

UNIVERSAL JURISDICTION AFTER THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

GABRIEL BOTTINI*

I. INTRODUCTION

Not so long ago, the creation of a permanent international criminal court seemed to be a chimera.¹ An observer situated at the height of the Cold War would have found it difficult to predict the recent development of international criminal law.² In the last decade, this initiative has included the creation of two *ad-hoc* international criminal tribunals by the U.N. Security Council.³ International interest in enforcing this fundamental area of international law, which had been largely forgotten for almost fifty years,⁴ has gained momentum once again.

* Law Degree 1999, University of Buenos Aires School of Law; LLM 2002, New York University. Professor of International Law, University of Buenos Aires and University of Palermo School of Law, Buenos Aires, Argentina.

1. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 564 (4th ed. 1990) (concluding that, "the likelihood of setting up an international criminal court is very remote.").

2. See Bruce Broomhall, *The International Criminal Court: Overview and Cooperation with States*, in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 45, 49 (1999) ("[I]t was only as East-West tensions lessened in the 1980s and as municipal systems gave more attention to war crimes, that the way was cleared for the developments which led to the adoption of the Rome Statute.").

3. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, Annex (1993), *reprinted in* 32 I.L.M. 1163 app. 1192 (1993); Statute of the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, at 3, U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598, 1602 (1994).

4. See Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 452 (1999). The efforts made within the International Law Commission to draft a Statute for an International Criminal Court, which started in 1950 (See *Question of International Criminal Jurisdiction* Document A/CN.4/15: *Report by Ricardo J. Alfaro, Special Rapporteur*, 2 Y.B. INT'L L. COMM'N I, U.N. Doc. A/CN.4/SER.A/1950/Add.1, U.N. Sales No.: 1957. V. 3, Vol. II), demonstrate that the aspiration to create an international criminal jurisdiction did not wither away after Nuremberg.

In 1998, a community of states evinced clear determination to deal with international criminality through multilateral means by adopting the Statute of the International Criminal Court (ICC).⁵ Although the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) “have not been unqualified successes,”⁶ their functioning helped parties achieve consensus on the ICC in Rome. In effect, the early tribunals enabled the world to see that international criminal tribunals can deliver justice and help resolve problems in countries struggling with the difficulties that come with protracted conflicts.

In addition to developments in international criminal law, the 1990s also brought an expansion of the principle of universal jurisdiction. This appears to be due, at least in part, to the lack of international judicial and enforcement mechanisms. Although recourse to the principle of universal jurisdiction before national courts became more frequent, this trend has not been accompanied by a systematic and thorough analysis of its legal and policy implications.⁷ Important questions remain concerning what criteria must be met before a state can legitimately exercise universal jurisdiction and which crimes are subjected to it.

The ICC Statute has received the sixty ratifications necessary for its entry into force.⁸ The new statute promises to impact universal jurisdiction in particular and the enforcement of international criminal law in general. While it is too soon to

5. See Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 1998 (1998) [hereinafter ICC Statute]. Bennouna characterizes the adoption of the ICC Statute as the most significant juridical event since the end of the cold war. See Mohamed Bennouna, *La Cour Pénale Internationale* [The International Criminal Court], in *DROIT INTERNATIONAL PÉNAL* 735, 735 (Hervé Ascensio et al. eds., 2000).

6. Charney, *supra* note 4, at 459.

7. See Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 241, 244 (2001) (stating that universal jurisdiction “has been under-theorized”); see also Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 *BERKELEY J. INT’L L.* 111, 113-14 (2003) (noting the “incomplete theoretical development of universal jurisdiction” due to the failure of commentators and jurists to consider the intricacies of the principle).

8. See ICC Statute, *supra* note 5, art. 126.1.

assess the ICC's impact on the latter,⁹ it is clear at the outset that the ICC and universal jurisdiction pursue similar goals. Both systems grant jurisdiction, albeit to a different extent, over offenses such as: war crimes, crimes against humanity, and genocide.¹⁰ Further, both systems attempt to punish crimes that domestic courts would otherwise be unable to prosecute under ordinary heads of jurisdiction. This overlap raises questions concerning whether the two systems are compatible and whether international justice is best served by having both systems function simultaneously.

The position advanced in this Note is that, given the legal and political problems caused by its application, universal jurisdiction should be replaced by the ICC for most crimes, with some exceptions—such as piracy. Theoretically, universal jurisdiction was designed to reduce impunity for most serious crimes that are of international concern. The ICC has the potential to serve that purpose, without posing the risks associated with the application of universal jurisdiction. This Note acknowledges that the ICC Statute is far from perfect. Its defects, however, are considerably less serious than those afflicting universal jurisdiction, and, for the most part, the issues can be worked out in time either through an amendment to the statute or through the development of jurisprudence within the ICC.

In stark contrast, problems associated with universal jurisdiction are either inherent to the concept of universal jurisdiction and, therefore, cannot be addressed without abandoning the system altogether, or they are embedded in the geo-political structure and dynamics of the international community. Empowering multiple competent fora to prosecute certain crimes is universal jurisdiction's *raison d'être*. This benefit also weakens each state's ability to protect its due process guarantees for crimes covered by universal jurisdiction, because the principle creates uncertainty with respect to the criminal law and procedure that will apply. Additionally, the fact that universal jurisdiction is exercised, as a general rule, by a country that is more powerful than the country where the crime was

9. See Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 145 (1999) [hereinafter Cassese, *Statute*].

10. See discussion *infra* Part III.

committed derives from the huge differences that exist among members of the international community in terms of power and resources. This unequal application of universal jurisdiction occurs partially because a centralized international authority, such as an executive branch and a court with mandatory jurisdiction, does not exist. Evidently, the practical problems that come with universal jurisdiction cannot be eliminated by simply changing its underlying norms.

The next part of this Note addresses some unsettled theoretical issues concerning universal jurisdiction. It touches on the controversial relationship between universal jurisdiction and other institutions of international law and it explores ways in which universal jurisdiction regimes can be created. The complexities that come with universal jurisdiction and disagreements that exist among scholars and states regarding its proper limits strongly suggest that maintaining a scheme that empowers every state to exercise its jurisdiction without an international framework is undesirable. Part III describes which crimes are subject to the jurisdiction of the ICC and which are covered by universal jurisdiction under general international law. It also explains the extent to which these crimes are covered by each system. The scope of the ICC is determined by studying the statute. Conducting this analysis with respect to universal jurisdiction, however, necessarily entails referring to different, and often contradictory, legal materials, which leads to unsatisfactory conclusions. Lack of uniformity makes it difficult to prove the validity of a state's assertion of universal jurisdiction over a particular crime. The transparency provided by the ICC Statute protects the ICC from this weakness. Moreover, Part III examines the extent to which both systems overlap, which further supports the proposition that the continued existence of universal jurisdiction is not necessary with the ICC in place.

Part IV examines compatibility problems between universal jurisdiction and the ICC, albeit recognizing that, from a strictly legal standpoint, universal jurisdiction and the ICC are not mutually exclusive.¹¹ This Part also considers the role domestic courts have played in addressing international criminality and how that role may change now with the ICC. Part IV

11. See Bernhard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT'L L. 67, 82 (1990).

then describes the main shortcomings involved in the exercise of universal jurisdiction.

Part V concludes by arguing that, in shaping international law in the twenty-first century, the international community should seek to diminish the role of the universality principle and strive to secure the effectiveness of the ICC. This will signify a new and fundamental step towards the development of international criminal law, the future of which depends on international cooperation through coordinated means and not in the disordered manner that universal jurisdiction offers.

II. UNIVERSAL JURISDICTION

A recent decision of the International Court of Justice (ICJ), in a case brought by the Democratic Republic of Congo against Belgium,¹² could have deeply influenced this study. The ICJ was presented with the opportunity to consider the concept of universal jurisdiction and to clarify some of the principle's most controversial elements. In fact, it was the first time the ICJ had the opportunity to speak to the validity of a state's application of the universality principle.¹³

Congo's complaint was based on an international arrest warrant issued by an investigating judge of the Brussels *tribunal de première instance* on April 11, 2000 against Mr. Abdulaye Yerodia Ndombasi,¹⁴ Congo's Minister for Foreign Affairs until November 2000.¹⁵ Yerodia was charged, "as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity."¹⁶ The Brussels magistrate derived his jurisdiction from the Belgian Law of June 16, 1993 "concerning the Punishment of Grave Breaches

12. Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Feb. 14, 2002), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_guillaume.pdf [hereinafter Arrest Warrant Case].

13. See Request for the Indication of Provisional Measures—Order (Congo v. Belg.), (Arrest Warrant Case) ¶ 4 (Dec. 8, 2000), available at http://212.153.43.18/icjwww/idocket/iCOBE/iCOBEorders/icobe_iorder_toc.htm (opinion dissidente de M. Francisco Rezek [dissenting opinion of Judge Rezek]).

14. Arrest Warrant Case, *supra* note 12, ¶ 13.

15. See *id.* ¶ 18.

16. See *id.* ¶ 13.

of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto,' as amended by the Law of February 1999 'concerning the Punishment of Serious Violations of International Humanitarian Law.'¹⁷ Since the ordinary heads of jurisdiction did not apply—the acts of which Yerodia was accused had been committed outside Belgium, Yerodia was not a Belgian national, and none of the victims of Yerodia's alleged offenses were Belgian nationals¹⁸—the arrest warrant clearly involved an exercise of universal jurisdiction.¹⁹

In spite of this, the Court did not address universal jurisdiction.²⁰ Instead, the ICJ focused its analysis on the minister's immunity, primarily due to a change in Congo's submissions. Initially, Congo claimed *inter alia* that "[t]he *universal jurisdiction* that the Belgian State attributes to itself" was in breach of international law,²¹ but, in its final submissions, Congo dropped that argument and kept only its claim concerning the violation of Yerodia's immunity.²²

The court itself acknowledged that, "[a]s a matter of logic," the issue of immunity should be considered only where there has been a previous determination finding that the state in question has jurisdiction.²³ It is debatable whether the ICJ was correct in focusing as it did on immunity, while ignoring jurisdiction.²⁴

17. See *id.* ¶ 15. A recent amendment has eliminated universal jurisdiction from this law, due to pressure from the U.S. See *Belgium Amends War Crimes Law*, BBC NEWS, Aug. 1, 2001, at <http://news.bbc.co.uk/2/hi/europe/3116975.stm> (last visited Feb. 6, 2004).

18. See Arrest Warrant Case, *supra* note 12, ¶ 15.

19. The arrest warrant was circulated internationally by Belgium through the International Criminal Police Organization (Interpol). See *id.* ¶ 14.

20. The ICJ did, however, reserve its right to address universal jurisdiction "in the reasoning of its Judgment, should it deem this necessary or desirable." *Id.* ¶ 43.

21. Arrest Warrant Case, *supra* note 12, ¶ 17. The case referred to the "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations." *Id.*

22. See *id.* ¶ 21.

23. *Id.* ¶ 46.

24. Referring to the issue of universal jurisdiction, Judge Oda asserted "that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the

The decision in the *Arrest Warrant* case, as well as other relevant precedent established in, *inter alia*, the *Pinochet*²⁵ and *Qaddafi*²⁶ cases, have essentially defined the basic elements of the law on immunity. The ICJ has held that, aside from 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.”²⁷ Such officials are entitled to immunity throughout the duration of their offices, even if they are accused of having committed war crimes or crimes against humanity.²⁸ It must be noted that immunity cannot be invoked before courts in the accused’s own country, before courts in another country when the accused’s country waives, before international tribunals, or after the accused ceases to hold the office.²⁹ Even after the accused’s tenure in office expires, however, immunity continues with respect to acts that are not performed “in a private capacity.”³⁰

The success the ICJ has had establishing rules on international immunity strongly suggests that the ICJ’s analysis concerning the validity and scope of the universality principle could have contributed to greater international legal certainty by shaping how and when this principle is applied. Nonethe-

Court is not requested in the present case to take a decision on this point.” *Id.* ¶ 12 (dissenting opinion of Judge Oda). However, on the same issue Judge Van den Wyngaert argued that the Court “could and should nevertheless have addressed this question as part of its reasoning.” *Id.* ¶ 42 (dissenting opinion of Judge Van den Wyngaert).

25. See Clive Nicholls, *Reflections on Pinochet*, 41 VA. J. INT’L L. 140, 146 (2000).

26. Cass. Crim. Paris, Mar. 13, 2001, at <http://courdecassation.fr/agenda/arrets/arrets/00-87215.htm>. For a somewhat critical view on this decision, see generally Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 EUR. J. INT’L L. 595 (2001).

27. *Arrest Warrant Case*, *supra* note 12, ¶ 51.

28. *See id.* ¶ 58.

29. *See id.* ¶ 61.

30. *Id.* According to Judge Van den Wyngaert, the ICJ should have explained what sort of acts fall within those performed “in a private capacity.” Moreover, it should have concluded that international crimes are not included in that concept and that there is no immunity for these crimes after the person ceases to hold the office, even if they were committed during that period. *See id.* ¶ 36 (dissenting opinion of Judge Van den Wyngaert).

less, this section will explore the concept of universal jurisdiction using the literature and case law that is available. Much of the confusion and controversy surrounding this jurisdictional ground derive from the frequent use of the term to describe concepts that are quite different.³¹ Hence, a single definition for universal jurisdiction is necessary for the theoretical development of the field.

A. *Scope of the Universality Principle*

By definition, universal criminal jurisdiction enables states to exercise jurisdiction over a criminal act even if there is no connection between the offense in question and the state exercising jurisdiction.³² It is undisputed that states can exercise universal jurisdiction only with respect to certain crimes.³³ Therefore, under principles of reasonableness, there is a strong presumption of illegality regarding any assertion of universal jurisdiction with respect to a crime that is not generally regarded by the international community as subject to this jurisdictional base.³⁴

31. See Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63, 69 (2003).

32. "[J]urisdiction to adjudicate generally follows jurisdiction to prescribe, subject to a rule of reasonableness." Sadat, *supra* note 7, at 248. Therefore, the concepts contained in this Note are applicable to both universal judicial and prescriptive jurisdiction unless otherwise stated.

33. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT] § 404 (1987) (referring to "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism"); see also Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368 (2001) (noting that universal jurisdiction extends to a "limited category of offences"); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988) (recognizing that universal jurisdiction "provides every state with jurisdiction over a limited category of offenses"); COMM. ON INT'L HUMAN RIGHTS LAW AND PRACTICE, INT'L LAW ASS'N, LONDON CONFERENCE: FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 21 (2000), at <http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf> (affirming the right of States to exercise universal jurisdiction over genocide, crimes against humanity, war crimes, and torture).

34. See RESTATEMENT, *supra* note 33, § 403 cmt. a (an exercise of jurisdiction is "unlawful if it is unreasonable").

The relevant criterion for the application of the universal-principle is the nature of the crime, not the place where the crime was committed, the nationality of the accused or the victim, or other elements.³⁵ States invoke other bases of jurisdiction under international law such as: the territorial principle (jurisdiction over crimes committed in the territory of the prosecuting state);³⁶ the active nationality principle (jurisdiction over crimes committed abroad by nationals of the prosecuting state);³⁷ the more controversial passive personality (jurisdiction over crimes affecting nationals of the prosecuting state);³⁸ and protective principles (jurisdiction over crimes prejudicial to certain fundamental interests of the prosecuting state).³⁹ Unlike crimes covered by these more traditional bases of jurisdiction, crimes which call for an exercise of universal jurisdiction have certain special characteristics and/or are so severe that all states have an interest in their repression.⁴⁰ Therefore, the theory of universal jurisdiction holds that international law entitles each state to assert jurisdiction over some crimes on behalf of the international community,⁴¹ even if the

35. The *Princeton Principles on Universal Jurisdiction* defines universal jurisdiction in Principle 1.1 as “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.” PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf [hereinafter PRINCETON PRINCIPLES].

36. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 110 (Routledge, 7th rev. ed. 1997) (1970).

37. *Id.* at 111.

38. *Id.*

39. *Id.*

40. The severity of the offense is clearly not the only significant factor. Piracy is the obvious example of a crime subject to universal jurisdiction and it is not necessarily more severe than ordinary murder, which by definition entails the death of the victim and is not subject to universal jurisdiction. See Géraud de La Pradelle, *La Compétence Universelle* [Universal Jurisdiction], in *DROIT INTERNATIONAL PÉNAL*, *supra* note 5, at 905, 907. But see 2 HUGO GROTIUS, *DE IURE BELLI AC PACIS LIBRI TRES* 504 (Francis W. Kelsey trans., Clarendon Press 1925) (arguing for the application of universal jurisdiction to injuries that “excessively violate the law of nature or of nations”). Nor is there any threshold beyond which a crime is so serious that it automatically becomes subject to universal jurisdiction.

41. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 88 (2001)

state that ultimately exercises jurisdiction has the weakest link to the crime compared to other states. If that is the case, other states will abandon their stronger claims to jurisdiction. Enabling all states to share the right to jurisdiction in this way is meant to function as a guarantee against impunity⁴² and prevent the alleged perpetrators of heinous crimes from “finding a safe haven in third countries.”⁴³

The universality principle is not limited to apply only in cases involving states that do not prosecute a crime, even when they have territorial or nationality jurisdiction over it.⁴⁴ Whatever effect that factor may have had on the development of other heads of jurisdiction, such as the passive personality principle, various regimes providing for universal jurisdiction do not require verification that states with stronger jurisdictional claims are not willing to exercise their jurisdiction.⁴⁵ The principle of vicarious jurisdiction—that is, the exercise of

(“In the exercise of universal jurisdiction, a state acts on behalf of the international community in a manner equivalent to the Roman concept of *actio popularis*.”).

42. See J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 234 (10th ed. 1989) (stating that the purpose of granting universal jurisdiction with respect to certain offenses “is to ensure that no such offence goes unpunished”).

43. Arrest Warrant Case, *supra* note 12, ¶ 46 (dissenting opinion of Judge Van den Wyngaert).

44. It is submitted that this assertion is valid with respect to general international law taking into account the international conventions that establish universal jurisdiction. Domestic criminal laws can provide otherwise. Article 8.6 of the Danish Penal Code provides for extra-territorial jurisdiction of Danish courts “over genocide, crimes against humanity and violations of the Hague Conventions, but only where another state has requested the extradition of the accused, extradition has been refused, and the alleged behaviour is a crime under Danish law.” See FIONA MCKAY, *REDRESS, UNIVERSAL JURISDICTION IN EUROPE* 22 (1999), available at <http://www.redress.org/publications/UJEurope.pdf>.

45. *But see* Scharf, *supra* note 33, at 368-69 (arguing that “[c]rimes subject to the universality principle occur in territory over which no country has jurisdiction or in situations in which the territorial State and State of the accused’s nationality are unlikely to exercise jurisdiction, because, for example, the perpetrators are State authorities or agents of the State”); Sammons, *supra* note 7, at 115 (“Therefore, the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the state of the perpetrator’s nationality, or of the crime’s commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.”).

jurisdiction by a state warranted by another state's failure to exercise its jurisdiction—is recognized by some states such as Germany (*stellvertretende Strafrechtspflege*), but even German law distinguishes vicarious jurisdiction from the principle of universality (*Universalitätsprinzip*).⁴⁶

B. *Universal Jurisdiction and Other Institutions of International Law*

To comprehend the implications of universal jurisdiction, it is necessary to establish its connection to other related institutions. For purposes of this Note, it is important to consider the meaning of universal jurisdiction as it relates to international criminal tribunals. The jurisdiction of an international criminal tribunal, which is at times called international jurisdiction,⁴⁷ should not be confused with universal jurisdiction. Universal jurisdiction is an exceptional basis of jurisdiction which is exercised unilaterally by a state and does not necessarily involve a third state or an international organization.⁴⁸ International jurisdiction is exercised by an international body to which states have expressly agreed to delegate the power to enforce certain parts of international criminal law.⁴⁹ A different issue is whether an international criminal tribunal will base its jurisdiction upon the universality principle or other principles.⁵⁰ The jurisdiction of an international tribunal is not constrained by where the crime was committed, or the nationality of the accused or the victim. But, even if the jurisdiction is

46. See Christoph J. M. Safferling, *Public Prosecutor v. Djajic*, 92 AM. J. INT'L L. 528, 529-30 (1998).

47. Sadat refers to the jurisdiction of the International Criminal Court as "universal international jurisdiction." Sadat, *supra* note 7, at 246. The denomination international jurisdiction is used in this Note to underscore the difference between such jurisdiction and universal jurisdiction.

48. For a more expansive definition of universal jurisdiction, see *Universal Jurisdiction*, in ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 535-36 (John P. Grant & J. Craig Barker eds., 2d ed. 2004).

49. See *Crime, International*, in ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW, *supra* note 48, at 105, 106-07.

50. This issue was hotly debated during the Rome Conference between those countries that argued in favor of the inclusion of the universality principle and those opposed to such inclusion, such as the United States. In the end, the latter position prevailed. See Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 350 (2001).

based upon the universality principle, an international tribunal should not be compared to universal jurisdiction exercised by national courts.⁵¹ A distinction should be made, even if the term “universal jurisdiction” is commonly used to describe the application of the universality principle by both an international tribunal and a state. Some of the most important objections that have been raised against universal jurisdiction, such as possible bias, due process violations, or intervention in the internal affairs of other states, are not present or have completely different dimensions in cases involving international jurisdiction.⁵²

Some writers argue that universal jurisdiction does not include crimes directly criminalized by international law (i.e., international crimes) and crimes for which all states are granted the liberty to prosecute the alleged offenders (for example, war crimes).⁵³ This is perhaps simply a definitional matter, but there is no reason to conclude that international crimes are not subject to universal jurisdiction. If a crime is directly punished by international law, all states are entitled (and in some instances required) to extend their prescriptive criminal jurisdiction to cover it. If they do extend their jurisdiction to cover the crime, they are simply confirming an international prescription (confirmation that will often be essential from the point of view of the principle of legality under the national law concerned).⁵⁴ In such cases, it is still important to determine whether all states are entitled to exercise their judicial jurisdiction or if only states with certain connections to the international crime in question can exercise jurisdiction.

51. *Contra* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 240 (2d rev. ed. 1999) (stating that “the ICC can exercise universal jurisdiction when a situation is referred to it by the Security Council”).

52. See discussion *infra* Part IV.B.

53. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 308 (5th ed. 1998); MALANCZUK, *supra* note 36, at 113.

54. The possibility that a certain crime may be penalized under both national and international law has long been recognized. In this respect, the United Nations War Crimes Commission established after the end of World War II affirmed that “a violation of the laws of war constitutes both an international and a national crime, and is therefore justifiable both in a national and international court.” U.N. WAR CRIMES COMM., HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 232 (1948).

Although, under the definition accepted here, international crimes can fall within the scope of universal jurisdiction, this does not mean that all international crimes can be universally prosecuted.⁵⁵ Genocide was confirmed as a “crime under international law” by the Convention on the Prevention and Punishment of the Crime of Genocide (Art. 1) in 1948,⁵⁶ but the Convention did not provide for universal jurisdiction (Art. 6). Nor can it be concluded that by that time there was a customary norm providing for the application of the universal principle over genocide. As Lord Slynn of Hadley put it in the House of Lords decision of November 25, 1998 in the *Pinochet* case, “[t]he fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it.”⁵⁷ Hence, an *ad hoc* analysis is necessary to determine whether a particular crime, internationally criminalized or not, has become subject to universal jurisdiction through an international convention or through custom.⁵⁸

55. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 473 (4th ed. 1997). *But see* Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT’L L. 237, 250 (1999) (arguing that “[t]he very notion of crimes of international law postulates that they constitute an attack against the international community as a whole and, therefore, any state is entitled to punish them”); *see also* Attorney-Gen. of Isr. v. Eichmann, 36 I.L.R. 277 (Isr. S. Ct. 1962) (noting that conventional war crimes “involve the perpetration of an international crime which all the nations of the world are interested in preventing”); Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-I-AR72, ¶ 62, 35 I.L.M. 35, 52-53 (Oct. 2, 1995) [hereinafter Tadic].

56. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. I, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention].

57. *Ex Parte Pinochet* (Regina v. Bartle), 37 I.L.M. 1302, 1313 (H.L. 1998); *see also* PRINCETON PRINCIPLES, *supra* note 35, at 42-43 (maintaining that universal condemnation of a crime does not mean that universal jurisdiction applies to that crime).

58. See DIETRICH OEHLER, *INTERNATIONALES STRAFRECHT* [International Criminal Law] 533, 533-34 (2ed. 1983). A crime that has not been directly criminalized by international law may be subject to universal jurisdiction. With respect to piracy, see Codification of Int’l Law, *Piracy*, 26 AM. J. INT’L L. 739, 761 (1932) (“The theory of this draft convention, then, is that piracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offenses which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and

The universality principle is certainly closely related to the maxim *aut dedere aut judicare*,⁵⁹ but universal jurisdiction can apply to cases beyond the purview of that maxim.⁶⁰ As Professor Meron states:

There is no reason why universal jurisdiction should not also be acknowledged in cases where the duty to prosecute or to extradite is unclear, but the right to prosecute when offenses are committed by aliens in foreign countries is recognized. Indeed, the true meaning of universal jurisdiction is that international law *permits* any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim.⁶¹

Thus, the principle *aut dedere aut judicare* by definition entails the *duty* of the state concerned to extradite or to prosecute the accused,⁶² while universal jurisdiction may refer only to the *right* of the state to prosecute the accused.⁶³ Conversely,

which do not involve attacks on its peculiar interests.”). *Contra* Luis Benavides, *The Universal Jurisdiction Principle: Nature and Scope*, 1 ANUARIO MEXICANO DE DERECHO INTERNACIONAL [MEXICAN ANNUAL SURVEY OF INTERNATIONAL LAW] 19, 27 (2001) (“[U]niversal jurisdiction is only applicable with regard to international crimes.”).

59. See MALANCZUK, *supra* note 36, at 113 (defining *aut dedere aut judicare* as the “obligation to prosecute or to extradite the accused”).

60. *But see* PRINCETON PRINCIPLES, *supra* note 35, at 55 (stating that universal jurisdiction “reflects the maxim embedded in so many treaties: *aut dedere aut judicare*, the duty to extradite or prosecute”); NGUYEN QUOC DINH ET AL., DROIT INTERNATIONAL PUBLIC [PUBLIC INTERNATIONAL LAW] 625 (5th ed. 1994) (equating the universality principle with the duty to extradite or punish).

61. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 570 (1995) [hereinafter Meron, *International Criminalization*].

62. Benavides, *supra* note 58, at 32-33; PRINCETON PROJECT, *supra* note 35, at 55.

63. In the case of the seizure of a pirate ship or aircraft, Article 105 of the United Nations Convention on the Law of the Sea establishes that “[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed,” but a duty to otherwise extradite the accused is not thereby imposed. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 105, 21 I.L.M. 1245, 1289 [hereinafter UNCLOS]. Article 5 of the Apartheid Convention constitutes another case where the custodial state has the right but not the duty to try a person charged with the crime of apartheid. See International Convention on the Suppression and Punish-

although it is generally not the case, it is at least theoretically possible for an international norm to provide for the duty to extradite or prosecute only if a state has jurisdiction under the ordinary heads of jurisdiction and not if the only connection with the crime is the mere presence of the accused within state boundaries (a form of universal jurisdiction).⁶⁴

At present, the conventional regimes that provide for mandatory universal jurisdiction also establish the duty to extradite or punish.⁶⁵ Therefore, the custodial state can surrender the accused to another state for purposes of prosecution, rather than exercise its own jurisdiction. Nonetheless, a state may have a duty to exercise universal jurisdiction over an alleged criminal, without having the option of surrendering her to another country. Therefore, it is proper to maintain the distinction between the universality principle and the principle *aut dedere aut judicare*, even though the former has a mandatory character.⁶⁶

It is also important to maintain distinctions between universal jurisdiction, *jus cogens* norms, and obligations *erga omnes*. The three concepts are based on the idea that members of the international community share common goals and fundamental values that shape an international *ordre public*. But the con-

ment of the Crime of Apartheid, Nov. 30, 1973, art. V, 1015 U.N.T.S. 243, 246 [hereinafter Apartheid Convention].

64. See, e.g., the treaties on terrorism discussed *infra* at notes 175-195 and accompanying text.

65. For instance Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft provides the following:

The 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. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 7, 860 U.N.T.S. 105, 109; Benavides seems to reject the possibility of a mandatory universal jurisdiction. Benavides, *supra* note 58, at 33. ("International law, through universal jurisdiction, only authorizes rather than obliges States to try and punish criminals.")

66. *But cf.* Brigitte Stern, *A Propos de la Compétence Universelle* [On Universal Jurisdiction], in LIBER AMICORUM MOHAMMED BEDJAOUI 735, 739 (Emile Yakpo & Tahar Boumedra eds., 1999) (stating that mandatory universal jurisdiction in general refers to the *aut dedere aut judicare* principle).

nections among these three concepts are far from clear, especially because international law has yet to develop a coherent theory that explains the implications of each.⁶⁷

While some argue that an international crime established by *jus cogens* norms is subject to universal jurisdiction,⁶⁸ these two theories are, in fact, completely separate. States may have “accepted and recognized” a norm that creates an international crime as a basic principle of international law “from which no derogation is permitted.”⁶⁹ However, in practice, states are free to determine for themselves whether application of the universality principle is best to address the crime in question. There is no necessary correlation under such circumstances.⁷⁰

It is argued that states are entitled to exercise universal jurisdiction over offenses covered by obligations *erga omnes*.⁷¹

67. On the relationship between *jus cogens* norms and obligations *erga omnes*, see *Report of the International Law Commission: Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. 10, at 281-82 & n.674-75 U.N. Doc. A/56/10 (2001). United Nations International Law Commission, Report on the work of its fifty-third session, at 281-282, available at <http://www.un.org/law/ilc/reports/2001/2001report.htm>.

68. For instance, the International Tribunal for the Former Yugoslavia has stated:

[A]t the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.

Prosecutor v. Furundžija, IT-95-17/1-T, ¶ 156 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>; see also Bassiouni, *supra* note 41, at 152 (“It is their status as *jus cogens* crimes that implies that universal jurisdiction exists.”); Jodi Horowitz, Regina v. Bartle and the Commissioner of Police for the Metropolitan and Others Ex Parte Pinochet: *Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations*, 23 *FORDHAM INT’L L.J.* 489, 525 (1999) (“Customary international law recognizes universal jurisdiction for offenses involving *jus cogens* violations.”).

69. Vienna Convention on the Law of the Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

70. See Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 383, 393 (2001) (arguing that “[a] violation of *jus cogens* may often qualify as an international crime subject to universal jurisdiction and vice-versa, but this need not necessarily be the case”).

71. Rosalyn Higgins, *The General International Law of Terrorism*, in *TERRORISM AND INTERNATIONAL LAW* 13, 24 (Rosalyn Higgins & Maurice Flory eds.,

However, even if all states have a legal interest in a state's fulfillment of its obligation to exercise criminal jurisdiction over a certain crime, that does not necessarily mean that other states also have jurisdiction over that crime.⁷² The ICJ affirmed this principle in a decision in which it concluded that human rights obligations should be included within *erga omnes* obligations, but also asserted that: "[O]n the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality."⁷³

Therefore, state practice, as defined by state policies and not the legal implication of the scope of these institutions, determines whether the universality principle is extended to apply to crimes covered by *jus cogens* norms and/or *erga omnes* obligations. A community of states may very well decide that the most effective way to deter the commission of certain crimes of international concern is not through the application of universal jurisdiction, but by entrusting the jurisdiction over such matters to an international tribunal, which is the method advocated here.

Finally, the legal regime applicable to universal jurisdiction and jurisdiction in general must not be confused with the regime that is applicable to jurisdictional immunities. As the ICJ indicated, "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."⁷⁴ Therefore, it is incorrect to state that "universal jurisdiction enables states to deny diplomats immunity for crimes against humanity."⁷⁵ Furthermore, the treaties that provide for universal jurisdiction do not thereby override jurisdictional immunities under international law.⁷⁶ Nonetheless, when a state ex-

1997) ("States may assert universal jurisdiction over a small number of offences universally considered to be offences *erga omnes*—harming not only those against whom they are directed, but the international community generally.").

72. See Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265, 277-78 (2001).

73. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 47 (Feb. 5).

74. Arrest Warrant Case, *supra* note 12, ¶ 59.

75. Melinda White, Note & Comment, *Pinochet, Universal Jurisdiction and Impunity*, 7 SW. J. L. & TRADE AM. 209, 209 (2000).

76. See Arrest Warrant Case, *supra* note 12, ¶ 59; de La Pradelle, *supra* note 40, at 915-16.

ercises its jurisdiction, the respect given to an immunity recognized by international law will depend, in practice, upon the provisions of that state's domestic law. The application of universal jurisdiction proves to be problematic because of inconsistencies that sometimes exist between national laws and international law with respect to issues like immunities.⁷⁷

Admittedly, the ICC Statute does not address the immunities issue as clearly as one might hope. The interplay between Article 27, which provides for the irrelevance of immunities before the ICC, and Article 98, which prevents the ICC from proceeding with a request for surrender or assistance "which would require the requested State to act inconsistently with its obligations under international law" in the immunities field, strongly suggests that an accused is prevented from invoking immunity only once in the ICC's custody.⁷⁸ Nonetheless, the ICC Statute provides uniformity, minor remaining questions notwithstanding, in a sensitive area of law that could, otherwise, lead to serious international tensions—if, for instance, one state exercises jurisdiction, while another invokes the accused's immunity.

C. *Universal Jurisdiction and International Conventions*

The last point considered is the way universal jurisdiction is established. There is general consensus in the literature that states are entitled, through custom, to provide for the application of the universality principle over a certain crime.⁷⁹ But even though several multilateral treaties, such as those in the field of terrorism, provide for universal jurisdiction, it has been suggested that creating universal jurisdiction by treaty is "inconsistent with the fundamental principles of international law."⁸⁰ This claim is closely related to the United States' fierce opposition towards the extension of the ICC's jurisdiction to

77. The conclusion reached by the ICJ that Belgium violated its international obligations towards the Congo by failing to respect the immunity of the latter country's Minister of Foreign Affairs demonstrates that the application of the Belgian law in question to Mr. Yerodia was inconsistent with international law. See *Arrest Warrant Case*, *supra* note 12, ¶ 71.

78. See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 64 (2001).

79. See, e.g., MALANCZUK, *supra* note 36, at 113; Stern, *supra* note 66, at 736.

80. Morris, *supra* note 50, at 349.

non-party nationals.⁸¹ It must be noted that these assertions have little merit under international law, and that there is, in principle, no reason why universal jurisdiction cannot be created by treaty as well as by customary law.⁸² Treaties providing for universal jurisdiction do not create obligations for third states, but only possibly for nationals of third states. This framework is consistent with Article 34 of the Vienna Convention on the Law of the Treaties. The fact that a treaty may subject a national of a non-party state to universal jurisdiction is not a *per se* violation of the rights of the state of citizenship, since “states do not have a right to exercise exclusive jurisdiction over their nationals, even in the case of official acts.”⁸³

If a treaty contains both the universality principle and a duty to extradite or punish, it is not incumbent upon a non-party state to act upon such duty, even if the person accused of the crime covered by the convention is present in its territory.⁸⁴ Nor is a non-party state entitled to exercise universal jurisdiction over an accused through the treaty, though it might derive that right from customary law. Ultimately, within the context of a treaty, application of universal jurisdiction to the national of a non-party state does not affect the validity of the established regime. Instead, its validity will depend on the fairness and reasonableness of the system, including general, but not necessarily complete, participation by members of the international community.⁸⁵

81. See *Clinton's Words: 'The Right Action'*, N.Y. TIMES, Jan. 1, 2001, at A6 (President Clinton's statement when authorizing U.S. signature of the ICC Statute).

82. For positions accepting the creation of universal jurisdiction by treaty, see, for example, Sadat, *supra* note 7, at 244; Scharf, *supra* note 33, at 363; Stern, *supra* note 66, at 736. *Contra* Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 401 (2001) (arguing that universal jurisdiction in the true sense refers only to customary law, not jurisdiction created by treaty).

83. Scharf, *supra* note 33, at 377; see also M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 68 (1995).

84. See MALANCZUK, *supra* note 36, at 113 (“[H]ow can . . . treaties [providing for the duty to prosecute or to extradite the accused], which are binding only among the parties to them, by themselves create true universal jurisdiction in relation to non-parties?”).

85. *But see* D.W. Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources*, 53 BRIT. Y.B. INT'L L. 1, 13 (1982) (requiring “univer-

Regardless of whether universal jurisdiction is defined by treaty or by customary law, it is important to note that rules concerning the application of universal jurisdiction are not necessarily uniform. For instance, presence of the accused is sometimes required for the exercise of universal jurisdiction.⁸⁶ In cases of piracy and terrorist acts, conventions that provide for universal jurisdiction expressly require the accused's presence at the time jurisdiction is exercised by the state.⁸⁷ A presence requirement not only avoids judgments *in absentia*, but also "prevents the exercise of extra-territorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state."⁸⁸ With respect to war crimes, however, the rule is not as clear. Although the regime created by the Geneva Conventions requires the presence of the accused in the territory of the state exercising universal jurisdiction,⁸⁹ some states' legislation does not contain such a requirement.⁹⁰

sal consent" for "a crime for which international public policy concedes universal jurisdiction").

86. See Philip Marshall Brown, *Codification of International Law*, 29 AM. J. INT'L L. 25 (Supp. 1935) [hereinafter Harvard Draft] (affirming that the universality provides that jurisdiction "may be founded simply upon a lawful custody of the person charged with the offence"); see also Mémoire Présenté par le Gouvernement de la République Démocratique du Congo [Memorandum Presented by the Democratic Republic of Congo] (Cong. v. Belg.), (Arrest Warrant Case) ¶ 90 (May 15, 2001), available at http://212.153.43.18/icjwww/idocket/iCOBE/icobepleadings/icobe_ipleadings_toc.htm; EUR. COMM. ON CRIME PROBLEMS, COUNCIL OF EUR., EXTRATERRITORIAL CRIMINAL JURISDICTION 15 (1990). *Contra* Counter-Memorial of Belgium (Congo v. Belg.), (Arrest Warrant Case) ¶¶ 3.3.1-3.3.84 (Sept. 28, 2001), available at http://212.153.43.18/icjwww/idocket/iCOBE/icobepleadings/icobe_ipleadings_toc.htm; Benavides, *supra* note 58, at 28 & n.48.

87. Indeed, in the *Arrest Warrant* case, President Guillaume stated that "[u]niversal jurisdiction *in absentia* is unknown to international conventional law." *Arrest Warrant Case*, *supra* note 12, ¶ 9 (separate opinion of President Guillaume).

88. *Ex Parte Pinochet* (Regina v. Bartle), 38 I.L.M. 581, 648 (H.L. 1999) (opinion of Lord Millett in United Kingdom House of Lords).

89. Rafaëlle Maison, *Les Premiers cas d'Application des Dispositions Pénales des Conventions de Genève par les Jurisdictions Internes* [*The First Instances of the Application of the Penal Provisions of the Geneva Conventions by Domestic Jurisdictions*], 6 EUR. J. INT'L L. 260, 265 (1995). *Contra* *Arrest Warrant Case*, *supra* note 12, ¶ 54 (dissenting opinion of Judge Van den Wyngaert).

90. With regard to Belgian practice, see Luc Reydam, *In re Pinochet: Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8,*

Customary regimes of universal jurisdiction, such as crimes against humanity, have also not established firm rules requiring presence. One might conclude that the exercise of universal jurisdiction *in absentia* under such customary regimes does not violate a clearly “existing prohibiting rule of international law.”⁹¹ However, one might also question the legality of such proceedings, given the conventional position concerning trials *in absentia* under universal jurisdiction.⁹² Further, the exercise of judicial criminal jurisdiction, without the presence of the alleged criminal, is difficult to reconcile with Article 14.3 of the International Covenant on Civil and Political Rights, which grants every person the right to be tried in her presence.⁹³ The absence of a rule regarding the presence of the accused in the state asserting jurisdiction is yet one other factor that separates universal jurisdiction from the ICC, which established criteria for the exercise of jurisdiction of all relevant crimes.

III. CRIMES SUBJECT TO THE ICC’S JURISDICTION AND TO UNIVERSAL JURISDICTION

A. *The ICC’s Jurisdiction*

As noted above, the ICC Statute is straightforward with respect to the crimes it covers. Under Article 5, the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and, once the state parties agree upon its definition, the crime of aggression.⁹⁴

1. *Genocide*

Although a contribution to the development of international law with respect to genocide could have been made

1998, 93 AM. J. INT’L L. 700, 701 (1999); see also International Crimes and International Criminal Court Act, 2000, § 8(1)(c)(i) (N.Z.) (allowing prosecution in New Zealand courts regardless of “the nationality or citizenship of the person accused”).

91. Arrest Warrant Case, *supra* note 12, ¶ 54 (separate opinion of Judges Higgins, Kooijmans and Buergenthal).

92. See Bassiouni, *supra* note 41, at 156 (“In addition, customary international law has not yet settled the issue of whether there needs to be a nexus to the enforcing state, such as the presence of the accused on its territory.”).

93. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14.3(d), 999 U.N.T.S. 171, 177.

94. See ICC Statute, *supra* note 5, art. 5.2.

under the ICC Statute by broadening the definition to include attacks against cultural and/or political groups, such expansion of the term would not have mustered the “quick and unanimous consensus” achieved by the agreed upon definition.⁹⁵ Instead, the ICC Statute adopted the definition of genocide found in the Genocide Convention. As it stands, genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁹⁶

At no point did the Ad Hoc Committee in 1995 question the inclusion of this crime in the ICC Statute in its preparatory discussions.⁹⁷ It should be noted, nonetheless, that the consensus among states regarding the definition of genocide and its inclusion in the statute, bears no reflection on whether future application of this provision will be problematic. In fact, although the Genocide Convention was adopted in 1948, the first international conviction for this crime occurred 50 years later.⁹⁸ Consequently, there are few precedents on which the ICC can base its decisions, and controversies on certain issues related to the crime of genocide will undoubtedly arise.

95. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 30 (1999).

96. See ICC Statute, *supra* note 5, art. 6.

97. See Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 89 (Roy S. Lee ed., 1999).

98. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶¶ 579-81, 674, 734 (Int'l Crim. Trib. for Rwanda Trial Chamber I, Sept. 2 1998), available at <http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> [hereinafter Akayesu]; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 368, 383 (2000).

2. *Crimes Against Humanity*

There were also no serious objections for the inclusion of crimes against humanity in the ICC Statute, though important differences were debated regarding the term's definition.⁹⁹ Under the ICC regime, crimes against humanity must be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹⁰⁰

Inclusion of a disjunctive test (that is, widespread *or* systematic attack), allows the ICC to exercise its jurisdiction over a broader range of scenarios than a conjunctive test would have allowed. But, this test is limited by certain factors such as: i) the requirement that the attack be "directed against any population" excludes crimes that are widespread but unrelated;¹⁰¹ and, ii) even the more inclusive term "widespread" requires "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."¹⁰²

In addition to acts that have traditionally been defined as crimes against humanity, Article 7 also includes heinous acts that do not appear in previous international instruments.¹⁰³ This new definition confirms that, despite existing chapter provisions to the contrary, modern international law does not require the commission of crimes against humanity to occur in connection with armed conflict.¹⁰⁴

3. *War Crimes*

As with crimes against humanity, the ICC Statute places limitations on the ICC's jurisdiction over war crimes. The ICC, "shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a

99. See von Hebel & Robinson, *supra* note 97, at 90.

100. ICC Statute, *supra* note 5, art. 7.1.

101. See von Hebel & Robinson, *supra* note 97, at 95.

102. Akayesu, *supra* note 98, ¶ 579.

103. See Arsanjani, *supra* note 95, at 31.

104. See Cassese, *Statute*, *supra* note 9, at 150 ("It is worth noting, . . . that unlike the charter provisions of the Nuremberg Tribunal and the ICTY relating to crimes against humanity, but like the relevant article of the ICTR Statute, Article 7 of the ICC Statute does *not* require that crimes against humanity be committed in connection with an armed conflict.") (emphasis in original).

large-scale commission of such crimes.”¹⁰⁵ It is clear, however, from the words “in particular,” that the ICC is not precluded from considering a single war crime, unrelated to any other additional factor, if its prosecution is consistent with the object and purpose of the ICC Statute.¹⁰⁶

Article 8, regarding war crimes, is by and large satisfactory and considered a progressive development of international law in several respects.¹⁰⁷ The ICC has jurisdiction over war crimes committed both in international armed conflicts and in conflicts “not of an international character.”¹⁰⁸ It does not, however, have jurisdiction over “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”¹⁰⁹

The list of covered war crimes is based on several instruments found in the field of international humanitarian law.¹¹⁰ This codification of the law of war, for purposes of the ICC Statute, resulted in a very broad definition of war crimes that empowers the ICC to address all of the most serious offences committed in armed conflicts.¹¹¹

B. *Crimes Subject to Universal Jurisdiction*

This section considers a few crimes that are deemed to be subject to universal jurisdiction. A thorough examination of the complexities presented by each crime is beyond the scope of this Note. While some authors include other offenses not listed below as subject to universal jurisdiction,¹¹² it is submit-

105. ICC Statute, *supra* note 5, art. 8.1.

106. See Arsanjani, *supra* note 95, at 33.

107. See SCHABAS, *supra* note 78, at 42 (noting that Article 8 “represents a progressive development,” but cautioning that “such detailed definition may also serve to narrow the scope of war crimes in some cases”).

108. ICC Statute, *supra* note 5, art. 8.2(c).

109. *Id.* art. 8.2(d).

110. See Arsanjani, *supra* note 95, at 32.

111. See *id.* at 33, 36.

112. Two very controversial cases in this respect are slave trade and illicit drug traffic. While there is some authority that supports the proposition that they are subject to universal jurisdiction both in the case of slave trade, see RESTATEMENT, *supra* note 33, § 404; Randall, *supra* note 33, at 798-99; Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U.—DCLJ. INT’L L. 1, 9 (2000); THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 173 (2d ed. 1990), and in the case of illicit drug traffic, BROWNLIE,

ted that, as international law stands today, any addition to the list of crimes presented here would be marginal.

1. Piracy

Piracy “is a crime that paradigmatically is subject to prosecution by any nation based on principles of universality, and it is crucial to the origins of universal jurisdiction”.¹¹³ The doctrine almost unanimously recognizes that all states have the right to try and punish a pirate.¹¹⁴ Moreover, the practice of

supra note 53, at 308, in *DPP v Doot* [1973] AC 807, *cited in* MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 139 (4th ed. 2000); *see also* Protocol Amending the Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 976 U.N.T.S. 4; Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 176; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 174, there does not seem to be enough state practice to reach that conclusion as a matter of customary international law. With respect to slave trade, see Roger S. Clark, *Steven Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 *RUTGERS L.J.* 371, 390 n.55 (1999). Regarding illicit drug traffic, see Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, in *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE* 103 (Karl M. Meessen ed., 1996). It is worth noting for example that UNCLOS, while providing for universal jurisdiction in the case of piracy (Art. 100), provides only for flag state jurisdiction in the case of slave trade (Art. 99) and illicit traffic in narcotic drugs or psychotropic substances (Art. 108). UNCLOS, *supra* note 63, arts. 100, 99, 108, 21 I.L.M. at 1288-89.

113. PRINCETON PRINCIPLES, *supra* note 35, at 45.

114. *See, e.g.*, 1 OPPENHEIM'S INTERNATIONAL LAW 469 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); STARKE, *supra* note 42, at 234; RESTATEMENT, *supra* note 33, § 404; MALANCZUK, *supra* note 36, at 112; MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 248 (1988); Arrest Warrant Case, *supra* note 12, ¶ 5 (separate opinion of President Guillaume); League of Nations, Comm. of Experts for the Progressive Codification of Int'l Law, *Criminal Competence of States in Respect of Offences Committed Outside Their Territory*, Annex: Report of the Sub-Committee, *reprinted in* 20 *AM. J. INT'L L.* 252, 253 (Supp. 1926); Harvard Draft, *supra* note 86, at 563. *But see* ALFRED P. RUBIN, *THE LAW OF PIRACY* 390-91 (2d ed. 1998) (“It may be concluded that ‘universal jurisdiction’ when extended beyond the bounds of jurisdiction to prescribe and applied to notions of enforcement and adjudication under national criminal laws, was at best a rule of international law only for a limited period of time and under political circumstances that no longer apply; at worst, it was merely a hobby horse of Joseph Story and some other learned Americans, and a British attribution to the international legal order of substantive rules forbidding ‘piracy’ and authorizing all nations to apply their municipal laws against it on the high sea, based on a model of imperial

domestic jurisdictions confirms that proposition.¹¹⁵

In *Lotus*, which was not a case of piracy, Judge Finlay and Judge Moore, in their dissenting opinions, upheld the extension of universal jurisdiction to the crime.¹¹⁶ The application of the universality principle is not justified in cases of piracy because a pirate “is of no nation or State”¹¹⁷ or because by engaging in piracy he “places himself beyond the protection of any state.”¹¹⁸ Due to the peculiar characteristics of this crime, however, over which there is often no “territorial” state to exercise jurisdiction, state practice granted every state the right to prosecute piracy as the most effective (and in some instances the only) way to deal with it.¹¹⁹

Piracy is generally committed on the high seas or in other areas that are not within the jurisdiction of any state.¹²⁰ Pi-

Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England and some equally race-proud Europeans and Americans alone.”).

115. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820), the U.S. Supreme Court confirmed the exercise of universal jurisdiction by the courts of that country over piracy, and in *United States v. Klintonck*, 18 U.S. (5 Wheat.) 144, 147-48 (1820), it stated that “[a] pirate, being *hostis humani generis*, . . . is punishable in the Courts of all [States].” See also In *Re Piracy Jure Gentium* [1934] AC 586), cited in DIXON, *supra* note 112, at 139 (concluding that universal jurisdiction exists with respect to piracy). On the U.S. piracy cases, see generally G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727 (1989).

116. S.S. *Lotus* (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), Lord Finlay stressed:

The practice with regard to crimes committed at sea has been that the accused should be tried by the courts of the country to which his ship belongs, with the possible alternative of the courts of the country to which the offender personally belongs, if his nationality is different from that of the ship. There has been only one exception: pirates have been regarded as *hostes humani generis* and might be tried in the courts of any country.

Id. at 51 (dissenting opinion by Lord Finlay). In his dissent Judge Moore affirmed that “in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come.” *Id.* at 70 (Moore, J., dissenting).

117. *Klintonck*, 18 U.S. (5 Wheat.) at 147.

118. DIXON, *supra* note 112, at 139.

119. See Sammons, *supra* note 7, at 126.

120. Judge Guillaume asserts that “universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State

rates attack “all nations indiscriminately” and thereby affect the “interests of maritime trade throughout the world.”¹²¹ These factors, together with the fact that piracy often involves very serious acts of violence, explain the relatively early subjection of this crime to universal jurisdiction.¹²²

Both the Geneva Convention on the High Seas and UNCLOS provide that piracy can be committed using a ship or aircraft against ships, aircrafts, on persons or property situated on the high seas or “in a place outside the jurisdiction of any State.”¹²³ The latter includes regions like Antarctica, which means that state parties would be able to exercise universal jurisdiction over acts falling under the definition of piracy provided by the above-mentioned treaties.¹²⁴

2. *War Crimes*

International law has traditionally recognized that combatants who violate the laws of war “should be liable to trial

territory.” Arrest Warrant Case, *supra* note 12, ¶ 5 (separate opinion of President Guillaume). Article 19 of the 1958 Geneva Convention on the High Seas and Article 101 of UNCLOS provide that any state may seize a pirate ship and that the courts of the state carrying out such seizure may exercise jurisdiction over the ship. Geneva Convention on the High Seas, Apr. 29, 1958, art. 19, 13 U.S.T. 2312, 2317, 450 U.N.T.S. 82, 92; UNCLOS, *supra* note 63, art. 105, 21 I.L.M. at 1289.

121. League of Nations, Committee of Experts for the Progressive Codification of International Law, *Questionnaire No. 6: Piracy*, Annex: Report by the Sub-Committee, *reprinted in* 20 AM. J. INT’L L. 222, 224-225 (Supp. 1926).

122. The universal condemnation of piracy in international law theory can already be found in Gentili’s work, and with all the necessary qualifications can be traced back to Greek and Roman sources. See 2 ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* 124 (John C. Rolfe trans., Clarendon Press 1933) (“Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men, because in the violation of that law we are all injured, and individuals in turn can find their personal rights violated.”).

123. Geneva Convention on the High Seas, art. 15(1)(b), *supra* note 120; 13 U.S.T. at 2316, 450 U.N.T.S. at 90; UNCLOS, *supra* note 63, art. 101(a)(2), 21 I.L.M. at 1288. This definition assimilates maritime and aerial piracy for the purpose of their repression. See QUOC DINH ET AL., *supra* note 60, at 623.

124. However, in the event that acts of piracy in the Antarctica were committed by observers or scientific personnel sent by the parties to the Antarctic Treaty, under Article VIII of that treaty the controlling principle among the parties to it will be that of active nationality. Antarctic Treaty, Dec. 1, 1959, art. VIII, 402 U.N.T.S. 71, 78.

and punishment by the courts of the injured adversary, in case he falls into the hands of the authorities thereof."¹²⁵ After World War I, Germany acknowledged "the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war",¹²⁶ but due to the political situation prevailing at the time, the provision failed to serve its purpose.¹²⁷ This special head of jurisdiction, which broadened states right to exercise jurisdiction over cases of armed conflict, introduced the application of universal jurisdiction to war crimes.

The scope of the words "war crimes" is not entirely clear¹²⁸ and they were deliberately omitted in the Geneva Con-

125. See James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70, 71 (1920). The principle was endorsed by the Institute of International Law in the Oxford Manual of the Laws of War on Land adopted in 1880. The chapeau of Section 3 of the manual established that, in the event any of its provisions were violated, "the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are." *Les Lois de la Guerre Sur Terre* [*The Laws of War on Land*], ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, SESSION D'OXFORD [THE ANNUAL OF THE INTERNATIONAL LAW INSTITUTE, OXFORD SESSION] 710, 727 (Edition Nouvell Abrégée 1928).

126. Treaty of Versailles, June 28, 1919, art. 228, in 1 THE TREATIES OF PEACE, 1919-1923, at 3, 121 (Carnegie Endowment for International Peace ed., 1924).

127. See Garner, *supra* note 125, at 77. After firm opposition from Germany to the surrender of its alleged war criminals under the Versailles Treaty, "the Allied governments accepted the German proposal, submitted as a compromise, to have all persons accused by the Allies of war crimes tried before the Supreme Court of Germany in Leipzig." Remigiusz Bierzanek, *War Crimes: History and Definition*, in 3 INTERNATIONAL CRIMINAL LAW 87, 93 (M. Cherif Bassiouni ed., 2d ed. 1999). Only a few of the alleged war criminals were eventually tried and convicted. U.N. WAR CRIMES COMM., *supra* note 54, at 48.

128. Article 6(b) of the Charter of the International Military Tribunal defined war crimes as:

violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, U.K.-U.S.-Fr.-U.S.S.R., art. 6(b), 82 U.N.T.S. 280, 288.

ventions.¹²⁹ Some relevant authority, however, concludes that “[e]very violation of the law of war is a war crime.”¹³⁰ Therefore, a war crime includes every violation of a provision of the law of war that implicates the criminal responsibility of the perpetrator.¹³¹

Prior to the adoption of the Geneva Conventions of 1949, no international convention in the field of international humanitarian law provided for universal jurisdiction. This is not surprising since, with the exception of an innocuous provision contained in the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field,¹³² each convention was also silent on criminal responsibility.

Several national decisions can be found in the aftermath of World War II that account for the application of universal jurisdiction to war crimes.¹³³ A British military court affirmed that, “under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in Inter-

129. See *Actes de la Conférence diplomatique de Genève de 1949*, Département politique fédéral, Berne, tome II B 351. [Acts of the 1949 Geneva Diplomatic Conference, Ministry of Federal Affairs, Berne vol. II B 351]

130. U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE* 178, ¶ 499 (1956). The provisions of the British Military Manual are in this sense similar since they establish that “all other violations of the Conventions not amounting to ‘grave breaches’, are also war crimes.” GR. BRIT. WAR OFFICE, *THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW* 174, ¶ 626 (1958); see also Hans-Heinrich Jescheck, *War Crimes*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1349 (Rudolf Bernhardt ed., 2000) (“War crimes include all grave violations of the laws of war.”).

131. The violation by a state, for example, of the duty to extradite or punish regarding grave breaches contained in the Geneva Conventions cannot be said to constitute a war crime. Determining the criminality of a specific provision of international humanitarian law is often not an easy task. See Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 *EUR. J. INT’L L.* 18, 23-24 (1998) [hereinafter Meron, *International Law*] (“Beyond the Geneva Conventions, the major problem for international humanitarian law is how to distinguish between norms that merely prohibit conduct and those that also impose individual criminal responsibility on the violators.”).

132. See Meron, *International Criminalization*, *supra* note 61, at 563.

133. See, e.g., *In re Tesch (Zyklon B Case)* (Brit. Mil. Ct. 1947), reprinted in 1 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 93 (U.N. War Crimes Comm’n ed., 1947); *Re Klein and Others (Hadamar Sanatorium Case)*, AD, 13 (1946), No 110, cited in 1 *OPPENHEIM’S INTERNATIONAL LAW*, *supra* note 114, at 470 n.21; *Re Ohlendorf and Others (Einsatzgruppen Trial)*, AD, 15 (1948), No 217, cited in 1 *OPPENHEIM’S INTERNATIONAL LAW*, *supra* note 114, at 470 n.21.

national Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed.”¹³⁴

Common Articles 49 of the First Geneva Convention,¹³⁵ 50 of the Second,¹³⁶ 129 of the Third,¹³⁷ and 146 of the Fourth¹³⁸ establish that “persons alleged to have committed or to have ordered to be committed” grave breaches are subject to the jurisdiction of all the State parties.”¹³⁹ Further, “it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts.”¹⁴⁰ Indeed, the system of universal jurisdiction in place is mandatory, albeit coupled with the option to extradite or punish. In cases of grave breaches, the same type of universal jurisdiction is provided for in Protocol I.¹⁴¹

134. The Almelo Trial (Brit. Mil. Ct. 1945), in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42 (U.N. War Crimes Comm’n ed., 1947).

135. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 75 U.N.T.S. 31, 62.

136. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 75 U.N.T.S. 85, 116.

137. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 75 U.N.T.S. 135, 236.

138. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287, 386.

139. See MARCO SASSÖLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR 247 (1999); see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 253 (2000) [hereinafter Meron, *Humanitarian Law*]; Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 2, 5 (1998) [hereinafter Cassese, *Current Trends*]; BROWNLIE, *supra* note 53, at 308; SHAW, *supra* note 55, at 470-71. *Contra* B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUEIL DES COURS [R.C.A.D.I.] 329, 362 (1960) (arguing that the Conventions do not require neutrals to search for and try war criminals where extradition does not occur); see also *Children and Armed Conflict, Report of the Secretary-General*, U.N. GAOR, 55th Sess., Prov. Agenda Item 112, ¶¶ 62-63, U.N. Doc. A/55/163-S/2000/712 (2000).

140. Tadic, *supra* note 55, ¶ 79.

141. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, arts. 51-56, 85, 1125 U.N.T.S. 3, 26-28, 41-42.

Because the Geneva Conventions have gained, for the most part, the status of customary law,¹⁴² universal jurisdiction, with respect to grave breaches, also has a customary character.¹⁴³ Additionally, state practice and the writings of publicists support the proposition that the universality principle is applicable under customary law, not only to grave breaches of the Geneva Conventions, but also to all war crimes committed in an international armed conflict,¹⁴⁴ despite the aforemen-

142. See Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808 (1993), G.A. Res. 808, U.N. GAOR, 48th Sess., at 7, 8, para. 25, UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159, 1168-69 (1993), para. 25.

143. It is worth noting, however, that there has not been an extensive application of the universal jurisdiction provisions of the Conventions by national jurisdictions. Maison refers to the case of the Danish High Court of 1994 condemning Refik Saric for crimes committed in a concentration camp in Bosnia, and to a case of the Tribunal de Grande Instance (TGI) de Paris also of 1994, as the first cases of application of the Geneva Convention's penal provisions by domestic jurisdictions. Maison, *supra* note 89, at 261. Maison also concludes that the universal prosecution of grave breaches to the Geneva Conventions is possible, if not mandatory, by virtue of a customary principle. *Id.* at 270; see also Cassese, *Current Trends*, *supra* note 139, at 5 (affirming that the "provisions on national jurisdiction over grave breaches have been, at least until recent years, a dead letter"). For the first exercise of universal jurisdiction over war crimes by a Swiss court, see Andreas R. Ziegler, *In re G.*, 92 AM. J. INT'L L. 78, 80 (1998). Still, during the 1990s there has been an increase in the application by national courts of the jurisdictional provisions of the Geneva Conventions, especially in cases arising from the conflicts in the former Yugoslavia and Rwanda. See MCKAY, *supra* note 44, at 8-9 (providing background on the practice of several European countries).

144. See SHAW, *supra* note 55, at 470 (explaining that universality clearly applies to war crimes); STARKE, *supra* note 42, at 234 (contending that universal jurisdiction most definitely covers war crimes). Brownlie asserts that war crimes, including violations of the Hague Conventions, are subject to universal jurisdiction. BROWNLIE, *supra* note 53, at 308. The Canadian legislation and the Austrian Military Manual provide for universal jurisdiction over war crimes. See Meron, *International Criminalization*, *supra* note 61, at 573. Articles 109 to 114 of the Swiss Military Penal Code also apply the universality principle to war crimes, SASSÖLI & BOUVIER, *supra* note 139, at 572. For other interpretations and applications, see Attorney-Gen. of Isr. v. Eichmann, 36 I.L.R. 5, 26 (Isr. D.C. Jm. 1961), *aff'd* 36 I.L.R. 277 (Isr. S. Ct. 1962) (describing universal authority of national courts in the absence of an international court); RESTATEMENT, *supra* note 33, § 404 cmt. A (noting that such "offenses are subject to universal jurisdiction as a matter of customary law").

tioned lack of agreement on the scope of the terms.¹⁴⁵ However, the regime applicable to war crimes is that of voluntary universal jurisdiction. Under general international law and in accordance with state practice, all states appear to have the right, but not the duty, to exercise their jurisdiction over such offenses. This last type of universal jurisdiction is then applicable to violations of both the Geneva Conventions¹⁴⁶ and Protocol I,¹⁴⁷ which are not grave breaches.¹⁴⁸

Universal jurisdiction is more controversial with respect to non-international armed conflicts. The criminality under international law of serious crimes that are committed in internal conflicts can no longer be denied.¹⁴⁹ Nonetheless, it is clear that "State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts—at least not the mandatory universal jurisdic-

145. *Contra* Summers, *supra* note 31, at 84 (asserting that "the *aut dedere aut judicare* provisions in the 1949 Geneva and other post-war conventions are not widely regarded to be rules of customary international law").

146. *See* Meron, *International Criminalization*, *supra* note 61, at 569 (referring to Article 129(3) of the Third Geneva Convention, which "provides that each state party 'shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches,'" as a basis for the right of all state parties to exercise their jurisdiction over such offenses). The Commentary, however, does not settle the question since it only states that "all breaches of the convention should be repressed by national legislation," without referring specifically to jurisdictional issues. *See* 3 JEAN S. PICTET, *GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY* 624 (A.P. de Heney, trans., 1960).

147. The Commentary to Protocol I, in reference to violations other than grave breaches, recognizes "the right of States under customary law, as reaffirmed in the writings of a number of publicists, to punish serious violations of the laws of war under the principle of universal jurisdiction." INT'L COMM. OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 1011 (Yves Sandoz et al. eds., 1987).

148. In this respect see the British Military Manual, which states that "all other violations of the Conventions not amounting to 'grave breaches', are also war crimes." UK WAR OFFICE, *THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW*, para. 626 (1958), *cited in* Meron, *International Criminalization*, *supra* note 61, at 565 n.63.

149. *See id.* at 565 (acknowledging the "growing recognition of the criminality of violations of common Article 3").

tion involved in the grave breaches system.”¹⁵⁰ Therefore, under international law as it stands today, the “grave breaches” regime, which involves not only universal jurisdiction but also the application of the principle *aut dedere aut judicare*, cannot be extended to internal conflicts.¹⁵¹

Furthermore, at least until quite recently, the application of any type of universal jurisdiction to war crimes committed in an internal conflict was generally rejected.¹⁵² It is clear that when the courts of one state pass upon the validity of acts committed during a conflict that took place (or is taking place) within the boundaries of another state, a serious question arises concerning a possible violation of the principle of non-

150. Tadic, *supra* note 55, ¶ 80.

151. *But see* Prosecutor v. Tadic, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-I-A72 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/5100272A4582.htm> (“As a matter of treaty interpretation—and assuming that the traditional reading of ‘grave breaches’ has been correct—it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the ‘subsequent practice’ and *opinio juris* of the States parties: a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of ‘grave breaches.’”); *see also* F.R.G., FED. MINISTRY OF DEF., HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL, para. 1209 (1992), cited in Meron, *International Criminalization*, *supra* note 61, at 565 (the German Military Manual, describing some violations of common Article 3 and Protocol II as “[g]rave breaches of international humanitarian law”). In Resolution No. 1193 (1998) the Security Council reaffirmed, in reference to the conflict in Afghanistan, “that persons who commit or order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches.” U.N. SCOR, 3921st mtg. at 3, U.N. Doc. S/RES/1193 (1998). It did not, however, explicitly state that the “grave breaches” regime applies to internal conflicts. *Id.*

152. International Humanitarian Law “applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations.” Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts*, 30 INT’L REV. RED CROSS 409, 414 (1990). The United Nations War Crimes Commission (for Yugoslavia) was equally categorical. “[T]he content of customary law applicable to internal armed conflict is debatable. As a result, in general . . . the only offences committed in internal armed conflict for which universal jurisdiction exists are ‘crimes against humanity’ and genocide, which apply irrespective of the conflicts’ classification.” UN Doc. S/1994/674, annex, para. 42 (1994).

intervention. However, recent state practice¹⁵³ and some authors support, at a minimum, the proposition that:

[e]ven if there is no clear obligation to punish or extradite authors of violations of the Geneva Conventions that are not encompassed by the grave breaches provisions, such as common Article 3, all states have the right to punish those guilty of such breaches. In this sense, nongrave breaches may fall within universal jurisdiction.¹⁵⁴

Despite the above, it is doubtful whether this practice is sufficient to conclude that the universal prosecution of crimes committed in a non-international armed conflict forms part of customary law.¹⁵⁵ In some instances, such prosecution has encountered the opposition of the affected state.¹⁵⁶ Of course, customary law and such opposition do not affect the applicability of special regimes that permit the application of universal jurisdiction to war crimes contained therein.¹⁵⁷

153. See, e.g., *Prosecution v. Saric* (Den. H. Ct. 1994), cited in Maison, *supra* note 89, at 261. The Belgian Law of 16 June 1993 (Loi de 10 février 1999 relative à la répression des violations graves de droit international humanitaire (M.B. 23 mars 1999, pp. 9286-87)) [Law of February 10, 1999, Relating to the Repression of Serious Violations of International Humanitarian Law] establishes the criminal jurisdiction of Belgian courts over certain violations not only of the Geneva Conventions and Protocol I, but also of Protocol II, regardless of where the offense was committed or of the nationality of the victim or accused. Article 109 of the Military Penal Code of Switzerland applies the punishment of imprisonment to “[a]ny person who contravenes the stipulations of international treaties.” SASSÖLI & BOUVIER, *supra* note 139, at 572.

154. Meron, *International Criminalization*, *supra* note 61, at 569.

155. Cf. *Dupaquier v. Munyeshyaka* (Fr. CA Nîmes 1996), cited in SASSÖLI & BOUVIER, *supra* note 139, at 1343-45; see also Memorial of the Democratic Republic of Congo, *supra* note 86, ¶ 77. It should be noted that this is a very sensitive area. One should be very cautious when determining whether a new customary rule has developed. The concerns of states in this respect are demonstrated *inter alia* by the preamble of the ICC Statute, which emphasizes “that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State.” ICC Statute, *supra* note 5, Preamble.

156. See generally *Arrest Warrant Case*, *supra* note 12.

157. See Meron, *International Criminalization*, *supra* note 61, at 574-75 (making reference to the regimes created by the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163, and by the Convention on the Prohibition of the Develop-

3. *Genocide and Crimes Against Humanity*¹⁵⁸

Article 6 of the Genocide Convention¹⁵⁹ stipulates that “[p]ersons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” The Genocide Convention hence does not enshrine the universality principle, which was considered and rejected in the *travaux préparatoires*.¹⁶⁰

Judge *ad hoc* Lauterpacht has argued that under Article 1 of the Convention, parties are entitled “to assume universal jurisdiction over the crime of genocide.”¹⁶¹ Further, the Spanish National Court has held that that Article VI does not foreclose the jurisdiction of other states, but merely imposes a duty to adjudicate the case on the state where the genocide was committed.¹⁶²

In any event, it is now generally accepted that “[w]hile genocide is not subject to the universality principle under conventional law, universal jurisdiction may be applied to the

ment, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800).

158. It is convenient to consider both crimes together since, as was stated by Bassiouni, “[t]he Genocide Convention of 1948 also covers certain manifestations of ‘crimes against humanity’ . . . but only with respect to certain specific acts accompanied with a specific intent and against specifically designated groups.” BASSIOUNI, *supra* note 51, at 203. Also note the statement of the International Criminal Tribunal for Rwanda that “[t]he crime of genocide is a type of crime against humanity.” Prosecutor vs. Kayishema, ICTR-95-1-T, ¶ 89 (May 21, 1999), available at <http://ictr.org/ENGLISH/cases/KayRuz/judgement/index.htm>.

159. Genocide Convention, *supra* note 56, at 280-82, art. VI.

160. See Morris, *supra* note 50, at 347. But see PRINCETON PRINCIPLES, *supra* note 35, at 47 (concluding that “Article 6 does not preclude the use of universal jurisdiction by an international penal tribunal, in the event that such a tribunal is established”). As was argued above, an international tribunal does not exercise universal jurisdiction *stricto sensu*.

161. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 235, 443 (Sept. 13).

162. See María del Carmen Márquez Carrasco & Joaquín Alcaide Fernández, *In re Pinochet: Spanish National Court*, 93 AM. J. INT’L L. 690, 693 (1999).

crime under customary international law.”¹⁶³ Therefore, although the customary character of the Genocide Convention has long been recognized,¹⁶⁴ customary law has further evolved with respect to permissible grounds to exercise jurisdiction over genocide.

Like genocide, no international convention provides for the application of the universality principle to crimes against humanity.¹⁶⁵ This has not prevented, however, the formation of a wide consensus among commentators that every state has the right to exercise their jurisdiction over crimes against humanity.¹⁶⁶ There is, of course, practice that supports this conclusion,¹⁶⁷ though it is not as extensive as might be expected

163. BASSIOUNI, *supra* note 51, at 234-35; see Charney, *supra* note 4, at 455; Meron, *Humanitarian Law*, *supra* note 139, at 253; Randall, *supra* note 33, at 835-37; RESTATEMENT, *supra* note 33, § 404 (Reporters' Note 1 states that “[u]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law.”). Regarding relevant state practice see, for example, Scharf, *supra* note 33, at 372 n.44 (citing a case of the German Federal Supreme Court). For the practice of Spanish courts, see Márquez Carrasco & Alcaide Fernández, *supra* note 162, at 692.

164. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

165. PRINCETON PRINCIPLES, *supra* note 35, at 47.

166. See, e.g., GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 241 (1999); SHAW, *supra* note 55, at 473; BASSIOUNI, *supra* note 51, at 240; see also Arrest Warrant Case, *supra* note 12, ¶ 65 (separate opinion of Judges Higgins, Kooijmans and Buergenthal); cf. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 114, at 998 (noting there are “clear indications pointing to the gradual evolution” of such a principle); Meron, *International Criminalization*, *supra* note 61, at 569. It is not correct, however, to state that “[c]rimes against humanity such as torture, murder, and forced disappearances have been subject to universal jurisdiction under international law since the International Military Tribunal of Nuremberg was established in 1945.” White, *supra* note 75, at 216. First, the Nuremberg Tribunal does not constitute *per se* an exercise of universal jurisdiction, at least as defined herein. See Morris, *supra* note 50, at 344. Second, it does not appear that by 1945 a customary norm had crystallized granting states universal jurisdiction over crimes against humanity.

167. See, e.g., *The Queen v. Finta*, [1994] S.C.R. 701, 705, 711 (Can.); *Polyukhovich v. Commonwealth* (Austl. 1991) 172 C.L.R. 501, 672, 677, 692; *Attorney-Gen. of Isr. v. Eichmann*, 36 ILR 5, 26 (Isr. D.C. Jm. 1961), *aff'd* 36 I.L.R. 277 (Isr. S. Ct. 1962); *Reydams*, *supra* note 90, at 703; *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985); *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 I.L.R. 125, 128-29 (Fr. Cass. Crim. 1983). For prosecutions of crimes against humanity in France under the Nuremberg Charter apart from the *Barbie* case,

given the aforementioned doctrinal consensus.¹⁶⁸

Lack of uniformity in the definition of crimes against humanity among different international instruments will likely provoke doubts as to the permissibility of a particular application of the universality principle;¹⁶⁹ a problem that has been eliminated with the single definition in the ICC regime. Certain crimes that are included in the definition of crimes against humanity in the ICC Statute are subject to universal jurisdiction under specific regimes, namely: apartheid;¹⁷⁰ enforced disappearance of persons;¹⁷¹ and torture.¹⁷²

see Brigitte Stern, In re *Pinochet: French Tribunal de Grande Instance (Paris)*, 93 AM. J. INT'L L. 696 (1999). *But see* Brigitte Stern, In re *Javor*, In re *Munyeshy-aka*, 93 AM. J. INT'L L. 525 (1999), for cases in which French courts declined to exercise universal jurisdiction over, *inter alia*, crimes against humanity.

168. *See* Bianchi, *supra* note 55, at 252.

169. As Sadat Wexler points out:

[O]f the several versions that have been 'promulgated,' no two are alike! The Tokyo Charter and Control Council Law No. 10 differed slightly from the Nuremberg version; the ICTY provision (article 5) on crimes against humanity differs from all of its predecessors; and the ICTR version (article 3) is different that the ICTY version. Municipal law applications of the crime have also varied from state to state. Finally, the International Law Commission has also adopted various formulations, none of which has been particularly well-received.

Leila Sadat Wexler, *A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 127, at 655, 662.

170. *See* Apartheid Convention, *supra* note 63, art. IV.

171. Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, art. 4, 33 I.L.M. 1529.

172. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., Supp. No. 51, at Arts. 5 & 7 (1), U.N. Doc. A/Res/39/46 (1984) (providing also for the duty to extradite or punish). There is some authority to argue that universal jurisdiction can be exercised over torture outside the framework of the Torture Convention as a matter of customary law. *See Decisions of the Committee Against Torture Under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Torture or Punishment*, U.N. GAOR, 45th Sess., Supp. No. 44, Annex 5, ¶ 7.2, at 111, U.N. Doc. A/45/55 (1990). In this respect, the decision in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and subsequent decisions under the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, Publ. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350) are not directly relevant since in principle they refer to civil and not to criminal liability under international law. *But see* BROWNLIE, *supra* note 53, at 302 (stating that because "civil jurisdiction is ultimately reinforced by procedures

4. *Terrorism*

The international community has long recognized the importance of international cooperation regarding the suppression of terrorism.¹⁷³ Partially because designing a widely accepted definition of terrorism has proved to be nearly impossible,¹⁷⁴ states have identified certain crimes that must generally be regarded as terrorist activities. This has been accomplished through specific international conventions, without adopting a convention of universal scope that comprehensively regulates all manifestations of terrorism.¹⁷⁵ Thus, strictly speaking, terrorism as such is not an international crime.¹⁷⁶

of enforcement involving criminal sanctions, there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens”).

173. For the efforts made under the auspices of the League of Nations, see Leo Gross, *International Terrorism and International Criminal Jurisdiction*, 67 AM. J. INT'L L. 508, 508, 510 (1973).

174. See JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 995 (2d ed. 2000). It is nevertheless clear that “[t]he international community’s failure to define terrorism is political, not technical.” Maurice Flory, *International Law: An Instrument to Combat Terrorism*, in TERRORISM AND INTERNATIONAL LAW, *supra* note 71, at 30, 33. *But see* Higgins, *supra* note 71, at 14 (arguing that “[t]he technical problems of definition are prodigious”). For a rejection of the usefulness of the term terrorism, see generally R.R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974).

175. See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 886-87 (1989). The European Convention on the Suppression of Terrorism, adopted within the Council of Europe in 1977, covers several crimes (Article 1) and provides for universal jurisdiction coupled with the duty to extradite or punish (Articles 6 and 7). See European Convention on the Suppression of Terrorism, Jan. 27, 1977, 90 E.T.S. 41, arts. 1, 6, 7. Within the United Nations, India has submitted to the 6th Committee of the General Assembly a Draft Comprehensive Convention on International Terrorism. U.N. GAOR 6th Comm., 55th Sess., Agenda Item 166, U.N. Doc. A/C.6/55/1 (2000). The Draft Convention contains a general definition of terrorism, *id.* art. 2, and provides for universal jurisdiction, *id.* art. 11.

176. See John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM. J. TRANS. L. 35, 37 (1986). *But see* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 994 (“In my opinion, it may be safely contended that, in addition, at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes.”).

The main multilateral conventions in the field of terrorism include: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention);¹⁷⁷ the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention);¹⁷⁸ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention);¹⁷⁹ the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (Convention on Protected Persons);¹⁸⁰ the International Convention Against the Taking of Hostages (Hostages Convention);¹⁸¹ the Convention on the Physical Protection of Nuclear Material (Convention on Nuclear Material);¹⁸² the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation (Airports Protocol);¹⁸³ the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Navigation Convention);¹⁸⁴ the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platforms Protocol);¹⁸⁵ the Convention on the Safety of United Nations and Associated Personnel (U.N. and Associated Personnel Conven-

177. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219.

178. Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 65.

179. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

180. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 168 [hereinafter Convention on Protected Persons].

181. International Convention Against the Taking of Hostages, 1316 U.N.T.S. 206 [hereinafter Hostages Convention].

182. Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124 [hereinafter Nuclear Material Convention].

183. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627 [hereinafter Airports Protocol].

184. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222 [hereinafter Maritime Navigation Convention].

185. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304 [hereinafter Fixed Platforms Protocol].

tion);¹⁸⁶ the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention);¹⁸⁷ and the International Convention for the Suppression of the Financing of Terrorism (Convention on the Financing of Terrorism).¹⁸⁸

These conventions (with the exception of the Tokyo Convention)¹⁸⁹ all provide, in similar terms, for a type of mandatory universal jurisdiction.¹⁹⁰ Under these conventions, a state party that has the accused in custody and is not willing to extradite him to another state party with jurisdiction under the relevant convention, must itself exercise jurisdiction if warranted.¹⁹¹ It appears, however, that the conventions do not establish universal jurisdiction in its most extensive form.

186. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 391.

187. International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, U.N. Doc. A/Res/52/164.

188. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, U.N. Doc. A/54/109.

189. David Freestone, *International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction*, in *TERRORISM AND INTERNATIONAL LAW* 43, 49 (Rosalyn Higgins and Maurice Flory eds., 1997) (stressing that the Tokyo Convention “based its case on existing principles”). It is interesting to note that Bassiouni, on the basis of Article 3.3 of the Tokyo Convention, which states that the convention “does not exclude any criminal jurisdiction exercised in accordance with national law,” concludes that the latter “allows national legislation to provide for universal jurisdiction.” Bassiouni, *supra* note 41, at 125. However, it is not so clear whether such provision overrides constraints imposed by international law to the exercise of criminal jurisdiction by states.

190. In his separate opinion in the Arrest Warrant Case, Judge Guillaume describes the jurisdictional scheme established by these conventions as “compulsory, albeit subsidiary, universal jurisdiction.” Arrest Warrant Case, *supra* note 12, ¶ 7 (Separate Opinion of President Guillaume). Actually, under the *aut dedere aut judicare* principle there is *a priori* no primacy between the duty to extradite and the duty to prosecute and so, if applicable, universal jurisdiction does not appear to be subsidiary. *Contra* SHAW, *supra* note 55, at 476 (stating in reference to the Montreal Convention that “[t]he wide range of jurisdictional bases is to be noted, although it would appear that universality as such is not included”); Higgins, *supra* note 71, at 28 (concluding that “only a very few of [terrorist activities] . . . give rise to universal jurisdiction”).

191. *Cf.* RUBIN, *supra* note 114, at 327 (asserting in reference to the Hague Convention that “there is no obligation in Article 7 to try him [the accused] in the exercise of ‘universal’ jurisdiction, but only to submit the case to the ‘asylum’ state’s competent authorities for prosecution. They can still find

First, although the custodial state can exercise its criminal jurisdiction over the accused even if he has no link to the state other than the fact that he is in its custody, it could not extradite the accused to a state (even if it is party to the convention) that cannot exercise jurisdiction based upon one of the other jurisdictional links provided for in the applicable convention.¹⁹² Second, the terrorism conventions do not establish alternative means of universal jurisdiction independent from custody that can be exercised if the accused is not present in the country.

States that are party to each convention are thus entitled to exercise universal jurisdiction over the particular crime. Furthermore, those conventions with a large number of state parties arguably have attained the status of customary international law.¹⁹³ Where this is the case, exercise of jurisdiction over the crimes regulated therein is open to all states.¹⁹⁴ However, it is not yet possible to conclude that universal jurisdiction can be exercised under customary law with respect to all activities that might be termed terrorism.¹⁹⁵

prosecution undesirable or impossible for lack of evidence or even for lack of jurisdiction over the offense regardless of article 4.2.”).

192. See Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 65, art. 4.2; Montreal Convention, *supra* note 179, art. 5.2; Convention on Protected Persons, *supra* note 180, art. 3.2; Hostages Convention, *supra* note 181, art. 5.2; Nuclear Material Convention, *supra* note 182, art. 8.2; Airports Protocol, *supra* note 183, art. 3; Maritime Navigation Convention, *supra* note 184, art. 6.4; Fixed Platforms Protocol, *supra* note 185, art. 3.4; Article 10.4 of the Convention of the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363; International Convention for Suppression of Terrorist Bombings, Dec. 15, 1997, art. 6.4, 2149 U.N.T.S. 284, 287; International Convention for the Suppression of the Financing of Terrorism, 54th Sess., Agenda Item 160, Annex I, art. 7.2, U.N. Doc. A/RES/54/109 (2000) [hereinafter Financing of Terrorism Convention].

193. See, e.g., MALANCZUK, *supra* note 36, at 40 (contending that multilateral treaties “may definitely constitute evidence of customary law”).

194. See, for instance, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167, which has 152 parties; the International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, which has 143 parties; the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, which has 131 parties.

195. See Higgins, *supra* note 71, at 24 (“Contrary to popular belief, terrorism is not subject to universal jurisdiction—some degree of connection with the event is required.”); see also RESTATEMENT, *supra* note 33, § 404 cmt. a (affirming that it “is increasingly accepted” that there is universal jurisdic-

IV. THE INTERNATIONAL CRIMINAL COURT AND THE FUTURE OF UNIVERSAL JURISDICTION

The above analysis concerning crimes subject to the ICC's jurisdiction and those subject to universal jurisdiction demonstrates the extent to which both systems' jurisdictions overlap. This is hardly surprising since universal jurisdiction and the ICC both respond to the international community's desire to find effective ways to deal with a few specific serious crimes.

While the crimes of aggression (included, at least formally, within the jurisdiction of the ICC), piracy, and certain

tion but only "for certain acts of terrorism, such as assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large"). In *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991), it was stated that "[i]n light of the global efforts to punish aircraft piracy and hostage taking, international legal scholars unanimously agree that these crimes fit within the category of heinous crimes for purposes of asserting universal jurisdiction," but the decision does not refer to terrorism in general in this respect. Regarding aircraft hijacking, see also *United States v. Rezaq*, 899 F. Supp. 697, 709 (D.D.C. 1995). On the reluctance of States to extradite terrorists, see W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 56 (1999). It should be noted that the recent International Convention for the Suppression of the Financing of Terrorism, *supra* note 192, art. 2, enshrines a quite general definition of terrorism, which may constitute the first step in achieving a general agreement at least as to the scope of the term. Further, negotiations are now being held within the United Nations General Assembly on the drafting of a comprehensive international convention on terrorism. See *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. GAOR, 57th Sess., Supp. 37, ¶ 20, U.N. Doc. A/57/37. The terrorist attacks that took place in the United States on September 11, 2001, triggered the adoption by the Security Council of Resolutions 1368, U.N. SCOR, 4730th mtg., U.N. Doc. S/RES/1368 (2001) and 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001). Neither of these resolutions provide for universal jurisdiction over terrorism, although theoretically the Security Council has the power to assert it under Chapter VII of the U.N. Charter. See U.N. CHARTER, chap. VII, art. 39. The extent to which the Security Council can override existing norms on a state's jurisdiction is a complex matter, which was debated in the *Lockerbie* case. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. U.K.)*, 1992 I.C.J. 3, 14 (Apr. 14); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 I.C.J. 114 (Apr. 14).

manifestations of terrorism,¹⁹⁶ are exclusively subject to universal jurisdiction, the rest of the crimes concerned—namely genocide, crimes against humanity, and war crimes—are covered by both systems. These latter crimes constitute the core of international criminality since at least the Nuremberg trials so it is clear that the ICC and universal jurisdiction are currently broad enough to address all major international crimes. These two schemes have the same basic functions and cover essentially the same crimes, but they are not coordinated in any way and they represent, in essence, different approaches to the same problem: One scheme depends upon the unilateral action of one state, while the other is based on the multilateral action of an international tribunal that has been established by a community of states.

Given the problems and risks associated with the application of universal jurisdiction, the international community should eliminate universal jurisdiction in favor of the ICC.¹⁹⁷ Further, the disappearance of universal jurisdiction will help make the ICC more effective. There should be a clear policy that heinous crimes affecting the entire international community that are left unpunished by the territorial or nationality states, should only be prosecuted, in a uniform way, by the ICC. The ICC would pursue widely shared goals and prosecution of international crimes would not depend on whether a state's interests entice it to exercise its criminal jurisdiction.

Moreover, given that a state with jurisdiction over a case before the ICC is entitled to invoke the principle of complementarity and eventually cause the case's inadmissibility,¹⁹⁸ continued recognition of universal jurisdiction by the international community will enable states to paralyze an ICC prose-

196. See SCHABAS, *supra* note 78, at 28 (noting that “[p]roposals at the Rome Conference to include drug trafficking and terrorism did not meet with sufficient consensus” and were not included in the ICC’s jurisdiction).

197. For the view that both systems can harmoniously co-exist, see Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 *TRANSNAT’L LAW* 357, 398-99 (2002); see also Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court*, 29 *MANITOBA L.J.* 1, 28-31 (2002) (explaining the “synergy” between the universality principle and ICC jurisdiction).

198. ICC Statute, *supra* note 5, art. 17; see also Cassese, *Statute*, *supra* note 9, at 159.

cution at their discretion. This serious possibility should not be disregarded. It is true that the ICC Statute contains a “test of the good faith of national authorities,”¹⁹⁹ under which the ICC may, if “proceedings were or are being undertaken or [a] national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court,” determine that a state is unwilling to genuinely prosecute a certain crime.²⁰⁰ In that case the ICC maintains jurisdiction, despite the opposition of the prosecuting state. But universal jurisdiction would allow several states, perhaps in bad faith, to invoke jurisdiction over the case. It would then be necessary for the ICC to consider the willingness of each of those states to prosecute, an examination that could be complex and take a considerable amount of time, thereby obstructing the work of the ICC. Domestic courts have a fundamental role to play in combating international criminality, but their powers should not be broad enough to jeopardize the fulfillment of the ICC’s goals.

A. *The Role of Domestic Courts*

From a legal standpoint, a functioning international criminal court and the exercise of universal jurisdiction by states are not mutually exclusive.²⁰¹ Even though, as has been stated, the ICC Statute does not establish the universality principle as a permissible basis for the exercise of jurisdiction by the ICC,²⁰² it certainly “does not prohibit universal jurisdic-

199. Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 900 (2002).

200. ICC Statute, *supra* note 5, art. 17.2(a).

201. See Marie-Claude Roberge, Int’l Comm. of the Red Cross, *The New International Criminal Court: A Preliminary Assessment*, (Dec. 31, 1998), at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/21F4EF8999A2B66DC1256B66005C6C32> (last visited Apr. 18, 2004). Article V of The Apartheid Convention, *supra* note 63, establishes that persons charged with the acts contained therein “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.”

202. See Brown, *supra* note 70, at 386.

tion.”²⁰³ The validity of the exercise of universal jurisdiction by national jurisdictions is not, legally speaking, affected by the ICC Statute.

The enforcement of international criminal law, like that “of international humanitarian law[,] cannot depend on international tribunals alone.”²⁰⁴ It would be inefficient,²⁰⁵ if not impossible,²⁰⁶ for the ICC to prosecute all those accused of committing crimes under international law. Unfortunately, history shows that such crimes are committed quite frequently, and given the context in which they are usually committed, there will be many alleged offenses to investigate.²⁰⁷ Ideally, several courts should be available to cope with international criminality, with the ICC at the center of them.

In fact, perhaps one of the most important contributions the ICC offers is its role as catalyst—encouraging domestic courts to actively prosecute persons accused of committing heinous crimes that often not only affect the victims, but also endanger international peace and security.²⁰⁸ The role of national courts in the prosecution of these crimes remains important.²⁰⁹

The ICC Statute acknowledges this role and gives it priority over the jurisdiction of the ICC.²¹⁰ This is done by the inclusion of the principle of complementarity, which in effect implies the subsidiary nature of international criminal justice *vis-à-vis* municipal courts.²¹¹ The Preamble and Article 1 of

203. Arrest Warrant Case, *supra* note 12, ¶ 64 (dissenting opinion of Judge Van den Wyngaert).

204. Meron, *International Criminalization*, *supra* note 61, at 555; Meron, *International Law*, *supra* note 131, at 29.

205. See El Zeidy, *supra* note 199, at 905.

206. See *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 43-44, U.N. Doc. A/51/10 (1996).

207. See *id.* at 219.

208. Cf. Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT’L L. 120, 123 (2001) (arguing that rogue states, such as Libya, will be placed under substantial pressure to prosecute persons accused of international crimes or to surrender them to other states or the ICC for trial).

209. See McKAY, *supra* note 44, at 5.

210. See Charney, *supra* note 208, at 122.

211. See ISABEL LIROLA DELGADO & MAGDALENA M. MARTÍN MARTÍNEZ, LA CORTE PENAL INTERNACIONAL [THE INTERNATIONAL CRIMINAL COURT] 295-296 (2001).

the ICC Statute establish that the ICC “shall be complementary to national criminal jurisdictions.”²¹² The most patent manifestation of the ICC’s complementary nature is in Article 17, which deals with admissibility.²¹³

Although the ICC Statute does not define the principle of complementarity, its meaning can be inferred from various of the Statute’s provisions.²¹⁴ Essentially, it means “that the court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction.”²¹⁵ Moreover, the Court must determine that a case is inadmissible when it “is not of sufficient gravity to justify further action by the Court,”²¹⁶ even if the national authorities concerned are unwilling or unable to take action. The scope of the term “gravity” in this context will have to be determined by the ICC in practice. Scale will no doubt be an element that is taken into account by the ICC for this purpose, since “the magnitude or widespread nature of the crimes may be an element of their admissibility before the Court or even of the Court’s jurisdiction.”²¹⁷ Also, in establishing whether the crime’s gravity justifies prosecution by the ICC, the consideration of the “Purposes and Principles of the Charter of the United Nations” will be important.²¹⁸

The states participating in the Rome conference no doubt intended that the ICC would deal only with “the most serious crimes of concern to the international community as a whole.”²¹⁹ Even with respect to those crimes, it did not pur-

212. See ICC Statute, *supra* note 5, Preamble, art. 1.

213. Arsanjani, *supra* note 95, at 27.

214. See El Zeidy, *supra* note 199, at 896.

215. Arsanjani, *supra* note 95, at 24. The unwillingness of states in this context may be manifested by proceedings undertaken “for the purpose of shielding the person concerned from criminal responsibility,” unjustified delay in the proceedings, or proceedings that “were not or are not being conducted independently or impartially, and [that] were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.” ICC Statute, *supra* note 5, art. 17.2(a), (c).

216. ICC Statute, *supra* note 5, art. 17.1(d).

217. El Zeidy, *supra* note 199, at 905.

218. See ICC Statute, *supra* note 5, Preamble.

219. Arsanjani, *supra* note 95, at 25.

port to substitute the ICC for the jurisdiction of national courts in whole or in substantial part.²²⁰

Recognizing that domestic courts will continue to handle the vast majority of cases involving many of the most serious crimes, however, does not necessarily mean that the role of universal jurisdiction will have to be extended or even maintained. The establishment of the ICC, which, despite its weaknesses, constitutes an important step forward,²²¹ needs to be complemented with prosecutions by domestic courts. But these prosecutions should be conducted under the traditional bases of jurisdiction, which do not suffer from the grave deficiencies that afflict universal jurisdiction.²²² Eliminating universal jurisdiction will not undercut the role of domestic tribunals because, under territorial and nationality principles, there will always be one or more countries with jurisdiction over crimes of international concern. In the event that none of these countries is willing to exercise jurisdiction, the ICC can get involved and consider the case in accordance with the referred to complementarity principle.

B. *Flaws of the Universality Principle*

Allegations that universal jurisdiction would lead to chaos have proven to be unfounded thus far.²²³ Yet the absence of widespread problems in its operation may be attributed to the following: the doctrine was only recently extended to crimes

220. See Antonio Marchesi, *La Corte Penale Internazionale: Ruolo della Corte e Ruolo degli Stati* [*The International Criminal Court: Role of the Court and Role of the States*], in CRIMINI INTERNAZIONALI TRA DIRITTO E GIUSTIZIA: DAI TRIBUNALI INTERNAZIONALI ALLE COMMISSIONI VERITÀ E RICONCILIAZIONE [INTERNATIONAL CRIMES BETWEEN LAW AND JUSTICE: FROM INTERNATIONAL TRIBUNALS TO TRUTH AND RECONCILIATION COMMISSIONS] 25, 33 (G. Giapichelli Editore ed., 2000).

221. *But see* ROBERTSON, *supra* note 166, at 324-67 (espousing a skeptical view of the court).

222. *Contra* Sadat, *supra* note 7, at 263 (advocating the harmonization of ICC and universal jurisdiction to prosecute, and even protect, criminal defendants).

223. See Graefrath, *supra* note 11, at 85 (making this claim in 1990). *But see* Arrest Warrant Case, *supra* note 12, ¶ 15 (separate opinion of President Guillaume).

other than piracy;²²⁴ its application remains negligible; and many states still reject its validity altogether. Indeed, some instances of the application of universal jurisdiction have already created tensions, even among countries with long-standing political ties.²²⁵ The strong pressure exerted by the United States on Belgium, a NATO ally, for the suppression of the Belgian law on universal jurisdiction, which eventually led to its amendment, is a striking example of how these tensions can emerge. U.S. Secretary of Defense Donald Rumsfeld even threatened to move NATO headquarters elsewhere if the Belgian law remained in effect.²²⁶

It is true that in some cases the exercise or purported exercise of universal jurisdiction has had beneficial effects. Apart from providing a forum where persons accused of committing serious crimes can be tried without the risk of impunity, prosecutions in foreign courts have fostered domestic prosecutions, human rights activism, and ultimately led to justice in the country concerned.²²⁷ But, given the existence of the ICC, these beneficial effects do not outweigh the problems and deficiencies that come with the exercise of universal jurisdiction.

1. *Due Process*

One concern raised by the exercise of universal jurisdiction relates to the violation of due process guarantees. The

224. Cf. Morris, *supra* note 50, at 358 (noting that “the modern use of universal jurisdiction is in its nascent stages”); Sadat, *supra* note 7, at 244 (explaining that, until recently, universal jurisdiction was seldom invoked).

225. On the negative reaction of the governments of Argentina and Chile towards the exercise of universal jurisdiction by Spanish courts, see Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 315 (2001). It is interesting to highlight that, apart from the equality deficit that the practice of universal jurisdiction presents in general and which is considered below, such practice often involves former colonial relationships. The country that was the colonial power purporting to exercise universal jurisdiction, such as Belgium or Spain, and the former colony being subject to it, such as Argentina, Chile, or Congo.

226. Craig Smith, *Rumsfeld Waves Stick Over War Crimes Law*, SYDNEY MORNING HERALD, June 14, 2003, available at <http://www.smh.com.au/articles/2003/06/13/1055220772624.html>.

227. Regarding Argentina and Chile, see Roht-Arriaza, *supra* note 225, at 315-16. With respect to Chad, see Reed Brody, *The Prosecution of Hissène Habré—An “African Pinochet”*, 35 NEW ENG. L. REV. 321, 335 (2001).

person accused of committing an offense under universal jurisdiction is subject to prosecution in any country. She may have no connection with the vast majority of competent countries and may not possess any knowledge of their laws, penalties, or criminal procedures. There are sometimes great differences among members of the international community in the definitions of crimes, the determination and extent of the penalties, and the applicable procedure.²²⁸ These differences are difficult to reconcile with the principle concerning the legality of criminal statutes and penalties.²²⁹ The ICC regime is quite different, as the definitions of the crimes, the procedures, and the penalties are unified. These are contained in the ICC Statute, “of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic,”²³⁰ and which, as with any international treaty, should not be difficult for a defense lawyer familiar with international law to understand.

The due process problem is exacerbated by the fact that there is little agreement among states or commentators as to which crimes are subject to universal jurisdiction under international law.²³¹ This uncertainty could easily lead to a situation in which a state invokes the universality principle where it is not warranted; such “prosecution would fail to fulfill the due process requirements that the criminal law be non-vague, specific, and prospective in its application.”²³² The great number of competent fora also increases the possibility of the accused being tried more than once for the same offense, in violation of Article 14.7 of the International Covenant on Civil and Political Rights, if a state does not recognize the former proceedings as valid.²³³ This problem does not exist under the ICC Statute, since the case is inadmissible if the person concerned has already been tried for the conduct in question, provided the process was a genuine one and was conducted in accordance with the requirements of justice.²³⁴ Under the ICC Statute, an independent international body assesses whether the prior judicial process is genuine, and not a national tribunal

228. See Sadat, *supra* note 7, at 256.

229. See de La Pradelle, *supra* note 40, at 918.

230. ICC Statute, *supra* note 5, art. 128.

231. See discussion *infra* Part II.

232. Morris, *supra* note 50, at 352.

233. See Graefrath, *supra* note 11, at 85.

234. See ICC Statute, *supra* note 5, art. 17.

with little or no knowledge of what international law requires for criminal proceedings to be deemed authentic, as in cases of universal jurisdiction.

The differences among states' criminal laws affect two defenses available in both universal and ICC jurisdiction regimes: statutes of limitations and amnesties or other pardons granted to convicted criminals. Regarding statutes of limitations, it is highly controversial whether, under general international law, they are applicable to war crimes, crimes against humanity, and perhaps other international crimes.²³⁵ The U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,²³⁶ and the European Convention on the Non-Applicability of Limitations to Crimes against Humanity and War Statutory Crimes,²³⁷ have received very few ratifications. Thus, it is difficult to argue that a customary norm has emerged in that respect.²³⁸ This has caused some anomalies in international prosecutions; for example, in the *Priebke* case, the Argentine Supreme Court granted Priebke's extradition to Italy, but an Italian court acquitted him on the basis of the Italian statute of limitations.²³⁹

Conversely, the law to be applied by the ICC is clear: "[C]rimes within the jurisdiction of the Court shall not be subject to any statute of limitations."²⁴⁰ While this provision may, in time, affect the development of customary international

235. Benavides, *supra* note 58, at 40 (stating that international "crimes are not subject to statutory limitations.").

236. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

237. European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, 82 E.T.S. 211.

238. See Christine Van den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity—Are States Taking National Prosecutions Seriously?*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 127, at 227, 233.

239. Priebke, a captain in the German military during World War II, publicly admitted responsibility for the massacre of 335 civilians in Italy in 1944. *Id.* at 228.

240. ICC Statute, *supra* note 5, art. 29. But the adoption of this provision does not mean that the doubts as to the existence of a rule of imprescriptibility of war crimes and crimes against humanity under general international law have been "laid to rest." Sadat, *supra* note 7, at 259-60 (Sadat suggests, however, that these doubts may have been laid to rest with the adoption of the ICC). Article 29 of the ICC Statute will undoubtedly have an impact on customary law in this respect, but it is in principle only applicable to the ICC.

criminal law,²⁴¹ the ICC Statute will remain more precise than customary international law.

The validity of amnesties and other pardons in international law with respect to international crimes is also a contentious issue.²⁴² In general, the best view is that amnesties and pardons in favor of persons who have committed international crimes are generally contrary to international law, especially when states have the duty to prosecute and punish a certain crime.²⁴³ But there may be exceptional cases in which amnesties and pardons are consistent with international law depending upon, *inter alia*, the extent to which the main perpetrators have been convicted or the most serious crimes excluded from amnesty, whether reparation has been provided to the victims, and whether the process was a truly democratic one that was subject to some sort of international monitoring.²⁴⁴ Under the framework of universal jurisdiction, assessment of the legality of such highly political processes, which almost always involve very complex historical and sociological factors, is left to a foreign court.²⁴⁵ Often the court will not know much

Therefore, it is too soon to know what its impact on proceedings before national courts will be.

241. See William Schabas, *Article 29: Non-Applicability of the Statute of Limitations*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 523, 524 (Otto Triffterer ed., 1999).

242. Cf. Sadat, *supra* note 7, at 260 (suggesting that international law rejects amnesties "with respect to grave breaches and perhaps other serious crimes committed in international armed conflict" and that a rule with respect to genocide is unclear); Benavides, *supra* note 58, at 40 (asserting that "no amnesty or pardon may be granted" for international crimes).

243. See Cassese, *Current Trends*, *supra* note 139, at 6; Sadat, *supra* note 7, at 260.

244. The U.N. Secretary General, referring to the amnesty in El Salvador, stressed the advantages of achieving a "broad degree of national consensus" before an amnesty is granted. See Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 225 (1996); Cf. Charney, *supra* note 4, at 458 (referring to the South African Truth and Reconciliation Commission).

245. Sadat refers to the fact that:

[I]t is not clear whether the forum state looks to its own law, the law of the state granting the defendant immunity, the law of the state of the defendant's nationality, the law of the state upon whose territory the crimes were committed (the territorial state), or international law to resolve the question.

Sadat, *supra* note 7, at 258.

about these issues and in some instances it might be influenced by its own political agenda.

The ICC Statute does not expressly state the way in which the ICC should cope with national amnesties, since a compromise on the issue was not attained.²⁴⁶ An amnesty can certainly be considered by the Security Council under Article 16 by requesting that the ICC “not . . . commence an investigation or prosecution, or . . . defer any proceedings already in progress.”²⁴⁷ Similarly, the prosecutor can decide not to initiate a prosecution when there is an amnesty in place, if she believes that “the interests of justice” are better served by preserving the status quo.²⁴⁸

Based upon Article 17, the ICC will arguably have discretion to find that, in specific cases, amnesties have been consistent with the desire to do justice, a circumstance that would render the case inadmissible.²⁴⁹ The U.S. Delegation wanted this discretion to be expressly granted to the ICC pursuant to a proposal it circulated in the Preparatory Committee. Inclusion of the power not to prosecute due to the existence of an amnesty, under certain conditions, would have been desirable.²⁵⁰

In any case, under the ICC, the challenge of a particular amnesty law is taken up by an independent international institution that does not share the interests of any particular state (except, perhaps, those of Security Council members) and which has the necessary expertise and resources to apply international law to complex situations.

Another factor that may affect the integrity of the proceedings before domestic tribunals is that these tribunals, when exercising jurisdiction over high profile crimes committed abroad with great international repercussions, can become a means of furthering the political agenda of the country in which they sit or the agenda of particular interested groups within that country. For example, with regard to the Belgian

246. Jessica Gavron, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L.Q. 91, 107-08 (2002).

247. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 522-23 (1999).

248. See Gavron, *supra* note 246, at 110.

249. See Sadat, *supra* note 7, at 261.

250. See Gavron, *supra* note 246, at 108; El Zeidy, *supra* note 199, at 943.

law on universal jurisdiction, Belgium's Foreign Minister Louis Michel acknowledged that "the noble cause that prompted the parliament to adopt this law was hit with abuse and manipulated for political ends."²⁵¹

The likelihood of this scenario in the case of universal jurisdiction is high since the crimes involved are often committed in the context of protracted political and military conflicts in which the interests of third countries, including the one exercising universal jurisdiction, are usually involved.²⁵² This increases the risk of biased or politically motivated proceedings, especially in the case of courts that lack independence from the political powers.²⁵³ Politically motivated courts are given a formidable power under the universality principle that they would not otherwise have and that is far less likely to be present in an international criminal court.²⁵⁴

2. *Sovereign Equality*

In practice, universal jurisdiction appears inconsistent with the notion of sovereign equality among states. Its operation usually involves one or more developed countries prosecuting crimes that occurred in less developed countries.²⁵⁵ Some advocates of the universality principle are perhaps unconcerned with this issue since they may also be proponents of

251. *Belgium Amends War Crimes Law*, *supra* note 17 (internal quotations omitted).

252. For instance, Third countries are often interested in humanitarian concerns, such as the fate of their nationals.

253. *See* Morris, *supra* note 50, at 338; *see also* Graefrath, *supra* note 11, at 85 (referring to "doubts as to the extent to which national courts are appropriately objective").

254. *See* Tadic, *supra* note 55, ¶ 62 (noting that "one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent, and disinterested judges coming, as it happens here, from all continents of the world").

255. *See* M. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences: Final Report 18* (second draft Jan. 2000) (stating that "all known cases where states did exercise universal jurisdiction were member states of the Organisation for Economic Co-operation and Development with respect to crimes committed outside these countries"), *cited in* Pita J.C. Schimmelpenninck van der Oije, *A Surinam Crime Before a Dutch Court: Post-Colonial Injustice or Universal Jurisdiction?*, 14 LEIDEN J. INT'L L. 455, 458 n.10 (2001).

“an emergent global public policy animated by commitments to markets, civil society, liberal peace, the rule of law, untrammelled communication, and transnationalism.”²⁵⁶ This policy, however, is “not clearly committed to the substantive reduction of global inequality.”²⁵⁷

Currently, universal jurisdiction is generally exercised by powerful countries over acts that occurred in developing countries and that were committed by persons from such countries. This practice necessarily involves the risk of imposing the West’s values on the developing world. As one author notes, given “the enormous effort and potential expense in collecting evidence, gathering witnesses, and trying accused perpetrators of horrific crimes committed extraterritorially, the motivation for almost every such national proceeding likely would have some foundation in politics or arise from a sense of judicial, and most likely Western, superiority.”²⁵⁸

Universal jurisdiction also gives powerful nations a means of politically influencing less powerful ones.²⁵⁹ Due to the great likelihood that good motives will be accompanied or intertwined with less altruistic ones, this practice should not be encouraged. Indeed, permitting states to assert universal jurisdiction might “encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined ‘international community.’”²⁶⁰

Thus far, weak countries with little to no political leverage have not exercised universal jurisdiction over powerful people from powerful countries through their courts.²⁶¹ This is certainly not because persons from developed countries, includ-

256. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT’L L. 599, 600 (1998).

257. *Id.*

258. Sammons, *supra* note 7, at 138.

259. See White, *supra* note 75, at 224. In his separate opinion Judge *ad hoc* Bula-Bula states that by issuing the arrest warrant Belgium infringed upon the political independence of Congo and coerced it to modify the composition of its cabinet. See Arrest Warrant Case, *supra* note 12, ¶ 89 (opinion individuelle de M. Bula-Bula [separate opinion of Judge *ad hoc* Bula-Bula]).

260. Arrest Warrant Case, *supra* note 12, ¶ 15 (separate opinion of President Guillaume).

261. For instance, Judge Rezek hypothesizes that certain judges of the Southern Hemisphere would not hesitate to initiate criminal actions against authorities of Northern Hemisphere countries, in relation to recent military episodes, but they do not do it because they are conscious that international

ing high-ranking officials, have never been suspected of, directly or indirectly, involvement in heinous crimes. In fact, it should be noted that in some of the most publicized cases involving the exercise of universal jurisdiction, such as the Pinochet and Hissène Habré cases, there are quite strong indications that the individuals involved received support from developed countries such as the United States and France.²⁶² Presumably, authorities from these countries should also be held accountable for such actions before a court of law. However, universal jurisdiction functions in an inequitable way and does not allow such prosecutions to occur. In contrast, the preamble of the ICC Statute reaffirms the purposes and principles of the U.N., among which sovereign equality is of paramount importance, and establishes an international tribunal before which the accused, regardless of citizenship or nationality, will be judged equally and fairly.

3. *Ineffectiveness of the Universal Jurisdiction System*

Finally, universal jurisdiction often fails in its attempts to bring persons accused of crimes to justice. Despite the formidable extension of competent fora, the system has not been very successful in punishing the perpetrators of such crimes. Consider the following several recent cases.

The proceedings conducted in the United Kingdom against General Augusto Pinochet are perhaps the most high-profile case involving universal jurisdiction. In any event, they triggered a great deal of discussion on the subject.²⁶³ The prosecution of a former Head of State, who had ruled a country for 17 years and held strong ties with the state exercising jurisdiction (Chilean authorities have recently admitted that they provided support to the United Kingdom during the Malvinas/Falklands war), was an important step, but two points must be made. First, one cannot ignore the fact that the territorial state, Chile, which strongly opposed the proceedings, is a developing country, while the United Kingdom

law does not authorize it. See Arrest Warrant Case, *supra* note 12, ¶ 10 (opinion individuelle de M. Rezek [separate opinion of Judge Rezek]).

262. On the Pinochet case, see White, *supra* note 75, at 224; on the Hissène Habré, affair see Brody, *supra* note 227, at 321.

263. See, e.g., Nicholls, *supra* note 25; Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415 (2000).

is a developed and very powerful one. This perhaps explains one of the reasons the case progressed as far as it did. Indeed, one may cast even greater doubt on the effectiveness of universal jurisdiction under other circumstances. Second, Pinochet was returned to Chile for medical reasons²⁶⁴—an outcome that suited the interests of both the British and Chilean governments.

Another famous case involving the application of the universality principle involved Hissène Habré, dictator of Chad from 1982 to 1990. In February 2000, Habré was indicted in Senegal on charges of torture, but he had also been accused of thousands of murders and other crimes against humanity.²⁶⁵ The charges against him were finally dismissed in July 2000, essentially due to political pressures by the Senegalese authorities.²⁶⁶ Here again, the concrete results of the indictment and a few developments in the investigation cannot be completely disregarded. However, neither the prosecution nor a full investigation was pursued. Further, although the prosecuting state in this case was not a developed country, it is still unclear whether initiating the prosecution would have been an option open to Senegal had the territorial state been a powerful one.

It is when this last element is present—i.e., when the accused is the national of a powerful country, and often when he is also a current or former member of the government of this state, as in the cases of Henry Kissinger²⁶⁷ and Ariel Sharon²⁶⁸—that the inability of universal jurisdiction to bring accused persons to justice is more striking, even if the prose-

264. The full text of Jack Straw's decision not to order Pinochet's extradition is available at <http://www.tni.org/pin-docs/straw3.htm> (last visited May 13, 2004).

265. See Human Rights Watch, *Chad: Hissène Habré's Victims Demand Justice* (Oct. 26, 2000), at <http://www.hrw.org/press/2000/10/habre1026.htm> (last visited Feb. 2, 2004).

266. See Human Rights Watch, *Senegal Actions on Ex-Chad Dictator Deplored* (July 4, 2004), at <http://www.hrw.org/press/2000/07/habre0705.htm> (last visited Feb. 2, 2004).

267. See, e.g., Claire Tréan, *Henry Kissinger est Attendu à Londres par les Convocations des Justices Françaises et Espagnoles* [*Henry Kissinger Awaited in London by Assemblies of French and Spanish Judges*], *LE MONDE*, Apr. 21-22, 2002, at 5.

268. See Amnesty Int'l, *Amnesty International Urges Investigation of Ariel Sharon*, (Oct. 3, 2001), at <http://web.amnesty.org/library/index/ENGMDE150892001> (last visited Feb. 6, 2004).

cuting state is a developed one. Indeed, concrete advances in prosecuting these individuals have been negligible, despite extremely active campaigns in support of such prosecutions. For instance, Judges Robert Le Loire of France, Rodolfo Canicoba Corral of Argentina, and Juan Guzman Tapia of Chile declared their intent to question Kissinger,²⁶⁹ and a criminal investigation was initiated against Sharon in Belgium,²⁷⁰ but neither has resulted in a criminal prosecution.²⁷¹ Moreover, as mentioned above, the initiation of proceedings against U.S. officials, including President George W. Bush, in Belgian courts resulted in the amendment of Belgium's universal jurisdiction statute. According to the amended law, Belgian courts "will only have jurisdiction over international crimes if the accused is Belgian or has his primary residence in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or if Belgium is required by treaty to exercise jurisdiction over the case."²⁷²

The international arrest warrant recently issued by Spanish Judge Balthazar Garzón against 46 persons accused of widespread human rights violations committed in Argentina by the last *de facto* regime constitutes another failed attempt to exercise universal jurisdiction.²⁷³ It should be noted, however, that the initiation of these proceedings had certain valua-

269. Doug Cassel, *The World Reaches Out for Justice*, CHI. TRIB., Aug. 12, 2001, Perspective, at 1.

270. *Id.*

271. Cf. Linda A. Malone, *The Appointment of General Yaron: Continuing Impunity for the Sabra and Shatilla Massacres*, 32 CASE W. RES. J. INT'L L. 287, 302-03 (Supp. 2000) (stating that the Kahan Report did not result in meaningful sanctions against Sharon, and Sharon retained his post in the Cabinet). See David B. Rivkin Jr. and Darin R. Bartram, *Just Say No: Wanted: Henry Kissinger*, WALL ST. J. (EUROPE), Apr. 22, 2002, A.10; Robert Sherrill, *He Can Run, But He Can't Hide: He May Never Face an International Tribunal, but Henry Kissinger Feels the Heat*, 93 TEX. OBSERVER 4 Aug. 8, 2001 (reviewing CHRISTOPHER HITCHENS, *THE TRIAL OF HENRY KISSINGER 2001*), available at <http://texasobserver.org/showArticle.asp?ArticleID=341> (last visited Oct. 20, 2004).

272. Human Rights Watch, *Belgium: Universal Jurisdiction Law Repealed* (Aug. 1, 2003), at <http://www.hrw.org/press/2003/08/belgium080103.htm> (last visited Feb. 2, 2004).

273. See Ana Gerschenson, *Canicoba Pidió la Captura de 46 Ex Represores que Reclama España [Canicoba Asked for the Capture of 46 Ex Represors which Spain Reclaims]*, CLARÍN.COM: PERIODISMO EN INTERNET [CLARÍN.COM: JOURNALISM ON THE INTERNET] (July 25, 2003), at <http://old.clarin.com/diario/2003/07/25/p-00801.htm> (last visited Jan. 24, 2004).

ble consequences, such as the annulment of Argentina's amnesty laws by the Argentine Congress.²⁷⁴ But Spain ultimately decided that it would not seek the extradition of the persons detained pursuant to Garzón's arrest warrant, and they were freed.²⁷⁵

Regarding the ICC, it would be unrealistic to deny that when important interests are at stake, states, especially powerful ones, will be able to hinder the work of the ICC and constrain its effectiveness. Nonetheless, the ICC is an autonomous international organization composed by independent judges.²⁷⁶ Thus, countries will have fewer excuses to block prosecutions, and, if they do, the political costs will surely be greater.

V. CONCLUSION

Unfortunately, the beginning of a new millennium has not marked the start of an era in which extreme violence and bloody conflicts are rare phenomena. On the contrary, humankind faces the ever-present danger of war and new challenges, including the use of weapons that are more sophisticated and destructive, in a time in which the use of force and lack of understanding take the place of peace and mutual assistance. Solutions to these problems are mainly political, but the effective and just enforcement of international criminal law and the punishment of some of the most serious crimes remains a relevant contribution to world peace.

This Note has demonstrated that the ICC, despite its shortcomings,²⁷⁷ in conjunction with prosecutions by domestic courts under the territorial and nationality principles, constitutes a better alternative for dealing with international crimi-

274. See Human Rights Watch, *Argentina: Senate Votes to Annul Amnesty Laws* (Aug. 21, 2003), at <http://hrw.org/press/2003/08/argentina082103.htm> (last visited Feb. 6, 2004).

275. See Lucio Fernández Moores, *Liberan a 33 Ex Represores, al Caerse los Pedidos de Extradición [33 Ex Represors Are Liberated After Requests for Extradition Fail]*, Clarín.com (Sept. 2, 2003), at <http://old.clarin.com/diario/2003/09/02/p-00501.htm> (last visited Jan. 24, 2004) (though at least 7 persons continued to be detained for other reasons).

276. See ICC Statute, *supra* note 5, art. 40.1.

277. See Cassese, *Statute, supra* note 9, at 157 (arguing that "in various areas of substantive international criminal law the Rome Statute constitutes a regression").

nality than the exercise of universal jurisdiction by states. Perhaps the most important objection to this scheme is that there are situations where the only available jurisdiction is universal jurisdiction.²⁷⁸ This is the case, for instance, when the state of nationality of an individual alleged to have committed offenses within that state is not a party of the ICC Statute and does not “accept the exercise of jurisdiction by the Court with respect to the crime in question.”²⁷⁹ But this scenario, common as it may be, is ultimately also an obstacle to the exercise of universal jurisdiction by third states. It is true that the threat of being subject to universal jurisdiction harasses the accused (for example, it limit his ability to travel to certain countries). This concern, however, does little to advance the cause of justice and does not justify the maintenance of a questionable system.

In the years to come the world will need a powerful and efficient ICC. On the one hand, this will involve encouraging all states to adopt the ICC Statute, a necessary precondition for the effective functioning of the court.²⁸⁰ It is of course essential that some of the most powerful countries in the world, including hopefully someday the United States, become parties of the ICC Statute.²⁸¹ Additionally, it is crucial that parties to the agreement cooperate with the ICC, especially by surrendering accused persons under their jurisdictions and providing information and evidence necessary for an investigation. This cooperation will depend more on the respect the ICC earns as an impartial and just institution than on the provisions of Part IX of the ICC Statute. On the other hand, the international community should participate in amending some of the ICC Statute’s provisions. An improved ICC Statute should *inter alia* provide for the universality principle as a permissible basis for the exercise of jurisdiction by the ICC, and include new crimes for which consensus is now feasible, such as terrorism.²⁸²

278. See Morris, *supra* note 50, at 360.

279. ICC Statute, *supra* note 5, art. 12.3.

280. See Roberge, *supra* note 201.

281. For the U.S. view on the ICC, see, for example, David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12 (1999).

282. *But see* Cassese, *Statute*, *supra* note 9, at 146 (affirming that “it was wise to exclude [from the ICC’s jurisdiction] such crimes as terrorism and drug trafficking, which at present stage of international relations are best investigated and prosecuted at the national level”).

The ICC currently benefits from the substantial participation of states and, as the ICC Statute improves in time, states will resort less to the principle of universal jurisdiction.²⁸³ The provisions in international conventions establishing universal jurisdiction over crimes that are not contained in the ICC Statute can be revoked as those crimes are incorporated into the ICC Statute, with the possible exception of piracy, which could remain as the only instance in which international law relies on universal jurisdiction. The ICC provides a forum that is substantially free of the deficiencies from which universal jurisdiction suffers, and one where respect for the human rights of the accused and of the victims is guaranteed.²⁸⁴ Further, the importance of the ICC lies not only in it becoming a deterrent factor of international criminality. It will also function as a legalizing or legislative body in other areas of international law such as the use of force. This is one of the major worries of some states *vis-à-vis* the ICC and it will be perhaps one of the new court's most transcendental contributions.

283. See de La Pradelle, *supra* note 40, at 917.

284. See LIROLA DELGADO & MARTÍN MARTÍNEZ, *supra* note 211, at 298; See Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 127, at 693, 693. For the role of victims under the ICC Statute, see Cassese, *Statute*, *supra* note 9, at 167 ("For the first time in international criminal proceedings the victims are allowed to take part in such proceedings by expounding in court their 'views and concerns,' either in person or through their legal counsel, on matters relevant to the proceedings.").