide, crimes against humanity, war crimes, torture and piracy, while the exercise of universal jurisdiction in other cases is based on treaty obligations, and is accordingly only binding on the State Parties thereto. Although the universality principle is currently accepted where it is a matter of international concern, numerous inconsistencies surround its application.

Based on the undertaken research, it is considered that universal jurisdiction in criminal matters is an additional ground of jurisdiction, which allows the State to prosecute alleged perpetrators for the most serious international crimes irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or any other jurisdictional basis

³⁰¹ UNODC Issue paper, *supra note* 96, pp.12-14.

³⁰² Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law*, 3 ed., OUP (2014), p.73.

recognized by international law. Although States are often reluctant to provide for universal jurisdiction in their domestic legislation in the absence of specific permission in international law, the developments of the *Lotus case* shall nevertheless be applied to the notion of universality.

It should be kept in mind that universal jurisdiction is a basis for jurisdiction only and does not itself imply an obligation to submit a case for potential prosecution as the latter is mostly left to domestic law. The principle of universality is permissive in character unless a mandatory treaty-based or customary international law obligation exists to provide for the prosecution of certain crimes. The subsidiary character of the universality principle speaks in favor of the recognition of the legitimate primary interest of the State to prosecute cases that have a direct link to it. Moreover, it was concluded that States should be allowed to conduct preliminary investigations aimed at establishing the location of the perpetrator and collecting the evidence, as well as to prepare extradition requests. However, trials *in absentia* are considered to be a violation of the basic requirements of due process as recognized by international law.

States establish different procedural requirements for the initiation of the proceedings based on the principle of universal jurisdiction (for example, the double criminality requirement contained in Austrian legislation or consent for the initiation of proceedings by the Attorney General for England and Wales in the UK). In the course of prosecution based on the universality principle due regard must be given to the *non bis in idem* principle and prohibition of extradition if the accused is likely to face a death penalty sentence or be subject to torture or other cruel or inhuman punishment or treatment in the State asserting jurisdiction.

The principle of universal jurisdiction must be at all times distinguished from the obligation to extradite or prosecute. The *aut dedere aut judicare* principle can also become applicable if there is no universal jurisdiction and the State exercises jurisdiction on another jurisdictional basis. In addition, universal jurisdiction relates to the competence of a State to prosecute persons before its own courts, rather than to the prosecution of those same persons before an international judicial body and therefore must not be confused with the jurisdiction of international criminal courts and tribunals. Moreover, although jurisdictional immunities can be a major obstacle in the assertion of universal jurisdiction, its application has to respect the immunities established by international law.

The practical application of the universality principle came a long way from the arrest of Augusto Pinochet in London to the most recent initiation of the proceedings against Hisséne Habré in Senegal. High hopes are expressed that the trial of Habré will turn into the first effective application of the principle of universal jurisdiction on the African continent. Although AU Member States voiced complaints that the principle of universal jurisdiction was being selectively and politically used against African officials, in reality citizens of a variety of States were tried based on the principle

of universal jurisdiction. In contrast, the ICJ has only touched upon the questions of universal jurisdiction and its related issues in its practice.

A number of barriers in the way of effective prosecutions were also reflected in this Thesis, which, *inter alia*, includes the failure to define crimes under international law as crimes under national law; sham on unfair foreign proceedings; political control over decisions to investigate, prosecute or extradite; statute of limitations; amnesty laws, etc.

As UN Secretary-General Ban-Ki-moon stated on the 15th anniversary of the Srebrenica massacres in 2010: “[t]he age of impunity has passed, and the age of accountability is now taking over.”³⁰³ Universal jurisdiction not only helps to bring the criminals to justice by ensuring accountability and combating impunity, but it also serves as an effective preventive tool. However, it should only be exercised in good faith, and consistently with other principles and rules of international law.

³⁰³ Secretary-General’s remarks at ceremony marking the 15th Srebrenica Commemoration, 12 July 2010, UN Secretary-General Ban Ki-moon, available at: <http://www.un.org/sg/STATEMENTS/index.asp?nid=4672> (visited last: 15.08.2015).

Bibliography

Books

1. Abtahi Hirad, Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff Publishers (2008).
2. Akehurst Michael, *Jurisdiction in International Law*, *British Yearbook of International Law*, vol. 46 (1972-73).
3. Bassiouni M. Cherif, *International Criminal Law*, 3rd ed., vol. 1, Sources, Subjects, and Contents, Martinus Nijhoff Publishers (2008).
4. Bassiouni M. Cherif, *International Criminal Law*, 3rd ed., vol. 3, International Enforcement, Martinus Nijhoff Publishers (2008).
5. Bassiouni M. Cherif, *The History of Universal Jurisdiction and Its Place in International Law in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*/ed. Stephen Macedo, University of Pennsylvania Press (2004).
6. Bedi Shiv R. S., *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing (2007).
7. Beigbeder Yves, *Judging Criminal Leaders. The Slow Erosion of Impunity*, Kluwer Law International Martinus Nijhoff Publishers (2002).
8. Berg Karen Janina, *Universal Criminal Jurisdiction as Mechanism and Part of the Global Struggle to Combat Impunity with Particular Regards to the Crime of Torture*, Neuer Wissenschaftlicher Verlag GmbH Nfg KG (2012).
9. Cassese Antonio, Gaeta Paola, Baig Laurel, Fan Mary, Gosnell Christopher, Whiting Alex, *Cassese's International Criminal Law*, 3rd ed., OUP (2013).
10. Cryer Robert, Friman Håkan, Robinson Darryl, Wilmschurst Elizabeth, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press (2010).
11. *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, section B, Berne, Federal Political Department.
12. Grover Sonja C., *The European Court of Human Rights as a Pathway to Impunity for International Crimes*, Springer-Verlag Berlin Heidelberg (2010).
13. Hafner Gerhard, *Accountability of International Organizations – A Critical View in Towards World Constitutionalism, Issues in the Legal Ordering of the World Community*/ed. Ronald St. John Macdonald, Douglas M. Johnson, Martinus Nijhoff Publishers (2005).
14. Hallevy Gabriel, *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer-Verlag Berlin Heidelberg (2010).

15. Henckaerts Jean-Marie, Doswald-Beck Louise, *Jurisdiction over War Crimes, Rules of Customary International Humanitarian Law, Vol. I: Rules*, International Committee of the Red Cross, Cambridge University Press (2005).
16. Inazumi Mitsue, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, INTERSENTIA (2005).
17. Kaleck Wolfgang, Ratner Michael, Singelstein Tobias, Weiss Peter, *International Prosecution of Human Rights Crimes*, Springer-Verlag Berlin Heidelberg (2007).
18. Kreijen Gerard, *State failure, Sovereignty and Effectiveness*, Martinus Nijhoff Publishers (2004).
19. Malanczuk Peter, *Akehurst's Modern Introduction to International Law, 7th rev. ed.*, Routledge, Taylor & Francis Group (2005).
20. Mann Frederick A., *The Doctrine of Jurisdiction in International Law*, *Recueil des Cours de l'Académie de droit international*, vol. 111 (1964).
21. Mann Frederick A., *The Doctrine of International Jurisdiction Revisited after Twenty Years*, *Recueil des Cours de l'Académie de droit international*, vol. 186 (1984).
22. Ryngaert Cedric, *Jurisdiction in International Law*, OUP (2008).
23. Shah Niaz A., *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Research in the Law of Armed Conflict, Routledge, Taylor & Francis Group (2011).
24. Shaw Malcolm N., *International Law, 6th ed.*, Cambridge University Press (2008).
25. Simpson Gerry, *Great Powers and Outlaw States, Unequal Sovereigns in the International Legal Order*, Cambridge University Press (2004).
26. Stahn Carsten, *The Law and Practice of the International Criminal Court*, OUP (2015).
27. Vierheilig Monika, *Customs Regime Between Germany and Austria (Advisory Opinion) in Decisions of International Courts and Tribunals and International Arbitrations*, *Encyclopedia of Public International Law*/ed. Rudolph Bindschedler, Thomas Buergenthal, Karl Doehring and others, North-Holland Publishing Company (1981).
28. Warren Christopher N., *Literature and the Law of Nations, 1580-1680*, OUP (2015).
29. Werle Gerhard, Jessberger Florian, *Principles of International Criminal Law, 3 ed.*, OUP (2014).

Journals

30. Anderson Kirsten, *How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?*, *Melbourne Journal of International Law*, vol. 7 (2006).
31. Bariffi Francisco J., *Scilingo Case*, *Max Planck Encyclopedia of Public International Law*, December 2006, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1795?rskey=CHUSIV&result=1&prd=OPIL> (visited last: 15.08.2015).

32. Beaulieu Catherine, Extraterritorial laws, Why They Are Not Really Working and How They Can Be Strengthened, ECPAT International (September 2008), available at: http://resources.ecpat.net/worldcongressIII/PDF/Journals/EXTRATERRITORIAL_LAWS.pdf (visited last: 15.08.2015).
33. Bekou Olympia, Cryer Robert, The International Criminal Court and Universal Jurisdiction: A Close Encounter?, *International and Comparative Law Quarterly*, vol. 56, issue 1 (January 2007).
34. Bovens Mark, Analyzing and Assessing Accountability: A Conceptual Framework, *European Law Journal*, vol. 13, issue 4 (July 2007).
35. Bowett Derek W., Jurisdiction: Changing Patterns of Authority over Activities and Resources, *British Yearbook of International Law*, vol. 53, issue 1 (1982).
36. Cafritz Eric, Tene Omer, Article 113-7 of the French Penal Code: The Passive Personality Principle, *Columbia Journal of Transnational Law*, vol. 41 (2003).
37. Cassese Antonio, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, *European Journal of International Law*, vol. 13, issue 4 (2002).
38. Cowles Willard B., Universality of Jurisdiction over War Crimes, *California Law Review*, vol. 33, issue 2 (June 1945).
39. Dimitrakos D., The Principle of Universal Jurisdiction & the ICC, 22 January 2014, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383587 (visited last: 15.08.2015).
40. Elst Richard van, Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions, *Leiden Journal of International Law*, vol. 13, issue 4 (December 2000).
41. Fernández Rosa Ana Alija, The 2014 Reform of Universal Jurisdiction on Spain. From All to Nothing, *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 13 (2014), pp.719-720, 724, available at: http://zis-online.com/dat/artikel/2014_13_883.pdf (visited last: 15.08.2015).
42. Garrod Matthew, The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality, *International Criminal Law Review*, vol. 12 (2012).
43. Green L.C., The Eichmann Case, *The Modern Law Review*, vol. 23, issue 5 (September 1960).
44. Gregor Neil, Heal Bridget, The Eichmann Trial Fifty Years On, *German History*, vol. 29, issue 2 (2011).
45. Hafner Gerhard, Accountability of International Organizations, Proceedings of the Annual Meeting, American Society of International Law (02-05 April 2003), vol. 97.
46. Harvard Research on International Law, Draft Convention on Jurisdiction with Respect to Crime, *American Journal of International Law*, vol. 29, (1935).

47. Hasian Marouf, Vectors of traumatic memories and mass-mediated representations of the “last” Nazi trial of John Demjanjuk, *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, vol. 17, issue 4 (2014).
48. Hladik Jan, Protection of Cultural Property: The Legal Aspects, *International Law Studies*, vol. 80 (2006).
49. Hoover Dalila V., Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court, *Cornell Law School Inter-University Graduate Student Conference Papers* (2011), Paper 52, available at: http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clacp (visited last: 15.08.2015).
50. Kamminga Menno T., First Convection Under the Universal Jurisdiction Provisions of the UN Convention Against Torture, *Netherlands International Law Review*, vol. 51, issue 3 (2004).
51. Kamminga Menno T., Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses, *Human Rights Quarterly*, vol. 23, issue 4 (November 2001).
52. Kaleck Wolfgang, From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008, *Michigan Journal of International Law*, vol. 30 (Spring 2009).
53. Kemp Susan, Guatemala Prosecutes former President Ríos Montt, *Journal of International Criminal Justice*, vol. 12, issue 1 (2014).
54. Kress Claus, Universal Jurisdiction over International Crimes and the Instiut de Droit international, *Journal of International Criminal Justice*, vol. 4 (2004).
55. McCarthy John G., The Passive Personality Principle and Its Use in Combatting International Terrorism, *Fordham International Law Journal*, vol. 13, issue 3 (1989).
56. McCrory Susan, The International Convention for the Protection of all Persons from Enforced Disappearance, *Human Rights Law Review*, vol. 7, issue 3 (2007).
57. Leonard Eric K., Global Governance and the State: Domestic Enforcement of Universal Jurisdiction, *Human Rights Review*, vol. 16, issue 1 (2015).
58. Miller Sarah, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, *European Journal of International Law*, vol. 20, issue 4 (2009).
59. Moral Ignacio de la Rasilla del, The Swan Song of Universal Jurisdiction in Spain, *International Criminal Law Review*, vol. 9 (2009).
60. Nigro Raffaella, The Notion of “Jurisdiction” in Article 1: Future Scenarios for the Extra-Territorial Application of the European Convention on Human Rights, *The Italian Yearbook of International Law*, vol. 20 (2010).

61. O'Donnell Kaitlin R., Certain Criminal Proceedings in France (*DRC v. France*) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?, *Boston University International Law Journal*, vol. 26 (2008).
62. Palombino Fulvio Maria, Universal Jurisdiction *in absentia* over genocide: some critical remarks in the light of recent Spanish jurisprudence, *Journal of Genocide Research*, vol. 9, issue 2 (2007).
63. Pion-Berlin David, The Pinochet Case and Human Rights Progress in Chile: was Europe a Catalyst, Cause or Inconsequential?, *Journal of Latin American Studies*, vol. 36, issue 3 (August 2004).
64. Randall Kenneth C., Universal Jurisdiction Under International Law, *Texas Law Review*, vol. 66 (1988).
65. Reydam Luc, Belgium's First Application of Universal Jurisdiction: the *Butare Four* Case, *Journal of International Criminal Justice*, vol. 1 (2003).
66. Roht-Arriaza Naomi, Universal Jurisdiction: Steps Forward, Steps Back, *Leiden Journal of International Law*, vol. 17, issue 2 (June 2004).
67. Schabas William A., The Contribution of the Eichmann Trial to International Law, *Leiden Journal of International Law*, vol. 26, issue 3 (September 2013).
68. Schaller Dominik J., From the editor: the Demjanjuk case – final justice?, *Journal of Genocide Research*, vol. 11, issue 2-3 (2009).
69. Shah Sangeeta, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *Human Rights Law Review*, vol. 13, issue 2 (2013).
70. Tomuschat Christian, Issues of Universal Jurisdiction in the *Scilingo* Case, *Journal of International Criminal Justice*, vol. 3, issue 5 (2005).
71. Turns David, Certain Criminal Proceedings in France (Republic of the Congo v France), Provisional Measures, Order of 17 June 2003, *International and Comparative Law Quarterly*, vol. 53 (2004).
72. Wouters Jan, The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks, *Leiden Journal of International Law*, vol. 16, issue 2 (June 2003).
73. Yang Xiaodong, Jurisdiction, *International Law*, published online October 2012, available at: <http://oxfordindex.oup.com/view/10.1093/obo/9780199796953-0030> (visited last: 15.08.2015).

Documents

74. Austria-US Extradition Treaty, Signed at Washington on 08 January 1998, US Treaty Doc. 105-50, 1998 U.S.T. Lexis 191; TIAS 49 Stat. 2710.
75. Accountability of International Organizations, Final Report, ILA, Berlin 2004, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9> (visited last: 15.08.2015).

76. Combating Transnational Organized Crime Committed at Sea, Issue Paper, UNODC, March 2013, available at: http://www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf (visited last: 15.08.2015).
77. Draft Articles on State Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC*, 2001, vol. II (Part Two).
78. Draft Code of Crimes Against the Peace and Security of Mankind, Report of the ILC on the Work of its Forty-Eighth Session, 06 May-26 July 1996, UN Doc. A/51/10, *Yearbook of the ILC*, 1996, vol. I, (Part Two).
79. Draft Convention on Genocide, Res. 180(II), UN GA, 21 December 1947.
80. Draft Statute for an ICC with commentaries, ILC, *Yearbook of the ILC*, 1994, vol. II (Part Two).
81. Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, Committee on International Human Rights Law and Practice, ILA, London 2000, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/20> (visited last: 15.08.2015).
82. Fourth EU-Africa Summit, Declaration, Brussels, 02-03 April 2014, available at: http://www.africa-eu-partnership.org/sites/default/files/userfiles/2014_04_01_declaration_4th_eu-africa_summit_en.pdf (visited last: 15.08.2015).
83. General Comment 20, Article 7, Human Rights Committee, Forty-fourth session (1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994).
84. Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, IDI Resolution, Vancouver, 26 August 2011, available at: http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF (visited last: 15.08.2015).
85. Immunity of State officials from foreign criminal jurisdiction, Final Report of the ILC on the Work of its Sixty-fifth session (06 May-07 June and 08 July-09 August 2013), UN Doc. A/68/10, *Yearbook of the ILC*, 2013, vol. II (Part Two).
86. Informal Expert Paper: The Principle of Complementarity in Practice, Office of the Prosecutor, ICC, 2003, available at: <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF> (visited last: 15.08.2015).
87. Kessedjian Bernard, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, Civil and political rights, including the question of enforced or involuntary disappearances, UN Economic and Social Council, 12 February 2003, UN Doc. E/CN.4/2003/71.
88. Nowak Manfred, Report of the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or

involuntary disappearances pursuant to paragraph 11 of Commission resolution 2001/46, 08 January 2002, UN Doc. E/CN.4/2002/71.

89. Observations by Belgium on the scope and application of the principle of universal jurisdiction, UN Sixth Committee, 2010, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf (visited last: 15.08.2015).

90. Orentlicher Diane, Report of the independent expert to update the Set of principles to combat impunity, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Commission on Human Rights, 08 February 2005, UN Doc. E/CN.4/2005/102/Add.1.

91. Permanent Mission of Austria to the UN, №66.000/2/2010, 15 April 2010, UN Sixth Committee, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Austria.pdf (visited last: 15.08.2015).

92. Question of missing and disappeared persons, Res. 20 (XXXVI), UN Human Rights Committee, 29 February 1980, UN Doc. E/CN.4/RES/1980/20.

93. Res. 1593, UN SC, 5158th meeting, 31 March 2005, UN Doc. S/RES/1593.

94. Res. 1966, UN SC, 6463rd meeting, 22 December 2010, UN Doc. S/RES/1966.

95. Rome Statute of the ICC, adopted 17 July 1998, entered into force 01 July 2002, 2187 UNTS 3.

96. Situation in Palestine, The Office of the Prosecutor, ICC, 03 April 2012, available at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (visited last: 15.08.2015).

97. Statute of the International Criminal Tribunal for Rwanda, adopted 08 November 1994, UN Doc. S/RES/955.

98. Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, UN Doc. S/RES/827.

99. The Africa-EU Strategic Partnership, A Joint Africa-EU Strategy, Council of the EU, Lisbon, 09 December 2007, 16344/07 (Presse 291), available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/97496.pdf (visited last: 15.08.2015).

100. The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the EU, 16 April 2009, p.37, available at: http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf (visited last: 15.08.2015).

101. The Crime of Genocide, Res. 96(I), UN GA, 11 December 1946.

102. The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the ILC on the Work of its Sixty-Sixth Session, 05 May-06 June, 07 July-08 August 2014, UN Doc. A/69/10, *Yearbook of the ILC*, 2014, vol. II (Part Two).
103. The Princeton Principles of Universal Jurisdiction, Princeton Project on Universal Jurisdiction, Program in Law and Public Affairs, Princeton University, 2001, available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (visited last: 15.08.2015).
104. The scope and application of the principle of universal jurisdiction, Agenda item 84, Sixty-fourth session, Legal – Sixth Committee, UN GA, available at: <http://www.un.org/en/ga/sixth/64/UnivJur.shtml> (visited last: 15.08.2015).
105. The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 20 June 2011, UN Doc. A/66/93.
106. The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 23 July 2014, UN Doc. A/69/174.
107. The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 26 June 2013, UN Doc. A/68/113.
108. The scope and application of the principle of universal jurisdiction, Report of the Secretary-General, UN GA, 28 June 2012, UN Doc. A/67/116.
109. The scope and application of the principle of universal jurisdiction, Report of the Secretary-General prepared on the basis of comments and observations of Governments, UN GA, 29 July 2010, UN Doc. A/65/181.
110. The scope and application of the principle of universal jurisdiction, Res., UN GA, 16 December 2009, UN Doc. A/RES/64/117.
111. The scope and application of the principle of universal jurisdiction: information provided by Spain, UN Sixth Committee, 2013, available at: http://www.un.org/en/ga/sixth/68/UnivJur/Spain_E.pdf (visited last: 15.08.2015).
112. UK, Scope and application of the principle of universal jurisdiction, UK mission to the UN, UN Sixth Committee, 2011, available at: http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf (visited last: 15.08.2015).
113. Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Resolution of the Seventeenth Commission, IDI, Krakow, 26 August 2005, available at: http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf (visited last: 15.08.2015).
114. Universal Declaration of Human Rights, Res. 217 A(III), UN GA, 10 December 1948, UN Doc. A/810.

115. Universal Jurisdiction, A Preliminary Survey of Legislation Around the World – 2012 Update, Amnesty International, 09 October 2012, Amnesty International Publications (2012), available at: <https://www.amnesty.org/en/documents/IOR53/019/2012/en/> (visited last: 15.08.2015).

116. US Submission, Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction, UN Sixth Committee, 2010, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf (visited last: 15.08.2015).

Conventional Law

117. (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 31.

118. (II) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85.

119. (III) Geneva Convention Relative to the Treatment of Prisoners of War, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 135.

120. (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 287.

121. Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 04 November 1950, entered into force 03 September 1953, 213 UNTS 222.

122. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted 10 March 1988, entered into force 01 March 1992, 1678 UNTS 221.

123. Convention for the Suppression of Unlawful Seizure of Aircraft, adopted 16 December 1970, entered into force 14 October 1971, 860 UNTS 105.

124. Convention on the High Seas, adopted 29 April 1958, entered into force 30 September 1962, 450 UNTS 11.

125. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted 14 December 1973, entered into force 20 February 1977, 1035 UNTS 167.

126. Convention on the Prevention and Punishment of the Crime of Genocide, adopted 09 December 1948, entered into force 12 January 1951, 78 UNTS 277.

127. Convention on the Safety of UN and Associated Personnel, adopted 09 December 1994, entered into force 15 January 1999, 2051 UNTS 363.

128. Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation, adopted 23 September 1971, entered into force 26 January 1973, 974 UNTS 178.
129. International Convention Against Taking of Hostages, adopted 17 December, entered into force 03 June 1983, 1316 UNTS 205.
130. International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entered into force 23 December 2010, 2716 UNTS 3.
131. International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, entered into force 18 July 1976, 1015 UNTS 243.
132. International Convention for the Suppression of the Financing of Terrorism, adopted 09 December 1999, entered into force 10 April 2002, 2178 UNTS 197.
133. International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.
134. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 08 June 1977, entered into force 07 December 1978, 1125 UNTS 3.
135. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted 26 March 1999, entered into force 09 March 2004, 2253 UNTS 179.
136. Slavery Convention, adopted 25 September 1926, entered into force 09 March 1927, 60 LNTS 254.
137. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, entered into force 07 August 1956, 249 UNTS 240.
138. The International Opium Convention, adopted 23 January 1912, entered into force 11 February 1915, 8 LNTS 187.
139. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.
140. UN Charter, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI.
141. UN Convention on Jurisdictional Immunities of States and Their Property, adopted 02 December 2004, not yet in force, available at: http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf (visited last: 15.08.2015).
142. United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

Domestic Legislation

143. Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, Belgium, adopted 16 June 1993, amended 10 February 1999, repealed 05 August 2003, available at: <http://www.refworld.org/docid/3ae6b5934.html> (visited last: 15.08.2015).
144. Act on Serious Violations of International Humanitarian Law, 05 August 2003, Belgium Law on Serious Violations, available at: http://iccdb.webfactional.com/documents/implementations/pdf/Belgium_Serious_Violations_of_International_Humanitarian_Law__2003.pdf (visited last: 15.08.2015).
145. Austrian Criminal Procedural Code, BGBl N°631/1975, adopted 09 December 1975, entered into force 31 December 1975, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326> (visited last: 15.08.2015).
146. Canada Criminal Code, R.S.C., 1985, c. C-46, available at: <http://laws-lois.justice.gc.ca/eng/acts/c-46/> (visited last: 15.08.2015).
147. Criminal Code of Finland, ks. L 39/1889 s. 101, adopted 19 December 1889, entered into force 01 January 1891, available at: <http://www.legislationline.org/documents/section/criminal-codes> (visited last: 15.08.2015).
148. Criminal Code of the Russian Federation, N°63-Fz, adopted 13 June 1996, entered into force 01 January 1997, available at: <http://www.russian-criminal-code.com/PartI/SectionI/Chapter2.html> (visited last: 15.08.2015).
149. Criminal Code of Ukraine, N°2341-III, adopted 05 April 2001, entered into force 01 September 2001, available at: <http://www.legislationline.org/documents/action/popup/id/16257/preview> (visited last: 15.08.2015).
150. French Code of Criminal Procedure, LOI N°58-1296, adopted 23 December 1958, entered into force 02 March 1959, available at: <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview> (visited last: 15.08.2015).
151. Penal Code of the French Republic, LOI N°92-683, adopted 22 July 1992, entered into force 01 March 1994, available at: <http://www.legislationline.org/documents/section/criminal-codes> (visited last: 15.08.2015).
152. Swedish Penal Code, SFS 1962:700, adopted 21 December 1962, entered into force 01 January 1965, available at: <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> (visited last: 15.08.2015).

Cases

153. *Attorney General of the Government of Israel v Eichmann*, Judgment of the District Court of Jerusalem, Criminal Case №40/61, 11 December 1961, p.15, available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf (visited last: 15.08.2015).
154. *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Dissenting opinion of Judge Oda, 14 February 2002, ICJ Reports (2002).
155. *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Dissenting opinion of Judge Van den Wyngaert, 14 February 2002, ICJ Reports (2002).
156. *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, ICJ Reports (2002).
157. *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Judgment, 14 February 2002, ICJ Reports (2002).
158. *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Separate opinion by Judge Koroma, 14 February 2002, ICJ Reports (2002).
159. *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, ICJ, Separate opinion of President Guillaume, 14 February 2002, ICJ Reports (2002).
160. *Banković and Others v. Belgium and Others*, Decision, ECtHR, Application №52207/99, 12 December 2001, available at: [http://hudoc.echr.coe.int/eng?i=001-22099#{\"itemid\":\[\"001-22099\"\]}](http://hudoc.echr.coe.int/eng?i=001-22099#{\) (visited last: 15.08.2015).
161. Case Concerning Certain Criminal Proceedings in France (*Republic of the Congo v. France*), ICJ, Order, 16 November 2010, ICJ Reports (2010).
162. Certain Criminal Proceedings in France (*Republic of the Congo v. France*), ICJ, Request for the Indication of a Provisional Measure, Order, 17 June 2003, ICJ Reports (2003).
163. Customs Régime Between Germany and Austria, PCIJ, Advisory Opinion, 05 September 1931, Series A/B, № 41.
164. *Ghameshlouy v. Commonwealth*, 279 Va. 379, 689 S.E.2d 698, 25 February 2010, available at: <http://www.courts.state.va.us/opinions/opnscvwp/1091120.pdf> (visited last: 15.08.2015).
165. In the Matter of the Extradition of John Demjanjuk aka John Ivan Demjanjuk, US District Court, 612 F.Supp.544 (N.D. Ohio, eastern Division), available at: <http://www.uniset.ca/other/cs4/612FSupp544.html> (visited last: 15.08.2015).
166. Individual opinion by M. Anzilotti, Customs Régime Between Germany and Austria, PCIJ, Advisory Opinion, 05 September 1931, Series A/B, № 41.

167. *Ould Dah v. France*, Decision, ECtHR, Application №13113/03, 17 March 2009, available at: [http://hudoc.echr.coe.int/eng#{"itemid":\["001-113014"\]}](http://hudoc.echr.coe.int/eng#{) (visited last: 15.08.2015).
168. *Pad and Others v. Turkey*, Decision, ECtHR, Application № 60167/00, 28 June 2007, available at: [http://hudoc.echr.coe.int/eng#{"itemid":\["001-81672"\]}](http://hudoc.echr.coe.int/eng#{) (visited last: 15.08.2015).
169. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, Advisory Opinion, 28 May 1951, ICJ Reports (1951).
170. The case of the S.S. "Lotus" (*France v Turkey*), PCIJ, Judgment, 07 September 1927, Ser. A, №10 (1927), reprinted in World Court Report, vol. 2 (1969), available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (visited last: 15.08.2015).
171. *The Prosecutor's Office of Salzburg v. Duško Cvjetković*, Supreme Court of Austria, Verdict on Jurisdiction, 15Os99/94, 13 July 1994, available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Austria/Cvjetkovic_ObersterGerichtshof_Judgement_13-7-1994.pdf (visited last: 15.08.2015).
172. Questions Relating to the Obligation to Prosecute of Extradite (*Belgium v. Senegal*), Merits, 20 July 2012, ICJ Reports (2012).

News Articles

173. Former Chad dictator's war crimes trial opens in Senegal, The Guardian, 20 July 2015, available at: <http://www.theguardian.com/world/2015/jul/20/former-chad-dictator-hissene-habre-war-crimes-trial> (visited last: 15.08.2015).
174. Human Rights Watch, News, Belgium: Universal Jurisdiction Law Repealed, 01 August 2003, available at: <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed> (visited last: 15.08.2015).
175. Kern Soeren, Spain Rethinks Universal Jurisdiction, Gatestone Institute International Policy Council, available at: <http://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction> (visited last: 15.08.2015).
176. Secretary-General's remarks at ceremony marking the 15th Srebrenica Commemoration, 12 July 2010, UN Secretary-General Ban Ki-moon, available at: <http://www.un.org/sg/STATEMENTS/index.asp?nid=4672> (visited last: 15.08.2015).
177. Spain moves to curb legal convention allowing trials of foreign rights abuses, The Guardian, 11 February 2014, available at: <http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses> (visited last: 15.08.2015).

Websites

178. Apartheid Convention, Status, Website of the UNTC, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&lang=en (visited last: 15.08.2015).

179. State Parties to the Rome Statute, Website of the ICC, available at: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (visited last: 15.08.2015).

180. UNCLOS, Status, Website of the UNTC, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (visited last: 15.08.2015).

Abstract (English)

One of the most heated debates of recent years in modern international law has been the scope and application of the principle of universal jurisdiction, which has been on the agenda of the United Nations General Assembly and the Sixth Committee since 2009, after a group of African States voiced complaints that it was being used selectively and politically abused. However, Africa's grave concern regarding the applicability of the principle of universal jurisdiction does not pertain to what is actually being done by the international community. Universal jurisdiction began as a modest and rather narrow doctrine, which was applicable only to the crime of piracy, but has developed along with the international legal order and as new challenges arose in international law.

Under the principle of universality, any State may exercise jurisdiction without the criminal conduct having any nexus to the prosecuting State. Doctrinally the rationale for universal jurisdiction is based on the idea that certain crimes are so serious that they affect the international community as a whole, are universally condemned and harmful to international interests, with the result that States can take appropriate action against the perpetrators. The practical application of the universality principle came a long way from the arrest of Augusto Pinochet in London to the most recent initiation of the proceedings against Hisséne Habré in Senegal.

Although a great amount of work has been undertaken in recent years to clarify universal jurisdiction, there is neither a consensus on what universal jurisdiction is or should be, nor regarding the crimes covered by the concept, either in doctrine or State practice. This Thesis identifies the scope and application of the principle of universal jurisdiction in criminal law, distinguishes it from other related concepts, and shows that it offers a basis for ensuring accountability, addressing impunity gaps and providing justice to victims.

Abstract (German)

Eins der meistdiskutierten Debatten des Völkerrechts in den letzten Jahren handelt um den Umfang und die Applikation des Prinzips der universellen Jurisdiktion, welches seit 2009 auf der Agenda der Generalversammlung und des sechsten Ausschusses der Vereinten Nationen ist, nachdem eine Gruppe von afrikanischen Staaten Bedenken über die selektive Anwendung und politischen Missbrauch geäußert hatte. Jedoch gehören Afrikas schwerwiegende Vorbehalte bezüglich der Applikation des Prinzips der universellen Jurisdiktion nicht zu den Kernaufgaben der internationalen Gemeinschaft. Universelle Jurisdiktion fand ihren Anfang als bescheidene und eher begrenzte Lehre, welche lediglich auf die Piraterie Anwendung fand. Mittlerweile entwickelte sie sich jedoch zusammen mit der internationalen Rechtsordnung zu einer neuen Herausforderung im Völkerrecht.

Gemäß des Prinzips der universellen Jurisdiktion ist es jedem Staat möglich ihre Gerichtsbarkeit auszuüben ohne dass die begangene Straftat in einem entsprechenden Nexus zu diesem Staat besteht. Dogmatisch findet die Grundüberlegung der universellen Jurisdiktion ihre Basis in der Idee, dass gewisse Straftaten so schwerwiegend und schädlich für die gesamte internationale Gemeinschaft und ihren Interessen sind, dass einzelne Staaten geeignete Maßnahmen gegen Straftäter ergreifen können. Die praktische Applikation der universellen Jurisdiktion reicht vom Arrest von Augusto Pinochet in London bis zur jüngsten Einleitung des Prozesses gegen Hissène Habré in Senegal.

Trotz des Bestrebens die universelle Jurisdiktion zu bestimmen, kam es weder zu einem Konsens über die Bedeutung der universellen Jurisdiktion, noch welche Straftaten von dem Konzept erfasst sind, weder in der Lehre noch durch die Praxis der Staaten. Diese Thesis beschreibt den Umfang sowie die Anwendung des Prinzips der universellen Jurisdiktion im Strafrecht. Des Weiteren wird sie von anderen ähnlichen Konzepten klar unterschieden und zeigt auf, dass sie als Basis zur Gewährleistung von Verantwortung fungiert indem sie Lücken in der Straffreiheit adressiert und Gerechtigkeit für Opfer bietet.

