



# **UNIVERSAL JURISDICTION ONLY FOR THE INTERNATIONAL CRIMINAL COURT**

by Farid Nabili

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**PROFESSOR: Karoly Bard**

Central European University

1051 Budapest, Nador utca 9.

Hungary

## **Abstract**

The Thesis, accepting its legality under international law, argues that states should be forbidden to exercise universal jurisdiction and, instead, international jurisdiction should be conferred upon the International Criminal Court in order to entitle it to prosecute crimes within its subject matter jurisdiction, no matter wherever, by whom and against whom the crimes were committed.

The thesis bases its arguments on two problems which its proposal would solve; these are: problems with the ICC's current jurisdictional status and problems attached to universal jurisdiction when exercised by states.

The thesis concludes that not only this proposal would have solved two main problems, but this would also, to a great degree, reduce political intervention into international criminal justice and increase its efficiency.

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## Introduction

*The aim of this paper is to argue that not the states, but the International Criminal Court<sup>1</sup> should be authorized to exercise universal jurisdiction<sup>2</sup>, this would solve problems attached to the conditions of the exercise of jurisdiction of the Court and problems associated with the universal jurisdiction of States, then the confinement of political intervention into international criminal justice to the minimum at least and increase in its efficiency would ensue.*

After the first unsuccessful endeavors to create an international criminal court before the II World War, the UN decided to start working on this issue again, after the WW II<sup>3</sup>. The goal was clear – to establish a permanent and independent international criminal court to deal with the most serious international crimes. However, political situation in the world and cold war intervened and the plan only was commenced again in the late 80s and early 90s parallel to the creation of Ad Hoc Security Council Tribunals. And finally, the Statue of the International Criminal Court<sup>4</sup> was adopted in Rome only in 1998 and came into force in 2002.

The idea of entitling the ICC to a jurisdiction on universality principle is not new. During the Rome conference, German delegation proposed jurisdiction for the Court on universality principle which based on the assumption that, under international law, the crimes within the subject matter jurisdiction of the Court (i.e. genocide, crimes against humanity and war crimes) were already within the ambit of universal jurisdiction applicable by any State and the Court

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<sup>1</sup> Hereafter will be referred as “the ICC” or as “the Court”.

<sup>2</sup> Universal jurisdiction should be understood as universal criminal jurisdiction, applicable by states and by international criminal tribunals here. However, throughout the Paper, in order to differentiate the terms, universal jurisdiction will be used while referring to states’ practice and international jurisdiction in regard to the jurisdiction of the ICC – both as jurisdiction based on universality principle. See Chapter2, Section 1 for more information on terminology and definition.

<sup>3</sup> On the establishment of international criminal tribunals, including the International Criminal Court, see A.Cassese. International Criminal Law. § 18. (2003) (Hereafter Cassese.)

should be entitled to be in the same position as States<sup>5</sup>. As a result of hard negotiations, under article 12 of the Rome Statute of the International Criminal Court (Hereafter as Rome Statute), it was agreed that the Court may exercise its jurisdiction when the crime is committed on the territory of the member state to the Rome Statute or when the perpetrator is the national of the member state, or when the situation in question referred to the Court by the United Nations Security Council (SC) or when a non party State *ad hoc* accepts the Court's jurisdiction.

This outcome of the Rome conference on the Court's jurisdiction was heavily criticized by Kaul, Sadat, Williams, Bekou and Cryer, among others. However, it seems that, the international community is satisfied with the current jurisdictional status of the ICC and there is a hope that, as more states join the Rome Statute as fewer problems attached to the conditions of the Court's exercise of jurisdiction will remain.

Moreover, current opposition to the Court, particularly from the US<sup>6</sup> mainly due to the Court's jurisdiction over non -Party States<sup>7</sup> brought about a discussion on this matter and might have affected to shift the topic of discussion from the jurisdiction based on universality to the even limited one- jurisdiction over non party State nationals. Among the few critics of the

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<sup>5</sup> E. Wilmshurst. *Jurisdiction of the Court in The International Criminal Court, the Making of the Rome Statute: Issues, Negotiations, Results*. Ed. By Roy S. Lee, at 139-140 (1999) (If the proposal was accepted, the Court would have jurisdiction over the crimes within its subject matter jurisdiction, committed in any State by any national in the world) (hereafter as Wilmhurst)

<sup>6</sup> US is not a Party to the Rome Statute. For the full position of the US and its criticisms of the ICC, See for example, CRS Report for Congress. *U.S. Policy Regarding the International Criminal Court* (updated Aug. 2006) available at <http://www.fas.org/sgp/crs/misc/RL31495.pdf>

<sup>7</sup> Under the Article 12.2 of the Rome Statute, the Court can exercise its jurisdiction when the alleged crime is committed on the territory of a member State and the perpetrator and the victim could be national of any State, no matter whether that particular State is a party to the Statute (or has accepted its jurisdiction *ad hoc*) or not. However, David Scheffer, who headed the US diplomatic delegation to the Rome Conference, has argued that, the Statute should be interpreted to limit the jurisdiction of the Court with respect to the crimes committed on the territory of a State Party against nationals of a State Party. See William A. Schabas. *An Introduction to the International Criminal Court*. 79 & n.75 (2007) (Hereafter as Schabas)

jurisdiction over non party State nationals Scheffer and Morris could be named as the most influential writers.<sup>8</sup>

All the above mentioned discussions are interrelated with the general principle of universality and derive from it. It can be inferred that those who support the principle of universal jurisdiction would not find it problematic for the Court to enjoy international jurisdiction (Bassiouni, Cassese, Reydam, Broomhall, Goldstone, Colangelo, Albin Eser). However, after the Rome Conference it has not been written much supporting the universality jurisdiction for the ICC., probably because the matter was already discussed and agreed during the Conference. Few exceptions to name would be Head of German Delegation at the Conference, Kaul, who expressly supported universal jurisdiction, other above mentioned critics (except Bekou and Cryer) of the Court's jurisdiction who raised issues that<sup>9</sup>, the perpetrators might go unpunished under the Court's current jurisdiction and also those (Kirsch, Scharf, Danilenko and others) who have opposed the criticism over the Court's jurisdiction over non – Party, relying on the theory of

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<sup>8</sup> As the issue of jurisdiction over non party States would be relevant where international jurisdiction is conferred upon the ICC, it should be mentioned that Scheffer had noted that "Vienna Convention on the Law of Treaties states clearly that treaties cannot bind non-party states--particularly with respect to treaty-based international institutions" and therefore article 12.2 of the Rome Statue, by entitling the Court to jurisdiction over nationals of non party States where the crime was committed on the territory of a party State contravenes the Vienna Convention. However, this argument was correctly responded by Scharf by pointing out that the Rome Statue does not oblige non party States no any action, such as providing evidence or any other form of cooperation. Hence, it does only bind (i.e. applies its subject matter jurisdiction over them) the nationals of the State concerned, not the State.

The Thesis agrees with Scharf and takes the position that under delegated universal jurisdiction or any other new treated based jurisdiction, international jurisdiction can be conferred on the ICC. However, the aim of the thesis is not to argue for "international jurisdiction for the ICC" from this perspective, that international law would allow it, so it should be done. Rather the thesis analyzes the issue from "problem-solution" perspective.

See David Scheffer. *The international Criminal Court: The Challenge of Jurisdiction*. 93 Am. Soc'y Int'l L. Proc. 70 (1999); Michael P. Scharf. *The ICC's Jurisdiction over the Nationals of Non-Party States in The United States and the International Criminal Court*. Edited by Sarah B. Sewall and Carl Kaysen. 220 (2000)

<sup>9</sup> O. Bekou, R. Cryer. *The International Criminal Court and Universal Jurisdiction: A close Encounter?* 68 Int'l & Comp. L.Q. 52 (Jan. 2007) (hereafter Bekou and Cryer) (Even though the authors mention problems with the current jurisdiction of the Court, they conclude by stating that "...owing to the difficulties that passing universal jurisdiction would have created in practice, and the hostility it would probably have caused to the ICC and to universal jurisdiction, whether for these reasons or not, the drafters in Rome probably got it right"

delegated universal jurisdiction (i.e. since any State has universal jurisdiction, they can too delegate it to an international criminal court)

This thesis takes the position of supporters of universal jurisdiction for the ICC (and those who would not find it problematic under international law) and agrees with the critics of the Court's current jurisdictional status<sup>10</sup>, but also agrees with the problems associated with universal jurisdiction, raised by Cassese, Reydam, Fletcher, Kontorovitch and others.

In other words, these positions taken serve to argue that universal jurisdiction should be exercised by the ICC only and no State should have such a right. Hence, these are also arguments.

The note this Thesis advances, is similar to the idea of an article by Bottini<sup>11</sup>, where he also proposes that, universal jurisdiction of States should be replaced by international jurisdiction of the ICC<sup>12</sup>, mainly due to the problematic nature of universal jurisdiction of States. But he also mentions that, the Court should also be permitted to use its jurisdiction on universality bases.

This Thesis, supporting the Bottini's proposal not only will discuss and analyze problematic nature of universal jurisdiction of States, but also discusses the problems attached to the Court's current jurisdiction (conditions of exercise) in details, warning that it is even more problematic than the critics have pointed out and will demonstrate how empowering the Court with jurisdiction based on universality principle can solve all these problems. This would greatly limit political intervention into international criminal justice and increase its effectiveness.

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<sup>10</sup> Critics of the Court could also include those who do not agree with the Court's jurisdiction over non-party State nationals, but critics here should mean those who are not satisfied with the conditions of the Court's exercise of jurisdiction since, there are still dangers that the perpetrators might go unpunished and question of "selective justice". This will be discussed in Chapter 1, Section 2.

<sup>11</sup> Gabriel Bottini. *Universal Jurisdiction after the Creation of the International Criminal Court*. 36 N.Y.U. J. Int'l L. & Pol. 503 (2004) (Hereafter as Bottini)

<sup>12</sup> He differentiates terms "universal jurisdiction" and "international jurisdiction", but both base on the universality principle and should be understood as synonyms. See pg. 19

The paper is composed of two Chapters, which are also two arguments for “international jurisdiction for the ICC”- two problems the ICC would solve if it were entitled to international jurisdiction and the States banned to exercise universal jurisdiction.

First Chapter will be dedicated to the ICC, its jurisdictional status and problems thereof. First Section of the first Chapter will describe the significance of the Court, which will include needs for the creation of an international criminal court and hopes attached to it and point out what makes it significant and different from other international criminal tribunals. The Second Section will demonstrate the problematic nature of the exercise of the jurisdiction of the Court in the sense that the Court is not able to meet the hopes attached to it and the solution would be entitling it to exercise its jurisdiction on universality principle.

The second Chapter of the thesis is discussing the principle of universal jurisdiction. First section of this Chapter presents the general theory of universal jurisdiction. Then the chapter, in its second section, proceeds to present and analyze the problematic nature of universal jurisdiction when exercised by States and argue that these problems would be neutralized by the ICC with its international jurisdiction, if the States were forbidden to use universal jurisdiction after it is conferred upon the ICC.

The reason for writing this thesis is the belief of the Author that justice must be isolated from the politics (even though it is not always possible) and everyone should be equal before international criminal law.



# Chapter 1 International Criminal Court: Its significance and problems attached to its jurisdictional status

This Chapter will serve to present the first argument for international jurisdiction for the ICC.

First Section of the Chapter will describe the significance of the Court, which will include needs for the creation of an international criminal court and hopes attached to it and point out what makes it significant and different from other international criminal tribunals. The Second Section will demonstrate the problematic nature of the exercise of the jurisdiction of the Court in the sense that the Court is not able to meet the hopes attached to it and the solution would be entitling it to exercise its jurisdiction on universality principle, this would then limit political intervention into international criminal justice.

## 1.1 Significance of the International Criminal Court

“The International Criminal Court reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted.”

Professor M. Cherif Bassiouni<sup>13</sup>

The concept of establishing an international criminal court capable of prosecuting individuals who have allegedly committed core international crimes dates back to 1899, the First Hague Convention for the Pacific Settlement of International Disputes<sup>14</sup>. Nevertheless, after the WW I, the victorious allies allowed Germany to prosecute its own nationals for alleged war crimes. However, Germany held “little more than show trials”<sup>15</sup> and most of the guilty criminals

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<sup>13</sup> Professor M. Cherif Bassiouni was the Chairman of the Drafting Committee, United Nations Diplomatic Conference on the Establishment of the International Criminal Court (Rome, 15 June- 17 July 1998). This Statement is from his speech delivered at the Ceremony for the Opening for Signature of the Convention on the Establishment of an International Criminal Court, Rome, 18 July 1998

<sup>14</sup> Schabas, *supra* note 7, Chapter I. Creation of the Court.

went unpunished. After WW II, the victorious allies created Nuremburg Tribunal and the International Tribunal for the Far East to try German/Japanese criminals accused of commission of crimes against humanity, war crimes and crimes against peace, which was criticized as “victor’s justice”<sup>16</sup>. While looking at the creation of the International Criminal Court (ICC), one should always take into consideration the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR), since they had great affect on the creation of the ICC. Nevertheless, due to political reasons this idea of creating an international criminal court did not turn into reality until 1998.

The need for an international criminal court was clear: Due to incapability or unwillingness of national courts, the perpetrators of serious international crimes were going unpunished. The reasons for this lay with the widespread nature of such violations and involvement of state or military officials and leaders in these atrocities.<sup>17</sup> Since the end of WW II until 1998, there have been about in 250 conflicts and around 170 million people have died in these conflicts and in violations of tyrannical regimes<sup>18</sup>. But all the perpetrators of these crimes, with few exceptions (e.g. some were tried and punished by the ICTY and ICTR), have not been brought before justice and have remained unpunished<sup>19</sup>. These concerns were restated in the Preamble of the Rome Statute of the International Criminal Court:

...Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured, [and later]

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<sup>15</sup> W. C. Austin, A. B. Kolenc. *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Symmetric War*. 39 Vand. J. Transnat’l L. 294. March (2006)

<sup>16</sup> *Id.*; See also *infra* note 3

<sup>17</sup> P. Kirsch. “*The Role of the International Criminal Court in Enforcing Criminal Law*.” 22 Am. U. Int’l L. Rev. 540 - 42 (2007)

<sup>18</sup> See M. Cherif Bassiouni. *Crimes against Humanity in International Criminal Law*. 554. (2<sup>nd</sup> Revised Ed. 1999) (Hereafter Bassiouni 1999)

<sup>19</sup> *Id.*

Determined to put and end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...<sup>20</sup>

Moreover, it can also be expressed that the ICC was meant to respond to criticisms such as “victor’s justice” and “selective justice”<sup>21</sup> and ensure that everyone would be equal before justice no matter what his/her status is. Articles 25 (individual criminal responsibility) and 27 (irrelevance of official capacity) embody such provisions to ensure equality of everyone before the justice. Particularly, Paragraph 2 of Article 27 is of great importance: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

The establishment of the ICC was, *per se*, a significant event, especially as the century old idea finally became a reality. One of its important aspects is that the ICC has the power to prosecute individuals who have committed crimes of genocide, war crimes and crimes against humanity. This did not exist in international relations for along time, only state responsibility was accepted and this power is conferred on the International Court of Justice. However, the ICC as an independent and impartial court of international character which will prosecute individuals, basing on criminal law principles and guarantees fair trial rights.

Another important note in relation to the ICC is that it is a permanent court; this makes it different from previous international criminal tribunals which had special missions<sup>22</sup>, such as International Military Tribunal Nuremberg and Allied tribunals in occupied Germany, International Military Tribunal Tokyo and Allied tribunals in the Far East (the former was established to punish war criminals who were acting in the interests of the European Axis

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<sup>20</sup> Adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (Hereinafter Rome Statute)

<sup>21</sup> See e.g., K. J. Fisher. A Review of Bringing Power to Justice? The Prospects of the International Criminal Court by J. Harrington, M. Milde, R. Vernon (2006). 38 Ottawa L. Rev. 117 (2006-2007) (book review);

For e detailed analysis of selective enforcement of international law, see Bassiouni 1999, *supra*, note 6, at 547-554

<sup>22</sup> However, According to Article 11 of the Rome Statue, the Court has jurisdiction only with respect to crimes committed after the entry into force of its Statue, which is 1<sup>st</sup> of July 2002.

Countries<sup>23</sup>, the latter for Far Eastern war criminals<sup>24</sup>), the ICTR (with temporal jurisdiction covering 1 January 1994- 31 December 1994<sup>25</sup>), the ICTY (with temporal jurisdiction extending to a period beginning on 1 January 1991<sup>26</sup>). All these previous tribunals had a mission and all were dissolved or will be dissolved after the cases before them are closed.

Furthermore, in contrast to the ICTY and the ICTR, the territorial jurisdiction of the Court will cover all Member States, and its personal jurisdiction extends to citizens of all the members states. Hence, the Court may try alleged criminals on one of these bases. In comparison, the jurisdiction of the ICTY and the ICTR was based on territorial bases; jurisdiction of the former extends to the territory of the Former Yugoslavia, and the latter to Rwanda and neighboring states.

As to personal jurisdiction, the ICTY may prosecute anyone who has allegedly committed crimes within its subject matter jurisdiction, satisfying territorial and temporal jurisdiction requirements described above. The ICTR may also try any accused person, but only if the crime was (allegedly) committed on the territory of Rwanda, *contra*, only Rwandan citizens may be brought before the ICTR for the crimes allegedly committed on the territories of the neighboring states, again meeting all other jurisdictional requirements (Article 1, ICTR Statute).

In sum, the creation of the ICC was itself a significant event, a first step in making the hope that no international criminals will benefit from impunity reality. However, the Court's success will depend on how much support it gains from the states and how it operates. Currently, 106 states are party to the Rome Statute<sup>27</sup>. Nevertheless, in the next section of this paper the

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<sup>23</sup> Article 6, Charter of the International Military Tribunal

<sup>24</sup> Article 5, Charter of the International Military Tribunal For the Far East

<sup>25</sup> Article 7, Statute of the International Criminal Tribunal For Rwanda

<sup>26</sup> Article 8, Statute of the International Criminal Tribunal For the Former Yugoslavia.

<sup>27</sup> See the official web-site of the ICC: <http://www.icc-cpi.int/statesparties.html> (as of march 18 2008) (the 106<sup>th</sup> Member- Republic of Madagascar ratified the Rome Statute on the 17<sup>th</sup> of March 2008 and the Statute will enter into force on 1 June 2008)

problems with the ICC's jurisdiction will be presented, it would be easier to observe what the international community is hoping from the ICC and how great importance the world has attached to the creation of the ICC when we take a look at Kofi Annan's statement:

Our hope is that, by punishing the guilty, the ICC will bring some comfort to their surviving victims and to the communities that have been targeted. More important, we hope it will deter future war criminals, and bring nearer the day when no ruler, no State, no junta and no army anywhere will be able to abuse human rights with impunity.<sup>28</sup>

The next Section demonstrate why the current status of the Court's jurisdiction makes it unable to meet the hopes attached to it – the problems attached to the exercise of its jurisdiction and how entitling the Court to an international jurisdiction would solve this problem.

## ***2.2 Problems attached to the Court's exercise of jurisdiction***

The previous part of the thesis presented the great hopes, in the sense that no perpetrator of international crimes will go unpunished and law will no longer be applied on selective bases due to political aims, were attached to the ICC and how significant the ICC is. This part of the thesis will describe the current jurisdictional status of the ICC, particularly preconditions for the exercise of its jurisdiction and discuss why the ICC is currently unable to realize these hopes. All of these will demonstrate the problems associated with the Court's exercise of jurisdiction, and it will be clear how authorizing The ICC would solve these problems.<sup>29</sup>

As stated above, the Rome Statue entered into force on July 1 2002, and 106 states are parties to it. According to Articles 1 and 4 of the Rome Statue, the ICC is a permanent international legal personality with the power to exercise its jurisdiction over persons who have

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<sup>28</sup> Statement made on 19 March 2002, see Department of Public Information - News and Media Services Division - New York on <http://www.un.org:80/ffd/pressrel/19b.htm> (last visit 8 march 2008)

<sup>29</sup> For purposes of this Thesis, only those problematic sides of the exercise of the ICC's jurisdiction will be raised, that could be solved if the Court was given international jurisdiction.

committed most serious international crimes and this power is exercised complementarily to national criminal jurisdictions.

Currently, the ICC has jurisdiction over the crime of genocide, crimes against humanity and war crimes and this jurisdiction is limited to most serious crimes of concern to the international community (Art. 5.1)<sup>30</sup>.

Article 17, sets forth conditions of admissibility, and makes clear what the “complementary” status of the ICC means, albeit not explicitly using the term of “complementarity”<sup>31</sup>. The Court may declare the case admissible and commence the exercise of its jurisdiction when the State in question is “unwilling or unable genuinely to carry out the investigation or prosecution” (Article 17.1), if (Article 13):

- a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor [of the ICC] by a State Party in accordance with article 14<sup>32</sup>;
- b) A Situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;
- c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

According to Article 12.1, the Court may exercise its jurisdiction if one or more of the following States are Parties to the Rome Statute:

- The State on which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- The State of which the person accused of the crime is a national.

<sup>30</sup> According to Article 5.2, the ICC has jurisdiction over the crime of aggression; however it can only be exercised after the member states agree on the definition of aggression and conditions under which the Court may exercise its jurisdiction over this crime.

<sup>31</sup> See M. Bezning. *The Complementarity regime of the International Criminal Court: International Criminal Justice between State Sovereignty and Fight against Impunity*. Max Planck UNYB 7, at 591-632 (2003) (for a detailed analysis of the complementarity regime of the ICC)

<sup>32</sup> See full text of the Rome Statute on the ICC Official web-site: <http://www.icc-cpi.int/legaltools/> (as of 16.03.08)

Any State not party to the Rome Statute, by declaration may accept the jurisdiction of the Court with respect to the crime in question, under Article 12 (3). The Court may also exercise its jurisdiction when a situation in any State referred to the Court by the Security Council pursuant to Article 13 (b)<sup>33</sup>.

Problematic nature of the Court's jurisdictional status is due to Article 12 of the Rome Statute – Preconditions to the exercise of jurisdiction. As seen from the above described conditions, the Court, on its own, without Security Council intervention, can only try cases when either a) the territorial state, on which the alleged crime has been committed, or b) the state, whose citizen has allegedly committed the crime is party to the Rome Statute. It implies that, when the State in question is not a member to the Rome Statute and the crime was committed by its national on its territory there is a possibility that the perpetrator will go unpunished if the situation is not referred to the ICC by the Security Council. This might, obviously, happen when the perpetrator is not prosecuted by domestic courts of the state in question. It is also easy to assume that, when national judiciary, due to some political reasons, is not willing to prosecute the perpetrator (e.g. the crime is committed by high officials or by their order), there are almost no probability that the State in question – a non member State – will lodge a declaration before the Court and accept its jurisdiction. A similar anxiety was raised by S. Williams:

It is a serious gap that the acceptance of the [Rome] Statute by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC. It is this provision that would have ensured that atrocities will not go unpunished if the territorial State or the State of nationality are not parties or do not consent *ad hoc* and there is no UN SC referral.<sup>34</sup>

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<sup>33</sup> Situation in Darfur, Sudan – a non party State- was referred by SC in 2005 (S/RES/1591) to the Court, and currently 2 cases (of this situation) are pending before the Pre-Trial Phase.

See Official Web Site of the ICC: <http://www.icc-cpi.int/cases/Darfur.html> (for more information)

<sup>34</sup> S. Williams. "Article 12" in The Commentary on the Rome Statute of the International Criminal Court. Edited by O. Triffterer, 341 (1999)

The Head of the German diplomatic mission to the Rome Conference, Kaul, had expressed that most of the conflicts which lead to international crimes are of internal-war character, and in such circumstances, when the custodial State is not a member State and when there is no *ad hoc* consent and no SC referral, “perpetrators of core crimes will have nothing to fear from the ICC”<sup>35</sup>. Hence, usually, after such conflicts one side who won the internal war takes over the State, and crimes, such as crimes against humanity, are never prosecuted by the domestic courts as the perpetrators become the officials. Kaul not only notes the possibility that the perpetrators might go unpunished, where neither the State of nationality of the perpetrator, nor the territorial state, where the crime was committed, is party to the Rome Statute (or has not accepted it *ad hoc*) and no referral by the Security Council, but also criticizes it from a universal equality approach<sup>36</sup> and has advocated for pure universality principle<sup>37</sup>. He points out that, universal jurisdiction<sup>38</sup> for the ICC would have also served these ends:

1) It could have avoided attempts by States so exclude their nationals from the Court’s jurisdiction;

2) It could have avoided unequal opportunities for States to be able to bring cases before the ICC without any blocking or filtering of cases by the Security Council, particularly by Permanent Members.

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<sup>35</sup> Hans-Peter. Kaul, ‘*Preconditions to the Exercise of Jurisdiction*’ in Antonio Cassese, Paula Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 583 (Volume I, 2003 (hereafter as H-P. Kaul)

<sup>36</sup> *Id.* 586

<sup>37</sup> Currently, the ICC can exercise international jurisdiction, has any situation in the world been referred to it by the SC. This can also be called as quasi- universal principle. Universality principle this thesis advocates is not dependant on any condition of such, the mere commission of crimes within the subject matter of the Court should enable it to exercise its jurisdiction and prosecute the alleged perpetrator without prejudice to (the primacy of) national criminal jurisdictions.

<sup>38</sup> It should be understood as international jurisdiction, sine some authors do not distinguish these 2 terms meaning both are jurisdiction on universality principle.



There may too be many similar scenarios also, for example, genocide is conducted to a minority by the majority ethnic nation in power in a State, and again if the State in question is not member to the Rome Statute and when there's no SC referral, the perpetrators will go unpunished. This leads to say that, in similar cases, the fate of the perpetrator will be decided by the SC members, particularly by 5 Permanent Member States. Hence, the position of one of the Permanent Member States will decide whether the perpetrators of core international crimes should go unpunished or not. This is a serious flaw of the Rome Statue that, core criminal case will be decided by a political body, the Security Council.

Bekou and Cryer, rightly, agreeing with the above expressed anxiety, rightly, further the consideration in respect to international peace, as the ICC was not entitled to universal jurisdiction, but just on the territoriality and nationality principles:

As the preamble of the Rome Statute claims, international crimes are said to ‘ threaten the peace, security and well-being of the world’ and ‘ the most serious crimes of concern to the international community as a whole must not go unpunished’ [citation omitted] Therefore, the refusal of the drafters of the Rome Statute to grant the ICC universal jurisdiction may be criticized not only on the basis that the jurisdictional regime of the Statute means that some offences may go unpunished, but also that the creators of the ICC failed to endow it with the mandate it needs in relation to assisting in the maintenance of international peace and security.<sup>39</sup>

Similar consideration would be the case of “traveling tyrants”<sup>40</sup>, perpetrators of core international crimes (e.g. ex dictators) would be traveling or moving to non party states to avoid the jurisdiction of the ICC, and might go unpunished due to criminal law provisions of the State or some other “close” relations with the State moved to. Again, it should be noted that these considerations are relevant when there is no Security Council referral.

<sup>39</sup> Bekou and Cryer *supra* note 9, at 56

<sup>40</sup> Quoting L. N. Sadat, *Id*

There are also fair enough criticisms that, when there is no basis of jurisdiction for the ICC on territoriality or nationality of the perpetrator of the member State, the SC would refer situations in those countries which can not resist it (obviously this State would not be a Permanent Member of the SC, e.g. neither the ICC, nor SC can do anything to unpunished perpetrators of international crimes in China or Russia since they are not party to the Rome Statute), thus selective enforcement of justice would again be the question.<sup>41</sup>

Concerns were raised over the possible misuse of Article 12 (3) – accepting the Court’s jurisdiction on an *ad hoc* basis – i.e. for political aims, due to vague expression of “with respect to crimes in question”<sup>42</sup>. However, Rule 44 (2) of the Rules of Procedure and Evidence improved this controversy by stating that:

...[T]he Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has a consequence the acceptance of jurisdiction with respect to crimes referred in article 5 of relevance to the situation and the provisions of Part 9 [of the Rome Statute – International Cooperation and Judicial Assistance], and any rules thereunder concerning States Parties, shall apply.

This Rule ensures that the case will be considered by the ICC as a situation, and alleged crimes to be considered by the Court might be committed by anyone, not only including aims of the accepting States. *Ad hoc* jurisdiction, nevertheless, may be used to ensure the guilty does not escape justice, e.g. in an international conflict, when a state is attacked by another and crimes committed on its territory, will probably be impossible for the attacked State to prosecute.

The role of Rule 44 (2) in respect to this presumed problem derived from article 12 (3) is expressed by a writer as following:

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<sup>41</sup> See e.g. D. Johnstone. *Selective Justice for Failed States Only. Do We Really Need an International Criminal Court?* In Online Journal CounterPunch: <http://www.counterpunch.org/johnstone01272007.html> (last visited 17/03/08) The author continues her criticism that, when a member State is not willing to prosecute the alleged perpetrator, and since the ICC has no police power, if it asks the SC for assistance by military, this would be contrary to the provisions of the Preamble of the Rome Statute by being an instrument to provide pretexts for war, rather than to keep the peace.

<sup>42</sup> See Schabas, *supra* note 7, at 78-81 (for a discussion on the acceptance of jurisdiction by a non-party State)

The introduction of Rule 44 brought some clarification as to the telos and functioning of ICC's ad hoc jurisdiction. This Rule addressed, in particular, the problem of “asymmetric liability,” which had generated doubts about the design and feasibility of ad hoc jurisdiction under Article 12(3). Furthermore, Rule 44 made it clear that instead of being a one-sided treaty stipulation in favor of third states, Article 12(3) must be applied in the light of the general features of the ICC system, such as the principle of reciprocity and the Statute's hostility toward the politicized use of the Court.<sup>43</sup>

It should also be taken into account that, the mere acceptance of the Court's jurisdiction on *ad hoc* bases does not automatically trigger the proceedings or investigations. This is not the same as referral of a situation by a member State under article 15. Hence, in *ad hoc* jurisdiction, the Prosecutor of the ICC plays an important role and decides whether to commence investigations or not.<sup>44</sup> For instance, a non-Member State, Côte d'Ivoire, has lodged an application declaring that it accepts *ad hoc* jurisdiction of the ICC, but the Prosecutor has said that the mission to Côte d'Ivoire will be sent “when security permits”<sup>45</sup>. Thus, since a state accepting the Court's jurisdiction on ad hoc basis can not commence investigation on its own initiative, possibilities of abuse of article 12 (3) even in the existence of Rule 44(2)-situation might be totally one sided and political- will primarily depend on the Prosecutor's position.

Another problem with the determination of the Court's jurisdiction would stem from Article 124, according to which a State may opt out and declare that for 7 years after the entry of into force of the Rome Statute for the state concerned, it does not accept the jurisdiction of the Court with respect to war crimes committed by its nationals or on its territory<sup>46</sup>. The Court will have to face a conflict of provisions of jurisdiction when e.g. a national of a member State, which

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<sup>43</sup> C. Stahn, Mohamed M. El Zeidy, H. Olásolo. *The International Criminal Court's Ad Hoc Jurisdiction Revisited*. 99 Am. J. Int'l L. 431 (2005)

<sup>44</sup> After the Prosecutor decides that there is a reasonable basis to proceed with an investigation, he submits the case to the Pre-Trial Chamber of the Court, and may only commence an investigation after its authorization. (Article 15 of the Rome Statute)

<sup>45</sup> Schabas, *supra* note 7, at 80 (quotation from Sixth Diplomatic Briefing of the International Criminal Court)

<sup>46</sup> See E. Wilmschurst. Jurisdiction of the Court in *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results*. Ed. By Roy S. Lee, at 139-140 (1999) (hereafter as Wilmschurst)

has opted out, commits a war crime on the territory of another member State. However, this can be solved by interpretation of the Rome Statute by its judges.

Some problems may also rise while deciding the territory and nationality of the accused and as the Court has jurisdiction when the accused is the national of a member State or has allegedly committed a crime on the territory of a member State. As to the territory, it is said that 50 % of international boundaries are disputed, particularly when there are conflicts are going on over the territory, the Court will not be able to determine the territory or boundaries<sup>47</sup>. As to the nationality of the accused, it was claimed that it would be difficult to determine the Court's jurisdiction where the nationality of the accused is not certain or where the accused has more than one nationality<sup>48</sup>.

Possible problems with territory would be impossible for the Court to solve, when its decision would lead to determination of an international border or would lead to take side in conflicts over the territory in question. But these problems with territory seem to be a very rare one.

However, possible problems with the nationality of the accused would be possible to solve by interpreting the Statue or applying an analogy of accepted criminal law provisions.

To conclude, under Rome Statute currently in force, there still remains a danger that the perpetrator might go unpunished and application of law on selective basis ("selective justice") is still a relevant concern and there is too much possible political intervention by the Security Council.<sup>49</sup> However, if the Court were given international jurisdiction as the German Proposal, all these problems would be irrelevant, since the Court would have jurisdiction over crimes

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<sup>47</sup> Schabas, *supra* note 7, at 76-77

<sup>48</sup> M. Frulli. "*Jurisdiction Rationae Personae*" in Antonio Cassese, Paula Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*. 536 (volume I, 2003)

<sup>49</sup> Security Council's role described in this chapter is only about the preconditions of the exercise of jurisdiction of the ICC, however in general, there are more possible SC interventions in the Court's functioning. See e.g. Article 16 of the Rome Statute.

wherever they are committed by anyone and against any national in the world, of course relying on complementarity regime. There would also be no need for a Security Council referral in order to authorize the Court with jurisdiction when it does not have one, this would have greatly limited political intervention into criminal justice.

This first Chapter presented the first argument for “the international jurisdiction for the ICC”. The next Chapter will present the second argument.

## Chapter 2 Universal Jurisdiction over international crimes

This Chapter will present the theory of universal jurisdiction of States and demonstrate and discuss problems attached to it. The aim of the Chapter is to demonstrate that the States should not enjoy universal jurisdiction and the only body with jurisdiction on universality principle should be the ICC.

### 2.1 The Principle of Universal Jurisdiction<sup>50</sup>

In this section general theory of jurisdiction on universality principle will be presented.

Before defining universal jurisdiction, it should be noted that, “universal jurisdiction” and “international jurisdiction” are 2 different terms; the former refers to the jurisdiction of national courts and latter to the jurisdiction of international tribunals, such as the ICC, regarding core international crimes.<sup>51</sup>

Currently, there is no global convention on criminal jurisdiction or universal jurisdiction. Thus, there is no consensus over the detailed definition of universal jurisdiction among scholars, as well. The reason behind it is clear; although, almost all modern scholars agree on the existence of universal jurisdiction<sup>52</sup>, they have not reached same conclusion on its scope and content. As a consequence of this and difference in the practice of national courts, different definitions of universal jurisdiction and different types of universality ensue. It is also worth to note that, those

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<sup>50</sup> Universal jurisdiction should be understood as universal criminal jurisdiction for the purposes of this thesis, albeit similar provisions might also be relevant for universal civil jurisdiction.

<sup>51</sup> See Bottini, *supra* note 11, at 513-14 (2004), (for a more comprehensive discussion on the differences between these terms); Leila N. Sadat defines the terms as universal interstate jurisdiction (i.e. applicable by states) and universal international jurisdiction (i.e. applicable by an international criminal court). Leila N. Sadat. *Redefining Universal Jurisdiction*. 35 New Eng. L. Rev. 245, 256 ( 2001)

<sup>52</sup> A rare exception is AP Rubin (Ethics and Authority in International Law (1998)). Citing from L Reydam's. Universal Jurisdiction, International and Municipal Perspectives. Note 2. p.28 (2003) (Hereafter Reydam's)

scholars who oppose the idea of universality are among the ones who have accepted its existence, but deny its efficiency for various reasons.<sup>53</sup>

According to Cassese, the principle of universal jurisdiction “empowers any State to bring to trial persons accused of international crimes, regardless of the place of the commission of the crime, or the nationality of the author or of the victim”<sup>54</sup> Nevertheless, this definition excludes one type of universal jurisdiction described by .Reydam. Hence, according to Reydam’s study, the 1<sup>st</sup> version of universal jurisdiction is called as The Co-operative General Universality Principle, which implies that, *custodial State* (a state where the offender can be found) can prosecute alleged perpetrators of serious crimes only on subsidiary bases, when the extradition is impossible due to some reasons not related to the commission of the crime.<sup>55</sup> This version covers not only international crimes, but all serious offences (obviously including international crimes), which are severely punishable in most states. The 2<sup>nd</sup> version of Reydam’s universality principle, the Co-operative Limited Universality Principle, coincides with the 1<sup>st</sup> version of Cassese’s universality principle- the narrow notion- Conditional Universal Jurisdiction, according to which, only the State where the accused offender of international crime is found can try him/her.<sup>56</sup> The 2<sup>nd</sup> version according to Cassese, -broad notion of universality- is Absolute Universal Jurisdiction, under which any state may prosecute the alleged perpetrators of international crimes wherever they are, matching with Reydam’s 3<sup>rd</sup> version of universality – the Unilateral Limited Universality Principle.

Bassiouni and Oxman believe that the “purest” definition of universal jurisdiction is the jurisdiction exercised by “national legal systems without any connection to the enforcing state

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<sup>53</sup> Next Section of this chapter is discussing this in more details

<sup>54</sup> Cassese, *supra* note 3, at 284

<sup>55</sup> See Reydam, *supra* note 52, at 28-42, (analyzing the versions of the universality principle)

<sup>56</sup> See Cassese, *supra* note 3, at 285-291 (presenting versions of universality)

other than the presence of the accused”<sup>57</sup> and heinousness of the committed crime. However, again, this definition leaves out the 2<sup>nd</sup> version described by Cassese, since it includes nexus to the presence of the accused in the territory of the state willing to exercise universal jurisdiction. Even though the next definition by the said authors characterized as “super pure” because it excludes the presence of the accused, it demonstrates that as long as different types (according to state practices, or according to scholarly writings) of universal jurisdiction exist, it is impossible to define universal jurisdiction in clear enough detail.

A General definition in the Princeton Principles on Universal Jurisdiction is given as following:

...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.<sup>58</sup>

As to the exercise of universal jurisdiction, Principle 1.2 sets forth a precondition that, any “competent and ordinary juridical body of any state” can exercise this jurisdiction, “provided a person is present before such judicial body”. Thus, even though request for extradition is recognized as a basis to bring the accused before the court, trial in absentia is not accepted. It implies that, the Princeton Principles favors conditional universal jurisdiction.

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<sup>57</sup> Citing from C. Randall, Book Review, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*. Edited by S. Macedo (2004). 99 Am. J. Int'l L. 294 (2005)

<sup>58</sup> Principles 1.1. For full text of the Princeton Principles on Universal Jurisdiction see: [http://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](http://lapa.princeton.edu/hosteddocs/unive_jur.pdf) (hereinafter as Princeton Principles)



Although, which international crimes should be subject to universal jurisdiction is a matter of discussion and many views exist on this<sup>59</sup>, the rationale behind the universal jurisdiction is clear;

These crimes pose such a threat to international community that, every state has a right to prosecute perpetrators of these serious international crimes, as *hostis humani generis*-enemy of mankind, in the interest of the international community, even though the crimes is not directly related to that particular state.<sup>60</sup> This similar rationale was expressed by the Supreme Court of Israel, in *Eichmann Case* in 1962, when first time in history a person charged with crimes against humanity was tried in a State on universality principle:

Not only do all these crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundation. The State of Israel therefore was entitled, pursuant to the principle of universality of jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. (At 304)<sup>61</sup>

As this Thesis is about empowering the ICC with international jurisdiction, I take the position that, the universal jurisdiction in general should, at least, include the current enforceable crimes under the subject matter jurisdiction of the ICC – genocide, crimes against humanity and war crimes.<sup>62</sup>

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<sup>59</sup> See e.g., S. Brown. *Evolving Concept of Universal Jurisdiction*. 35 New Eng. L. Rev. 384 (2001) (quoting different views on this discussion)

<sup>60</sup> C. Bassiouni expresses the rationale of the exercise of universal jurisdiction as following:  
 (1) (N)o other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) there is an interest of the international community to enforce. Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community.

(C.Bassiouni. *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*. 42 Va. J. Int'l L. 96 (2001) (Hereafter Bassiouni Article )

<sup>61</sup> Cassese states that, it could also be argued that this case was not based on pure universality bases, since most of the surviving victims and their relatives were in Israel. Cassese, *supra* note 3, at 293

The principle of universal jurisdiction can be built on conventional (*aut dedere aut judicare* principle of various conventions and on *jus cogens* norms<sup>63</sup>) and on customary international law<sup>64</sup>, which form its legitimacy. Although this thesis does not discuss the legitimacy (e.g. interpretation of conventions, reasonings of case law et cetera) of universal jurisdiction much in details, the following subchapter of the thesis will touch on this matter while presenting the problematic side of universal jurisdiction.

As seen in this section, universal jurisdiction is a matter of question under international law. The matter has not been settled by international law, yet. However, in 2002, in the Arrest Warrant Case (Democratic Republic of the Congo v. Belgium), the ICJ had a chance to clarify the questions over universal jurisdiction. But, as Congo decided to ask for clarification of question over the immunity and took back the other question – universal jurisdiction. The ICJ held that, incumbent minister enjoys immunity and Belgium failed to respect this by claiming for his arrest basing on universal jurisdiction. Judges of the ICJ, in separate opinions, have expressed

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<sup>62</sup> Bassiouni correctly recognizes that not all international crimes under universal jurisdiction raise to the level of *jus cogens*, however, the ones (piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, torture) that have raised to *jus cogens* crimes under international criminal law are enforceable under universal jurisdiction. He notes that, not all conventions on international crimes include provisions of universal jurisdiction, some do not state it clearly, but *jus cogens* status of these conventions imply that universal jurisdiction in respect to these crimes exist. Bassiouni Article, *supra* note 60. Part IV;

Principle 2.1 of The Princeton Principles recognizes the following crimes as serious crimes under international law to which universal jurisdiction applies: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture. Since, Principle 2.2 states that application of universal jurisdiction to these crimes is without prejudice to application of universal jurisdiction to other crimes under international law, this list can be perceived as a minimum.

<sup>63</sup> See E.M Wise. *Aud Dedere Aur Judicare: The Duty to Prosecute or Extradite*. In International Criminal Law. Edited by M. Cherif Bassiouni .V.2. Procedural and Enforcement Mechanisms. (2<sup>nd</sup> Ed. 1999)

<sup>64</sup> For a detailed analysis of universal jurisdiction and customary international law see Claus Kreß. *Universal Jurisdiction over International Crimes and The Institute de Droit De International*. 4 J. Int'l Crim. Just. (Part 3) 569-576 (2006); For description of national case law on universal jurisdiction of various states see Reydam, *supra* note 52, Part II. Universal Jurisdiction in Municipal Law.

their view on universal jurisdiction, but very different views were raised by them and it did no help for clarification.<sup>65</sup>

This section presented theory of jurisdiction on universality principle applicable by states and it should be concluded that the position of the thesis is that it welcomes the idea of universal jurisdiction in general. However, next section will present and discuss the problems associated with the exercise of universal and make it clear that it should be exercised by a centralized international criminal court, which is the ICC, not by states.

## ***2.2 Problematic side of universal jurisdiction and the ICC role in solving them.***

This Section will present and analyze the problematic nature of universal jurisdiction when exercised by States and argue that these problems would be neutralized by the ICC with its international jurisdiction, if the States were forbidden to use universal jurisdiction after it is conferred upon the ICC.

It is said that, after Randall's publication arguing for the legality of universal jurisdiction over crimes under international law in 1988, this subject became a hot topic for scholarly disputes<sup>66</sup>. Many scholars have supported universal jurisdiction, finding it effective at the same time pointing out the weaknesses and possible problems and have presented their recommendations where possible. These scholars have taken the position that these are possible problems and should be solved. However, some have opposed universality principle in general due to several problematic sides of it and don't find it effective at all. Additionally, some even

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<sup>65</sup> See Roger O'Keefe. *Universal Jurisdiction. Clarifying the Basic Concept*. 2 J. Int'l Crim. Just. (for a detailed discussion of the ICJ judges' views on the matter in the Arrest Warrant Case)

<sup>66</sup> *Id.* 569.

have argued that these “so called” problematic sides of universal jurisdiction can, not surprisingly, promote international criminal justice. This Section will briefly present positions of some distinguished authors of all of the above mentioned positions, analyze them and conclude whether universal jurisdiction is problematic.

Cassese strongly supports conditional universal jurisdiction, however also raises some possible problems with this<sup>67</sup>. He notes that judges might abuse this power against foreign officials, obviously favoring political aims of judge’s State. He suggests that the following 2 limitations have to be considered by judges:

- a) there must be available compelling evidence against the accused;
- b) The accused must not enjoy immunity at the time of charge.

He also raises problems while establishing evidence and witness testimony inherent of absolute universal jurisdiction. Among other possible problems, he mentions that these cases (e.g. Pinochet, Sharon etc.) basing on universal jurisdiction, may lead to international disputes and there can be controversy over priority of jurisdictions, since theoretically any state has universal jurisdiction. He perceives it legal and effective to apply universal jurisdiction, even in absentia, over low ranking political or military officials and all civilians charged with serious international crimes and argues that this might lead to alleged perpetrator’s subsequent arrest and trial in the his State or to possibility of extradition. And hence, this might reduce impunity and have deterrent effect.

Bruce Broomhall has also pointed out the last argument in favor of universal jurisdiction in absentia, that the stigma attached to investigations and prosecution would have a deterrent effect<sup>68</sup>, but without mentioning any limit over whom this could be applied.

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<sup>67</sup> See Cassese, *supra* note 3, at 290-91

<sup>68</sup> Ryan Rabinovitch. *Universal Jurisdiction in Absentia*. 28 Fordham Int’l L.J. 520 & n.96 (2005)

Richard Goldstone by arguing for universal jurisdiction in absentia has expressed that, failure of the accused's appearance before the court is not a justification to ignore the rights of victims and their families.<sup>69</sup>

Anthony J. Colangelo believes that universal jurisdiction in absentia does not harm interstate relations, in fact, it has the adverse effect<sup>70</sup>. He argues that it attracts international attention to human rights and promotes signaling among states by providing them with more options in struggle with perpetrators of international crimes. He puts forward his argument in respect to conditional universal jurisdiction and points out that, similar criticisms (i.e. it disrespects interstate relations etc.) are relevant for both types. Moreover, he expresses that, universal jurisdiction in absentia prevents future possible worse problems referring to Belgian Ndombasi Case that, the relations between Belgium and Congo would even become worse and much tenser if the accused was arrested and brought before Belgian court while present there.

Colangelo rightly notes that those criticisms which are relevant to absolute universal are also very relevant to conditional universal jurisdiction. Hence, both can cause an interstate dispute or tension. However, his argument of "signaling" among states is not persuasive. This "signaling" argument would only be perceived as effective when the crimes in question (or the situation) do not give rise to a state's interest. From a pragmatic point of view, his arguments in favor of universal jurisdiction are not acceptable, where no perpetrator is punished. This might even have a negative effect, since it establishes that universal jurisdiction in absentia is not a real threat as long as there is no extradition. It is also worth to note that, similar cases such as Sharon,

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<sup>69</sup> *Id.* & n.98

<sup>70</sup> See Anthony J. Colangelo. *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*. 36 Geo. J. Int'l L. Part E. Universal Jurisdiction in Absentia as a Vehicle for International Law and Policy. (2005)

G.H.W. Bush, Fidel Castro, Tibet Case in different states, among others, also create tense enough interstate situations. And one would never know the outcome of the case where the accused is prosecuted in a foreign state while present there, on conditional universal jurisdictional bases. In these situations, where it raises serious questions of interstate relations, the case could also be closed on several national law reasons, or in a worse situation, the accused (when he is guilty of committing an international crime) might benefit from this tense situation and be acquitted.

It should be noted that, trials in absentia are accepted only in some civil law states. It implies that, common law countries would not be able to apply universal jurisdiction in absentia. Moreover, even when the accused is charged, there is very less likelihood that he will be punished or the sentence will be able to be executed due to political interests, e.g. In Spain, a civil law country with broad universal jurisdiction, a criminal complaint was lodged against former Chinese president Jiang Zemin, and other officials for alleged genocide in Tibet. This led to political tensions between Spain and China which responded that it is interference with China's internal affairs and denied the accusation, and since Spanish law forbids trials in absentia, the case ended with no result.<sup>71</sup>

Reydams in his distinguished work on universal jurisdiction, inter alia, demonstrated the following conclusions<sup>72</sup>:

- Universal jurisdiction may lead to “forum shopping” by victims, i.e. they will be inclined to select a suitable state – which prescribes broad universal jurisdiction - to lodge a criminal complaint.
- Neither international conventional law, nor international customary law provides a basis for universal jurisdiction in absentia; otherwise this would have ensued in the arbitrary benefit of

<sup>71</sup> See e.g. Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and beyond*, 35 Ga. J. Int'l & Comp. L. 525-28

<sup>72</sup> See Reydams, *supra* note 52, at 220-27

the powerful. Universal jurisdiction in absentia is inconsistent with the principle of sovereign equality of states. He refers to the finding of the ECJ in the *Corfu Case*, to support his argument, which held that “from the nature of things...be reserved for the most powerful states and might easily lead to perverting the administration of international justice”<sup>73</sup>

- State practice of universal jurisdiction in absentia is not neutral at all (*Pinochet* case in Spain, *Ndombasi* and *Sharon* cases in Belgium etc).

He rightly raises questions on the neutrality of cases, mentioning not only its inconsistency with the equality of states due to several reasons such as political, military power, judicial institutions etc., but also doubts the neutrality of exercise of universal jurisdiction in absentia. He suggests that, universal jurisdiction in absentia should only be used with consent of the State in question, to be settled case by case. However, one might raise several questions on this proposal: which state's consent would be needed (the state of the nationality of the accused, the state where the accused currently resides, the state on whose territory the crime was committed?) What if one state involved gives its consent the others involved do not? Why would not a State of nationality of the accused (or custody state) prosecute him by itself while on its territory if it gives consent to another state to prosecute? In real political life, it would probably be known to States beforehand whether the state involved would give its consent or not, even before the media and people will be aware of the case. So depending on this, state willing to exercise its universal jurisdiction will shape its strategy. This might lead to the (ab)use of universal jurisdiction for interstate political bargaining. Even further question would be, whether justice based on politics' consent is acceptable at all, where the situation is about serious international crimes.

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<sup>73</sup> *Id.* at 225 & n.5

H. Kissinger has raised concerns over universal jurisdiction that, it will lead to “judicial tyranny”<sup>74</sup> and simply substitute the tyranny of governments by the tyranny of judges.<sup>75</sup> This problem was also raised by Reydams and, correctly, was described as “western judicial imperialism”<sup>76</sup>. However, it should be born in mind that, the commencement of prosecution is the first step before judges can deal with the matter. In common law countries universal jurisdiction can only be commenced for exercise by or on behalf of the Attorney General, who represents the executive, no the judiciary. Thus, in this case, government (executive) plays a great role in the exercise of universal jurisdiction before the matter goes to judiciary. In civil law countries, a local prosecutor (who are usually appointed by the head office of Prosecutor) or a victim (as *partie civile*, in order to claim for compensation for a criminal act) can initiate investigation even in the event of universal jurisdiction<sup>77</sup>. This implies that, prosecutor (representing government) takes place in the exercise of universal jurisdiction to initiate the proceedings, again, it could be stated that initial proceedings play a more important role than the trial itself in the case universal jurisdiction

Among those who oppose universal jurisdiction is George Fletcher<sup>78</sup>. He emphasizes the *ne bis in idem*<sup>79</sup> principle and criticizes the universal jurisdiction on this basis that, a perpetrator of an international crimes could be brought before justice in any country and be acquitted (on

<sup>74</sup> Henry Kissinger. *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*. Available at : <http://www.globalpolicy.org/intljustice/general/2001/07kiss.htm>

<sup>75</sup> *Contra*, See Kenneth Roth. *The Case for Universal Jurisdiction*. At: <http://www.foreignaffairs.org/20010901faresponse5577/kenneth-roth/the-case-for-universal-jurisdiction.html> (last visit 23/03/08)

See also Benjamin B. Ferencz's response . A Nuremberg Prosecutor's Response to Henry Kissinger's essay "The Pitfalls of Universal Jurisdiction at <http://www.derechos.org/nizkor/icc/ferencz4.html>

<sup>76</sup> He describes it as a “one-way traffic between Western and developing countries”, due to several reasons such as lack of institutional capacity or political power developing countries are unlikely to take part in the exercise of universal jurisdiction. “The ‘universal’ in ‘universal jurisdiction’ may remain wishful thinking for along time” Reydams, *supra* note 52, at 222

<sup>77</sup> *Id.* 221

<sup>78</sup> See G. Fletcher. *Against Universal Jurisdiction*. 1 J. Int'l Crim. Just. 580, *passim* (2003)

<sup>79</sup> Prohibition of double jeopardy



purpose). In this case, he can not be accused of this crime again by any other state relying on any jurisdictional basis. This can easily be misused and when another state wishes to exercise universal jurisdiction just ignoring his acquittal the situation would even get deteriorated. Even though he was responded by Albin Eser in his article<sup>80</sup>, by arguing that, this problem is not inherent for universal jurisdiction, but for all types of concurrent jurisdictions. But still it does not make any difference whether this is an inherent problem of universal jurisdiction or not, this is a very strong argument, particularly against universal jurisdiction as it deals with the most serious international crimes and taking into account of political nature of them, this could really be a legal problem and lead to political problem as well.

Eugen Kontorovitch in his article clearly raises more doubts on universal jurisdiction, however by presenting the inefficiency of this system from a “cost-benefit” analysis and bargaining of prosecutorial entitlements among interested states for other benefits as peace, democracy et cetera.<sup>81</sup> His conclusion was that<sup>82</sup>:

With some limited exceptions, international law recognizes that welfare may be enhanced by waiving prosecutorial entitlements in exchange for other benefits. Indeed, international practice is rife with such transactions. However, the growth of UJ will make efficient transactions harder to reach because the relevant entitlements are now dispersed among nearly 200 de facto co-owners. Because those seeking a waiver of prosecutorial entitlements must now negotiate with a multitude of nations, each with holdout power, such deals become hard to reach.

In this article not only he analyzes universal jurisdiction from economic approach, but also expresses the objective nature of universal jurisdiction, which is easily manipulated and used for State interests that does not usually match with universal justice interest.

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<sup>80</sup> See A. Eser. *For Universal Jurisdiction: against Fletcher’s Antagonism*. 39 Tulsa L. Rev. 957-58 (2004)

<sup>81</sup> E. Kontorovitch. *The inefficiency of Universal Jurisdiction*. 2008 U. Ill. L. Rev, *passim* (2008)

<sup>82</sup> *Id.* 417

And in last, from a practical approach, not only there are objective problems such as evidence, witnesses etc. are away from the State in case of universal jurisdiction, but the means of observing due process by a foreign State is also problematic, if not possible. This becomes crucial when an accused is acquitted (or pardoned) in a State (of nationality or on whose territory the crime was committed or just any State using universal jurisdiction) to shield him from justice.

In summary universal jurisdiction is plausible in theory but neither is real, nor practical or efficient in State practice. It cannot be agreed more with G. Bottini that “problems associated with universal jurisdiction are inherent to the concept of universal jurisdiction” and the system needs to be abandoned.<sup>83</sup> The followings, as were discussed throughout the 2<sup>nd</sup> section, are some of the most important problematic sides of universal jurisdiction:

- Use for political aims of the State, particularly of powerful ones capable of it;
- May ensue in interstate disputes and tensions;
- Case law of various states demonstrates that, the perpetrator usually is not punished due to several reasons – inefficient practice.
- *Ne bis in idem* approach – any state can use universal jurisdiction and shield the accused from justice, then, later if any State claims to exercise universal jurisdiction, this will lead to the question of double jeopardy.
- Practical problems of guaranteeing fair trial for the accused (particularly relevant for universal jurisdiction in absentia) and observing due processes standards while prosecution of the accused in other State, which can be the basis of claim that the prosecution was conducted to shield the accused from justice and call for the exercise of universal jurisdiction, but in most cases acquittal in the first State

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<sup>83</sup> Bottini, *supra* note 11, at 505

trying the suspect could be the end story. Further, differences in national laws regarding the due processes may also cause problems for defense and fair trial.

The ICC with international jurisdiction would serve as a cure for all the above mentioned problems. Since, the ICC is an international court and independent from any State interest problems related with misuse of universal jurisdiction by states will not be relevant here. In contrast to State exercise of universal jurisdiction, exercise of international jurisdiction by the Court would more likely result in punishment of the accused, reduce the fears of misuse of proceedings to shield the accused from justice. And when a state is conducting prosecution to shield the accused from justice, the Court can handle the case since the state would be in a position of “unwilling” to genuinely prosecute the accused and used it to shield the accused.

Moreover, as an international court, it will always be in the center of attention by international community and media which might reduce any chances of misuse.

Furthermore, the Court will use Rome Statute and rules of evidence and other relevant documents which are accessible by everyone, hence reduce the criticisms of due process.

Additionally, since the Court is functioning on complementarity principle, hence will have jurisdiction when a State “is not willing or able to” prosecute the accused; there should be no opposition against the Court if a state in question is not against the prosecution of the accused.

To conclude, this chapter has presented jurisdiction on universality principle and problems thereof and argues that if power of universal jurisdiction of State courts is taken away from them and conferred on the ICC, these problems would be solved or be greatly neutralized.

## Conclusion

The thesis argued that not the states but the International Criminal Court should enjoy jurisdiction on universality principle. The ICC should be authorized to exercise international jurisdiction and be enabled to prosecute any alleged criminal of international crimes within the Court's subject matter jurisdiction no matter where (membership to the Court should be irrelevant), by whom, against whom the crime is committed.

The thesis presented this view from a "problem-solution" view. The problems as the main reasons of the thesis's position were:

1. Current conditions of the exercise of jurisdiction of the Court is not effective, and when a crime is not committed by a party State National or on its territory, and when there is no UN Security Council referral and no *ad hoc* acceptance of the Court's jurisdiction, perpetrators might go unpunished and the ICC can do nothing. Moreover, the Statute enables the SC to refer any situation to the Court no matter the state in question is a party to the Rome Statute. Hence, the concern of "selective justice" is still relevant. One would question why the Court can exercise jurisdiction over any situation and prosecute the alleged criminals when there is a SC referral, but can not do the same on its own- without the SC referral (approval)?
2. Universal jurisdiction applicable by courts of any State (as long as national laws permit) is problematic because it may be used for political aims-interest of states, may be used to shield the accused from justice and because of fair trial and other relevant questions.

The thesis, in other words, at the same time offered a "one bullet two rabbits" solution, which is entitling the ICC with international jurisdiction and forbidding the States to exercise

universal jurisdiction after temporal jurisdiction of the ICC, this can be done by amending article 12 of the Rome Statute.

The conferral of international jurisdiction up on the ICC would, to a great degree, reduce political intervention into international criminal justice, in regard to both problems- either the SC intervention (“selective justice”) or misuse of universal jurisdiction by states for their political aims, and all these would increase the efficiency of international criminal justice and increase the deterrent effect of international criminal law, in general.

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