# UNIVERSAL JURISDICTION FOR GROSS HUMAN RIGHTS VIOLATIONS – THE OBJECTIONS RAISED AND THE ANSWERS TO THEM

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Central European University, July 2007

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## EXECUTIVE SUMMARY

For the purposes of this thesis universal jurisdiction is defined as the jurisdiction of a State to prescribe and prosecute a certain conduct that is directed against international norms, values and interests that are deemed to be vital to the community of nations so as to entail universal condemnation as a criminal conduct without any other links, like territorial, active or passive nationality, protective principle, to the State prescribing it.

Universal jurisdiction is governed by the standard set out in the *Lotus case*. This standard states that States are generally free to prescribe for themselves the jurisdiction that they see fit so long as that does not conflict with a prohibitive norm of international law. One such prohibitive norm is the non enforcement of its laws on the territory of another State without its consent.

The crimes for which universal jurisdiction should be prescribed have to have a certain nature. They should be customary international law that have gained the status of *jus cogens* norms and that have a defined elements of crimes and settled case law so as to be in line with the principle of legal certainty. The *jus cogens* nature of the crimes obliges States to cooperate in order to put a stop to a breach of these types of norms. If the States fail to cooperate, individual States can take up the obligation to prosecute in order to safeguard the values protected by these *jus conges* norms.

Immunities present a limited obstacle to the prosecution of individuals but only while these individuals are in office. After these individuals have stepped down they are open to prosecution for international crimes committed during their time in office as well as prior to their assent to and after their decent from office.

## INTRODUCTION

A little over six decades ago the World saw the first trials of individuals in front of an international tribunal for perpetrating some of the worst atrocities human kind has ever seen. Sixty-two years ago, the Allies of WWII established the International Military Tribunal[1] (IMT) to try the highest ranking Nazi officials for crimes against peace, war crimes and crimes against humanity. This was the first time in recent history where individuals were brought in front of an international body for crimes they have committed under international law. The notion that an individual can be held accountable for acts that were legal under domestic law but were contrary to international law was put in to place[2]. For some people this was the beginning of the end of impunity for what today is widely referred to as international crimes.

It was not too long after that that the realities of the Cold War took hold and the idea of ending impunity was gradually swept away at the sidelines. This is not to say that the norms of international criminal law stood still. Several conventions dealing with the normative codifications of international crimes have been adopted during this period, like the Genocide Convention[3], the Four Geneva Conventions and its Additional Protocols[4], the

[1] The International Military Tribunal was set up by the Allies (United States, Great Britain, France and the Soviet Union) after the end of the war in Europe on August 8, 1945 with the signing of the London Charter which created the tribunal. Later another agreement including the charter of the Tribunal was also adopted which drafted the crimes that were to be used by the Tribunal.

[2] "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" United States v. Von Leeb (*The High Command case*) as quoted in: Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 574.

[3] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by General Assembly resolution 260 A (III) of 9 December 1948 (hereinafter the Genocide Convention).

[4] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (hereinafter Geneva Convention I, II, III or VI respectively)

Torture Convention[5] as well as several conventions dealing with the issue of terrorism. Nevertheless, the nearly five decades of the Cold War were marked with bloody regional and civil conflicts for which trials of individuals who violated international law were few and far between. There were certainly no international trials like the ones conducted by the IMT at Nuremburg or Tokyo.

The end of the Cold War and the breakup of the Soviet Union and the former Yugoslavia at the begging of the 1990's saw an explosion of internal and international conflicts which were marked with gross violations of the rules or war. One of the answers given by the international community to these events was to establish, by a resolution of the United Nations (UN) Security Council (UNSC), the *ad hoc* international criminal tribunals, namely the International Criminal Tribunal for Yugoslavia[6] (ICTY) and a year later by the same mechanism for the atrocities committed in Rwanda, the International Criminal Tribunal for Rwanda[7] (ICTR), to name just the more famous ones. This positive development was followed by a further important step taken in Rome in 1998 by negotiating and adapting the Statute for a permanent International Criminal Court[8] (ICC) an endeavor that was started some four and a half decades ago by the International Law Commission (ILC) of the UN[9].

However, these positive developments did not spell out the end of impunity for individuals committing atrocities. The institutions mentioned in the previous paragraph have come a step too short in fulfilling that ultimate goal. The ICTY and ICTR are *ad hoc* tribunals



[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (hereinafter the Torture Convention).
[6] The UNSC established the ICTY under SC resolution 808 (1993) of 22 February 1993, UN Doc. S/RES/808.
[7] The UNSC established the ICTR under SC resolution 955 (1994) of 8 November 1994, UN Doc. S/RES/955.
[8] Established with the adoption of the Rome Statute on the 17 July 1998 as a product of the UN Diplomatic Conference of Diplomatic Plenipotentiaries on the Establishment of the International Criminal Court and entered in to force after its 60th ratification on 1 July 2002 (hereinafter the Rome Statute).
[9] The International Law Commission was given the mandate to codify the rules of international criminal law and its latest proposal was the Draft Code of Crimes Against Peace and Security of Mankind of 1996. This issue was considered by the International Law Commission since 1948 and it put forward a similar proposal in 1954. (official web site of the ILC http://untreaty.un.org/ilc/texts/texts.htm last visited on 13 March 2007).

with limited territorial and temporal jurisdictions[10], they are very costly to maintain, they are generally focused on prosecuting the top figures responsible for the crimes and their mandate is predicted to end soon. The ICC, although its Statute has entered into force, has had a strong opposition from some very powerful States and its Statute is considered as an international treaty which means that it can not create obligations to third parties and is only binding *inter partes* which lives States that have not sign onto it outside of its reach[11]. That has been somewhat mitigated by the possibility of a referral of a situation by the UNSC to the Prosecutor of the ICC[12], but given the fact that the UNSC is governed by the veto power of the "permanent five" the margin for political considerations is vide.

These gaps left open by the international community, through which serious perpetrators of international crimes can slip, can be closed by the doctrine of universal jurisdiction. Unlike the collective actions taken by the international community mentioned above universal jurisdiction is left to individual States. The notion of universal jurisdiction, widely said, allows for individual States to bring perpetrators of the most serious international crimes in front of their domestic judicial bodies without the need for showing any of the traditional nexus to the prosecuting State. The only thing that is needed to be shown for the process to start is that there are sufficient evidence and suspicions for lunching an

[10] The ICTY under its Statute has territorial jurisdiction over crimes committed in its Statute within the territory of the former Yugoslavia beginning from 1992 and theoretically has no end date (paragraph 2 of the UNSC resolution 808 (1993)), while the ICTR has a territorial jurisdiction over crimes committed only in Rwanda from the begging of 1 January 1994 ending on 31 December 1994 (paragraph 1 of the UNSC resolution 955 (1994)).

[11] The jurisdiction of the ICC encompasses both crimes that have been committed on the territory of one of the State parties to the Statute or by nationals of one of the State parties. The Statute on the other hand does not exclude individuals who are nationals of States not parties to the Statute if they have committed the crimes in the Statute on the territory of a State party. *See* Articles 12-14 of the ICC Statute (available at http://www.un.org/law/icc/statute/english/rome_statute(e).pdf, last visited on 6 June 2007)

[12] Article 13 of the Rome Statute (Exercise of Jurisdiction)
The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:
(…)
b) A situation in which one or more of such crimes appears to have been committed if referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations, or
(…)

investigation. It is needles to say that such a wide jurisdiction can be a useful tool in combating impunity for serious international crimes.

The doctrine of universal jurisdiction, however, is far from a settled matter, although it has been extensively used for the crime of piracy for centuries. Several States have advanced this idea and have prescribed it in their internal criminal law and several cases have emerged which will be discussed bellow. But it is a grave understatement to say that this has proceeded smoothly. I will show that universal jurisdiction is a legal instrument available to States which is lawful under international law to prosecute individuals for mass human rights violations; that it should be limited to certain crimes and that for those crimes, in certain cases, it can also be considered as an obligation; that immunities are a temporary bar to prosecution but that they can be overcome after the individuals in question leave office.

One of the problems facing the doctrine of universal jurisdiction is the problem of defining what exactly universal jurisdiction really means and what does it stand for? One of the ideas put forward is that universal jurisdiction is covered by the principle of *aut dedere aut judicare*, extradite or prosecute. This type of provision has been incorporated in to several conventions, beginning from the four Geneva Conventions to the Torture Convention and the conventions dealing with hijacking of different types of vessels. In my opinion the principle of *aut dedere aut judicare* is too narrow and constricting for the doctrine of universal jurisdiction, but that will be discussed further on.

Problems with terminology are also present when talking about universal jurisdiction since the same doctrine has been referred to as, for instance, "pure or true universal jurisdiction[13]", "universal jurisdiction in absentia[14]" which can lead to difficulties during the discussion. For now the working definition of universal jurisdiction in this thesis is the

[13] Judgment of the International Court of Justice, *Case concerning the arrest warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002, General List No. 121, hereinafter the *Arrest Warrant Case.*
[14] *The Arrest Warrant Case.*

following: universal jurisdiction is the jurisdiction of a State to prescribe and prosecute a certain conduct that is directed against international norms, values and interests that are deemed to be vital to the community of nations so as to entail universal condemnation as a criminal conduct without any other links, like territorial, active or passive nationality, protective principle, to the State prescribing it. The problems of definition and terminology will be discussed in Chapter I of the thesis which will give the parameters for the discussion.

Another group of problems are related to the questions of is universal jurisdiction legal under international law? What international rules govern its prescription in domestic law? Does it clash with other principles or doctrines of international law like State sovereignty and non-interference? Is it an obligation under international law or is it just an option for States to have it in their domestic laws if they so chose? There have been some conflicting views about these issues in both cases and scholarly works and they will be tackled in Chapter II of the thesis.

Further issues that have been raised in connection with universal jurisdiction are concerned with the question of for which crimes is it applicable? Is universal jurisdiction open for all crimes subject only to the discretion of States prescribing it or is it reserved to a specific category of crimes? If it is only for a certain category of crimes then what are they? What are the criteria that those crimes have to meet? Can they be found in customary or treaty law or both? These questions will be part of Chapter III of the thesis.

Another big hurdle that needs to be overcome in the path of universal jurisdiction as a measure to stop impunity is the question of immunities. The idea of universal jurisdiction is to bring perpetrators of serious international crimes in front of domestic judicial bodies. The problem that can arise from this is the fact that the most serious perpetrators of these crimes are individuals who hold high ranking positions in States and therefore have immunities for

their actions in front of foreign courts. The questions that arise here are: is universal jurisdiction in confrontation with the principle that one sovereign does not adjudicate on the affairs of another? Do all high ranking officials have immunities and what are they and what is their scope? For which actions do they have immunities? Does this come in to conflict with impunity? Is there a way around them?

Even though this thesis deals with jurisdiction of States, nevertheless, the gist of this thesis is the fact that universal jurisdiction can be one of the measures that are available to States for combating impunity for gross violations of human rights. Therefore, the answers to some of the more common objections raised to it will be presented in this thesis like the question of immunities. Immunities from jurisdiction are not *per se* a jurisdictional issue and does not determine in any way the forum in a criminal case. But rather they are more of a bar to the continuation of the case itself and are one of the objections that are frequently raised to universal jurisdiction. In order for a comprehensive review of the topic the issues of immunities will have to be presented and they find their place in Chapter IV of the thesis.

To reiterate, the idea of this thesis is to answer some of the questions raised to universal jurisdiction as a viable stop gap measure for combating impunity that range from what is universal jurisdiction? Is universal jurisdiction legal? Is it an option left to States or does it come attached with some obligations? Can everybody be subjected to prosecutions under the universal jurisdiction principle? If not so then who are these individuals, why are they excluded and is there a time limit to this exception? An unfavourable answer to one of these questions will exclude the possibility of universal jurisdiction as an instrument against impunity for gross human rights violations.

## CHAPTER I – DEFINING UNIVERSAL JURISDICTION

One of the first difficulties presented when discussing universal jurisdiction is the problems of its definition. When discussing universal jurisdiction judges and scholars have referred to it as "true", "classical", "pure", universal jurisdiction "properly so called" and so on. The *ad hoc* judge, Van den Wyngaert, in the *Arrest Warrant Case* concluded that "there is no generally accepted definition of universal jurisdiction in conventional or customary law. States that have incorporated that principle in their domestic legislation have done so in a very different way"[15]. Both scholars and judges have used different terms from "true", "proper" and "pure" universal jurisdiction, to using a narrower term like universal jurisdiction in absentia[16] as a separate concept. In order to properly define the term under discussion in this thesis I will look at the definitions of some of the codifying projects on universal jurisdiction as well as some of the scholarly discussion.

The term universal jurisdiction itself implies that what is understood to be the subject of it the discussion is the jurisdiction of States. Under public international law there are two types of jurisdiction that a State may have; one is the jurisdiction to prescribe and the other is the jurisdiction to enforce[17]. Since this discussion is about criminal law the discussion bellow is limited to criminal jurisdiction exercised by States.

Jurisdiction to prescribe means that a State can prescribe a certain conduct by groups or individuals as criminal by statutory acts, executive orders or judicial decisions; to say what



[15] Dissenting opinion by *ad hoc* judge Van den Wyngaert in the *Arrest Warrant Case*, paragraph 44.
[16] *See*: Separate opinions of judge Guillamue, and the judges Higins, Kooijmans and Buergenthal use many of these terms in their discussion in the *Arrest Warrant Case*.
[17] *See*: Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 736

the *mens rea* and the *actus reus* of the crime is and prescribe penalties for it. What conduct is deemed criminal is generally left to the discretion of the States themselves[18].

On the other hand a jurisdiction to enforce means that a State can take actions directed to enforcing the laws it has enacted through various different kinds of organs most notably through the police forces or the judicial organs of the State[19]. These are separate kinds of jurisdictions and although they are intertwined (a State can not have a jurisdiction to enforce if it first did not prescribe that conduct as criminal) they have to be kept separate when discussing them since their use in similar situations can have different consequences under international law which will be discussed in Chapter II.

States can prescribe their jurisdiction under several "heads" or "titles" which give the specific conduct in question a link or nexus to the State itself and therefore generally shows the underlying interest of that State to prosecute that conduct. There are several titles when it comes to criminal jurisdiction and they are: territoriality principle, the nationality principle, passive personality principle, protective principle and universality principle[20]. The doctrine of effect has also been used by several States to define their jurisdiction. The later five principles are also known as extraterritoriality principles.

The most widely used kind of jurisdiction is the territorial jurisdiction. This jurisdiction means that a State can prescribe and prosecute a crime that has been committed or has been alleged to have been committed on the territory of that State. Under term "territory of a State" it is meant both aircraft and sea vessels that use that State's flag. A crime does not have to be completely perpetrated on the territory of the State for it to have



[18] *See*: Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 737
[19] *See*: Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 737
[20] *See*: Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 579; Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 736

jurisdiction. A crime can be started in the territory of one State and be finished in another, the most typical example being when a person fires a gun across the border from one State into another and kills a person on the other side. The act was started on the territory of one State but was finished on the territory of another. In this case, under the territorial principle, both States have the jurisdiction over that crime. The territoriality principle is the most widely used because in this case the State has the most clear link with the crime; it has the general responsibility over the conduct of law on its soil, the evidence and witnesses are on its territory as well as the victims of the crime. The vindication of the victimized individual or group is also best accomplished by territorial jurisdiction[21].

The nationality principle or title is an extraterritorial one, meaning that it is mostly used when a national of that State commits a crime outside of the territory of the individual's State. In that case the State of which the individual is a national can prosecute him/her. This principle has been largely used in Continental Law systems but it is not unknown in Common Law system for the most serious crimes such as murder or treason. This principle is used because of the special link that an individual has with his/her State through his/her nationality and because, in some instances, States have clauses for non-extradition of nationals to other States in their constitutions and when an individual tries to abscond by seeking refuge in his/her own State, in the interest of justice, the State of nationality can prosecutes that individual[22].

The passive personality principle means that a State can have jurisdiction over a crime that has been committed abroad against one of its nationals. This is a rarely used concept and



[21] *For more see*: Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 579-584; *and* Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 737 .

[22] *For more see*: Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 584-591; *and* Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 738 .

has been controversial in the past[23], but as it has been said by judges Higins, Kooijmans and Buergenthal in the *Arrest Warrant Case* that this principle "today meets with relatively little opposition, at lest so far as a particular category of offences is concerned"[24].

The protective principle allows for a State to prescribe and prosecute a crime that has been committed abroad by an individual who is not a national because the crime in question affects the vital national interests of the State. A prime example for this is counterfeiting the currency of a State and is widely considered as a crime that falls under the protective principle because counterfeiting of the national currency, cumulatively taken, can subvert the national economy. The crime of treason is also another good example of this principle since the act is done against the national security interests of the State.

The protective principle is combined with the effects doctrine which entitles that if a conduct can have an adverse effect in the territory of a State it can criminalize that conduct like, for instance, for trying to smuggle drugs in to the territory of a State, even though the crime was not committed on its territory or by its national and its nationals are not yet victims, the negative effect that narcotics can have motivates it to protect itself. The effects doctrine is mostly used in matters when prescribing immigration laws and economic offences and has most recreantly been used by the United States and the European Union in its antitrust legislations[25].

The final principle or title which has been used by States to prescribe a conduct as criminal is the universality principle, which is the topic of this thesis. This principle means that a State can assert jurisdiction over a crime that does not have any of the above mentioned



[23] *See*: Dissenting opinion of Judge Loder, Judgment of the Permanent Court of International Justice, *The case of the S.S. "Lotus"* (France v Turkey), 7 September 1927, No. 22, paragraph 36 (hereinafter *The Lotus Case*).
[24] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal the *Arrest Warrant Case*, paragraph 47; *and also see generally* Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 589-591 *and* Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 739
[25] *For more see*: Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 591-592; *and* Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 739

links to it. The crime could have been committed on the territory of another State by an individual that is not a national of that State, against an individual that is also not its national and that does not have a dilatory effect on its territory, but under the doctrine of universal jurisdiction, the State can still exercise jurisdiction over that crime.

Despite *ad hoc* Judge Van den Wyngaert assertion that today there is no comprehensive definition of universal jurisdiction several definitions have been advanced by various authors. For instance Roger O'Keefe has said "[i]t would seem sufficiently well agreed that universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct[26]". As he points out this is only to be understood as universal jurisdiction to prescribe or prescriptive universal jurisdiction.

A more positivistic definition of universal jurisdiction is given by Reydams "[p]ositively defined, a State exercises universal jurisdiction when it seeks to punish conduct that is totally foreign i.e. conduct by and against foreigners, outside its territory and its extensions, and not justified by the need to protect a narrow self-interest[27]". Another approach to defining universal jurisdiction, instead of saying what universal jurisdiction is, is by saying what universal jurisdiction is not, thus giving a negative definition. For instance, Ascensio observes that universal jurisdiction "is usually defined negatively, as a ground of jurisdiction which does not require any link or nexus with the elected forum[28]".

As we can see from these definitions, the authors concentrate on the jurisdictional element of the definition giving what elements universal jurisdiction should have from a procedural standpoint, that is, the absence of the other jurisdictional links to the State. What

[26] Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 745

[27] L. Reydams, Universal Jurisdiction, International and Municipal Perspectives, Oxford, Oxford University Press, 2003, p. 5.

[28] Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemala Generals, Ascensio, 1 Journal of International Criminal Justice 690, Oxford University Press, 2003, p. 699.

these definitions fail to mention is for which crimes does universal jurisdiction apply? Taking these definitions as they are would mean that States are theoretically free to prescribe any conduct as criminal and that any conduct can fall under the universal jurisdiction of that State.

On the other hand for example, other authors have put an additional element to those definitions and that element puts a limit on universal jurisdiction by saying what kind of types of crimes it can be prescribed for. For instance Theodor Meron has said that "[i]ndeed, 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. These are the offenses that are recognized by the community of nations as of universal concern, and as subject to universal condemnation.[29]"

One of the best known attempts to frame universal jurisdiction as a concept was done by the Princeton project on universal jurisdiction The Princeton Project was an effort by several scholars to come up with useful guidelines for judges, legislators and state officials when dealing with the issue of universal jurisdiction in order to encourage and promote an end to impunity through prosecution of individuals of serious international crimes by national authorities. These guidelines were put forward as the Princeton Principles on Universal Jurisdiction[30]. The definition of universal jurisdiction given by these scholars is set out in Principle 1 (Fundamentals of Universal Jurisdiction)

> "1. For the purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[31]"

[29] International Criminalization of Internal Atrocities, Theodor Meron, 89 American Journal of International Law 554, The American Society of International Law, July 1995, p. 570

[30] The Princeton Principles on Universal Jurisdiction part of the Princeton Project on Universal Jurisdiction issued in 2001 http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf (last visited on 14 March 2007) (hereinafter the Princeton Principles).

[31] Principle 1(1) of the Princeton Principles p. 28

As we can see from the definition the additional element that these scholars put is the nature of the crime in question. In the Princeton Principles the nature of the crime is what defines universal jurisdiction and, although in Principle 1(1) there is no mention of what that nature is, in the commentaries to the Principles the heinousness of the crime is put forward as a delimitating factor from other crimes that would not fall under universal jurisdiction[32].

This factor in my opinion is too vague to give a good guideline for what crimes should fall under universal jurisdiction. Certainly murder is considered as crime that is and can be very heinous, this crime is universally condemned and proscribed by every nation in the world but still it is not something that has been considered or discussed to fall under the doctrine of universal jurisdiction. In an article by Eugene Kontorovich[33], where he discusses the crime of piracy as an inadequate basis on which to develop universal jurisdiction, he points out that piracy was not considered as a crime that falls under universal jurisdiction because it was considered as of a particularly heinous nature.

States in the XVII, XVIII and XIX century employed what was know to be called privateers to raid the commercial shipping of other States. These privateers committed the same acts as pirates, meaning that they could board a vessel and commandeer its cargo and people and if that vessel chose to resist, privateers could use force to capture it. The only difference between the pirates and privateers was the fact that the latter possessed letters of *marque* meaning that they had the authorization of the Government that issued those letters to raid shipping of certain specifically named States that were considered as hostile by that Government. The shipping of neutral or allied States was generally excluded as an authorized target by the issuing Government. The ships and cargo that was seized by the privateers could



[32] "It should be carefully noted that the list of serious crimes is explicitly illustrative, not exhaustive. Principle 2(1) leaves open the possibility that, in the future, other crimes may be deemed of such a heinous nature as to warrant the application of universal jurisdiction." Princeton Principles p. 48

[33] The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations, Eugene Kontorovich, 45 Harvard International Law Journal 183, Harvard College, winter 2004.

be sold in a special judicial procedure on the territory of the State that issued the letter of *marque*. The profits made by privateers could be spent without any problems in the State that issued the letter of *marque* to the privateers. Letters of *marque* were generally recognized and respected by other nations. The reason for this was the fact that privateering was one of the ways in which States could harass the commercial shipping of their enemy nations but not have the expenditures that would come with having a sizable navy to accomplish that same task. Another reason why privateering was not considered as a crime was the fact that privateers were expected to follow certain rules like attacking only ships of the nations which were specifically mentioned in the letters of *marque*, they had to treat the captured ships and crew with decency, although this was not always the case, they had to sell their "bounty" in a special procedure that left a portion of the proceeds to the State that issued the letter[34].

The fact that piracy was considered as a heinous crime is not the reason why it fell under the universality principle, since privateers also committed the same acts as pirates, but rather the facts that pirates did not respect the shipping of friendly or neutral States; that they did not have an authorization by any State and therefore they did not sail under the flag of any State; that they were not bound by any rules of conduct towards the ships and crews that they raided; that every State could find itself at risk from attack by pirates while they would only be open to attacks by privateers from enemy States; all these reasons could be considered as contributing factors to this universal condemnation. The fact that they posed a threat to every seafaring nation and that they did not respect the minimal rules set out for privateers were probably the key factors why pirates were considered *hostes humani generis*, enemies of all man kind.



[34] *For a more in-depth discussion on piracy and their equivalency with privateers see*: The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations, Eugene Kontorovich, 45 Harvard International Law Journal 183, Harvard College, winter 2004, p. 210-219.

I would now like to return to another definition quoted above, the one given by Theodor Meron, when he speaks about what offences should fall under universal jurisdiction, where he says "[t]hese are the offenses that are recognized by the community of nations as of universal concern, and as subject to universal condemnation"[35]. This element of the definition would give a more concrete guideline as to what crimes could be considered to fall under universal jurisdiction. Namely what this gives us is a reference to crimes which have achieved a status of universal condemnation, conduct that has been considered by most, if not all nations as something that endangers the interests of all nations and not only the ones that that specific conduct was directed at. Although the issue of what specific crimes would fall under universal jurisdiction will be discussed in Chapter III, it is sufficed to say that the conduct of individuals that would fall under this concept is a conduct that is in violation of a certain norms or interests that are deemed so vital to the community of nations that their perpetrators deserve universal condemnation. A typical example of this would be war crimes, the conduct prescribed by these crimes is a violation of the rules of war that have an almost universal recognition as vital to the community of nations and therefore their violation should be and is sanctioned.

Having in mind the discussion presented in this Chapter and taken into account all of the definitions presented above, I would propose the following as definition of universal jurisdiction that would be used in this thesis. Universal jurisdiction is the jurisdiction of a State to prescribe and prosecute a certain conduct that is directed against international norms, values and interests that are deemed to be vital to the community of nations so as to entail universal condemnation as a criminal conduct without any other links, like territorial, active or passive nationality, protective principle, to the State prescribing it.



[35] International Criminalization of Internal Atrocities, Theodor Meron, 89 American Journal of International Law 554, The American Society of International Law, July 1995, p. 570, *see* footnote 29

This definition has the following elements. First, it is a prescriptive jurisdiction meaning a jurisdiction to prescribe a certain conduct as criminal in its internal law, whether statutory, judicial or executive in nature. This is not limited only to prescription of a certain conduct as criminal but also to seizing jurisdiction and taking certain steps, like launching an investigation, interviewing witnesses, taking affidavits and ultimately issuing an arrest warrant and prosecuting the alleged criminal.

Second, a State is not free to prescribe just any conduct it deems fit as criminal that would fall under the title of universal jurisdiction. The conduct in question has to be a violation of a vital norm, value or interest of the community of nations so as they would feel shocked and affected by it even though they were not the direct victims of the conduct and have universally condemned the conduct as criminal.

Third, this conduct should not have any of the other links to the State proscribing that crime. This means that the crime should not be committed within the territory of the State and this would include any aircraft and sea vessels carrying its flag, the premises of the diplomatic or consular missions abroad and similar instances that would be considered to fall under the territory of that State; it should not be committed by one of its nationals or an alien with permanent residency within that State; the victims should not be nationals of that State; and the conduct should not be directed at the specific national interests of that State but rather at the interests of the entire community of nations.

Taking in to account what was said above this definition will be used as a part of this thesis and whenever the term universal jurisdiction is mentioned these are the general parameters which should be kept in mind. I will try to avoid terms like “pure”, true” or universal jurisdiction “properly so called” in order to minimize confusion.

## CHAPTER II – IS UNIVERSAL JURISDICTION LEGAL?

This Chapter will deal with the questions like is universal jurisdiction lawful under international law? Is it just an option that States have when prescribing their jurisdiction or has it risen to the level of an obligation prescribed by international law? In order to answer these questions I will look at the two different but interconnected jurisdictions, the jurisdiction to prescribe and the jurisdiction to enforce that a State has under international law and discuss whether the recourse to them is lawful.

There are generally two cases that cover this issue, one is the *Lotus Case* decided by the Permanent Court of International Justice (PCIJ) in 1927, and *The Arrest Warrant Case* decided by the ICJ in 2002, although the issue is covered in the separate and dissenting opinions of the judges and not in the main judgment. Both of these cases give argumentations on both side of the issue of legality of extraterritorial jurisdiction, and especially universal jurisdiction of States.

### 1.1 THE LOTUS STANDARD

The *Lotus Case* was settled by the ICJ's predecessor, the PCIJ in 1927 and the main issue of the case was whether a State could have extraterritorial jurisdiction over a crime that was committed on the territory of another State. The dispute began when a French ship, the *Lotus*, collided with a Turkish ship, the *Boz-Kourt*, in international waters. In this collision the *Boz-Kourt* was sunk and several of its crew and passengers drowned. The *Lotus* managed to save some of the stranded survivors and then continued on its voyage to Constantinople, where it docked and submitted a report to the port authorities on the collision. The Turkish

authorities asked for one of the officers of the *Lotus*, Mr. Demons, who was on watch duty at the time of the collision, to come ashore and give a statement regarding the incident. After several hours of questioning together with the captain of the *Boz-Kourt*, he was arrested, tried and convicted for negligence according to Turkish law. The Turkish law in question conferred jurisdiction on Turkey by virtue of the protective principle, i.e. that Turkey has jurisdiction over a foreigner who "[…] commits an offence abroad to the prejudice of Turkey or of a Turkish subject […]"[36].

After diplomatic negotiations, France and Turkey concluded a *compromis* in which they agreed to present France's espousal claim to the PCIJ for a decision on two matters, one whether Turkey "acted in conflict with the principles of international law – and if so what principles – by instituting […] joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* […][37]"; and second, if the answer to the previous issue was positive, what damages does Turkey owe, under the rules governing State responsibility, to France.

The Court first managed the frame the issue so that it only had to decide whether Turkey did or did not have the jurisdiction to prosecute the case under international law. What the Court did not do, calling upon the *compromis* of the parties, is to look at the decision of the Turkish court in terms of whether it correctly applied Turkish law to the case or whether the proceedings themselves could constitute a denial of justice[38]. For the Court the issue revolved around a singe point, whether the "principles of international law prevent



[36] *The Lotus Case*, p. 15
[37] *The Lotus Case*, p. 6
[38] *The Lotus Case*, p. 14.

Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law"[39].

France, in its arguments presented to the Court, stated that the Court should take a positivistic view in regards to international law, meaning that in order for Turkey to have jurisdiction over the case it should show some title of jurisdiction that is recognized under international law. Turkey, on the other hand, took the view that international law confers upon all States the possibility to freely determine its criminal jurisdiction except in cases that would come in to conflict with international law[40].

Because the way the issue was framed the Court started its reasoning by looking at the nature of international law, and went on to say that the rules of international law govern relations between independent, sovereign States and, as a consequence to that, they are only binding upon States so long as there is a consent given by them in a treaty or by usage that has risen to the level of principles of law. Therefore, any restrictions made upon the State's freedom to act under international law cannot be presumed[41], but quite the opposite, the restriction imposed on States has to be prescribed. In order for there to be a restriction of the State's freedom to act, a rule under public international law must exist that prohibits that act.

In the following page the Court gave an *obiter dictum* which has a very important consequence to the topic at hand by saying that international law is "[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it lives them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards to other cases, every State remains free to adopt the principles



[39] *The Lotus Case*, p. 16.
[40] *The Lotus Case*, p. 19
[41] "The rules of law […] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of community aims", *The Lotus Case*, p. 19

which it regards as best and most suitable"[42]. So, in order for Turkey to have wrongfully conferred upon its self extraterritorial jurisdiction a rule of public international law must be shown to exist barring that specific kind of jurisdiction.

The Court, in a very narrowly decided decision[43], ruled on the side of Turkey by saying that it cannot find any prohibitive rule that would bar Turkey from prescribing its jurisdiction in the extraterritorial manner in which it did. It found that, although the crime was committed on French territory under the flag principle[44], that same crime, under the same principle, had its adverse effect on Turkish territory and, therefore, was not outside Turkey's prerogatives prescribed by international law when it seized jurisdiction over Lieutenant Demons under its domestic law.

The Court, however, did find a prohibitive rule under international law that would limit a States jurisdiction, and that limit was on the jurisdiction to enforce its laws. As I have mentioned earlier in the thesis[45], a State, in regards to criminal law has two types of jurisdictions, the jurisdiction to prescribe or prescriptive jurisdiction and the jurisdiction to enforce or enforcement jurisdiction[46]. A jurisdiction to prescribe means that a State can prescribe a certain conduct as criminal and that it can prosecute persons for that crime in front of its judicial bodies. In this type of jurisdiction, theoretically, the State is not bound by its territory, any conduct perpetrated anywhere can be prescribed as criminal under its domestic laws.



[42] *The Lotus Case*, p. 20
[43] In T*he Lotus Case* the Court made its decision by virtue of the President casting the deciding vote.
[44] "…by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go further than the rights which it exercises within its territory properly so called. It follows that what occurs on the board a vessel on the high seas must be regarded as if it occurred on the territory of a state whose flag the ship flies." *The Lotus Case*, p. 26.
[45] *See*: Chapter I above and the accompanying footnotes.
[46] Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 736.

The jurisdiction to enforce, on the other hand, means that a State has the jurisdiction to enforce its laws through its domestic bodies. Put in terms of criminal law a State's criminal enforcement jurisdiction would comprise of conducting an investigation, issuing an arrest warrant, apprehension of an alleged perpetrator, prosecuting that perpetrator and eventually awarding and enforcing a penalty on that perpetrator. As we can see, the jurisdiction to prescribe and the jurisdiction to enforce are highly interconnected jurisdictions. A State can hardly have the jurisdiction to enforce without previously seizing that jurisdiction by prescribing it. But, nevertheless, they have to be regarded as separate since their exercise can have differing consequences under international law.

The PCIJ did not *per se* speak of a jurisdiction to prescribe and a jurisdiction to enforce in *The Lotus Case*, however, the reasoning of the court can be said to support this. In analyzing whether there was a prohibitive rule in international law that would limit a State's jurisdiction the Court said that the first restriction imposed by international law was that States can not exercise their jurisdiction in any form on the territory of other States[47] without that State's consent. What that means is that the jurisdiction to enforce is strictly territorial except in circumstances where a permissive rule of international law exists. This rule, on the other hand, does not prohibit a State from exercising jurisdiction on its territory for a crime that has been committed abroad. If the perpetrator of a crime is within the reach of the State, that is, in its territory, than it has every right to prosecute that individual. In the specific case in front of the PCIJ the Turkish authorities apprehended Lieutenant Demons when he left the *Lotus* to give a statement about the accident and, therefore, he was on Turkish soil.

Following these rules spelled out by the PCIJ, in order for a State to exercise its criminal jurisdiction on the territory of another State it has to obtain the permission of that

[47] "In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." *The Lotus Case*, p. 19-20.

State through the mechanism of judicial cooperation. For instance, if a State has information that an alleged perpetrator of a crime is on the territory of another State it can not send its police forces to apprehend that person. What it can do is to issue an arrest warrant and to ask the help of that State in apprehending the individual. Another example would be when a State is investigating a crime committed abroad it can not take sworn affidavits from witnesses, nor can it send a team of investigators on the territory of that State without its consent and knowledge[48]. Its only recourse, if it does not want to go outside of the rules of international law and commit an internationally wrongful act that would trigger State responsibility, is to go through the proper mechanisms of cooperation in criminal matters and seek the help of the official organs of that State.

The dissenters in *The Lotus Case*, on the other hand, were of the opinion that both jurisdictions of a State are strictly territorial in nature. Judge Loder considered that in light of the notion of sovereign equality of States that arises from their independence and sovereignty all law is, consequently, territorial[49]. For him a law can certainly not be extended to include cases where foreigners commit crimes in a foreign territory. To do otherwise would be infringing on the sovereign rights of foreign States to apply its laws in their territory at their discretion. The subsequent presence of a suspect on the territory of a State does not extend the jurisdiction of that State. The only exception to this general rule, according to him, is concerning offenses committed by foreigners abroad but "are directed against the State itself or against its security or credit"[50]. The reasoning of the other dissenting judges is in line with



[48] *For more on the issue of jurisdiction to prescribe and enforce see*: Universal Jurisdiction; Clarifying the Basic Concept, Roger O'Keefe, 2 Journal of International Criminal Justice 735, Oxford University Press, 2004, p. 738-740

[49] "The fundamental consequence of their independence and sovereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory." *The Lotus Case*, p. 36.

[50] *The Lotus Case*, p. 36-37.

that of Judge Loder and can be clearly seen in the summary of Judge Weiss on page 49 of the judgment:

> "Two principles of international law clearly emerge from the controversial doctrine and contradictory judicial decisions which have been invoked as authority by both Parties in the course of the hearings:
> 1. First of all, there is the *principle of the sovereignty of States* in criminal matters, not a universal, unlimited sovereignty such as Turkey adduced, but a sovereignty founded upon *and limited* by territory over which the State exercises its dominion, that is to say, territorial sovereignty.
> 2. Secondly, there is the principle of the *freedom of the high seas*, including the application of the *law of the flag* which is its corollary." (emphasis added by Judge Weiss)

When we apply the principles given by the majority decision in the *Lotus Case* to universal jurisdiction we can see that the freedom of States to act is confirmed in relation to their possibility to prescribe for themselves the jurisdiction that they chose, including universal jurisdiction. States can prescribe certain conducts as criminal that have occurred on the territory of another State, committed by foreigners to foreigners that do not have a deleterious effect on their territory at their own discretion. There is no rule under international law that prohibits that kind of jurisdiction in terms of the fact that no settled practice or *opinio juris* exits that would prohibit such a jurisdiction.

Quite the contrary, some of the titles that confer extraterritorial jurisdiction can be said that have become a settled matter, as we can see from the words expressed in the separate opinion of Judges Higgins, Kooijmans and Buergenthal cited above[51] the *Arrest Warrant Case* in the matter of the passive personality principle. The fact that few States have chosen to prescribe to themselves that kind of jurisdiction can be said to emanate from different reasons, like the fact that enforcing universal jurisdiction can be very costly to States, both in terms of money and in political backlash that can arise from alienating certain States whose nationals will find themselves on the receiving end of the prosecutions; that it

[51] *See*: footnote 24.

can overburden the criminal justice system with cases that have no tangible link, and therefore no recognizable immediate interest to the State[52]. The absence of a widespread practice among States of universal jurisdiction is not evidence of *opinio juris* of a prohibitive rule to the option of States to have that kind of jurisdiction. Consequently universal jurisdiction remains an open possibility for States to have it prescribed in their laws and they can freely choose to do so at their own discretion.

In terms of enforcing universal jurisdiction, States have a more limited scope at their discretion. They can certainly enforce their law in their own territory when a person who has allegedly committed one of the crimes that would fall under its universal jurisdiction is found on that State's territory, like in the case of the Rwandan nuns convicted for crimes against humanity in Belgium[53].

Taking in to consideration of the fact that the decision in the *Lotus Case* was decided by the President's casting vote, the question remains is the *dictum* given by the Court still good law? And, since this is a case that was decided 80 years ago, has there been a development in international law that would contradict this *dictum*? This was part of the discussion in the separate and dissenting opinions given in *The Arrest Warrant Case* which also had a discussion on the limits of enforcement of the laws containing universal jurisdiction[54].

### 1.2 THE ARREST WARRANT AMBIGUITY



[52] Dissenting opinion of *ad hoc* Judge Van den Wyngaert, *The Arrest Warrant Case*, paragraph 56.
[53] *For more on this case see*: Belgium's War Crimes Statute: A Postmortem, Steven R. Ratner, 97 American Journal of International Law 888, American Society of International Law, October 2003, p. 899
[54] Separate opinion of Judge Guilleme; joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; dissenting opinion of *ad hoc* judge Van den Wyngaert, *The Arrest Warrant Case*.

The dispute between the Democratic Republic of Congo (Congo) and Belgium started when a Belgium judge of the Brussels *tribunal de premiere instance*, acting upon a complaint filed by individuals, issued an arrest warrant for Abdulaye Yerodia Ndombasi, then a serving Minister of Foreign Affairs of the Congo. The arrest warrant was issued for war crimes and crimes against humanity allegedly committed by Yerodia before his ascendance to office of Foreign Minister. The crimes were allegedly committed by making various speeches in which Mr. Yerodia called for racial hatred and violence during the month of August 1998. The judge of the Brussels *tribunal de premiere instance* issued the warrant under the Belgium law concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto of June 16, 1993 as amended on February 19, 1999 concerning the Punishment of Serious Violations of International Law. The law, as it is was in the books at the time of the issuance of the arrest warrant, conferred jurisdiction on Belgium for war crimes and crimes against humanity without any of the traditional links for jurisdiction like territoriality, active or passive personality, protective principle or custody over the alleged perpetrator therefore allowing for trials *in absentia*. The arrest warrant was circulated through INTERPOL to all States including the Congo who received the warrant on June 7, 2000[55].

Shortly after these events the Congo filed a complaint against Belgium in front of the ICJ stating that Belgium has violated "the principle that a State may not exercise its authority on the territory of another State … 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 [and] the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State"[56].



[55] *The Arrest Warrant Case* paragraphs 13-15.
[56] *The Arrest Warrant Case* paragraph 1.

The Court during its deliberation decided to use the principle of judicial economy and focused only on the issue of immunities and not on the legality of Belgium's prescription of universal jurisdiction feeling that it had a more clear point of law to contend with and make a ruling. This was helped in no small amount by both Belgium and the Congo when they stipulated that Belgium had the authority to prescribe universal jurisdiction by its laws[57].

The discussion that follows will center on the separate and dissenting opinions in *The Arrest Warrant Case* since they deal, in part, with the question of the legality of universal jurisdiction, and the discussion on immunities as a limit of universal jurisdiction will be put in Chapter IV of the thesis. The separate opinions of President Guillame and the joint separate opinion of Judges Higgins, Kooijmns and Buergenthal discuss the standard set out by the *Lotus Case*, but from a different standpoint.

President Guillame, in his separate opinion, took a positivistic view of international law and looked for a rule that would authorize States to confer upon themselves universal jurisdiction. When it comes to universal jurisdiction his opinion is that traditional customary international law only recognizes the crime of piracy to fall under such jurisdiction. This custom was codified in the Article 19[58] of the Geneva Convention on the High Seas (CHS) of 29 April 1958 and in Article 105[59] in the Montego Bay Convention of 10 December 1982. The reason for this recognition, according to President Guillame, is the fact that piracy is



[57] *The Arrest Warrant Case* paragraphs 41 and 46.

[58] Article 19 of the Geneva Convention on the Law of the Sea
On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

[59] Article 105 Seizure of a pirate ship or aircraft of the United Nations Convention on the Law of the Sea of 1982
On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

committed outside of any territory of the State, but even in cases of crimes committed on the high seas international law is restrictive because it allows for a jurisdiction for piracy, but not for trafficking slaves or narcotics[60].

President Guillame further on reviewed the text of the several conventions containing the principle of *aut deudere aut judicare*, to extradite or prosecute, and he concluded that this principle gives compulsory but subsidiary universal jurisdiction. These conventions are designed to refuse a safe haven on the territory of a contracting party to perpetrators of certain crimes defined by those specific conventions that have the "extradite or prosecute" principle build in. But these conventions presuppose the presence of the offender on their territory since a State can hardly extradite somebody without first having him/her in custody. But, for President Guillame the notion of exercising universal jurisdiction when the perpetrator is not present on the territory of State, i.e. *in absentia*, is not known in pubic international law[61]. The principle of extradite or prosecute is simply a convention rule which applies *inter partes*, among the parties of a treaty, and therefore lacks true universality.

Having not found the permissive title under conventional law, President Guillame goes on to look at customary international law, namely, the practice of States evidenced through cases and the prescription of laws[62] as evidence of *opinio juris* with universal jurisdiction. Finding no settled practice of universal jurisdiction among States and no *opinio juris*, President Guillame concluded that customary international law does not support universal jurisdiction. He conceded that the rule emanating from the *Lotus Case* does not exclude a State to exercise jurisdiction over crimes committed abroad, but only for those



[60] "Thus under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States such as trafficking in slaves or narcotic drugs or psychotropic substances." Separate opinion of Judge Gullame paragraph 5.
[61] Separate opinion of Judge Guillame, *Arrest Warrant Case,* paragraph 9.
[62] Separate opinion of Judge Guillame, *Arrest Warrant Case,* paragraphs 10-12

titles or links that have been widely accepted in the practice of States. But international law has progressed since the time of the *Lotus* judgment. For him, the adoption of the United Nations Charter and the widespread wave of decolonization in the 1960 and 1970 signaled the strengthening of the principle of territoriality not its weakening. Allowing for the courts of every State to prosecute international crimes, according to President Guillame, would risk judicial chaos and would encourage arbitrary prosecutions for the benefit of powerful States in the name of an "ill-defined international community"[63].

The opinion of President Guillame on the jurisdiction of States under international law is best summarized in the paragraph 16 of his separate opinion

> "States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in the cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various convention if the offender is present on their territory. But apart from these cases, international law des not accept universal jurisdiction; still less des it accept universal jurisdiction *in absentia*" (emphasis added by President Guillame)[64].

Judges Higgins, Kooijmans and Buergenthal, on the other hand, go in different direction when they analyze the legality of universal jurisdiction. They look at various kinds of treaties that have the *aut deudere aut judicare* principle and come to the conclusion that this is an obligatory jurisdiction under those treaties and that this obligation is only *inter partes*, that is, among the parties of the treaty. These treaties have not crystallized in an international custom as of yet and, therefore, are not binding upon non-parties.

The three Judges also look at State practice by looking at cases that have been adjudicated by national courts and in to national laws that prescribe some kind of form of universal jurisdiction as a reference to *opinio juris* and come to the same conclusion as

[63] Separate opinion of Judge Guillame, *Arrest Warrant Case*, paragraph 15.
[64] Separate opinion of Judge Guillame, *Arrest Warrant Case*, paragraph 16.

President Guillame, that there is neither a settled practice of States nor *opinio juris* that would oblige States under customary international law to prescribe universal jurisdiction in their national laws. Their point of departure, on the other hand, from President Guillame, is by saying that even though international law is silent on the customary nature of universal jurisdiction it does not, *per se*, mean that universal jurisdiction is unlawful, it is just not obligatory. In that regards international customary law "is neutral as to exercise of universal jurisdiction"[65]. States, under the *Lotus* test are free to determine their jurisdiction in a manner that they chose is appropriate, so long as they do not go beyond the prohibitive rule set out in the same test, that a State may not exercise jurisdiction on the territory of another State without its consent.

In regards to the necessity of the presence of the alleged perpetrator on the territory of the State that is exercising universal jurisdiction the Judges say that universal jurisdiction should follow the rules and procedures already in place for other extraterritorial jurisdiction. Those rules have to follow the prohibition put forward by the *Lotus Case* that all exercises of extraterritorial jurisdiction should not be executed on the territory of another State without that State's consent. For instances of exercising universal jurisdiction *in absentia* the Judges said that that particular practice is widespread in different national criminal systems and that that certainly indicates that trials *in absentia* are not unlawful under international law and that it is up to the States themselves to decide whether to have it on their statutes for universal jurisdiction[66]. For them "there is no rule of international law (and certainly not the *aut*



[65] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph 45. In the same paragraph the Judges say "while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the legality of such a jurisdiction. In short, national legislation and case law – that is, State practice – is neutral as to exercise of universal jurisdiction."

[66] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph 55 – 56.

*deudere aut judicare* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise universal jurisdiction.[67]"

The Judges in their separate opinion also give something that can be considered as a guideline for safeguards when exercising universal jurisdiction *in absentia*. These safeguards, according to them, are essential "to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations among States"[68]. In the recommendation of the judges, when States exercise universal jurisdiction they must first offer the State of which the accused is a national the option to prosecute. In furtherance, the charges may only be instigated by an official organ, like an investigating magistrate or a prosecutor that can guaranty the independence of the prosecution form the Government of that State and also the opportunity for a consideration of good interstate relations to be taken[69].

This approach, although sounds helpful, is not laid down by international law. There is noting in international law to say that one title of jurisdiction, in this case the title of active nationality, has precedent over another title and would require States to offer the State of nationality of the perpetrator the "first dibs" at a prosecution. The same can be said with regards to the charges only being instigated by a prosecutor or an investigating magistrate. There are various national systems of instigating criminal procedures and nothing in international law says that one is better or guaranties more independence over another.[70]

### 1.3 CONCLUSION

[67] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph 45.
[68] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph 59.
[69] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph 59.
[70] *For more on this discussion see*: When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002; Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case, Steffen Wirth, 13 European Journal or International Law 877, Oxford University Press, 2002.

Given these almost completely different opinions on the issue of legality of universal jurisdiction I would like to join in the discussion presented above. I would agree that there is, as of now, no conventional or customary rule of international law that would oblige States to prescribe universal jurisdiction in their criminal laws, at least not when it comes to discussions of jurisdiction of States and their freedom to act. The rule that would require States to prosecute perpetrators of serious international crimes is still in its nascent form and has not crystallized yet. In the following Chapter I will put forward an argument that for certain crimes and in certain circumstances universal jurisdiction might be seen as an obligation albeit a very narrow one.

But the absence of a permissive rule does not mean that universal jurisdiction is unlawful under international law. This would go against the very horizontal nature of the international system of independent, sovereign States that are equal before international law[71]. This system means that States, because they do not recognize another sovereign that is above them, are the main lawmakers by concluding treaties or by their practice and usage that has become regarded as law. International law is designed to fit in to this system by allowing States a wide margin of discretion at their disposal to pursue their individual and collective interests. In order for one to say that a certain recourse is not available to States under international law one must show the existence of a prohibitive norm that would bar that recourse like, for instance, the prohibition on the use of force other than in cases of self-defense or under authorization by the Security Council of the United Nations.

The neutral position of international law in regards to universal jurisdiction means that recourse to prescribing it is open to States. Universal jurisdiction might be said that sets

[71] *For more see*: Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 5-13.

the very outer limits of what a State can prescribe as criminal, but nevertheless States are free to prescribe as wide or as narrow a jurisdiction as they see fit. The only firm limit on criminal jurisdiction under international law is that a State should not exercise its jurisdiction on the territory of another State without that State's consent. But this prohibitive rule applies for all titles of extraterritorial jurisdiction not just universal jurisdiction. Therefore, like when exercising other titles of extraterritorial jurisdiction, when using the title of universal jurisdiction, States should make use of the mechanisms of judicial cooperation in criminal matters. The same applies to trials in absentia. This mechanism of enforcement is not considered as an enforcement of extraterritorial jurisdiction on the territory of another State since the trial is conducted in the territory of the State prescribing the law. Third States are free to recognize the outcome of that trial as valid or not.

## CHAPTER III – UNIVERSAL JURISDICTION FOR WHAT CRIMES?

As we have seen from the previous Chapter, States pretty much have a wide discretion at their disposal when it comes to prescribing their criminal jurisdiction. Theoretically States are free to prescribe any conduct of individuals that happens anywhere in the world as criminal so long as this does not conflict with a prohibitive rule of international law[72]. After saying these words this Chapter and its title seems superfluous since if States are free to legislate on any crime that they wish and prescribe for itself universal jurisdiction then there is little point in discussing the need for States to limit themselves to a few narrow crimes.

This Chapter will give the development and the definition of the crimes for which, under my opinion, should fall under the title of universal jurisdiction. The reasons why States should refrain to only those crimes will be given in the course of this Chapter and will be dealt mostly in the summary, but for now suffice it to say one of the reasons is prudential in nature that if all States gave every crime in their penal codes such a wide extraterritorial jurisdiction then their courts would never get themselves out of the mountain load of cases that might come up in just a single day. The order of the crimes that will be presented in this Chapter is a historical one and it follows the one presented in the Princeton Principles and this should in no way mean that they are ordered in any way that would indicate precedents of one over the other in terms of their grave nature and importance.



### 1.1 PIRACY

[72] Several such limitations put on States upon their freedom to criminalize conducts is the growing body of human rights instruments and the developing case law of international bodies under those instruments since States can not criminalize conducts that are clearly normal uses of human rights protected by those instruments. The freedom of States to prescribe conducts has been significantly narrowed but nevertheless there is still a wide body of conduct that can be deemed as criminal by States.

Piracy has been historically the first, and for some time, the only crime for which Stats had prescribed or considered worthy of prescribing universal jurisdiction. Piracy has had a long historical development and has been know to authors dating back from antiquity. According to M. Cherif Bassioni[73], piracy has been know in Homer's Iliad and The Odyssey, Thucydides has references about it in his History of The Peloponnesian Wars and piracy is also mentioned in the writings of Cicero, who was also credited with coining the phrase of pirates as *hostes humani generis* or enemies of the human race[74]. In his book advocating the freedom of the sees, *mare liberum*, Grotius tackled the issues of jurisdiction at sea and advocated for the use of the flag principle, meaning that ships on sea were an extension of the territory of the State whose flag they fly. Because pirates did not fly the flag of any State a pirate ship itself did not have the nationality of any State and, therefore, not under the jurisdiction or protection of any State. The consequence of that was that every State could exercise jurisdiction over a pirate ship[75]. This approach was a very pragmatic one and it is not reminiscent of universal jurisdiction, but rather it could be said that it was "the recognition of the universal application of the flag State's jurisdiction in the right to defend against pirates and eventually to pursue them as both a preventive and punitive measure"[76].



[73] Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, M. Cherif Bassiouni, 42 Virginia Journal of International Law 81, Virginia Journal of International Law Association, Fall 2001; *and also in*: M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p. 39-63.

[74] M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p.46.

[75] M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p. 47.

[76] M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p. 47

The law of piracy developed more extensively between the XVII and the XIX century whereby most States criminalized piracy. This criminalization did not occur because of some coordinated effort to outlaw piracy in every State, but out of the interests of the States to protect themselves from the very real threat of piracy on the high seas. As we have mentioned above in the discussion about the definition of universal jurisdiction[77], the reason why piracy got universal condemnation was not because of the heinous nature of the act which was committed, since raiders of commercial shipping carrying letters of *marque* and flying the flag of a State did not fall in the category of pirates although they committed in essence the same acts[78]. The reason why piracy was accepted as a crime of universal jurisdiction is because pirates were not part of any nation; they did not fly the flag of any State; they attacked ships of any State and, therefore, were a threat to every State. By not flying a flag of a nation, they put themselves outside the jurisdiction and protection of a single nation and became under the jurisdiction of all nations. This was put very eloquently by Chief Justice Marshal in 1818 in the case of *United States v. Klintock*:

> "Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the Act of Congress applying to all persons whatsoever, though they ought to not be so considered as to extend to persons under the acknowledged authority of a foreign State, ought to be so constricted as to comprehend those who acknowledged the authority of no State. Those general terms ought not be applied to offences committed against the particular sovereignty of a foreign power, but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amendable to the laws of all nations.[79]"

The Supreme Court in that case decided that the Act of Congress of 1790 extends to all persons and all vessels that do not fly the flag of any State and thus throw off their



[77] *See*: Chapter I, p. 13 and 14 above and the accompanying footnotes.
[78] *Generaly see*: The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations, Eugene Kontorovich, 45 Harvard International Law Journal 183, Harvard College, winter 2004, p. 211-220
[79] Judgment of the United States Supreme Court, *United States v. Klintock*, 18 U.S. 144, (1820), *as quoted in* M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p.48.

national character and commit piracy on other vessels. Today piracy is defined in both the Convention on the High Seas[80] and the Montego Bay Convention[81] in Articles 19 and 105

[80] The provisions on piracy in the Convention on the High Seas are

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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

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

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

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19

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

[81] The provisions on piracy in the UN Convention on the Law of the Sea of 10 December 1982 are:

Article 101. Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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

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

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

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

Article 102. Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103. Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 104. Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

respectively, which, in these conventions by using the same wording, universal jurisdiction is conferred upon all States for this crime. As we can see from these conventions every State can exercise jurisdiction over pirates and pirate ships so long they are captured on the high seas or in the territorial waters of that State[82]. Therefore, the crime of piracy is confirmed as an international crime in both conventional and customary international law and today is, probably the least disputed crime falling under the universality principle.

### 1.2 SLAVERY

Slavery and the slave trade was equated with piracy as an crime that entails international denunciation in the Declaration of the Vienna Congress in 1815[83] mostly as a result of the shift of the public opinion in several countries and especially Great Britain. Slavery and slave related practices have been the topic of numerous conventions since then always evoking universal condemnation. These conventions have ranged in topics from the suppression of slavery and the slave trade, to forced labor under the World Labor Organization, to the trafficking of women and children under the United Nations. Slavery in the context of war is part of international humanitarian law and its practice in times of conflicts is considered a war crime or a crime against humanity[84].

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Article 105. Seizure of a pirate ship or aircraft

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

[82] *See*: Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 593

[83] M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p.76

[84] M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p. 77.

Despite the numerous conventions very few of them hold provisions on universal jurisdiction and those are mainly the ones that deal with the trafficking of slaves on the high seas. The reasons for this may lay in the fact that the medium for the trafficking of slaves in these cases is the high seas and therefore outside of the jurisdiction of States and this is the most effective way of fighting slave traders and traffickers. The provisions on the slavery conventions require States to have effective measures to prevent and suppress the practicing of slavery and slave related practices among which is the criminalization of slavery, extradition and judicial assistance very reminiscent of the *aut dedere aut judicare* "extradite of prosecute" clauses of other conventions. The Convention on the High Seas, as one example, requires that "[e]very State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.[85]" As piracy the practice of slavery has diminished over the past century although there has been an increase of trafficking women and children for sexual exploitation, but this has not been the subject of a specific treaty. Despite the fact that slavery and slave related practices have been the subject of a customary or conventional international law, in Bassiouni's conclusion, and although it has received universal condemnation, state practice has not supported the idea of universal jurisdiction for all manifestations of slavery and slave related practices. The drive to make slavery and slave related practices as a universal jurisdiction crime for all practices has been mostly on the part of scholars[86].



[85] Article 13 of the Geneva Convention on the High Seas of 29 April 1958.

[86] *For more on this see*: M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p. 49-50; *and also in* Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, M. Cherif Bassiouni, 42 Virginia Journal of International Law 81, Virginia Journal of International Law Association, Fall 2001.

## 1.3 WAR CRIMES

Today War Crimes, along with Genocide and Crimes Against Humanity, are probably the most undisputed serious international crimes[87]. War crimes have developed for centuries alongside with the rules and customs of war. States, after various conflicts, have seen fit to try individuals for violations of the rules and customs of war[88], although this has been a sporadic event in history. This changed significantly in the XX century especially after WWII and the setting up of the International Military Tribunal (IMT) for Europe and the Far East[89]. Despite the various criticism that have been said about the IMTs it was undoubtedly a significant step forward for the enforcement of humanitarian law and helped introduce the concept of individual criminal responsibility under international law[90]. The realities of the Cold War took over shortly after the end of WWII and no major war crimes trials, especially not of an international character, occurred until the middle of 1990's when an explosion of prosecutions for war crimes started with the setting up of the ICTY[91] and the ICTR[92]. These two tribunals were crucial when it comes to the advancement of the notion and definition of war crimes, crimes against humanity and genocide.

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[87] *Generally see*: Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006; International Criminalization of Internal Atrocities, Theodor Meron, 89 American Journal of International Law 554, The American Society of International Law, July 1995; Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 594-597.

[88] Instances where States have seen fit to try individuals have been after major wars like the Civil War in the United States and the famous Libber Code, in South America after various conflicts and Europe after WWI and the Libsing trials *see*: Francis Lieber's Code and Principles of Humanity, Theodor Meron, 36 Columbia Journal of Transnational Law 269, Columbia Journal of Transnational Law Association, Inc. 1997.

[89] *See*: footnote 1 above.

[90] The various critiques of the IMT are that, it was set up as victors justice, that it only included individuals from Germany as a occupied nation, that the law used for defining war crimes, crimes against humanity and especially the crime against peace are *ex post facto*; that the composition of the judges did not include members of the neutral powers *for more see* Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, 560-561.

[91] See footnote 6.

[92] See footnote 7.

War crimes, today, are defined as the breaches of the rules and customs of war. For instance the Charter of the IMT, which the UN in a General Assembly Resolution[93] confirmed that its principles were part of international law, defined war crimes in Article 6 (b) as violations of the "laws or customs of war."[94] The violations of the laws and customs of were considered to be conduct that was contrary to the various Hague and Geneva Conventions[95] in force at the time as well as various practices, training manuals and instructions issued to the troops on the field. The laws of war developed after WWII and various comprehensive conventions, namely the Geneva Conventions of 1949, were adopted and, consequently, later definitions of war crimes came to include them in their definitions. In the ICTY statute, for instance, war crimes are defined in Articles 2[96] and 3[97] as violations

[93] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremburg Tribunal, General Assembly Resolution 95(1) of 11 December 1946.

[94] Article 6(b) of the Charter of the IMT

"(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor 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.

[95] The Conventions that were in force at the time which were indicative of the rules and customs of war are: Geneva law – Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864; Additional Articles relating to the Condition of the Wounded in War. Geneva, 20 October 1868; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929; Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929; Hague law – Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 as well as the rest of the conventions adopted on the same date in The Hague.

[96] Article 2 Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) willful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) willfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

[97] Article 3 Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

of both the Geneva Conventions of 1949 and the rules and customs of war. The Court in the *Tadic case* interpreted the ICTY Statute, especially Article 3, to mean that the rules and customs of war apply in both international and internal conflicts and on the whole territory of the belligerent parties[98]. When it came to adopting the Statute of the ICTR a year later the members of the Security Council had, without reservation, accepted the fact that international humanitarian law, especially Common Article 3 of the Geneva Convention, applied also to internal conflicts[99]. Because of the nature of the conflict in Rwanda the emphasis in the Statute was put on crimes against humanity and not war crimes *per se* but rather on the customary provisions in Protocol II and Common Article 3 to the Geneva Conventions[100]

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(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

[98] Decision of the Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Tadic, case No.IT-94-1-AR72, October 2, 1995, paragraphs 69-122 (giving an explanation on the applicable law and its sources in both treaty and customs) the court using the interpretations given by some of the members of the Security Council to the Statute when it was adopted concluded that the rules and customs of were applicable in internal conflicts as well as international and that not only grave breaches of the Geneva Conventions were crimes but also violations of the Common Article 3 of the Geneva Conventions, the Hague (IV) Convention and others as stated in the commentaries to the Statute by the Secretary General in his report to the Security Council *in* Report of the Secretary General to the Security Council pursuant to paragraph 2 of SC Resolution 808, paragraphs 41-44, UN Doc. S/25704, *see also* Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 572-573.

[99] *See*: Report of the Secretary General of 13 February 1995 pursuant to paragraph 5 of the Security Council Resolution 955 (1994), UN Doc. S/1995/134 paragraphs 11-12 *and also see* Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 572-573.

[100] Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

which contain the customary rules of war applicable in internal conflicts. The common Article 3 of the Geneva Conventions was considered by the International Court of Justice (ICJ) as a "minimal yardstick" in the *Nicaragua Case*[101] applicable to all types of conflicts. Nevertheless, the rules and customs of war are now indisputably applicable in internal conflicts as seen from the statements of several States made during the adoption of the Statute of the ICTY in the UNSC.

Although it has been a practice in the past that States themselves prosecute individuals responsible for committing war crimes this was mainly in cases where the States themselves have had some link to the conflict either by being one of the belligerent parties, by the fact that the conflict took place on their territory, or the fact that the war crimes were perpetrated by one of their nationals or to one of their nationals. Universal jurisdiction, as we have stated previously on the other hand, is a title of jurisdiction that requires no jurisdictional links to the State conducting the proceedings. The question that follows is: can, or are, States obligated to prosecuted individuals for war crimes?

The answer to this can be found in the Geneva Conventions of 1949 and the rules concerning grave breaches common to the four Conventions and the Additional Protocol I thereto. Grave breaches "shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified



(h) Threats to commit any of the foregoing acts.

[101] Judgment of the International Court of Justice, *The Case Concerning the Military and Paramilitary Activities in and Around Nicaragua* (Nicaragua v. The United States), June 27 1986, General List No. 70, paragraph 218, (hereinafter *The Nicaragua Case*)

by military necessity and carried out unlawfully and wantonly"[102]. The Geneva conventions also provide for jurisdictional provisions stating that:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case"[103].

This has been largely considered as one of the first forms of the *aut dedere aut judicare* - "extradite or prosecute" principle which has evolved with time in terms of phrasing.

The plane language of the Conventions clearly means that Stats have an obligation to enact legislation necessary for the prosecution of perpetrators of grave breaches, and also to search them out and punish them[104]. Since the four Geneva Conventions are universally accepted by all States[105] in is immaterial whether this is a provision that is customary in nature or is just *inter partes*; it is still applicable to all States. On the other hand, the much respected Pictet commentaries to the Geneva Conventions say that during the preparatory work this provision was understood to mean to be applicable in a territorial manner[106].

[102] Article 50 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Geneva, 12 August 1949.
[103] Article 49 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Geneva, 12 August 1949.
[104] Although there is still doubt to whether the obligation to search for the perpetrators of the grave breaches of the convention was understood to be territorially meaning that State parties are limited to search only within their territory or it is meant to understand as meaning only for crimes that happened on their territory *see* separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph 31.
[105] As of the accession of Nauru to the Geneva Conventions on 27 June 2006, all (totally 194) States are members to the Four Geneva Conventions of 1949 (source the International Committee of the Red Cross *available at* http://icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P last visited on 24 March 2007).
[106] "The obligation imposed on the Contracting Parties to search for persons accused of grave breaches of the Convention implies activity on their part. As soon as one of them is aware that a person on its territory has committed such an offence, it is its duty to see that such person is arrested and prosecuted without delay. It is not, therefore, merely at the instance of a State that the necessary police searches should be undertaken: they should be undertaken automatically, and the proceedings before the courts should, moreover, be uniform in

Regardless of this, the plain language of the convention clearly authorizes States to search and prosecute for individuals committing grave breaches regardless of the fact of the territory of the commission of the crime or the nationality of the individual[107].

Another question that arises from this provision is should States be limited to prosecuting just the grave breaches of the Geneva Contentions or should this be extended to include other provisions of the conventions. Just to reiterate the grave breaches provisions do not include the Common Article 3 of the Conventions which, as discussed above, is also part of the rules and customs of war recognized by the ICJ in the *Nicaragua Case* as a "minimal yardstick"[108] and are also criminalized by the Statute and jurisprudence of the ICTY and ICTR. Since the IMT it has not been necessary for a specific provision that criminalizes a conduct to be present in the rules and customs of war in order for an individual criminal responsibility to exist under international law. The Hague and Geneva Conventions prior to WWII did not contain specific provisions criminalizing certain acts. They were prescriptive of the conduct of hostilities and of the belligerent parties' attitude towards protected persons or property. Yet their violation was considered to be criminal under international law by the Nuremburg tribunal. The reasons for this was best put in one the decisions of this tribunal which said that:

> "It is not essential that a crime be specifically defined ad charged in accordance with a particular ordnance, statute or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts were in fact rimes under international law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements.[109]"



character, whatever the nationality of the accused" Commentaries to Article 49 to the Geneva Conventions p. 363-364 *available at* http://icrc.org/ihl.nsf/COM/365-570060?OpenDocument (last visited on 24 March 2007).

[107] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *The Arrest Warrant Case*, paragraph

[108] *See* footnote 101 above.

[109] Judgment of the Military Tribunal established under Control Council Law No. 10, *United States v. List, as quoted in* Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 575.

Therefore it could be said that the definition of war crimes is not limited to the grave breaches provision of the Geneva Convention and that all violations of the rules and customs of war are considered as war crimes whether committed in internal or international conflicts and are, consequently, also available for States to prescribe as crimes entitling universal jurisdiction[110].

### 1.4 CRIMES AGAINST HUMANITY

Crimes against humanity have been of a fairly recent development in comparison to piracy and war crimes. The first discussion about crimes against humanity as a separate category of international crimes was made at the negotiation of the Versailles peace agreement after the end of WWI. The great devastation and casualties suffered by both sides caused the Allies to consider the possibility of international trials for violations of the rules of war. The Allies set up a commission to look into the option of putting individuals responsible for atrocities on trial. The commission submitted a report[111] in which the majority of members concluded that an international tribunal should be set up to try individuals who have violated, among others, the "laws and customs of war and the laws of humanity[112]". The report of the commission was strongly objected by the United States representatives[113] at the conference and their main points of contention were the commission's recommendation that

[110] *For more on the criminalization of the non-grave breaches of the Geneva Conventions see*: International Criminalization of Internal Atrocities, Theodor Meron, 89 American Journal of International Law 554, The American Society of International Law, July 1995, p. 572-576.
[111] Majority Report of the Commission on Responsibilities issued on 29 March 1919 *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 4-8.
[112] Majority Report of the Commission on Responsibilities issued on 29 March 1919 *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 5. One other crime was part of the commission's recommendations and that was for "acts which provoked the world war and accompanied its inception".
[113] Memorandum of Reservations to the Majority Report, 4 April 1919 submitted by the Representatives of the United States *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 8-9.

heads of States can also be prosecuted regardless of the issue of immunities and the fact that "laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.[114]" The strong objections made by the United States representatives led to the adoption of the watered down provisions of the Versailles Peace Treaty of 1919 in which the Allied powers "publicly arraign[ed] William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties."[115] The former Emperor was never brought in front of an international tribunal and the trials for which the treaty has specific provisions in articles 227[116], 228[117] and 229[118] were never properly executed in both Germany and Turkey[119].

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[114] Memorandum of Reservations to the Majority Report, 4 April 1919 submitted by the Representatives of the United States *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 8; The Reservations further on went on to say that "war was and is by its very nature inhumane, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity" p.10.

[115] Article 227 of the Peace Treaty of Versailles 1919. This Article also provides provisions for the possibility of establishing a special tribunal for the prosecution of the former Emperor but this provision was never used on account of the fact that the former Emperor found safe refuge in Holland *see* Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 555-558.

[116] Article 227

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial

[117] Article 228

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

[118] Article 229

The lessons gathered from the Commission on responsibilities from WWI were utilized in the aftermath of WWII with the setting up of the IMT for Europe and the Far East. Interestingly enough, this time it was the United States representatives who, at various meetings of the Allied powers, were pushing for the establishment of an international tribunal that would deal with the atrocities committed during the war. This was finally accomplished by the creation of the IMT, in which Statute, the crime against humanity[120] found its place. As with war crimes, crimes against humanity were confirmed by a resolution of the UN General Assembly as principles of international law[121].

Despite this positive development, as with war crimes, the Cold War was marked with the scarcity of trials for crimes against humanity that were not related to WWII. One of the normative developments in terms of crimes against humanity was the adoption of the Genocide Convention of 1948 which made this offence as a separate crime under international law although it was understood to be included in the definition IMTs Charter as a crime against humanity. The definition and the nature of the crime of Genocide will be discussed in a separate section in this Chapter bellow.

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Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

[119] Germany, and later Turkey following Germany example, made an arrangement with the Allied powers for the trials of the accused to be conducted in Germany in Leipzig by prosecutors of the Allies but in front of German judges. The results of these trials was far from satisfactory since most of the individuals accused were found not guilty or given light sentences *for more see*: Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 558.

[120] Article 6 (c) of the Statute of the IMT

The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes […]

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

[121] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremburg Tribunal, General Assembly Resolution 95(1) of 11 December 1946.

Crimes against humanity, unlike war crimes, piracy, slavery and genocide, do not have a convention that specifically deals with these crimes and, therefore is solely and firmly rutted in customary international law. In the commentaries made by the Secretary General in a report to the Security Council prior to the adoption of the Statute of the ICTY[122], crimes against humanity have been defined as attacks against the civilian population regardless of the fact of whether they have been committed in a time of war or in a time of peace and in an international or an internal conflict[123]. Similarly, when it came to the adoption of the Statute of the ICTR by the Security Council the provisions for crimes against humanity were undisputedly included in Article 3[124]. And finally crimes against humanity are part of the Statute of the ICC defined in Article 7 of the Statute but since this is a convention dealing with the establishment of the ICC it is only considered to be *inter partes*. Nevertheless, as said before, crimes against humanity are considered to be firmly rutted in customary international law.

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[122] Report of the Secretary General to the Security Council pursuant to paragraph 2 of SC Resolution 808, paragraph 47-48 (UN Doc. S/25704)

[123] Article 5 of the Statute of the ICTY

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

[124] Article 3 of the Statute of the ICTR

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

As we can see from the various instrument mentioned earlier, especially in the case of the ICTR and the ICC, crimes against humanity are acts which are committed against the civilian population in a widespread or systematic manner (the accumulation of both is not required; it can either be one or the other) and there is no necessity of an existence of a conflict, but it applies to both international and internal conflicts[125]. In a more recent report[126] by the Secretary General to the Security Council it has been suggested that the case law under the ICTY and the ICTR can be interpreted to include acts of a terrorist nature, such as intentional car bombing of civilians, if they contain "a pattern or [a] methodical plan against a civilian population albeit not in its entirety. They could be collective in nature or a multiple collection of acts and, as such, exclude a single, isolated or random conduct of an individual acting alone"[127].

Unlike the case of war crimes, where there was a specific provision in a convention, namely the grave breaches provision of the Geneva Conventions of 1949, conferring what could be interpreted as universal jurisdiction, the lack of a convention on crimes against humanity, except the Rome Statute which only deals with the jurisdiction of the ICC, may lead to the conclusion that crimes against humanity are not universal jurisdiction crimes. State practice or *opinio juris* is inline with that statement. As said by M. Cherif Bassiouni, Canada, Israel, Germany, France, Belgium and Switzerland have statutes that provide for prosecutions of crimes against humanity, but that their own courts have interpreted them to exclude universal jurisdiction, they have rather concentrated on prosecutions that are based



[125] Report of the Secretary General to the Security Council pursuant to paragraph 2 of SC Resolution 808, paragraph 47 (UN Doc. S/25704)
[126] Report of the Secretary General on the establishment of a special tribunal for Lebanon, 15 November 2006, paragraphs 23-25 (UN Doc. S/2006/893).
[127] Report of the Secretary General on the establishment of a special tribunal for Lebanon, 15 November 2006, paragraphs 24 (UN Doc. S/2006/893).

on territoriality, passive or active personality principles[128]. But as we have set earlier in this thesis, the fact that a positive rule of international law that would obligate or allow States to prosecute an individual for an international crime under the title of universal jurisdiction does not exist, this still does not mean that States are not free to proscribe crimes against humanity as an universal jurisdiction crime. Only a rule of prohibitive nature in international law can restrain the freedom of the State to prescribe, which at the present, does not exist.

### 1.5 GENOCIDE

Genocide has been introduced as a separate crime under international law by the Genocide Convention of 1948. Article 2 of the Genocide Convention defined Genocide as acts committed against a group with the specific intent to cause the destruction of that group[129]. This definition was reproduced in verbatim in both the Statues of the ICTY and the ICTR as well as in Rome Statute of the ICC[130]. The crime can be committed both in times of pace and in times of conflicts regardless of their international or internal character. The definition of the convention requires a specific kind of intent in the act and that is for the individual to desire, by the acts that he/she has committed, for the destruction of the group. On of the most criticized aspects of the crime of genocide as set out by the Convention is the



[128] M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law *in* Stephen Macedo ed., Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law, Philadelphia, University of Pennsylvania Press, 2004, Chapter I, p. 52.

[129] Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(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.

[130] Article 4, Article 2 and Article 6 respectively follow the exact wording of the Genocide Convention.

fact that in its definition it does not protect political groups that are put under persecutions by various Governments around the world.

The crime of genocide is of a rule of a customary nature under international law as recognized by the ICJ in its advisory opinion[131] as early as 1951. It is also the only international crime that has been recognized as a peremptory or a *jus cogens* norm of international law by the ICJ in its decision on admissibility in the case of *Armed Activities on the Territory of the Congo*[132] in February of 2006. The significance of this will be discussed further on below in this Chapter, sufficed to say that such a status under international law would mean that theoretically the crime of genocide would trump all other norms of international law that are not of the same character.

The jurisdiction over the crime of genocide, on the other hand, under the Convention is strictly territorial in nature as set out by Article 6 in which is it stated that "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction"[133]. The clear language of the Convention leaves no discussion on the intention that the crime of genocide under the authorization of the convention should be prosecuted only on the territory that it was committed, but this does not *per se* exclude or prohibit the prescription of the title of universal jurisdiction in domestic law for that crime. Universal jurisdiction, therefore, is not out of the reach of States to legislate if they so desire for the crime of genocide.



[131] Advisory opinion of the International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1950-1951), 28 May 1951, General List No. 12.
[132] Judgment of the International Court of Justice, *Armed Activities on the Territory of the Congo* (New Application: 2002), Democratic Republic of the Congo v. Rwanda (2002-2006), 3 February 2006, General List No. 126, paragraph 64 (hereinafter *Armed Activities on the Territory of the Congo*).
[133] Article 6 of the Genocide Convention.

## 1.6 CRIMES AGAINST PEACE

Crimes against peace were first introduced at the trials at Nuremberg although the concept was looked over during the peace negotiations at Versailles in 1919 by the Commission on Responsibility[134]. The Commission came up with a specific recommendation and that was that a special international tribunal should be set up to try the most senior government officials for the atrocities of the war including former heads of States for war crimes, crimes against humanity and crimes against peace. As we have said earlier, the recommendations of the Commission on Responsibilities were strongly objected to by the United States and Japan, who submitted reservations to the Majority report[135]. Their main objections were to the fact that some of the alleged crimes were not established as crimes under international law and therefore would be *ex post facto* and that, also, nothing under international law would allow for the prosecution of incumbent or current heads of States for crimes by a tribunal to whose jurisdiction they were not subject when the alleged offenses were committed[136].

It took another World War for the crimes against peace to be perceived as international crimes for which individuals can be prosecuted. This time the main advocates for the inclusion of the crimes against peace in the Statute of the IMTs were the United States. The basis for the crimes was set out in violations of existing agreements and assurances of peace and friendly relations that were made prior to the war and especially in

[134] Majority Report of the Commission on Responsibilities issued on 29 March 1919 *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 5.
[135] Memorandum of Reservations to the Majority Report of 4 April 1919 submitted by the Representatives of the United States *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 10.
[136] Memorandum of Reservations to the Majority Report, 4 April 1919 submitted by the Representatives of the United States *in* Michael R. Marrus, The Nuremberg War Crimes Trial 1945-1946: A Documented History, Bedford Books, Boston, 1997, p. 10; *also see* Reflections on the Prosecutions of War Crimes by International Tribunals, Theodor Meron, 100 American Journal of International Law 551, The American Society of International Law, 2006, p. 554-559.

the Kellogg-Briand Pact and were defined in Article 6(a)[137] of the Statute of the IMT. Never the less, the trials under the IMTs for Europe and the Far East and under Control Council law No. 10 were the only ones thus far for this crime. The ICTY and the ICTR, as well as the other hybrid Criminal Tribunals, do not have crimes against peace as part of their subject matter jurisdiction. The main reason for this is the fact that States have not yet come to any agreement on what aggression actually is and there is definitely no defined State practice or *opinio juris* to that regard. The problem of defining crimes against peace was very obvious during the drafting of the Rome Statute of the ICC, so much so that the provision of the crime against peace in the Statute was left to be discussed and defined at a later date by the year 2008[138].

In principle, crimes against pace are international crimes, since the UN early on recognized the Charter of the IMT where these crimes were first defined, as embodying the principles of international law. But the lack of an agreement on what these crimes actually are in terms of what the acts and conducts are actually criminalized makes it impractical and undesirable in terms of legal certainty to include them just yet as crimes that would fall under universal jurisdiction. The fact that the definition of these crimes was strongly debated at the Rome conference without an agreement being reached supports the conclusion that States do consider crimes against peace as international crimes, but as to what conduct is actually criminalized, an agreement to that effect is lacking.



[137] Article 6 (c) of the Statute of the IMT

The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes […]

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the forgoing;

[138] Articles 5, 121 and 123 of the Rome Statute govern the time when the State parties should start re-negotiating for a definition to the crime of aggression.

## 1.7 TORTURE

Torture was defined as an international crime fairly recently in comparison to the crimes mentioned above. Nevertheless, it was established as a conventional crime with the Torture Convention and has reached customary intentional law status even before then. The definition of the crime of torture is given in Article 1[139] of the Torture Convention which concentrates mainly on torture conducted by State officials rather than private individuals. Torture conducted in times of conflicts or on a widespread or systematic manner against the civilian population can be considered as either a war crime, crime against humanity or genocide the last one dependent on the specific kind of intent of the perpetrator. The Torture Convention is specifically intended to be used in times of peace.

[139] Article 1of the Torture Convention

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The Torture Convention, in Articles 5[140] and 7[141], establishes a mechanism of jurisdiction that is typical of the "extradite or prosecute" principle but does not confer universal jurisdiction upon State parties. What the Torture Convention does is to sets up a mechanism of jurisdictions in which the presence of the offender in the territory of a State party is necessary in order for it to be able to prosecute. In one of the earliest decisions the ICTY, in the *Furunzjija case*[142] the Court discussed the nature of the crime of torture. In this decision the Court found that the crime of torture "[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules."[143] Further on, when the Court discussed the consequences to individual States of the *jus cogens* nature of the crime, said that because of the seriousness and the universal condemnation of the conduct "every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an

[140] Article 5of the Torture Convention

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases:

(a) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

[141] Article 7 of the Torture Convention

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These 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. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

[142] Judgment of the International Criminal Tribunal for the former Yugoslavia, IT-97-17/1 "Lastva Valley", 10 December 1998 (hereinafter the *Furundzija case*).

[143] *The Furundzija case*, paragraph 153.

extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.[144]"

As it was discussed in for the crimes above, the crime of torture is of both conventional and customary nature. There are no specific provisions in the Torture Convention that confers universal jurisdiction in the sense of the definition discussed in Chapter I above, but rather it uses the "*aut dedere aut judicare*" principle enshrined in its articles 5 and 7. This extradite or prosecute principle was used in the *Pinochet case*[145] when the House of Lords had to consider whether a former head of State can be put on trial for acts of torture committed in Chile in front of a Spanish court. The House of Lords decided that the former President of Chile could be put on trial in Spain for acts of torture but it went shy of saying that torture is a crime of a universal jurisdiction character. In the following section I will discuss why should these specific crimes invoke the universality principle and why should States limit themselves, for now, only to these crimes.

### 1.8 THE NATURE OF THE CRIMES

Once we have established that, unless a prohibitive rule of international law exists, States are generally free to prescribe their jurisdiction in a manner that they see fit and for crimes which they deem fit it seems unnecessary to argue why should States stop only for the crimes outlined above and not prescribe other crimes that would fall under the universality principle. What in this part of the Chapter I will put forward is that these international crimes,



[144] *The Furunzjija case*, paragraph 156.
[145] Judgment of the House of Lords, *R v. Bow Street metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte, [2000] 1 AC 61*, 25 November 1998 (hereinafter Pinochet I); Judgment of House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No 3), *[2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827* (hereinafter Pinochet III).

unlike other crimes, have a special nature or status under international law and that it is this status that sets them apart from most other international norms.

What the discussion on the crimes presented above shows is that these crimes have several elements in common. One is the fact that they are all rules of international law of a customary nature. Except for crimes against humanity all of the crimes are set down in international treaties which have crystallized into custom or have been codified from custom to treaty. But, this only means that states are obligated to prevent or prosecute the commission of these acts and does not say what jurisdiction should be awarded for them. These rules are of a substantive nature; they define the conduct that is criminalized and prescribe criminal responsibility on the individual that commits them. What these rules do not do is settle the issue of jurisdiction of States when it comes to the obligation to prosecute. The narrowest obligation that arises to States from this is to prescribe the conduct as criminal in their domestic laws and prosecute these crimes if they are committed on their territory.

A second common characteristic of the above mentioned crimes is the fact that they have been recognized by courts or scholars as being peremptory norms of international law or *jus cogens*. The concept of *jus cogens*[146] has been debated by scholars and judges since its conception. This first time that the concept was codified in conventional law was in the Vienna Convention on the Law of Treaties in its Article 53[147] although scholars have tangled with the issue since the 1930's[148]. The concept was first developed as a restriction on States on their treaty making powers. By introducing the concept of *jus cogens* States were no

[146] *For more on the development of jus cogens see*: Normative hierarchy in International Law, Dinah Shelton,100 American Journal of International Law 292, American Society of International Law, 2006, p. 292-324

[147] Article 53 Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[148] Normative hierarchy in International Law, Dinah Shelton, 100 American Journal of International Law 292, American Society of International Law, 2006, p. 297-298

longer free to conclude treaties at their discretion. Any treaty that is contrary to a peremptory norm is null and void since the moment of its conclusion and it does not produce any legal effects. If a subsequent peremptory norm arises after the conclusion of a treaty, the treaty itself stops to produce legal effects and it is void since the emergence of that norm.

One of the points of contention about *jus cogens* norms is their source. The VCLT in Article 53 states that peremptory norms are norms "accepted and recognized by the international community of States as a whole" and therefore puts the source of peremptory norms in the consent of States. Others put the source of *jus congens* norms in natural law, international public order, or constitutional principles[149]. If the source of *jus cogens* is derived from consent of States then their applicability is limited only to the law on treaties in regards to the validity and applicability of treaties. For those who see the sources of *jus cogens* norms in public order, peremptory norms are there to protect the highest values of the community of States and, therefore, are of a higher level in the hierarchy of norms. As the *ad hoc* judge Dugard put it in his separate opinion in the *Armed Activities on the Territory of the Congo* case

> "Norms of *jus cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of *jus cogens* advance both principle and policy means that they must inevitably play a dominant role in the process of judicial choice.[150]"

The debate about whether *jus cogens* norms actually exist has been settled in a small way since the 2006 judgment of the ICJ in the case of *Armed Activities in the Territory of the Congo* where the court expressly recognized that the crime of genocide is norm of a *jus*

[149] *For more see*: Normative hierarchy in International Law, Dinah Shelton, 100 American Journal of International Law 292, American Society of International Law, 2006, p. 300-302.
[150] Separate opinion of *ad hoc* Judge Dugard, *Armed Activities on the Territory of the Congo*, paragraph 10.

*cogens* nature. For the Court, the existence of *jus cognes* norms is not in question any more, but the Court, nevertheless, is very wary of using *jus cogens* norms to trump other norms of international law. In *Armed Activities on the Territory of the Congo* case the ICJ, although finding that the crime of genocide set out in the Genocide Convention is of a peremptory character, the *jus cogens* nature of it is only in regards to the substantive provisions of the Genocide Convention and it does not apply to the provisions on jurisdictional issues in a similar way as the notion that reservations are allowed for provisions of a treaty that are not against its object and purpose. Therefore, the reservation that Rwanda made when it acceded to the Genocide Convention in regards to the compulsory jurisdiction of the ICJ in disputes arising from the Genocide Convention can not be overridden by the *jus cogens* nature of the crime of genocide[151].

The Court seems to leave some room for maneuvering by saying that a peremptory rule of international law does not exist in terms of the provisions of Article 9[152] which deals with the jurisdiction of the ICJ in relation to disputes arising from the Genocide Convention and, therefore, reservations to Article 9 do not go against the *jus cogens* nature of the norms of the Genocide Convention[153]. Future developments seem to depend on how narrow the Court or other bodies interpret the case law of the ICJ. Hopefully the ICJ or other courts in their future judgments will narrow the scope of the ICJ's decision and interpret it so that the

[151] "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfillment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention." *Armed Activities on the Territory of the Congo*, paragraph 67.

[152] Article 9 of the Genocide Convention.
Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

[153] "In so far as the DRC contended further that Rwanda's reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention. Rwanda's reservation cannot therefore, on such grounds, be regarded as lacking legal effect." *Armed Activities on the Territory of the Congo*, paragraph 69.

decision in the case of *Armed Activities on the Territory of the Congo* is distinguished as only related to the rules that govern the jurisdiction of the ICJ as just another forum for settling disputes between States and that it has nothing to do with the establishment of individual criminal responsibility for international crimes in domestic or other forums.

In its previous judgment in the *Arrest Warrant Case*[154] of 2002 the ICJ did not seem to think that war crimes and crimes against humanity trump over immunities of incumbent heads of States or Ministers of Foreign Affairs, but then again the Court did not pronounce on whether the nature of war crimes and crimes against humanity is *jus cogens* or even whether the concept of *jus cogens* actually exists. Several conclusions might arise from the *Arrest Warrant Case* case; one that the Court does not think that war crimes and crimes against humanity are of a *jus cogens* nature; two, if they are of a peremptory nature than immunities of incumbent heads of States and Ministers of Foreign Affairs are of the same nature as well; or three that they fall outside of the substantive scope of the definition of war crimes and crimes against humanity similarly to the Article 9 reservations of the Genocide Convention and, therefore, the *jus cogens* nature of war crimes and crimes against humanity can not trump over norms dealing with immunity which are of procedural nature. I will go in more details about this case and the issues presented in it when I talk about immunities in the next Chapter. The first majority opinion in which the Court specifically mentions a rule as a peremptory norm of international law is the case of *Armed Activities on the Territory of the Congo* and hopefully the Court will have more courage in its next decisions when expanding on this concept, but for the moment the conclusion stands that the ICJ seems reluctant to use



[154] Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law." *The Arrest Warrant Case* paragraph 71.

the concept of peremptory norms to trump over clearly established concepts like the consensual character of the jurisdiction of the ICJ[155].

A third common characteristic of these crimes is that their *jus cogens* character under international law cloaks them with obligations that are of an *erga omnes* nature[156]. What that means is that the obligations in question are owed to every member of the international community as a whole and not just to specifically determined or affected States. The ICJ in the *Barcelona Traction Case* set out to distinguish obligations *erga omnes* by stating:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations ***erga omnes*** (original emphasis).[157]"

For the ICJ in the *Barcelona Traction Case* obligations *erga omnes* were obligations arising from the outlawing of aggression, genocide, the basic rights of the human person including the protection against slavery and racial discrimination[158] and the ICJ in the later

[155] "In the present case the Court is confronted with a very different situation. The Court is not asked, in the exercise of its legitimate judicial function, to exercise its choice between competing sources in a manner which gives effect to a norm of *jus cogens*. On the contrary, it is asked to overthrow an established principle - that the basis of the Court's jurisdiction is consent - which is founded in its Statute (Art. 36), endorsed by unqualified State practice and backed by *opinio juris*. It is, in effect, asked to invoke a peremptory norm to trump a norm of general international law accepted and recognized by the international community of States as a whole, and which has guided the Court for over 80 years. This is a bridge too far... For this reason the Court, in the present instance, has rightly held that although norms of *jus cogens* are to be recognized by the Court, and presumably to be invoked by the Court in future in the exercise of its judicial function, there are limits to be placed on the role of *jus cogens*. The request to overthrow the principle of consent as the basis for its jurisdiction goes beyond these limits. This, in effect, is what the Court has held." Separate opinion of *ad hoc* Judge Dugard, *Armed Activities on the Territory of the Congo*, paragraphs 13 and 14.

[156] It should be noted that the concept of *jus cogens* and obligations *erga omnes* are not interchangeable. For one *jus cogens* deals with the status and character of a norm while the term *erga omnes* with the nature of the obligations. Not all obligations under norms of *jus cogens* are of an *erga omnes* character but when it comes to the the obligation to prevent or prosecute of international crimes as discussed above these obligation seem to have an *erga omnes* character to themselves. *For more on this issue see*: Maurizio Ragazzi, The Concept of International Obligations Erga Omnes, Oxford Monographs of International Law, Oxford University Press, Oxford, 2000, p. 190-210.

[157] Judgment of the International Court of Justice, *Case Concerning The Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belgium v. Spain, Second Phase) 5 February 1970, No. 50, paragraph 33. (further on the *Barcelona Traction Case*).

[158] *Barcelona Traction Case*, paragraph 34.

judgment in the *East Timor Case*[159] added the right of self-determination of peoples to that list. One of the consequences of the *erga omnes* character of peremptory norms is the fact that since the obligation is owed to every member of the international community, every State can be considered as individually affected by a breach of such an obligation and can call on the State committing such a breach to responsibility.

The Draft Articles on State Responsibility have specific provisions dealing with norms of a *jus cogens* nature and their *erga omnes* effect. Article 48[160] of the Draft Articles on Sate Responsibility deals with the invocation of responsibility by a State other than the injured State and, more specifically in paragraph 1(b), with obligations that are owed to the entire international community, namely, obligations *erga omnes*. In the Commentaries to Article 48 of the Draft Articles it is said that:

> "Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations […] All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such.[161]"

In case of a breach of a peremptory norm by States the institute of State responsibility is triggered, but with a twist. For example Article 41 states that "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.[162]" A further obligation is not to recognize any consequences that arise from the breach or give



[159] Judgment of the International Court of Justice, *Case Concerning East Timor*, (Portugal v. Australia), 30 June 1995, No. 84, paragraph 29 (hereinafter *The East Timor Case*).

[160] Article 48 Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(...)

(b) The obligation breached is owed to the international community as a whole.

[161] Commentaries to Article 40 of the Draft Articles on State Responsibility *in* Draft Articles on State Responsibility for Internationally Wrongful Acts with Commentaries, United Nations International Law Commission, Yearbook of The International Law Commission, 2001, vol. II, Part Two, paragraph 10, p. 322 (hereinafter Commentaries to the Draft Articles on State Responsibility).

[162] Article 40(1) of the Draft Articles on State Responsibility.

any assistance to the State that is in breach of a *jus cogens* norm[163]. In the Commentaries to Article 41(1) it is said that States have a positive obligation to cooperate in order to counter the effects of a breach of a peremptory norm. The cooperation in question may be through an international organization like the UN or it can be through a collective action by States and rather what the obligations under Article 41 of the Draft Articles call for, "in the face of serious breaches [of peremptory norms], is a joint and coordinated effort by all States to counteract the effects of these breaches.[164]" The only limit that is put on this cooperation to end a breach is that it has to be lawful meaning that States can not use unlawful means to give effect to that purpose. This obligation to cooperate is also extended to States that are not particularly affected by the breach[165].

### 1.9 CONCLUSION

This discussion presented thus far has shown that from the customary nature of international crimes arises a substantive duty of States to prevent or prosecute these crimes. Since this thesis deals with the part of prosecution I will focus on that part of the State's obligations. Because these are norms of criminal law the way to execute or enforce them is to put in place a process that would be able to provide for the establishment of the guilt or innocent of an individual. On the other hand, the *jus cogens* nature of these crimes also creates an obligation *erga omnes* of States towards the international community to prosecute individuals for these crimes. The narrowest obligation that would arise from these norms is the prosecution of individuals who have committed these crimes on the territory of the State

[163] Article 40(2) of the Draft Articles on State Responsibility.
[164] Commentaries to Article 41(1) of the Draft Articles on State Responsibility, paragraph 3, p. 287.
[165] Commentaries to Article 41(1) of the Draft Articles on State Responsibility, paragraph 3, p. 287.

in question or, if we go about the reasoning presented in the *Furunzjija case*[166], who are within its jurisdiction. The question that we might pose is what are the consequences if a State fails in its duty, either because it is unable or because it is just unwilling, to prosecute individuals who have committed these crimes?

One of the consequences would be the triggering of State responsibility for failure of an execution of an obligation that is owed to the "international community as a whole"[167] because of the *erga omnes* nature of the obligation. Another obligation, but this time of the international community since this is a breach of a peremptory norm, is the cooperation of States to counter the effects of the breach of the *jus cogens* norm[168] which in this instance is the obligation of the State to prosecute these international crimes. There are several ways that States can do this. One would be to cooperate in creating an *ad hoc* or a hybrid criminal tribunal, like the ICTY, the ICTR or the Sierra Leone Special Court, or make a reference through the Security Council to the ICC; another way would be a collective action, either through the UN or other regional or international organization or through a collation to provide assistance to the local government for effective prosecutions, when it is not able to prosecute these crimes, or to put pressure on the government to have prosecutions when it is unwilling to prosecute. But what if these efforts fail and the government of the State on whose territory the crimes have occurred or is in custody of the alleged perpetrator is still unable or unwilling to prosecute the individuals who have committed these crimes?

In that situation the logical conclusion is that, since these obligations arrive from norms that are, first of all, criminal law norms which are of a *jus cogens* nature and that have attached with them obligations *erga omnes*, the obligations of individual States would be that they can and should prosecute individuals that have committed these crimes. The obligation

[166] See footnote 142-143 above and the accompanying text.
[167] The *Barcelona Traction Case* paragraph 33, *see* footnotes 157 and 158 and the accompanying text above.
[168] *See* footnotes 162-165 and the accompanying text.

to take collective measures to counter the effects of the breach of a *jus cogens* norm is then transferred to individual States since the values that are protected by these norms are of interest to every individual member of the community of States. These states can call upon their obligation set out in Article 41(1) of the Draft Articles on State Responsibility[169] to counter the effects of the breach by taking over the responsibility for the prosecution of the individuals who have allegedly committed these crimes and assert jurisdiction even without the traditional nexus in criminal law jurisdiction and relaying simply on the universality principle. The State can claim that since it is specially affected by a breach of a *jus conges* norm with an *erga omnes* character then it can act in order to protect its interests and out of the duty to protect the interest of the international community of States in order to protect the values and principles of the community as a whole and punishing the violation of the international public order which is protected by these *jus cogens* norms.

In relations to the question why should States stop only at these crimes the answer would be that these crimes are, except for the crimes against peace, relatively well defined either in treaty or custom; they have been expounded upon in the case law of different international and national courts; their meaning is relatively certain in terms of the *mens rea* and *actus reaus*, existence or non-existence of a conflict an the other elements of the crimes; and they are relatively few in number in terms of types of crimes (six to be more precise, but the number might increase in the future dependant on whether another international crime reaches the level of seriousness and condemnation as these other crimes). These crimes are also crimes that go against the core values of the international community and the international public order. The expansion of the list of these crimes by individual States without the consent and condemnation of the wider community of States would diminish the value of these norms and the values that they protect not to mention the fact that it would

[169] *See* footnotes 162-165 and the accompanying text.

most likely bring the condemnation of other States that the criminal processes started under this expanded list of crimes have a political background and do not have a the interest of performing justice[170].



[170] *For more on the criticism of the dangers that universal jurisdiction presents from an international relations perspective see*: The Pitfalls of Universal Jurisdiction, Henry Kissinger, 80 Foreign Affairs 86, 2001.

## CHAPTER IV – THE ISSUE OF IMMUNITIES AS AN OBSTICALE TO UNIVERSAL JURISDICTION

This Chapter will look at the questions of immunities, the challenges that they present to universal jurisdiction and the ways around them. The issue of immunities will be presented through a case study of two prominent decisions of different courts. The first case is one of the most famous cases on universal jurisdiction where a decision was reached that a former head of State does not have immunity and therefore can stand trial for international crimes, namely, the *Pinochet case* decided by the House of Lords of the United Kingdom (UK). The second case, *The Arrest Warrant* case, was settled before the International Court of Justice (ICJ) and it also dealt with the questions of immunities, but this time of incumbent Ministers of Foreign Affairs. The ICJ in this case found that incumbent Ministers of Foreign Affairs have immunities from prosecution while in office. The ICJ in this case also gave an *obiter dictum* spelling out four instances when Foreign Ministers, incumbent or former, do not enjoy immunities. Both of these cases will be looked at critically in order to see the reasoning of the judges, the "black letter law" and the unsettled issues that were not tackled or were left unclear and vague by the different courts.

### 1.1 GENERAL NOTES ON IMMUNITIES

Immunities do not deal with jurisdictional issues in criminal matters, although a forum can be prevented from entertaining a case because the individual in front of it has a certain type of immunity from prosecution. Immunities do not deal with the links that the acts committed have with the forum of choice and are not part of the jurisdictional principles discussed in the previous Chapters (like the territorial principle). What immunities deal with

is the questions of insulating certain individuals from different types of procedures, be they civil, administrative or criminal. They can be found in proceedings both in front of national and international courts as well as foreign and domestic courts. The way that they work is by stopping a certain legal procedure from commencing or proceeding forward because of the delicacy of an issue or the nature of the functions of a individual and so. Both natural and legal persons can have immunities, and in international law that means individuals, States or international organizations.

Since this thesis deals with questions and objections raised to effective prosecutions of individuals who have committed international crimes under the universality principle it is important to answer how these objections related to immunities can be surpassed. The discussion in this Chapter will focus on that issue and will give insights in to the questions of how much do immunities frustrate an effective prosecution of international crimes under the universality principle.

This Chapter will generally deal with two types of immunities, personal immunities or immunities *ratione personae* and functional immunities or immunities *ratione materiae*. Immunities *ratione personae* are immunities afforded to individuals, namely heads of States and Governments, Ministers of Foreign Affairs and certain types of diplomatic personal[171] during their term in office. While the latter only have immunities in the receiving State, the immunities of heads of States and Governments and Ministers of Foreign Affairs are to be respected *erga omnes*, that is, in every State no matter whether the State official is on an official or private visit. Personal immunities are allotted to these individuals because of the nature of their office and the functions that they perform in international relations[172].



[171] The questions of immunities of diplomatic personal is governed by Vienna Convention on Diplomatic Relations of 18th April 1961 which is a widely excepted instrument, while the immunities of heads of States and Governments and Foreign Ministers by customary international law.

[172] Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 621-668; When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v.

The immunities of the heads of States date back centuries when the head of State was personified with the State itself and, therefore, bringing any kind of action, be it civil or criminal, against a head of State of another country would have been considered as bringing an action against the State itself[173]. This reasoning has been stated in almost all of the opinions of the Law Lards in the Pinochet judgments[174]. This may be an antiquated line of reasoning and today has generally been replaced by the idea that the reason behind these immunities for all the categories of individuals mentioned above is the role that they play in international relations. Namely, the need for maintaining the smooth machinery of international politics, which requires States to be represented at different forums, presses the need for creating privileges that these categories of individuals must have in order to perform their functions. These privileges can range from the freedom to travel, to conduct negotiations and talks, to be free of any pressures by other States, especially from their coercive apparatus, typically from law enforcement and judicial organs. This need of maintaining peaceful relations among nations is specifically mentioned in the preamble of the Vienna Convention on Diplomatic Relations of 18 April 1961 (VCDR)[175].

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Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002; Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case, Steffen Wirth, 13 European Journal or International Law 877, Oxford University Press, 2002.

[173] Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 622.

[174] It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself." Opinion of Lord Browne-Wilkinson in the Pinochet III.

[175] The States Parties to the present Convention,
Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,
Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Immunity *ratione personae* is a procedural immunity, meaning that a person enjoying it is inviolable, which includes both their person and their personal property, in civil, criminal or administrative procedures. They last while the individual is in office and they afford absolute protection[176]. For instance if a head of State is suspected of having committed a crime he/she can not be brought in front of a court in a foreign State. If a complaint is lodged against a head of State in front of a foreign court, the court simply has to conclude that that individual has immunity and dismiss the complaint until the immunity is still in place. Therefore immunities *ratione personae* only afford procedural defence. Once the individual has left his office immunities *ratione personae* are lifted and what is left is immunities *ratione materiae*[177].

Immunities *ratione materiae* are connected with the nature of the specific acts that these individuals perform. Namely immunities *ratione materiae* come in to play after the individual has left his/her office and it covers only those acts that have been performed in the individual's official capacity while leaves him/her open to actions brought against him/her for acts done in that individuals private capacity[178]. For instance, if a head of State signs a contract with a company for arms supplies he/she can not be sued for a breach of contract if the company is not paid, although it is his signature on the contract, because the signing of the contract was part of his/her official functions and duties as a head of State. On the other hand if the contract was for buying a personal summer home in another State than an action for a breach of contract can be brought against him/her in a foreign court after his/her term in office expires.

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Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention, (Preamble of The Vienna Convention on Diplomatic Relations of 18th April 1961).

[176] When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002.

[177] When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002.

[178] When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002.

In a criminal procedure immunities *ratione materiae* afford a substantive defence, meaning that the act committed in another State might be punishable by the State's internal or by international law, but the fact that the act was done in the individual's *de jure* or *de facto* official capacity clears the individual of the possibility of prosecution in front of a foreign State under the principle that one sovereign does not adjudicate the affairs of another[179]. The responsibility in that case is transferred to the official's State triggering State responsibility under international law rather than individual responsibility. Immunity *ratione materiae* can be invoked *erga omnes* meaning applicable towards all States.

The big question in relation to universal jurisdiction is whether international crimes, although committed while in office and using, or rather abusing, one's office, can be considered as official acts or not, and, even if they do fall under the category of official acts, does international law award immunity *ratione materiae* for them. To reiterate, immunities of individuals are a bar to prosecutions in any type of extraterritorial jurisdiction regardless of the nexus that is used to link the crime to the foreign forum. The issues immunities *ratione personae* and *ratione materiae* as well as the issue of official v. private acts were tackled in the cases that are described in some detail in this Chapter. The *Pinochet case* deals with immunities *ratione materiae* of former heads of States, while the *Arrest Warrant Case* deals with immunities *ratione personae* of incumbent Ministers of Foreign Affairs but as mentioned above also gives an *orbiter dictum* by the judges that can be used for both incumbent and former Ministers of Foreign Affairs[180].



[179] "basic principle of international law that one sovereign State (the forum State) does not adjudicate on the conduct of a foreign State. The foreign State is entitled to procedural immunity form the processes of the forum State. This immunity extends to both criminal and civil liability." Opinion of Lord Browne Wilkinson in Pinochet III.

[180] *For more on the issue of immunities see*: Ian Brownlie, Principles of International Law, fourth edition, Clarendon Press, Oxford, 1990, p. 329-340 and 355-361; Malcolm N. Shaw, International Law, fifth edition, Cambridge University Press, Cambridge, 2003, p. 621-668; When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002; Immunity for Core Crimes? The ICJ's Judgment in

## 1.2 THE PINOCHET CASE

### *1.2.1 Introduction*

In 1998 the former President of the Republic of Chile, Augusto Pinochet Ugarte, went on a trip to the UK to have a surgery, an operation that his doctors in Chile were reluctant to perform, mostly out of fear that, if they made a mistake, they would be in trouble. He was the former Head of State and, up until a few years ago, the most powerful man in Chile who literally had the power of life and death of everybody in the country in his hands. And there was another reason why he wanted to go to the UK, he wanted to travel[181]. His arrival in the UK sparked an avalanche of litigation that started in Spain some two years ago, in 1996. In Spain, a person filed an individual criminal complaint against Pinochet and an investigation was lunched. The investigating magistrate, judge Garzón, upon receiving information that Pinochet was in the UK and that he was going to be there for more than a day, prepared a provisional arrest warrant and an extradition request for a trial in Spain under various charges, among which, genocide and terrorism[182]. The stage was thus set for the trial of one of the most brutal dictators in the 20th Century.

### *1.2.2 The Background of the Case*



the Congo v. Belgium Case, Steffen Wirth, 13 European Journal or International Law 877, Oxford University Press, 2002.

[181] *For more see*: Naomi Roth-Arriaza, The Pinochet Effect – Transnational Justice in an Age of Human Rights, University of Pennsylvania Press, 2005.

[182] See: The Pinochet Papers – The Case of Augusto Pinochet in Spain and in Britain, edited by Reed Brody and Michael Rathner, Kluwer Law International, 2000, p. 58.

Augusto Pinochet Urgarte was a general in the Chilean Army and in September of 1973 organized a military coup that brought down the democratically elected leftist president. He also organized a military junta of which he was the leader and in 1974 became the President of Chile. During his reign he put in place a brutal regime in order to suppress his political opponents, human rights activist, and ordinary people who just did not like what they saw happening around them. He did this by arbitrarily detaining them, holding them without communication with their families, torture on a wide scale, and eventually killing them. This culminated in the organization of Operation Condor, an almost continent wide hunt for the political opposition in Chile, Argentina Uruguay, Paraguay, Bolivia and Brazil, who, alarmed by a spread of leftist opposition groups, linked their intelligence services. They were able to detain, for example, Uruguayan nationals in Chile or Paraguay and hold them there, torture them, and either send them to Uruguay and leave them there to their faith or they just made them disappear within the torture camps of the intelligence services[183]. The main coordinator of Operation Condor was the Chilean President, Augusto Pinochet.

When he was arrested in the UK the litigation for extradition began in the British courts which ended up with a decision of the House of Lords as the highest court in the land. There were tree separate decisions by the House of Lords delivered in the Pinochet case. The first decision allowed the extradition of Pinochet to Spain, but, because of the fact that later some links were found between one of the Law Lords (Lord Hoffmann) and Amnesty International, a human rights NGO that was involved as an interested party in the litigation, the Pinochet I judgment was set aside in the judgment of Pinochet II. The House of Lords in the Pinochet II judgment decided that because Lord Hoffman served as a director of one of the charities of Amnesty International he could be considered as personally interested in the

[183] *For more see*: Naomi Roth-Arriaza, The Pinochet Effect – Transnational Justice in an Age of Human Rights, University of Pennsylvania Press, 2005.

outcome of the case[184]. The House of Lords did not find the need to go in to the possibility of actual bias of Lord Hoffmann because it considered that his opinion was to be excluded *ex offcio.* Therefore, because no one can be a judge in his own case the opinion of Lord Hoffmann was set aside and a new hearing for the appeal was needed. The Pinochet III judgment also dealt with the extradition request from Spain. In this Chapter I will only analyze the Pinochet I and III judgments because they are the ones that deal with the notion of Universal Jurisdiction and the problems of immunity of former Heads of States for chargers of committing crimes under international law.

### *1.2.3 The Judgment*

The House of Lords delivered two decisions on the issue of whether the UK should allow for the extradition of Senator Augusto Pinochet Ugarte to Spain to face charges of torture and conspiracy to commit torture, hostage taking and conspiracy to take hostages and genocide[185]. Although a lot of subjects were touch upon in these judgments the main issue was about whether Pinochet, as a former head of State, is entitled to immunities *ratione materiae* in respect to international crimes and especially in respect to the crime of torture.

The Pinochet I judgment did not narrow the charges against Pinochet as the Pinochet III judgment did so the discussions presented there are more to the general point of immunities for former heads of State in front of domestic courts. The Pinochet I judgment was decided 3 to 2 for the extradition of Pinochet with the issue revolving around the



[184] "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own case should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." – Lord Brownie Wilkinson quoting Lord Campbell in the decision of *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759; *See*: The Pinochet Papers – The Case of Augusto Pinochet in Spain and in Britain, edited by Reed Brody and Michael Rathner, Kluwer Law International, 2000, p. 198.

[185] Opinion of Lord Browne-Wilkinson in Pinochet III.

question of whether the acts committed by Pinochet could be considered as official acts or private acts of heads of states, since if they were official acts then they would fall under the cover of immunity *ratione materiae*. Since the Pinochet I judgment was set aside in the Pinochet II judgement I will not present that discussion here, save to say that the opinions of Lord Slynn of Hadley and Lord Lloyd of Berwick were against extradition because they considered that the principle of *par in parem non habet imperium*[186] (one sovereign does not adjudicate on the affairs of others) enshrined through immunities *ratione materiae* as overriding the obligations and prerogatives of States to prosecute individuals for international crimes[187]. Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann, on the other hand, were of the opposite opinion, that is that the acts of Pinochet while he was in office were not part of what was understood as official acts of a head of state under international law, since torture, taking of hostages and genocide were not normal functions of a state[188]. The reasoning was that since these did not fall under the normal functions of a State because they

[186] Opinion of Lord Millet in Pinochet III.

[187] "…clearly international law does not recognise that it is one of the specific functions of a head of state to commit torture or genocide. But the fact that in carrying out other functions, a head of state commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great. I accept the approach of Sir Arthur Watts Q.C. in his Hague Lectures, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 Recueil des cours 56-57:
"A head of state clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as head of state, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other states whether or not it was wrongful or illegal under the law of his own state." Opinion of Lord Slynn of Hadley in Pinochet I.

[188] "In my view, article 39(2) of the Vienna Convention, as modified and applied to former heads of state by section 20 of the Act of 1978, is apt to confer immunity in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution. This formulation, and this test for determining what are the functions of a head of state for this purpose, are sound in principle and were not the subject of controversy before your Lordships. International law does not require the grant of any wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law." Opinion of Lord Nicholls of Birkenhead in Pinochet I.

were outlawed by international law they could not fall under the official acts of a head of state and therefore immunities *ratione materiae* could not be awarded for them.

In the Pinochet III judgment, on the other hand, the issues of immunities were looked through the prism of the Torture Convention and the central issue was not whether international law, or more precisely, customary internationally law, by making certain conducts criminal, had removed immunities *ratione materiae* from former heads of states, but whether that was done by the Torture Convention. Lord Browne-Wilkinson, in his opinion managed to reduce the counts of the Spanish courts to just the counts that contained acts of torture or conspiracy to commit torture after the adoption of the Act which incorporated the Torture Convention into UK's domestic law since only those crimes were extraditable crimes under UK law at the time of their commission[189].

For the Law Lords the Torture Convention took the centre stage since it provided them with a firm ground from where to start their arguments. For them it was not disputable that the crime of torture has achieved a status of international crime even before Pinochet came to power and not only that; it has achieved a status of a peremptory norm of international law[190]. But for them this was still not enough to override the immunities of *ratione materiae* and the principle that one sovereign does not adjudicate on the affairs of another. For most of the Law Lords it was not until the adoption of the Torture Convention that a mechanism was put in to place to try individuals for the crime of torture outside of their country:

[189] "The consequences of requiring torture to be a crime under UK law at the date the torture was committed are considered in Lord Hope's speech. As he demonstrates, the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 (the date on which s 134 came into effect) are not extraditable, ie only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and the single act of torture alleged in charge 30 are extradition crimes relating to torture." Opinion of Lord Browne-Wilkinson in Pinochet III judgment.

[190] "It was suggested by Miss Montgomery QC, for Senator Pinochet, that although torture was contrary to international law it was not strictly an international crime in the highest sense. In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention state torture was an international crime in the highest sense." Opinion of Lord Browne-Wilkinson in Pinochet III judgment.

> "What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal-the torturer-could find no safe haven."[191]

The way the Torture Convention did this, reasoned the Law Lords, was by stating that under international law torture could no longer be considered as a normal practise or functions of States and, therefore, torture committed by State officials, even one as high as heads of states, can no longer be considered as official acts of a state official while in office. For some of the Law Lords, the functions of a State are determined by international law and, consequently, the functions of a head of state as well. A head of state can only perform such functions as are within the realm of State functions under international law and since torturing one's own subject was no longer part of the functions of a State under international law it follows that torture is not a part of the official acts of a head of state and can not be said to be able to raise the shield of immunities *ratione materiae*[192]. Considering the acts of commission of international crimes by individuals in office as something that does not fall under the definition of official acts may cause problems especially in regards to the determination of State responsibility for the commission of those same crimes. If these acts were to be considered private acts then they would not trigger State responsibility since only acts performed in one's official capacity or under the colour of official capacity can trigger State responsibility something which will be discussed in the conclusion of this Chapter.



[191] Opinion of Lord Browne-Wilkinson in Pinochet III.

[192] "I consider, with respect, that the conclusion that after 29 September 1988 the commission of acts of torture was not, under international law, a function of the head of state of Chile does not involve the view that Chile is to be taken as having impliedly waived the immunity of a former head of state. In my opinion there has been no waiver of the immunity of a former head of state in respect of his functions as head of state. My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore, in this case, the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture." Opinion of Lord Hutton in Pinochet III judgement.

There is another line of reasoning presented by some of the Law Lords in which, according to international law, a former head of state can commit acts that are deemed criminal in his/her national law or in the national law of another State, but that that by itself does not mean that they are any less official and that are not part of the official functions of a head of state. An act being criminal in domestic law even if it is criminal in both states i.e. the State of nationality of the individual and the forum State does not mean that the forum State can adjudicate on the conduct of former heads of state for acts that were done in exercising his/her official functions. For foreign courts to do this would mean that they would scrutinize the internal policy decisions of a foreign State. These acts can only be challenged in the State of nationality of the head of state. For most of the Law Lords this was also true in respect to international crimes committed by heads of states when the forum State is not at the same time the State of nationality of the former head of state[193]. The fact that a crime was deemed an international crime and a crime of a *jus congens* nature did not mean that States other than the State of nationality can assert jurisdiction for prosecution of former heads of states since they were covered by immunities *ratione materiae* and in order for those immunities to be lifted they had to be withdrawn explicitly by the State of nationality of the former head of state.

There have been two conflicting conclusions that have been reached in regards to this point. One is the fact that the Torture Convention, by including the definition of Torture in Article 1 in which torture is defined among other things as being "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in



[193] "I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime." Opinion of Lord Browne Wilkinson in Pinochet III

an official capacity[194]", has been intended to include all state officials including heads of states[195]. Therefore Article 1 includes the explicit waiver or immunities of heads of states.

The other proposition that was put forward was the fact that, unlike similar conventions that define international crimes, for instance the Genocide Convention, the Statutes of the ICTY and ICTR, who have separate and explicit provisions that take away head of state immunity, the Torture Convention does not have that kind of a provision and therefore, nor has that kind of a provision ever been discussed during the drafting of the Convention. The conclusion, for Lord Goff of Chieveley at lest, was that it would be unthinkable that any of the delegations who were negotiating the convention would include a waiver of immunities for heads of states in the text of the convention in Article 1 and would not comment on it or make any mention of it in the *travaux priparatoires* or send notice to their respective Governments about the implications of these provisions. Since this was not the case, no waiver of immunity should be found in the Torture Convention[196] and consequently Senator Pinochet could not be extradited to Spain or to any other State whatsoever except to Chile, the country of his nationality.

[194] Article 1 of the Torture Convention

[195] It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty" Opinion of Lord Browne Wilkinson in Pinochet III.

[196] "It must follow, if the present argument is correct, first that it was so obvious that it was the intention that immunity should be excluded that a term could be implied in the convention to that effect, and second that, despite that fact, during the negotiating process none of the states involved thought it right to raise the matter for discussion. This is remarkable. Moreover, it would have been the duty of the responsible senior civil servants in the various states concerned to draw the attention of their governments to the consequences of this obvious implication, so that they could decide whether to sign a convention in this form. Yet nothing appears to have happened. There is no evidence of any question being raised, still less of any protest being made, by a single state party. The conclusion follows either that every state party was content without question that state immunity should be excluded sub silentio, or that the responsible civil servants in all these states, including the United Kingdom, failed in their duty to draw this very important matter to the attention of their governments. It is difficult to imagine that either of these propositions can be correct. In particular it cannot, I suspect, have crossed the minds of the responsible civil servants that state immunity was excluded sub silentio in the convention." Opinion of Lord Goff of Chieveley in Pinochet III.

Another line of reasoning was presented by one of the Law Lords, Lord Millett, who did not concentrate on the Torture Convention as the other Law Lords did, but rather on general customary international law. For Lord Millett the issue is not whether the Torture Convention created a mechanism in which the immunities of state agents were removed because the very existence of an international crime of a specific nature is sufficient for exercising extraterritorial jurisdiction. For him universal jurisdiction is authorized under international law and whether a State chooses to adopt it is up to its discretion[197]. But for universal jurisdiction to be authorized two criteria have to be satisfied:

> "First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria."[198]

For Lord Millett the offence of torture as defined in the Torture Convention would in the overwhelming number of cases be carried out by individuals who would be shielded by immunities *ratione materiae* i.e. by public officials in the exercise of their official functions. The definition in the Torture Convention would make no sense if the wall of immunities was raised so high since virtually no one or at least not the people most responsible could be punished under it.

> "In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."[199]



[197] "Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts." Opinion of Lord Millett in the Pinochet III.
[198] Opinion of Lord Millett in the Pinochet III.
[199] Opinion of Lord Millett in the Pinochet III.

For Lord Millett Senator Pinochet could be extradited for all counts relating to the offences of torture and conspiracy to commit torture "whenever and wherever carried out"[200]. The authorization of this was not the Torture Convention but the international crime of torture based on customary international law and its status of peremptory norm of international law.

## 1.3 THE ARREST WARRANT CASE

### *1.3.1 Background of the case*

The dispute between The Congo and Belgium started when a Belgium issued an arrest warrant or the arrest of Abdulaye Yeodia Ndombasi, then a serving Minister of Foreign Affairs of The Congo, for crimes against humanity and war crimes. The Congo submitted an application against Belgium in front of the ICJ in 2000 and the ICJ decided the case in 2002[201].

### *1.3.2 The Question of Immunities*

The Court during its deliberation decided to use the principle of judicial economy and focused only on the issue of immunities and not on universal jurisdiction feeling that it had a more clear point of law to contend with and make a ruling. This was helped in no small amount by both Belgium and the Congo when they stipulated that Belgium had the authority to prescribe universal jurisdiction in its laws[202].

[200] Opinion of Lord Millett in the Pinochet III.
[201] For more on the background of the case see Chapter II and the accompanying text.
[202] *The Arrest Warrant Case* paragraphs 41 and 46.

After settling the issues of standing and jurisdiction the Court went on to consider the merits of the case which, for the ICJ, revolved around the issues of: do incumbent Ministers of Foreign Affairs have immunities? And if they do then what is their scope? In an interesting leap of steps the Court declared that Ministers of Foreign Affairs have immunities and that these immunities are grounded in customary international law[203]. What it failed to do is to take most of its usual steps, when looking in to whether customary international law provides for immunities of Ministers of Foreign Affairs i.e. of looking for State practice and *opinio juris sive necessitatis.* The Court simply looked at the VCDR and the New York Convention on Special Missions of 8 December 1969 (CSM) and concluded that these two conventions do not cover the issue at hand, namely that the VCDR covers immunities of diplomatic personal and the CSM covers immunities of heads of States or Governments, Ministers of Foreign Affairs and other personal of higher rank when they take part of a special mission to another State. Therefore, for the Court any law that governed this issue must be found in customary law but it did not show any argument that this was rutted into State practice or whether it had *opinio juris*[204].

What the Court did do is to look at the nature of the office of Ministers of Foreign Affairs, and to find that that is the justification of their immunities. It reasoned that because Ministers of Foreign Affairs are charged with conducting the foreign affairs of their respective governments, that is that they are authorized to negotiate and conclude treaties i.e.



[203] On the other hand *ad hoc* judge Van den Wyngaert considers that both State practice and *opinio juris* that can support the existence of immunities of Ministers of Foreign Affairs is lacking. She considers that the absence of a case where a Minister of Foreign Affairs is put on trial is not a sufficient indication of a settled state practice but rather the that this practice can be explained by other reasons like courtesy, political considerations, practical concerns or lack of jurisdiction. For Judge Wyngaert the basis of immunities of Ministers of Foreign Affairs is the comity of nations not international law but there is no customary international law that awards immunities to Ministers of Foreign Affairs; Dissenting opinion of *ad hoc* judge Van den Wyngaert, *Arrest Warrant Case* paragraphs 13-19.

[204] "These conventions provide useful guidance on certain aspects of the question of immunities. They do not however, contain any provisions specially defining the immunities enjoyed by Ministers of Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the question relating to the immunities of such Ministers raised in the present case" *The Arrest Warrant Case* paragraph 52.

bind their Governments without the need for presenting credentials[205] and that they occupy a position that is similar to heads of States and Governments in the sense that they are recognized in international law as representing their States simply by the virtue of the office that they hold and, therefore, must have the freedom to travel or to be in communication with their diplomatic missions around the world or with other Governments whenever the need for that might arise. In order to accommodate this need of the international community, to establish and maintain friendly relations, Ministers of Foreign Affairs need to be endowed with immunities. As for the scope of the immunities the Court seams to conclude that because the functions of Ministers of Foreign Affairs are analogous to those of heads of States or Governments or heads of diplomatic missions they should be afforded the same types of immunities, namely immunities *ratione personae* and *ratione materiae*[206].

After establishing the customary nature of immunities of Ministers of Foreign Affairs the Court went on to conclude that *incumbent* Ministers of Foreign Affairs have immunities *ratione personae* and therefore they are protected from any "act of authority of another State which would hinder him or her in the performance of his or her duties".[207] In this sense for the Court there is no difference between acts performed in an official or private capacity, before or during the Minister's ascent to office, whether the incumbent Minster is on a private



[205] Vienna Convention on the Law of Treaties
Article 7
(…)
2. In virtue of their functions and without having to produce full powers the following are considered as representing their State:
(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.
[206] *The Arrest Warrant Case* paragraph 53.
[207] *The Arrest Warrant Case* paragraph 54.

or official visit in the State issuing the warrant or in a third State; the inviolability afforded by immunities *ratione personae* are absolute while the individual is still in office[208].

The court went on to say that event though this meant that an incumbent Ministers of Foreign Affairs enjoy absolute immunity that does not mean that this can lead to impunity. In an important *obiter dictum* in paragraph 61 of the judgment the Court gave an exhaustive list of instances when incumbent or former Ministers of Foreign Affairs can be tried for international crimes. Those instances are:

1. When the proceedings are brought in front of the national courts of the State in which the Minister holds his/her office. In this case international immunities that are afforded to them do not apply. What is applicable is the domestic law of the State;

2. In the case when the State where the Ministers holds his/her office waives that immunity;

3. When the individual ceases to be a Minister of Foreign Affairs than he/she does not enjoy immunities for acts performed prior or subsequent to the period that the individual was in office and while his/her period in office for acts that were not performed in his/her official capacity;

4. When the individual appears before international criminal tribunals like the *ad hoc* ICTY and the ICTR and the permanent ICC[209].

The third paragraph of the judgment's *obiter* is the only one that comes in to play with universal jurisdiction and, therefore, it is the only one that will be commented on in this Chapter. The Court clearly means that this refers to immunities *ratione materiae* and it spells out the scope of this kind of immunities. For the Court, a former Minister of Foreign Affairs can be tried for acts committed prior to his/her ascent to office and subsequent to his/her

[208] *The Arrest Warrant Case* paragraph 55.
[209] *The Arrest Warrant Case* paragraph 61.

leaving office of Minister of Foreign Affairs. This is understandable since these time periods have nothing to do with the reasons why Ministers of Foreign Affairs were awarded immunities in the first place. They were simply not representatives of their States.

The part of the *obiter dictum* which is most criticized is the part where the Court said that former Ministers of Foreign Affairs can not be prosecuted in front of foreign courts for acts committed in their official capacity while in office after they completed their term[210]. The problem of this *obiter dictum* of the Court was exacerbated by the ambiguity in the majority part of the judgment of the Court as to what acts can be considered to be official or private acts and in which category do international crimes fall in to. A hint of the Courts opinion can be seen in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal. For them, when explaining the meaning of point three of the judgment's *obiter dictum*, they said that they do not consider that serious international crimes, like war crimes and crimes against humanity, can be considered as "official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform"[211]. For them, State related motives are not the proper test for determining what constitutes public State acts. They support their opinion by citing judicial decisions as State practice[212].

I would respectfully disagree with such a conclusion. Following this line of reasoning would lead us to the conclusion that since these are not official functions of a State than whenever an official would perform these acts they would fall under the notion of private acts and are not something that can trigger State responsibility. To give an example, a widespread



[210] *See generally*: Dissenting opinion of *ad hoc* judge Van den Wyngaert, *Arrest Warrant Case*; When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, Antonio Cassese, 13 European Journal or International Law 853, Oxford University Press, 2002; Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case, Steffen Wirth, 13 European Journal or International Law 877, Oxford University Press, 2002.
[211] *See:* Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paragraph 85.
[212] *See:* Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paragraph 85

practice of torture can be conducted by the intelligence apparatus of a State with the acquiescence or order of a Minster of Foreign Affairs, but because torture is a serious international crime it does not fall under "normal" functions of a State and are done as private acts of the official, and therefore, it does not trigger State responsibility. In the case of war crimes, the likely direct perpetrators are the armed forces of a State and one can hardly say that the use of force is not one of the normal functions of a State.

On the contrary use of force by a State is something that we have known to associate as the visible *jure imperii* of a State. Using force, conducting investigations, holding individuals in detention is part of the normal functions of a State, but when a State engages in such functions it has to respect certain international standards and obligations. Not respecting them does not make them any less of functions of the *jure imperii* of a State; it just means that that State has breached its international obligation. If these kinds of acts of State officials are not State functions then what kind of acts are they? They certainly do not fall under the commercial or private acts. To equate them with the normal buying and selling of goods and property by State officials diminishes the seriousness of these acts.

Under the Draft Articles on State Responsibility[213] prepared by the UN's International Law Commission State responsibility can be triggered if there is a breech of an international obligation by a State and if that breach can be attributed to the State[214]. In order for a breach of an international obligation to be considered as attributable to the State the act must be performed (in most cases although there are several exceptions as shown in Articles 9, 10 and 11 of the Draft Articles) by its State organs regardless of the State's internal organization or



[213] Commentaries on the Draft Articles on State Responsibility prepared by the International Law Commission on its fifty-fifth session in 2001 published in the *Yearbook of the International Law Commission*, 2001, vol. II part two (further on *Draft Articles on State Responsibility*).

[214] Article 2 Elements of an internationally wrongful act of a State from the Draft Articles on State Responsibility

There is an internationally wrongful act when conduct consisting of an act or omission:

a) Is attributable to the State under international law; and

b) Constitutes a breach of an international obligation of that State.

law[215]. An action of a State official can trigger State responsibility even if the acts were unauthorized or *ultra vires*[216]. If one has to draw the line between private and official acts then one has to look at whether the State officials acted with apparent authority or not[217]. For an act of an organ or an official to be considered to be private it has to be "so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributed to the State"[218]. This relatively high threshold was put in to place so that States can not take refuge behind the argument that the act was committed contrary to the laws, practices or instructions issued to its officials and, therefore, not attributable to it. This can not be the case even if the organs of that State disavow the acts of an official.

### 1.4 CONCLUSION

The ICJ in the *Arrest Warrant Case*, using the rule of judicial economy, delivered a short but not a very clear judgment. The Court should be congratulated for establishing the customary rule that awards immunities to Ministers of Foreign Affairs and through that to

[215] Chapter II of the Commentaries of the Draft Articles gives the example where even though some States may consider their police forces to be distinct from the executive part of the Government simply because the perform a public function and are prime example of the *jure imperii* of the State. For the ILC internal law can be useful in determining whether an act can be imputed to a State it, nevertheless, is not the only criteria to govern this issue.

[216] Article 7 of the Draft Articles

**Excess of authority or contravention of instructions**

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions; *and see* "(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question. Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it." Commentaries to Article 7 of the *Draft Articles on State Responsibility* paragraph 2, p. 99.

[217] "this indicates that the conduct…comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omission of individuals who happen to be organs or agents of the State." Commentaries to Article 7 of the *Draft Articles on State Responsibility* paragraph 8, p. 102.

[218] Commentaries to Article 7 of the *Draft Articles on State Responsibility* paragraph 7, p. 102.

other high state officials. The need for establishing and preserving peaceful and friendly relations also pushes forward the need for immunities of Ministers of Foreign Affairs and other high ranking state officials. Where the Court erred, in my opinion, is in the definition of the scope of those immunities and especially in the ambiguity it created around the notion of official versus private acts of former state officials.

The notion of immunities for official acts of former state officials should still be considered as part of international law. The problem arises when state officials, namely Ministers of Foreign Affairs, commit serious international crimes while in office by using, or rather abusing their official authority. To exclude these acts from the notion of official acts would also exclude them from the possibility that their perpetration can trigger State responsibility for internationally wrongful acts.

The exit strategy is in the reasoning that: yes, these should be considered official acts and therefore can be attributed to the State, but that this does not preclude the possibility of prosecution. The serious nature of the crimes that would fall under the notion of universal jurisdiction also means that they can trump over immunities for former State officials for acts committed in their official capacity. Crimes against humanity, war crimes, torture, slavery and piracy are considered to be international crimes of a *jus cogens*[219] nature and an argument can be made that they can override immunities *ratione materiae*. The fact that a former State official no longer holds office means that he/she does not need the immunities provided by international law because the rational for awarding immunities does not exist any more. The State official no longer requires to have the freedom to travel, to be in contact with his/her respective Government, does not need to be free to meet with other officials of different States for sake of maintaining friendly relations etc. In this case it could be said that the value

[219] For more on the discussion on international crimes as *jus cogens* norms see the Conclusion of Chapter III above and the accompanying footnotes.

of ending impunity for such serious crimes that have the status of *jus cogens* norms overrides the residual value of the principle that one sovereign does not adjudicate on the affairs of another, since in this case we are talking about former State officials. These crimes are outlawed by international law and attract the condemnation of the entire community of States, they are *contra legem*; in another word they are criminal and their commission gives rise to individual criminal responsibility under international law. It is worth noting that this should only apply for the most serious international crimes that have attained the status of *jus cogens*, For other "normal crimes", even international crimes, that are not *jus cogens*, like taking of hostages, the rational of immunities for former State official and the principle of one sovereign does not judge on the affairs of another should be applicable.

This was also the gist of the majority of the Law Lords in the Pinochet judgment, although, when allowing for the extradition of Senator Pinochet to Spain, they used various avenues to get to that conclusion. The fact that all of the States involved were a party to the Torture Convention made the decision somewhat easier by saying that the Convention provided for a mechanism of extraterritorial jurisdiction for the crime of torture and the waiver of immunities or for the creation of a system in which no torturer could find a safe haven by hiding in a foreign country. For some of them, for instance Lord Goff of Chieveley, immunities of serving heads of states, and now if we abide by the ICJ's decision in the *Arrest Warrant Case*, heads of governments and Ministers of Foreign Affairs, have also attained the equal status of these crimes i.e. the status of *jus cogens* norms[220]. But once a head of state or other state officials are removed from office then the rationale for awarding immunities to these officials is lost and the seriousness of the crime as well as the international condemnation of it overrides the concerns of States not to be put under the scrutiny of other

[220] "The jus cogens character of the immunity enjoyed by serving heads of state ratione personae suggests that, on any view, that immunity was not intended to be affected by the convention." Opinion of Lord Hope of Craighead in the Pinochet III.

States in terms of their official acts and policies, in short in the way they run their own business[221].

It is a problem if the acts by which heads of state or other high ranking government officials commit international crimes are considered by default as private acts because the rational behind the whole sovereign immunities concept is put on its head. In the case of *United States v. Noriega*[222] the Federal Court for the district of Florida had to decide whether to apply the act of state doctrine to Noriega, a *de facto* dictator of Panama and dismiss the case of to continue with the criminal trial for drug trafficking committed by Noriega while a *de facto* dictator. The Court reasoned that, being a *de facto* dictator or not, the acts that Noriega performed were not acts of state officials in the exercise of their duties. The Federal Court reasoned that not every act that is performed by a head of state or a public official can be considered as an official act[223] but only those acts that are performed for the furtherance of the interests of one's State and not for one's personal interests, like improving one's financial status as it was the case of Noriega.

The fact that an act was committed in one's official capacity does not mean that the act was not criminal under international law when it was committed. As it was said in Lord Millett's opinion in the Pinochet judgement, the seriousness of certain international crimes, like genocide, crimes against humanity, war crimes, torture, piracy and slavery overrides any concerns that arise in terms of immunities of former State officials. Immunities of serving State officials, meaning immunities *ratione personae*, may be of the same rank as these

[221] "It is just that the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the convention are so strong as to override any objection by it on the ground of immunity ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available." Opinion of Lord Hope of Craighead in the Pinochet III.

[222] Judgment of the United States District Court for the Southern District of Florida, *United States of America, Plaintiff v. Manuel Antonio Noriega, et al., Defendants*, 746 F. Supp. 1506, 1990, U.S. Dist. 8 June 1990, hereinafter *US v. Noriega.*

[223] "Defendant does little more than state that, as the de facto ruler of Panama, his actions constitute acts of state. This sweeping position completely ignores the public/private distinction and suggests that government leaders are, as such, incapable of engaging in private, unofficial conduct." *US v. Noriega* p. 1522.

international crimes, but once a state official has stepped (or has been toppled) down his/her immunities are only related and limited to "ordinary crimes" performed in the exercise of their official functions and not to crimes of such a serious nature as to be universally condemned by the international community and to have achieve the status of *jus cogens*. Acts that commit these crimes do not become private acts just because they are criminal under international law as suggested by some Law Lords in the Pinochet III judgment or by judges Higgins, Kooijmans and Buergenthal expressed in their separate opinion[224]. It is just that these crimes are of such a serious nature as to override any concerns of residual immunities awarded to these individuals in the form of immunities *ratione materiae*.

Unfortunately the ICJ is very reluctant to use the notion of *jus cogens* in order to override other established norms of international law. As discussed in conclusion to Chapter III above the ICJ in *Armed Activities on the Territory of the Congo* the ICJ seems to imply that the overriding effect of the *jus cogens* nature of these crimes only has that effect over norms that are related to the substantive provisions of these crimes. In the case of *Armed Activities on the Territory of the Congo* the ICJ found that the reservation that Rwanda made to Article 9 of the Genocide Convention could not be overridden by the *jus cogens* nature of the crime since the issue of jurisdiction was of a procedural nature and was not part of the object and the purpose of the Genocide Convention and its substantive provisions[225]. This case is actually the fist time that the ICJ has, in a majority decision, specifically entertained



[224] "It is now increasingly claimed in the literature … that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of ***Io*** *Congreso del Partido* (1978) *QB* 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public state acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions" Joint separate opinion of judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case*, paragraph 85.

[225] *See*: *Armed Activities on the Territory of the Congo*, paragraph 67.

the idea of peremptory norms[226] and in it the ICJ is reluctant to use the concept of *jus cogens* to override established rules of international law such as the one of the consensual jurisdiction of the ICJ when entertaining cases[227]. It left to be seen whether the ICJ in future cases will be more open to using arguments connected with *jus cogens* norms that are not related to its jurisdiction and will start using them to trump other norms of international law outside of the concept of treaty law as established by Articles 53 and 64 of the VCLT and use them to protect or uphold the core values of the international community from which they seem to emanate[228]. Hopefully the Court will not be so reluctant in future cases.



[226] *See*: Normative hierarchy in International Law, Dinah Shelton, 100 American Journal of International Law 292, American Society of International Law, 2006, p. 305.
[227] Separate opinion of *ad hoc* Judge Dugard, *Armed Activities on the Territory of the Congo* paragraphs 13 and 14, *see* footnote 155.
[228] Separate opinion of *ad hoc* Judge Dugard, *Armed Activities on the Territory of the Congo* paragraph 10 *see* footnote 150 above.

## CONCLUSION

This thesis explores some of the practical issues of universal jurisdiction in terms of discussing some of the legal challenges that have popped up over the years in the attempts to practise it and giving answers to them. This thesis tries to answer questions like: what is universal jurisdiction? Is universal jurisdiction legal? What crimes are associated with it and why these crimes and not others? Is universal jurisdiction obligatory to all States or is it just an option? What are the limits of universal jurisdiction and why some classes of individuals are protected from its reach? Is that protection temporary or permanent?

The definition of universal jurisdiction given in this thesis tries to go beyond the pure technical definition of jurisdiction and the separation of jurisdiction to prescribe and jurisdiction to enforce and adds an element of quality by adding the requirement of seriousness of the crime and its universal condemnation. This qualitative element adds a limitation to the type of crimes that would be considered to fall under the universal jurisdiction concept.

One of the issues discussed in this thesis is the issue of whether States that assert universal jurisdiction over crimes that have not been committed on their territory or that do not have any of the traditional jurisdictional links violate international law; in other words is universal jurisdiction legal? The conclusion is that the black letter law that was spelled out in the *Lotus case* applies here, meaning that States are free to prescribe for themselves a jurisdiction that is as broad or as narrow as they see fit so long as that does not conflict with a prohibitive norm of international law. One such prohibitive norm is that States can not exercise jurisdiction on the territory of another State with out that State's consent. This is inline with the concept of the international system as one constituted of independent and

equal States in which the freedom of States to act and prescribe their own conduct is only limited by prohibitive norms of international law contrasted to the positivistic view of the international systems where States only have those prerogatives that are prescribed by international law[229]. The conclusion is that States are free to prescribe their jurisdiction as they see fit and for crimes that they see fit but they can not enforce their law on the territory of another State without that State's consent.

As discussed in Chapter III the character of the norms governing these crimes is *jus conges*, which shows the seriousness and the condemnation of the international community as well as the values that they protect as stated in the ICJ's *ad hoc* judge Dugard's separate opinion[230] in the case of *Armed Activities on the Territory of the Congo*. It is this *jus cogens* status of the crimes which obligates States to cooperate when a breach of these norms occurs. States can do this by pressuring the territorial State to have prosecutions for individuals who commit these crimes or by setting up an international tribunal for the same purpose. But, if this duty of States to cooperate in order to counter the effects of a breach of peremptory norms is not met, then this obligation is left to the individual States themselves. This is because of the nature of the values and principles that these norms protect, which are the core values and principles of the community of States. These values and principles enshrined in *jus congens* norms need to be protected and since these norms are also of an *erga omnes* character, meaning that the obligations that they entail are owed to every other State or to the international community as a whole, then every State is individually affected and has the right to protect itself and the duty to protect the interests of the community of States as a whole. The way to do this, since these are breaches that are committed by individuals, is to go



[229] The majority decision in the ICJ's *Arrest Warrant case* does not have any pronouncement on this issue but the discussion is presented in the Separate opinions of judges Higgins, Kooijmans and Buergenthal, opinion of Judge Guilleme, dissenting opinion of *ad hoc* judge Van den Wyngaert. Judges Higgins, Kooijmans and Buergenthal and *ad hoc* judge Van den Wyngaert took the former position while judge Guilleme took the latter position.

[230] Separate opinion of *ad hoc* Judge Dugard, *Armed Activities on the Territory of the Congo*, paragraph 10.

after and prosecute them. Foreign States may not bring another State in front of their courts but they can certainly try individuals under one of the extraterritorial principles and, consequently, under the universality principle. But again the duty to cooperate would also oblige other States to render assistance through the normal mechanisms of judicial cooperation to the State that has taken up on itself to prosecute these crimes.

Not all crimes should fall under the universal jurisdiction principle even though they might have achieved customary and *jus cogens* status. One example of this is the crime of aggression (or crimes against peace) where, although it has reached a status of customary norm and universal condemnation in terms of a prohibition of aggressive war, it still lacks an agreed definition of what conducts would fall under the notion of aggression. This lack of an agreed definition or elements of crimes and the lack of any cases since the end of WWII would put the prosecution of this crime in violation of the principle of legal certainty and *nullum crimen sine lege* (no crime without law) as well as under the suspicion of a politically motivated prosecution.

The possibility of having politically motivated trials has been voiced out as one of the strongest criticisms of universal jurisdiction. The argument goes that once the door is opened for States to try high ranking officials of other States, even ones that have left office, than this could lead to prosecutions that are purely motivated out of political reasons like settling scores between nations[231]. A further argument would be that this would leave the mechanisms of internal crisis or conflict resolution to the judicial review of other States because other States might chose not to abide by general amnesties provided for facilitating an end to a conflict like the mechanism set up in the South Africa truth commission[232].



[231] The Pitfalls of Universal Jurisdiction, Henry A. Kissinger, 80 Foreign Affairs 86, 2001, p. 92.
[232] The Pitfalls of Universal Jurisdiction, Henry A. Kissinger, 80 Foreign Affairs 86, 2001, p. 90.

One of the answers to these criticisms is that the principle of universality as seen in this thesis is only an obligation in terms of a stop gap measure of a last resort when other mechanisms of cooperation among States have failed and the international community has not acted in the face of obvious atrocities. States rarely chose to prosecute unless they feel that they are protecting their own interest or when are pushed by their own civil society or by resolute groups of individuals. It is highly unlikely given the risk of political backlash on the international stage that States will radically pursue the doctrine of universal jurisdiction. The dilemma is presented: that we either take human rights seriously, which means that consistent prosecutions and punishment is sought for perpetrators of gross human rights violations, or we just pay lip service to them and accommodate and exclude the highest ranking State officials from prosecution and punishment[233]. The answer, for me at least, is clear; the fight against impunity for such gross human rights violations is worth the risk that the principle of universality might be abused to settle political scores between nations. The growing interdependency between States and the reaction mechanism of international relations to such political calculation will serve to minimise the possibility of such abuses.

A further issue that is discussed in this thesis is the issue of immunities for high ranking State officials, namely heads of states, heads of governments and Ministers of Foreign Affairs. Although immunities are not related to the mechanism of choosing a forum for prosecution, nevertheless, if the doctrine of universal jurisdiction is to be a viable measure for fighting impunity ways to circumvent the challenges that immunities present need to be addressed.

The ICJ, for instance, in its *Arrest Warrant Case* extended the immunity enjoyed by heads of states to other high ranking state officials and gave a dictum in which it stated that

[233] This dilemma is presented in: Is the Bell Tolling for Universality, Antonio Cassese, 1 Journal of International Criminal Justice 589, Oxford University Press, Oxford, 2003, p. 595.

former high ranking State officials have immunity *ratione materiae* for prosecutions in front of courts of other States for acts committed in their official capacity. As I have said this concept, if we take the explanation in the separate opinion of Judges Higgins, Kooijmans and Buergenthal in paragraph 85 – that the commission of serious crimes can not be considered to be official acts – would mean that the commission of these crimes can not trigger state responsibility.

I believe that this should not be the case. Rather the approach should be taken that serious international crimes can be committed while performing the official functions of one's office but that they are what their name says – criminal – they are contrary to international law and that individual responsibility should be the result of their commission. The *jus cogens* nature of these crimes should be seen as overriding the residual considerations to the doctrine of "one sovereign does not adjudicate on the affairs of another" and the reluctance of courts to put the internal policy decisions of another State under their review. High ranking state officials still enjoy immunities for "ordinary crimes" i.e. crimes, international or otherwise, that are not of such a serious nature as to be considered as having *jus cogens* status. The values protected by these *jus cogens* norms can be seen as central to the stability of the international system and therefore should be given higher consideration than norms governing immunities *ratione materiae*. The immunity *ratione personae* was never put in to dispute and in the Pinochet III judgment it was said that they were of the same, *jus cogens*, status as serious international crimes.

To shortly summarize, universal jurisdiction is within the power of States to prescribe under international law subject to limitations of prohibitive rules of international law, but States should constrain themselves to international crimes of the most serious nature which have achieved a *jus cogens* status and who have the necessary legal certainty in the definition

of the conduct that they consider criminal. States can not prosecute high ranking State officials while they are still in office because of the need for preserving peaceful and friendly relations among States but they can prosecute high ranking officials for serious crimes of international law once they have left office.

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