

**Charles University in Prague
Faculty of Law**

Dissertation Thesis

**The Still evolving Principle of
Universal Jurisdiction**

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I hereby declare that I elaborated this dissertation thesis on the subject of '*The Still evolving Principle of Universal Jurisdiction*' independently and all sources and literature used were cited properly. This dissertation has not been used in order to be granted another or the same academic degree.

Prague, May 2015

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“The jurisdiction to try crimes under international law is universal”

Attorney General of the State of Israel v. Eichmann, 36 Int'l L. Rep. 5, 26

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List of Abbreviations

A. Ch.	Appeals Chamber
AU	African Union
CAT	1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIL	Customary International Law
ECJ	European Court of Justice
EU	European Union
GA	General Assembly of the United Nations
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
LOPJ	<i>Ley Orgánica del Poder Judicial</i>
NGO	Non-Governmental Organization
Nuremberg Tribunal	International Military Tribunal for the Major War Criminals, Nuremberg
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
SC	UN Security Council
SS	<i>Schutzstaffeln</i>
StPO	<i>Strafprozessordnung</i>
T. Ch.	Trial Chamber
Tokyo Tribunal	International Military Tribunal for the Far East, Tokyo
UN	United Nations
UNCLOS	1982 UN Convention on the Law of the Sea
UNGA	United Nations General Assembly
VCLT	1969 Vienna Convention on the Law of Treaties

1 Introduction

1.1 Topic

Universal jurisdiction is a long established principle of international law and much has been written on the subject. Even so, at present, it *still* remains one of the most confusing doctrines of modern international law. There is a wide range of views on the principle, in particular its content, scope and implementation, which are reflected in inconsistent definitions of the principle in the national legislation of states. Moreover, there are divergent views on which crimes are subject to its application in national legislation and domestic judicial practices, which, in some instances, include crimes that lack the basic characteristics inherent to the concept. All of these different views hamper substantial progress on the topic. What is more, the scope and application of universal jurisdiction has unavoidable implications for a range of other norms and concepts of international law, especially that of state sovereignty and non-intervention. Thus the constant tension between the principle of state sovereignty and universal jurisdiction has to be balanced in order to maintain state integrity, but at the same time diminish impunity.

In a globalizing world where states are increasingly interdependent, the exercise of universal jurisdiction enables the international community to bring an end to, or at least deter, the commission of serious crimes that harm human dignity. From the principle's beginnings, primarily as a means for states to assert jurisdiction over piracy, there has been a gradual expansion of its content to encompass heinous acts such as war crimes, crimes against humanity and genocide. However, in 2003, Cassese, made a provocative remark when he claimed that "[i]t would seem that the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes."¹ Regardless of Cassese's expression, at present, even though the principle of universality² faces many challenges it remains a hotly debated, yet sensitive, subject of modern international law. Subsequently, this study argues that the principle of universal jurisdiction is still in transition and will seek to demonstrate that various new aspects and approaches on the principle can be

¹ CASSESE, A.: "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" *Journal of International Criminal Justice*, Vol. 1(3), (2003), p. 589 [hereinafter CASSESE, Is the Bell Tolling].

² In this thesis the terms 'universality principle' and 'universal jurisdiction' will be used interchangeably.

considered in order to enhance its implementation. In fact, as international law continues to formulate, so do its principles. Therefore the continuously evolving nature of the universality principle in modern international law cannot be denied; consequently further study on the topic cannot be disregarded.

After two of the most horrifying and costly wars in human history, the world is not the same as it was at the end of the nineteenth century, when states were seen as absolutely sovereign and restrained only by rules of international law to which they gave their express or implied consent. At that time concepts of reserved domain of international affairs were exempted from any external scrutiny for what governments did to their own people, even when the conduct would constitute, what today is considered a heinous offence under international law. Hence, the thrust of the concept of universal jurisdiction was the legislative authority of a state to extend its prescriptive jurisdiction when there was no territorial or national linkage.

At present, despite a wide acceptance of universal jurisdiction by states, this principle is not applied homogeneously, nor is its application implemented without difficulty. States do accept the basic idea of universal jurisdiction and its existence is not disputed, but since it is a highly complex legal topic (not to mention the political aspect surrounding it) there is a need to continue to undertake a thorough analysis on the principle and its characteristics. Indeed, universal jurisdiction is a unique and exceptional principle which is intended to form a part of the international criminal justice system in the fight against impunity.³ It is noteworthy, that after the *Pinochet* case⁴ there was a positive sign towards an effective usage on universal jurisdiction, after which a few steps were taken on which could have been built upon in a more progressive way, most importantly the Princeton Principles on Universal Jurisdiction (2001).⁵ Nonetheless, nowadays it seems that universal jurisdiction is under negative pressure; especially a political one. Accordingly, it is fundamental that universal

³ Impunity arises from a failure by states to meet their obligations to investigate violations and diminishes the rule of law and undermines human rights. The concept of 'impunity' is defined as the impossibility, *de jure* or *de facto*, of bringing perpetrators of human rights violation to account.

⁴ For details of the *Pinochet* case, see Chapter III.

⁵ The 2001 Princeton Principles on Universal Jurisdiction. An assembly of prominent international law scholars from around the world drafted the Princeton Principles on universal jurisdiction, for the purposes of aiding legislators, judges, and government officials in interpreting and applying international law. The Principles mark the first systematic effort to bring order to this significant and growing area of international law. Available online at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf [hereinafter, Princeton Principles].

jurisdiction becomes more openly accepted and internationally supported, in order not to diminish and loose its significance within international regime.

Developments in the concept of universal jurisdiction, especially its practical application, must be guided by international consensus, not through advocacy action of parties with short term and narrow objectives. One of the major achievements in international law in recent decades has been the shared understanding that there should be no impunity for serious crimes. International cooperation and coordination is constantly being strengthened and new measures adopted to ensure that serious crimes are not left unpunished. These attempts to bring perpetrators to justice have given practical recognition to international criminal jurisdiction, as well as to prosecutions based on universal jurisdiction.⁶

1.2 Scope and Limits – Outline of the Problem

Universal jurisdiction has significantly helped with closing the impunity gap - making key to international justice. However, it is important to be aware of the divergent views and practices on its scope and application. If the principle is not carefully applied it could cause friction in international relations, particularly when exercised by developed states over nationals of developing countries. Measures are needed in order to end political manipulation and selective application of universal jurisdiction, especially by judges (described today as ‘new tyranny’ or ‘tyranny of judges’) as well as politicians from states outside of Africa.⁷ Clear guiding rules or criteria on the exercise and application of universal jurisdiction are needed to avoid subjective application of the principle.

The main practical rationale for the existence of the universality principle is when the territorial state fails to act, and there is an absence of the International Criminal Court (ICC) to deal with the case due to its limited scope of jurisdiction, the principle of universal jurisdiction becomes a major player in filling the impunity gap and denying

⁶ United Nations General Assembly (UNGA). Report of the Secretary General, Sixty-fifth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/65/181, (29 July 2010), p. 4. Available online at <http://daccess-ods.un.org/TMP/3941234.35020447.html> [retrieved 3.2.2015].

⁷ United Nations Press Release on “*Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, Seek Further Guidance from International Law Commission*”, (17 October 2012). Available online at <http://www.un.org/press/en/2012/gal3441.doc.htm> [retrieved 20.12.2014].

safe havens for perpetrators. Hence, universal jurisdiction offers an additional tool for the exercise of criminal jurisdiction. This function of universal jurisdiction makes it an important component of the international criminal justice system. This thesis cannot, and does not intend to, describe all the matters related to the universality principle and should not be looked at as an exhaustive paper on the subject, but rather, as an emphasis on newly emerging discussion pertaining to universal jurisdiction.

Simply having the universality principle is not enough, it also has to be applied in practice, but there lies the main challenge of the principle of universal jurisdiction. This thesis aims to discuss the nature and scope of the principle in a straight forward manner where inquiry into the recent developments in international criminal law is underpinned by two major concerns. The first is the concern with respect to the lacuna of jurisdiction generating the prevalence of impunity. The second concern is the assurance of fairness, impartiality, foreseeability and the protection of human rights in the exercise of jurisdiction. It is sometimes referred to the character of the principle as ‘individuality of universal jurisdiction’ stipulating to the fact that it is a principle with its own character and its application of criminal law depends exclusively on the nature of the crime. ‘Individuality’ does not imply that universal jurisdiction should become the general rule when major international crimes are committed as it should only be exercised as a last resort.

The present study addresses crimes and cases that are limited to those human rights violations prohibited by international law and are of such criminal gravity as to fall within the scope, and trigger, the exercise of universal jurisdiction. The commission of these serious offences, which undermine the most fundamental human rights, such as the right to life or human dignity, can never be justified as they violate the most basic human rights and under no circumstances can be derogated from. In modern international law the crime of piracy seems to be the only crime over which claims of universal jurisdiction are undisputed although international treaties have provided for universal jurisdiction over other crimes; crimes that are far more heinous.

Indeed, the primary forums for prosecuting individuals for crimes are domestic courts. At the national level, states continue to have the primary responsibility for bringing to justice those responsible for crimes under international law. Ideally, this responsibility should be performed by the state in which the crime occurred, namely,

the territorial state where most of the evidence will be found; the accused, victims and witnesses are likely to be located; and they are able to understand the legal system and language of the court. However, in many cases this is not possible, either because the territorial state is unable or unwilling to do so or because the suspect has fled into another state. In such circumstances, other states must intervene, by exercising universal or some other form of extraterritorial jurisdiction.⁸

Nonetheless, there still remains the fact that many courts have never faced a case of such gravity and scope, and thus have been reluctant to use the universality principle. International criminal jurisdiction, the jurisdiction exercised by international criminal courts such as the ICC⁹ and the two *ad hoc* tribunals; the International Tribunal for the former Yugoslavia (ICTY)¹⁰; and the International Criminal Tribunal for Rwanda (ICTR)¹¹, must be distinguished from that of universal jurisdiction. International criminal jurisdiction will not be dealt with independently, only the jurisdiction of the ICC will be addressed briefly in relation to the principle of subsidiarity in Chapter V. In addition, it is important to recall that jurisdiction can be both civil and criminal. However, only universal jurisdiction linked to individual criminal responsibility will be considered in this analysis, thus excluding jurisdiction in civil cases.¹²

Furthermore, it should be mentioned that the exercise of universal jurisdiction without limitations could create jurisdictional conflicts between states; subject individuals to abuse of process; or give rise to politically motivated legal prosecutions. The unwarranted exercise of universal jurisdiction could also create tension between

⁸ See especially Chapter II on 'Jurisdictional Regime in International Law' and Chapter IV regarding 'The Idea of Subsidiarity in the Context of Universal Jurisdiction'.

⁹ The International Criminal Court (ICC). See the 1998 Statute of the International Criminal Court (Rome Statute). Available online at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [retrieved 20.12.2014].

¹⁰ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Yugoslavia since 1991. See the Statute of the ICTY. Available online at <http://legal.un.org/avl/ha/icty/icty.html> [retrieved 20.12.2014].

¹¹ The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizen Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994. See the Statute of the ICTR; available online at <http://legal.un.org/avl/ha/ict/ict.html> [retrieved 20.12.2014].

¹² An act by an individual may be attributed to a state in certain situations, such as when an individual has acted as an agent or on behalf of the state (for example, acting as a member of the government). Nevertheless, this study will focus on the issue of individual responsibility, rather than on the collective responsibility of the group behind the offence.

states, as it could be perceived as a means of interfering in the domestic affairs of another state or as a hegemonic jurisdiction exercised by some developed countries against individuals from developing countries. When discussing limits on universal jurisdiction one has to keep in mind that in the application of this principle, it is important to have regard to other more established international law norms, including the sovereign equality of states, non-interference and immunity of state officials. These norms are long established within international law and therefore the scope of application of the principle of universal jurisdiction should be limited, first and foremost, by respect to these norms. One principle that is consistently challenged and questioned when discussing universal jurisdiction is the principle of state sovereignty.

When applying universal jurisdiction in practice, it is important to consider the rights of states to self-govern and any action that takes place under the principle of universal jurisdiction must take that into consideration. The practice is of particular concern in view of the potential political and legal implications of indiscriminate and selective use of the principle against persons who, for example, enjoy immunity under international law. However, the present study does not discuss the matter of immunity as such even though admittedly, immunity is a central impediment to the application of law and both fields are inextricably linked.¹³

Put simply, universal jurisdiction is one small, but essential, component of the emerging international system of justice in the fight against impunity and therefore worth considering in detail. The broad range of opinions concerning the definition and scope of the principle, demonstrates the need for further study of the topic. It has been said that universal jurisdiction has been developed as a remedy for the failure by states to prosecute international crimes; then why isn't it used more often? There is a holistic view on what universal jurisdiction constitutes and there is even a general definition on its content but more problematic is to decide upon the crimes which are applicable to universal jurisdiction and to set out guiding rules on when and how to exercise the principle.

¹³ 'Immunities' and 'amnesties' from the exercise of universal jurisdiction will not be addressed in details. The issue of immunity, as an obstacle to a court considering a case, would only arise after the court has established its jurisdiction. Any discussion relating to immunity would, therefore, be qualitatively different from a discussion about the principle of universal jurisdiction, and could derail or confuse the discussion of the latter. On immunities see *inter alia* the work of the International Law Commission (ILC), on the topic "*Immunity of State officials from foreign criminal jurisdiction*", which was included into the Commission's long term projects since 2007. Available online at <http://www.un.org/law/ilc/index.htm> [retrieved 4.4.2015].

1.2.1 International Criminal Law, Human Rights and Humanitarian Law

When discussing the subject of universal jurisdiction, three branches within international law are touched upon, namely international criminal law, human rights and humanitarian law. The strict prohibition of serious human rights violations binds state and individuals as well. International humanitarian law and international criminal law provide that those individuals responsible for serious offences should be held accountable. Thus, conducting a trial and establishing accountability is one of the means to uphold respect for fundamental human rights. In addition, prosecuting the commission of a heinous crime by means of fair and impartial mechanism plays a vital role in reconciliation – the interest of the victims to see justice being done, and also the interest of the international community as a whole to deter such violence in the future.

It is so, that the international human rights law did not fully develop until after the establishment of the United Nations (UN) system, while international criminal law and humanitarian law (which has its roots in laws of war) have a much longer history. When analyzing such a substantial and complex principle as universal jurisdiction, it is important to bear in mind that here, the development of international criminal, humanitarian and human rights law is studied in correlation. Its development has been achieved through the mutual influence of these fields of law which is likely to continue in the future.

1.3 Aim of the Study and Central Questions

The objective of this thesis is to identify and explore how far the law of universal jurisdiction has actually evolved, and how far we should expect it to evolve in the near future considering its constraints and challenges. Thus, in order to gain a broader perspective on the purpose of the principle a thorough inquiry into how the law has changed and what has caused the change will be demonstrated.

Particularly, the present study seeks to examine and reassess primarily three matters; two issues pertaining to the scope of the universal jurisdiction; and one matter related to the principles' application. These matters include firstly, the relationship between universal jurisdiction and other concepts of international law; and secondly, an

analysis on the heinousness nature of the crimes falling under the umbrella of universal jurisdiction. Thirdly, and lastly, after having established the prerequisite and determinant factor on the scope of the principle, this thesis addresses the application of the universality principle, namely, the emerging notion of subsidiarity. It is necessary to apply the principle of universal jurisdiction with much caution and within a well-established framework in order to avoid any abuse that may go against the well-established principle of state sovereignty – the sovereign equality of all states. Universal jurisdiction should not be seen as a threat to territorial integrity. Therefore the exercise of universal jurisdiction must be subject to the following guiding principles and conditions. The need is to identify those crimes subject to universal jurisdiction and the circumstances under which it could be invoked in modern international law. The purpose of this thesis is to advance discussion on the principle and contribute to the ongoing discussion with some additional considerations.

The aim of the present study is thus three-fold. Primarily, universal jurisdiction should be conceptually distinguished from other principles of international law, primarily that of *aut dedere aut judicare* (the obligation to extradite or prosecute). Nonetheless, universal jurisdiction should not be seen in isolation, rather, as a part of a bigger framework to deter impunity. Thus examination on the evolving nature of universal jurisdiction with respect, and in connection, to other well established principles of international law, namely, the principle of *aut dedere aut judicare* will be reexamined. Universal jurisdiction should not be confused with the exercise of international criminal jurisdiction, as previously mentioned, or with the obligation to extradite or prosecute. States have clearly indicated that they are different legal institutions, but are complementary to the goal of ending impunity. Can we use the *aut dedere aut judicare* principle and universal jurisdiction in correlation in order to enhance the enforcement and usage of the universality principle?

Secondly, universal jurisdiction should be invoked only for the most heinous crimes (characterized as of *jus cogens* nature) that have been universally condemned by the international community. Considerations on aspects which seem to have provoked current controversies are such as how recent developments of the principle of universal jurisdiction have been affected by the concept of *jus cogens*, thus classifying universal jurisdiction as a logical consequence of *jus cogens* norms. What

crimes can be considered as triggering universal jurisdiction? Are there any newly emerging threats to the international community? What are the conditions for a crime to be of such gravity ('gravity threshold') to cause international attention and evoke prosecution on the basis of universal jurisdiction.

Thirdly and finally, this study seeks to locate the assertion of universal jurisdiction within the legal system of jurisdiction and avoid it being in violation of national sovereignty but playing a complementary role. Therefore clarification on modalities and application of universal jurisdiction will be considered. It is necessary in order to end, or at least deter, the commission of these serious crimes to have the universality principle workable, not just as a theoretical topic. Hence there is a need to have some 'guidance' on how and when to apply the universality principle in the modern jurisdictional regime. Accordingly, the question, what modalities are there in order to enhance the usage of universal jurisdiction and foreseeability in its exercise, while simultaneously respecting state integrity and preventing jurisdictional conflicts? A possible solution will be given on how the universality principle might be used in a more foreseeable and balanced way.

In addition, it is equally important to discuss possible future evolvement and speculation on the principle, *de lege ferenda*, as well as analyzing the history and origins of universal jurisdiction. Challenges and responses to universal jurisdiction will be addressed and solutions proposed. Important case law exists where universal jurisdiction played an important part and will be briefly described. Furthermore, universal jurisdiction is not the only way to tackle impunity for international crimes and therefore it should not be seen in isolation from other principles of international law; it is part of a wider system that aims to enhance the deterrent effect of punitive measures and thus halt the commission of international crimes. In fact, universal jurisdiction being as complex as it is has given rise to more debates than it has ever solved; raising multiple concerns; and causing international tension. In addition, one must not forget that when states exercise universal jurisdiction they are not enforcing their own national law, but they are acting as agents of the international community as a whole, rendering the universality principle an important status within modern international law.

1.4 Structure of the Study

This thesis is divided into three main parts which are further divided into seven chapters (Introduction and Conclusions included). The first part ('General Part') will deal with the nature and scope of universal jurisdiction by reexamining the jurisdictional framework that the universality principle is stemming from; following up with historical overview of the principle. Part two ('Specific Part') will make a survey into the core international crimes that attract the application of universal jurisdiction and the values upon which those crimes infringes. Thereafter, an inquiry into an effective implementation and enhancement of the usage of universal jurisdiction will be provided. Lastly, part three ('Challenges and Responses') will address certain restrains on the exercise and application of universal jurisdiction.

First, in the following Chapter II, this study briefly revisit the jurisdictional regime within international law from which universal jurisdiction is derived, by recapturing the general notion of jurisdiction, the jurisdictional basis accepted in modern international law and the principle of state sovereignty. It will be argued that the original notion behind state sovereignty has changed in the twenty-first century, especially when considering the universal jurisdiction.

Next, in Chapter III an examination will be undertaken on the historical background of the universality principle; its origins and main milestones will be described and how universal jurisdiction has grown from being a principle over piratical acts to encompass grave crimes of international concern. In addition, the concept of the universality principle will be observed more thoroughly, including its components, classification and legal status under modern international law while providing for case law inquire. Special attention will be given to the relationship between universal jurisdiction and the principle of *aut dedere aut judicare* in order to manifest that these principles cannot be seen in isolation from each other and should be studied in correlation.

Based on the examination made in Chapters II and III, a more theoretical analysis will be undertaken in Chapter IV when discussing the nature of crimes falling under the scope of universal jurisdiction; its heinous nature and *jus cogens* status. It is important to note that this chapter will not seek to make a comprehensive list of crimes to which universal jurisdiction could be applied, rather consideration will be brought up on

how the concept of ‘gravity’ of crimes has changes from covering piratical acts (piracy analogy) to include more serious offences such as war crimes. Consideration on where should the ‘gravity threshold’ is for universal jurisdiction and whether newly emerging threats, such as cyberterrorism and serious environmental crimes, might fall under the umbrella of universal jurisdiction. Discussion on the definitional elements of a heinous offence will be provided while looking into the relevant conventions and case law.

Within Chapter V, special attention will be given to the discussion of the emerging idea of subsidiarity as a guiding principle in the context of universal jurisdiction. It will be demonstrated how the usage of subsidiarity can be guided by the complementarity principle of the ICC, thus using complementarity as a model for the notion of subsidiarity in the application of universal jurisdiction. The primary aim of this this chapter is to illustrate one possible solution on how to enhance the application of universal jurisdiction within the lacuna of jurisdictional bases and simultaneously avoiding misuse in its exercise and foster foreseeability in the application of universal jurisdiction.

The objective of Chapter VI is to recapture the observations made from the preceding analysis (within the previous chapters) and propose recommendations; while considering contemporary challenges on the scope and application of universal jurisdiction. Thereafter, Chapter VII makes concluding remarks.

The aim of this thesis is to make an additional contribution to the ongoing discussion and propose how a proper balance may be struck between enforcement of international criminal law on the basis of universal jurisdiction and respect for state sovereignty. In addition, this thesis seeks to open up for further considerations on the topic. It will touch upon the nature, scope and application of the principle of universal jurisdiction whereas all of these factors are continuously evolving – the principle of universal jurisdiction is *still* evolving.

PART I – GENERAL PART: NATURE OF UNIVERSAL JURISDICTION

2 Jurisdictional Regime in International Law¹⁴

Universal jurisdiction is usually distinguished from other jurisdictional claims, due mainly to the reason, that it lacks certain **links** that others have. In fact, universal jurisdiction is defined as the assertion of jurisdiction over a conduct committed outside of a state, by a foreigner and against a foreigner, and where that conduct poses no threat to the vital interests of the state asserting the jurisdiction. In other words, universal jurisdiction is prescriptive jurisdiction where none of the jurisdictional links, such as territory, nationality or interests of state exist at the time of the commission of the alleged offence.¹⁵ Premised on that, those ‘links’ are a manifestation of an entitlement attributed by international law. Consequently, doctrines have sought to find an alternative ground for universal jurisdiction in international law that may replace jurisdictional links.

While there seems to be a growing consensus that the exercise of universal jurisdiction can be a useful tool for the fight against impunity, especially with regard to international core crimes (such as genocide, crimes against humanity and war crimes); on what grounds and to what extent it is established, is still a source of confrontation. Given that jurisdictional links have been regarded as an indicator that distinguishes universal jurisdiction from other jurisdictional claims, it is all the more crucial at the outset to address the question of the status of those jurisdictional links within international legal system, before proceeding into the core of this thesis, namely, the principle of universal jurisdiction. Accordingly, it will be helpful to

¹⁴ In the beginning it is necessary to mention that since every national and international legal system defines the concepts, used in this Chapter (and within the whole thesis) differently in some respects, the definitions and clarifications chosen to be used by the author may not correspond exactly with those used in every jurisdiction.

¹⁵ Prescriptive jurisdiction is the authority of a state to make its law applicable to persons or activities. Two more types of jurisdiction can be distinguished along with prescriptive jurisdiction, but these are the jurisdiction to adjudicate and jurisdiction to enforce. See BANTEKAS, I.: *International Criminal Law*. 4th ed. Oxford: Hart, 2010, p. 329; KACZOROWSKA, A.: *Public International Law*, 4th ed., Routledge, 2010, p. 313; and Section 2.1.1 on ‘Forms of Jurisdiction’ in this thesis. Moreover, unlike other basis of jurisdiction in international law, the prescriptive substance of universal jurisdiction authorizes and circumscribes universal adjudicative jurisdiction. Thus it defines not only the universal crimes themselves, but also the judicial competence for all courts wishing to exercise universal jurisdiction. See further, COLANGELO, A. J.: “The Legal Limits of Universal Jurisdiction” *Virginia Journal of International Law*, Vol. 47, (2006), p. 163.

clarify the distinctions between these bases of jurisdiction for the purposes of this thesis. In addition, since this study examines the law of jurisdiction *ratione loci* under international law, it might be useful to clarify the general concept of ‘jurisdiction’ at the beginning.

The nature, scope and application of universal jurisdiction are far from being clear. Therefore, in order for us to properly understand the principle of universal jurisdiction, and before proceeding with the evolution and scope of the principle¹⁶, it is necessary at the outset to recollect the understanding of the notion of ‘jurisdiction’ in general and the forms of jurisdiction applicable, especially with respect to universal jurisdiction. Moreover, it is important to make a brief survey into the jurisdictional bases available in modern international law in order to recapture the regime from which the universality principle stems from.

The *Lotus* case of 1927, which remains the most quoted international decision with respect to assertion of jurisdiction, describes state’s right to exercise criminal jurisdiction and stipulates within its decision that “every state remains free to adopt the principles which it regards as best and most suitable.”¹⁷ This passage suggests that there are a number of generally accepted principles on the basis of which states can exercise criminal jurisdiction in conformity with international law. This case will be analyzed in more details within this chapter. Let us now turn to the notion of ‘jurisdiction’ in international law.

2.1 The Concept of Jurisdiction – General Overview

*“Jurisdiction is the means of making law functional.”*¹⁸

It is not easy to provide a general overview of the notion of jurisdiction without leaning too much toward either the theoretical or the practical side. Although earlier authors may have found it justifiable to resort to purely doctrinal enumeration, it has

¹⁶ See Chapter III on “Formation and Implication of Universal Jurisdiction”.

¹⁷ *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Series A, no. 10 [hereinafter, the *Lotus* case].

¹⁸ BLAKESLEY, CH. L.: “Extraterritorial Jurisdiction.” In BASSIOUNI, M. CH. (ed.): *International Criminal Law: Multilateral and Bilateral Enforcement Mechanism*. 3rd ed. (Vol. 2.): Martinus Nijhoff Publishers, 2008, p. 89.

become increasingly necessary to discuss jurisdiction in the light of concrete instances of the exercise of jurisdiction or even within the limited context of, say, criminal jurisdiction (as is the main emphasis within this study). Aside criminal jurisdiction there exists also civil jurisdiction, which will not be dealt with within this thesis.¹⁹

The phrase ‘jurisdiction’ derives from the Latin term *juris dictio*, or simply ‘the exercise of justice’. The approach of public international law to jurisdiction has evolved through the years with the academic and practical progress. Technically speaking, two approaches could be taken to the issue of jurisdiction of states. One being that states are allowed to exercise jurisdiction as they see fit, unless specifically prohibited (or a rule to the contrary exists). The other approach would be that states are not allowed to exercise jurisdiction unless there is a rule permitting the contrary.²⁰

At present, when speaking of state’s ‘jurisdiction’ one refers to its authority under international law to regulate the conduct of both natural and legal persons, and to regulate property in accordance with its municipal law.²¹ It reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. For this reason, jurisdiction is indeed a vital and central feature of state sovereignty. It is an exercise of authority which may alter, create or even terminate legal relationships between states.²²

When looking into scholarly articles one can certainly recapture the changing perception on the notion of jurisdiction. For example, in 1964 Mann conceptualizes jurisdiction as an inherent power or ‘right’ of a state to regulate conduct. Hence, the power is comprised of an authority to legislate and the authority to enforce. Consequently, jurisdiction is a concept at the same level as sovereignty.²³ Akehurts,

¹⁹ With respect to civil jurisdiction, Reydams notes that: “what applies for criminal jurisdiction applies to some extent *mutatis mutandis* for civil jurisdiction, because the latter is considered less intrusive.” REYDAMS, L.: *Universal Jurisdiction: International and Municipal Legal Perspective*. Oxford: Oxford University Press, 2003, pp. 2-3 [hereinafter REYDAMS, Universal Jurisdiction].

²⁰ RYNGAERT, C.: *Jurisdiction in International Law*. Oxford: Oxford University Press, 2008, p. 21 [hereinafter RYNGAERT, Jurisdiction].

²¹ O’KEEFE, R.: “Universal Jurisdiction, Clarifying the Basic Concept” *Journal of International Criminal Justice*, Vol. 2(3), (2004), p. 736.

²² SHAW, M. N.: *International Law*. 6th ed. Cambridge University Press, 2008, p. 645.

²³ See MANN, F. A.: “The Doctrine of Jurisdiction in International Law” *Recueil des Cours*, 111, (1964), pp. 1-162. Mann, 20 years later reaffirms this doctrinal position. See MANN, F. A.: “The

in 1975, in contrast to Mann's more doctrinal treatment of the subject, presents a more pragmatic view of jurisdiction and discusses various instances in which a state actually claims and exercises jurisdiction, without much probing as to the philosophical underpinnings.²⁴ Partly due to the development and accumulation of state practice, later academics engage less in theoretical speculations but refer more to practical matters. For instance, in 1982, Bowett explores in his writings on 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' the theoretical and practical grounds for a state's entitlement to establish rules of behavior (jurisdiction to prescribe) within the limits allowed by international law.²⁵ Ryngaert provides a well-balanced general view of jurisdiction and follows very much a classical approach in 2008, starting with the *Lotus* case²⁶ and the territoriality principle, and then discussing the exercise of extraterritorial criminal jurisdiction before exploring the doctrinal basis of jurisdiction.²⁷ Furthermore, in 2007 Cassese treats the issue of jurisdiction as essentially one of competing assertions made by national and international tribunals²⁸ whereas three years later Bantekas in his writings, views both national and international courts as cooperative and complementary enforcers of the law.²⁹

While scholars and practitioners often employ the term 'jurisdiction', and most of them have a notion of what it means, it is hardly self-evident to exactly define it. What is certain is that jurisdiction somehow relates to sovereignty. In a world composed of equally sovereign states, any state is entitled to give shape to its sovereignty or imperium by adopting laws - to '*juris-dicere*' - to state what the law is

Doctrine of International Jurisdiction Revisited after Twenty Years" *Recueil des Cours* 186, (1984), pp. 9-116 [hereinafter MANN, the Doctrine of Jurisdiction (1984)].

²⁴ See AKEHURST, M.: "Jurisdiction in International Law" *British Yearbook of International Law*, Vol. 46, (1975), pp. 145-257.

²⁵ BOWETT, D. W. "Jurisdiction: Changing Patterns of Authority over Activities and Resources" *British Yearbook of International Law*, Vol. 53, (1982), pp. 1-26.

²⁶ In the *Lotus* case, the Permanent Court of International Justice (PCIJ) took a very liberal view of state's rights to exercise jurisdiction which is only limited by 'prohibitive rules', *supra* note 17. See case analysis in Section 2.3.1

²⁷ Because jurisdiction in its practical sense from the perspective of public international law concerns primarily international criminal matters, it is always useful to see how the issue of jurisdiction is approached in the context of international criminal law, which, given the rapidly growing case law and literature, can now rightfully be regarded as a full discipline of law in its own right. See RYNGAERT, Jurisdiction, *supra* note 20, pp. 29-48; 101-144.

²⁸ CASSESE, A.: *International Criminal Law*. 2nd ed. Oxford: Oxford University Press, 2007 [hereinafter CASSESE, International Criminal Law].

²⁹ BANTEKAS, *supra* note 15, pp. 355-372.

relating to persons, activities or legal interests.³⁰ Jurisdiction becomes a concern of international law when a state, in its eagerness to promote its sovereign interests, adopts laws that govern matters of not purely domestic concern.³¹

The public international law of jurisdiction guarantees that foreign nations' concerns are also accounted for, and that sovereignty-based assertions of jurisdiction by one state do not unduly encroach upon the sovereignty of other states. The law of jurisdiction is doubtless one of the most essential as well as controversial fields of international law, in that it determines how far, *ratione loci*, a state's laws might reach. As it ensures that states, especially powerful states, do not assert jurisdiction over affairs which are the domain of other states, it is closely related to the customary international law principles of non-intervention and sovereign equality of states; guaranteeing a peaceful co-existence between states through erecting jurisdictional barriers which nations are not supposed to cross.

As Ryngaert stated "the law of jurisdiction is one of the building blocks of the classical, billiard-ball view of international law as a 'negative' law of State co-existence"³²; hence stipulating to the fact that the underlying idea, behind the rules and limits on jurisdictional regime, is for the purposes of maintaining stable and peaceful international relations among nations. In this regard, one can certainly question whether the principle of universal jurisdiction fits within the jurisdiction regime, without infringing peaceful relation and stability among states.

2.1.1 Forms of Jurisdiction

As previously mentioned jurisdiction refers to the power asserted by states by which they seek to prescribe and enforce their municipal laws over persons and property. This power is typically employed in three forms, which correspond to the three branches of government: legislative (or prescriptive); adjudicative; and enforcement.³³

³⁰ RYNGAERT, Jurisdiction, *supra* note 20, p. 18.

³¹ *Ibid.*

³² *Ibid.*

³³ BANTEKAS, *supra* note 15, p. 329.

Bassiouni asserts that the terms used to enforce and prescribe law are not often of equal scope. That is, “that a sovereign state, or an entity exercising some of the attributes of sovereign state or legal entity that has some sovereign attributes can enforce the prescription of another state, or international law, even though the enforcing power may not have prescribed what it enforces.”³⁴ To be clearer, there are three primary categories of powers: executive is considered to be the jurisdiction with the potential to interfere the most. The term ‘executive’ can be defined as, “the right to effect legal process coercively, such as to arrest someone, or undertake searches and seizures.”³⁵ This jurisdiction is related to the ability of a government to take action inside the boundaries of another country and, in most cases, this is carried out by domestic law enforcement agencies.³⁶

Nevertheless, one should take note that according to the principles of independence of states and territorial sovereignty, state officials should not execute their authority on foreign territory nor impose the will of their state upon another territory. One of the most important examples in relation to this issue was the case of the Nazi criminal Adolf Eichmann, who was seized by Israeli agents in Argentina in 1960. Eichmann’s capture on Argentine soil was a patent breach of Argentina’s territorial sovereignty and an unlawful exercise of Israeli jurisdiction.³⁷ However, the act itself of ‘illegal apprehension’ of suspects on foreign soil does not prevent states from exercising their jurisdiction in later stage. Indeed, the act of detention *per se* in a foreign country would constitute a breach of both international law and the principle of non-intervention, thereby constituting a violation of the human rights of the person concerned.³⁸

³⁴ BASSIOUNI, M. CH.: “The History of Universal Jurisdiction and Its Place in International Law”. In MACEDO, S. (ed.): *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press, 2006, p. 40 [hereinafter BASSIOUNI, History of Universal Jurisdiction].

³⁵ CRYER, R., FRIMAN, H., ROBINSON, D., WILMSHURST, E.: *An Introduction to International Criminal Law and Procedure*. Cambridge University Press, 2007, p. 38.

³⁶ *Ibid.*

³⁷ SHAW, *supra* note 22, p. 651.

³⁸ *Ibid.*, p. 681. See further MORGENSTERN, F.: “Jurisdiction in Seizures Effected in Violation of International Law” *British Yearbook of International Law*, Vol. 29, (1952), p. 256; MANN, F. A.: “Reflections on the Prosecution of Persons Abducted in Breach of International law”. In DINSTEIN, Y. (ed.): *International law at a time of perplexity: essays in honour of Schabtai Rosenne*. Dordrecht: Martinus Nijhoff Publishers, 1989.

Legislative means of power represent the superiority of established organs of the state to make binding law within its territory. In the same way, it is known that in certain conditions these rules may be extended to include a foreign country.³⁹ However, the enforcement of such legislation would be complex, not only in a practical way, but also when considering international law due to the principle of non-intervention.⁴⁰ The term ‘judicial’ means that domestic courts are competent and capable of passing judgment on matters brought before them. Furthermore, it concerns the power of the national courts of a specific state to judge cases in which a foreign issue is present. It should be noted that by passing judgment over offences committed by another country, it is possible that courts will actively intervene in the internal jurisdiction of a country in which the offences took place.

In short, there are a series of reasons that might influence national courts when making the decision to exercise this jurisdiction. Specifically, “in criminal matters these range from the territorial principle to the universality principle and in civil matters from the mere presence of the defendant in the country to the nationality and domicile principles.”⁴¹

2.1.2 Principle of State Sovereignty in the 21st Century

In the twenty-first century one can acknowledge that the original notion behind the principle of state sovereignty has indeed changed.⁴² International communication is getting more integrated and globalization has made communication between countries more intricate and complex. Nowadays, the activities of one nation affect other states on many levels. For instance, arbitrary exercise of sovereignty will cause the infraction of the sovereignty of other nations, and indeed this is the case when

³⁹ SHAW, *supra* note 22, p. 649.

⁴⁰ CRYER *et al.*, *supra* note 35, pp. 37-38.

⁴¹ SHAW, *supra* note 22, p. 38.

⁴² See for instance a demonstrative statement, made by Ferencz B. B. (Former Prosecutor for the Nuremberg War Crimes Trial), on the changing nature of the notion of state sovereignty. “The system has changed. The days of absolute state sovereignty is absolutely obsolete [...] the notion of absolutely sovereign state is absolutely obsolete and observe. We live in an independent world where you cannot do anything without international controls and directions [...] everything is dependent on each other [...] The sovereignty does not belong to the state anymore.” Comments made during a speech at the Congress on “*Universal Jurisdiction in the XXI Century*”, held in Madrid, Spain from 20th – 23rd May 2014. The discussion is available online at <http://www.fibgar.org/congreso-jurisdiccion-universal/english/ponencias.html> [retrieved 26.10.2014].

exercising universal jurisdiction that poses substantial conceptual and practical challenges to sovereignty principle in international relations.⁴³

In the past years a gradual reduction has been occurring from the original notion of state sovereignty, which might be linked to the rise of human rights awareness and the need to protect people from abuse by a state. In September 1999, the former UN Secretary General Kofi Annan suggested that the classical legal concept of state sovereignty may have to yield in some circumstances to the “sovereignty of individual”.⁴⁴ Thus stipulating that in its most basic sense the nature of state sovereignty is being redefined by the forces of globalization and international cooperation which is “a hopeful sign at the end of the twentieth century”.⁴⁵

‘Sovereignty’ as a core principle of international law, is expressed in the Charter of the United Nations within Article 2(1) as a founding principle for the UN and Article 2(7) as a principle prohibiting intervention in the domestic jurisdiction of states. Sovereignty is for the purpose of this study understood as a “legal status within but not above public international law.”⁴⁶ It is a principle that can be balanced by other international principles; such as the principle of universal jurisdiction. Generally, sovereignty means that one state cannot demand that another state take any particular internal action. Hence, it follows that no state has the authority to tell another state how to control its internal affairs. Sovereignty both grants and limits power: it gives states complete control over their territory, while restricting the influence that states have on one another.⁴⁷ State sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory.

The original notion behind the principle of state sovereignty embraced the idea that “states were not subject to the authority of any higher institutions or principle;

⁴³ NYST, C.: “Solidarity in a Disaggregated World-Universal Jurisdiction and the Evolution of Sovereignty” *Journal of International Law and International Relation*, Vol. 8, (2012), pp. 47-49.

⁴⁴ Kofi A. Annan, “Secretary-General’s Speech to the 54th Session of the UN General Assembly,” (20 September 1999), SG/SM/7136 GA/959.

⁴⁵ *Ibid.* See also United Nations Press Release: “Secretary-General Presents his Annual Report to the General Assembly”, Press Release SG/SM/7136/GA/9596 <http://www.un.org/press/en/1999/19990920.sgsm7136.html> [retrieved 2.3.2015].

⁴⁶ KLEFFNER, J. K.: *Complementarity in the Rome Statute and National Criminal Jurisdictions*. Oxford: Oxford University Press, 2008, p. 314.

⁴⁷ CASESSE, A.: *International Law*. 2nd ed. Oxford University Press, 2005, pp. 49-51 [hereinafter CASSESE, International Law]; CRAWFORD, J.: *Brownlie's Principles of Public International Law*. Oxford University Press, 2012, pp. 447-448.

therefore, state itself was the ultimate source of political authority within its territory.”⁴⁸ Every state was given the right to have a high degree of autonomy in governing its internal affairs. This right of autonomy implied that states were entitled to control the relationships between their governments and the citizens and groups that constitute their respective societies. In the same way, the right of autonomy entailed freedoms from external interference in the domestic affairs of the state, especially if interference was coercive in nature.⁴⁹ It should be noted that the right of non-interference “provided a measure of stability, predictability, and order within the anarchic system of nation-states for several centuries.”⁵⁰ In other words, from a sovereignty perspective, a state’s right to exercise criminal jurisdiction over acts committed in its territory and elsewhere by its citizens is, although not amounting to a prerogative, an undisputed part of its sovereignty. Moreover, the exercise of jurisdiction in a bystander state can be seen as undue interference and create dangerous friction in inter-state relation.⁵¹

It is possible to withhold that state sovereignty and the international criminal justice system are in a way two sides of one coin, but are nevertheless different constituencies which sometimes leads to conceptual tension. This is, for example so, regarding the principle of universal jurisdiction. It is especially with respect to the exercise of universal jurisdiction by one state that the need to establish some common grounds becomes important in order not to violate the sovereignty of other nations⁵² (later chapters further explore the conflicts between the two doctrines of universal jurisdiction and state sovereignty). Furthermore, it has to be retained that one of the

⁴⁸ CRONIN, B.: “The Tension between Sovereignty and Intervention in the Prevention of Genocide” *Human Rights Review*, (2007), p. 293; CASESSE, *International Law*, *supra* note 47, pp. 53-54. Put differently, one can certainly say that sovereignty of state is an elaborate and multifaceted notion; it is ‘a child’ of a long history of ideas about state, sovereigns and monarchs, and their relationship with the population they govern. In a way, it is a never ending discourse between autocracy and democracy which holds a special place at the intersection of international relations, law and political science.

⁴⁹ CRONIN, *supra* note 48, p. 293.

⁵⁰ *Ibid.*

⁵¹ As will be illustrated, in relation to the principle of universal jurisdiction, the concept of state sovereignty is complex and continuous one, hence leaving many questions open-ended.

⁵² COLANGELO, A. J.: “Universal Jurisdiction as an International ‘False Conflict’ of Laws” *Michigan Journal of International Law*, Vol. 30(3), (2009), pp. 902-903 [hereinafter COLANGELO, False Conflict].

most important aspects of state sovereignty is for a state to control its internal affairs, although sometimes subject to limitations imposed by international law.⁵³

2.2 Traditional Legal Bases on which Jurisdiction may be Exercised

At present, international law has specifically acknowledged five bases for national criminal jurisdiction, those being; territorial jurisdiction; nationality jurisdiction (or ‘active personality principle’); passive personality jurisdiction; protective jurisdiction (also referred to as the ‘security principle’); and universal jurisdiction⁵⁴; all of whom will be briefly described below. Universal jurisdiction is usually distinguished from the other four jurisdictional claims, due mainly to the fact that it lacks certain links that others have, thus making the usage of the principle controversial.

Nevertheless, the importance of these five jurisdictional principles is that they are accepted by all states and the international community as being consistent with international law. It is so even though some principles are generally recognized and deemed uncontroversial while others, such as the principle of universal jurisdiction, is rather subject to more controversy.

2.2.1 Jurisdiction with a Specific Link

2.2.1.1 Territorial Jurisdiction

Territorial jurisdiction, sometimes also called the ‘principle of territoriality’, is the basic principle of national criminal jurisdiction and the least controversial.⁵⁵ A state is an international entity based on a particular territory within which it has exclusive competence to govern its population. Furthermore, a state has the power to legislate

⁵³ NYST, *supra* note 43, pp. 57-59.

⁵⁴ According to Reydams the doctrine identifies up to seven jurisdictional principles. In addition to the five jurisdictional bases, the jurisdiction of the flag state and the representative principle should also be considered. See REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 21-22; COOMBES, K.: “Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations” *George Washington International Law Review*, Vol. 43, (2011), pp. 424-425.

⁵⁵ RYNGAERT, *Jurisdiction*, *supra* note 20, p. 42; CRYER *et al.*, *supra* note 35, pp. 46-46; BANTEKAS, *supra* note 15, p. 332.

and enforce its domestic law through various domestic mechanisms.⁵⁶ This form of jurisdiction is accepted by all states as an essential aspect of state sovereignty.⁵⁷ Any exception to the complete power of a sovereign within its own territory must be made under the consent of the nation itself, although, it has to take into account that an “absolute and complete nature of territorial jurisdiction can be modified either by general principles of international law or by specific obligations freely undertaken by the territorial sovereign”.⁵⁸ One of the main functions of a state is to maintain order within its own territory, so there is no surprise that the territorial jurisdiction is the most frequently invoked ground for criminal jurisdiction.⁵⁹ It is the most pervasive and least controversial principle of prescriptive jurisdiction under international law that confers jurisdiction based on the *locus* of a crime. It assumes that jurisdiction may be exercised by the courts of the state where the crime is committed.⁶⁰

The principle derives from the Westphalian model of state sovereignty and underscores each nation’s ‘right to political self-determination’ and dominion over activities within its boarder. As Chief Justice Marshall articulated in the famous 1812 *Schooner Exchange* case, “the jurisdiction of the nation within its own territory is exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty.”⁶¹ Accordingly, territorial jurisdiction is recognized to be the most basic jurisdiction under customary international law. The PCIJ declared in the 1927 *Lotus* case that “in all systems of law the principle of the territorial character of criminal law is fundamental” and that “the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent states from extending the

⁵⁶ BROWNLIE, I.: *Principles of Public International Law*. 7th ed. New York: Oxford University Press, 2008, p. 301; SHAW, *supra* note 22, p. 653; OPPENHEIM, L.: *Oppenheim’s International Law: Peace*. 9th ed. Edited by Sir WATTS, A.: Harlow: Longman, 1992, p. 458.

⁵⁷ BROWNLIE, *supra* note 56, p. 303. See also BASSIOUNI, M. CH.: “Theories of Jurisdiction and their Application in Extradition Law and Practice” *California Western International Law Journal*, Vol. 5(1), (1974), pp. 3-34 [hereinafter BASSIOUNI, Theories of Jurisdiction]; Harvard Research in International Law “Draft Convention on Jurisdiction with respect to Crime” *American Journal of International Law*, Vol. 29, (1935), pp. 495. A research in International Law, under the auspices of the Faculty of the Harvard Law School [hereinafter, Harvard Research].

⁵⁸ BEALE, J. H.: “The Jurisdiction of a Sovereign State” *Harvard Law Review*. Vol. 36(3), (1923), p. 245; DIXON, M.: *Textbook on International Law*. Oxford: Oxford University Press, 2007, p. 144.

⁵⁹ AKEHURST, *supra* note 24, p. 152.

⁶⁰ BROWNLIE, *supra* note 56, p. 301; OPPENHEIM, *supra* note 56, p. 458.

⁶¹ *Schooner Exchange v. McFaddon*, 11 U.S. 116, 3 L. Ed. 287, 3 S. Ct. 287 (1812), pp. 136–137.

criminal jurisdiction of their courts beyond their frontiers”.⁶² Thus, the jurisdiction of a state is considered to have effect generally within the territory of that state. Furthermore, Akehurst has observed that “one of the main functions of a State is to maintain order within its own territory, so it is not surprising that the territorial principle is the most frequently invoked ground for criminal jurisdiction [...]”.⁶³

The notion of territoriality has been somewhat widened, for instance, to include jurisdiction over a crime that is only partly committed in its territory. It is therefore possible to subdivide the territorial jurisdiction into two parts, subjective territorial jurisdiction that allows jurisdiction of a state where a crime was commenced, and objective territorial jurisdiction, that acknowledges the jurisdiction of a state where a crime was completed or had effect.⁶⁴

Perhaps the primary reason why the territoriality principle is so undisputed is that it confers multiple **practical advantages**. First, the *locus commissi delicti* (the place where the crime has allegedly been committed) is usually the *forum conveniens* (the appropriate place of trial) since it is easiest to collect evidence and hear witnesses. Second, it is normally the place where the rights of the accused are best safeguarded, for instance the accused is more likely to be familiar with the criminal law in force, know and speak the language in which the trial is conducted. In this regard, the principle fosters efficiency and predictability. By affording respect for each nation’s sovereignty, the territoriality principle generally reduces the potential for international tension. Generally, in many criminal prosecutions, the state in which the crime occurred has the greatest capacity to investigate the crime; collect evidence; examine witnesses; and apprehend the perpetrators.⁶⁵ As regard to the principle of universal

⁶² See the *Lotus* case, *supra* note 17, p. 20.

⁶³ AKEHURST, *supra* note 24, p. 152.

⁶⁴ These two territorial doctrines can lead to significantly different results, particularly concerning the problem of conspiracy and inchoate offences where elements are committed abroad. BROWNLIE, *supra* note 56, p. 654; CRYER *et al.*, *supra* note 35, p. 47; KACZOROWSKA, *supra* note 15, p. 316; see further BANTEKAS, *supra* note 15, pp. 333-336.

⁶⁵ BROWNLIE, *supra* note 56, p. 303; Amnesty International published a 722-page memorandum in September 2001 on “Universal jurisdiction: The duty of states to enact and implement legislation, documenting state practice at the international and national levels in approximately 125 countries in separate chapters”. See in this regard “Chapter One – Definitions”, pp. 4-6. Available online at <http://www.amnesty.org/en/library/info/IO53/003/2001> [hereinafter, Amnesty International Report]. See also BASSIOUNI, Theories of Jurisdiction, *supra* note 57, pp. 3-34.

jurisdiction, these advantages adherent to the territorial jurisdiction are one of many reasons why states have been reluctant in the practice of the universality principle.

2.2.2 Extraterritorial Jurisdiction with a Specific Link

2.2.2.1 Nationality Jurisdiction

Nationality jurisdiction is yet another traditional legal ground of jurisdiction, sometimes also called ‘active personality jurisdiction’, according to which a state may criminalize offences committed abroad by one of its nationals. Thus, the **nationality of the suspect** is the determining factor. It includes jurisdiction asserted by a state based on the domicile or residence of a suspect.⁶⁶ It allows states to prescribe legislation regulating the conduct of their nationals abroad and in some cases it has also been applied to persons with residency rights.⁶⁷ The competence of a state to prosecute its nationals on the sole basis of their nationality – and regardless of the territorial state’s competing claim – is based on the allegiance that is owed to one’s country of nationality under domestic law.

Traditionally, the nationality jurisdiction is implemented in one of two ways. On the one hand, in some states, national courts have jurisdiction over certain criminal conduct committed by their nationals abroad, regardless of whether those offences are criminal under the law of the territorial states. Here the underlying rationale is the will of a state that its nationals comply with its own law, irrespective of where they are and regardless of the laws in the state where the offence is committed. On the other hand, criminal jurisdiction over crimes committed by nationals abroad is subordinate to the offence being punishable under the law of the territorial state, thus the motivation here being the desire of the state of nationality not to extradite its nationals to the state where the crime has been committed.⁶⁸

⁶⁶ BROWNLIE, *supra* note 56, p. 303; SHAW, *supra* note 22, p. 659; OPPENHEIM, *supra* note 56, p. 462.

⁶⁷ AKEHURST, *supra* note 24, pp. 156-157; BANKETAS, *supra* note 15, p. 338.

⁶⁸ CASSESE, International Law, *supra* note 47, p. 337.

2.2.2.2 *Passive Personality Jurisdiction*

Passive personality jurisdiction is asserted by a state whose national is the victim of a crime.⁶⁹ Accordingly, the link that lies between the state exercising jurisdiction and the offence is the **nationality of the victim**, thus forming a link between the state exercising jurisdiction and the offence through the nationality of the victim. Under this principle a state can therefore apply jurisdiction according to international law over a foreigner who has committed an act, that took place outside the territorial boundaries of the state, but the act was committed against one of its nationals.⁷⁰

Historically, the validity of the passive personality principle has been regarded as controversial and its application has been a source of conflict between states and has been described as the “most contested in contemporary international law.”⁷¹ The basis for this controversy was that the principle subjects an individual to the laws of a state with which the perpetrator’s only connection is the victim's nationality.⁷²

Nevertheless, at present the principle has gained acceptance among countries and is considered as one of the acceptable jurisdictional bases.⁷³

⁶⁹ BROWNLIE, *supra* note 56, p. 304; SHAW, *supra* note 22, p. 664; See also Harvard Research, *supra* note 57.

⁷⁰ MCCARTY, J. G.: “The Passive Personality Principle and Its Use in Combating International Terrorism” *Fordham International Law Journal*, Vol. 13, (1989), pp. 300-301.

⁷¹ CHEHTMAN, A.: *The Philosophical Foundations of Extraterritorial Punishment*. Oxford University Press, 2010, p. 56. In the *Lotus* Case, France objected to Turkey's assertion of passive personality jurisdiction in accordance with the Turkish Criminal Code. Even though the majority of Judges refused to address the passive personality principle in the *Lotus* case, each of the six dissenting Judges addressed on the principle. All of the dissenting Judges rejected the passive personality principle because it was not in conformity with international law and they further argued that under international law a country could not extend its laws to cover alleged offenses committed by foreigners outside the territory of that country.

⁷² *Ibid.*, p. 302; BASSIOUNI, M. CH.: *International extradition and world public order*. Sijthoff, 1974, pp. 255-256. Moreover, the passive personality principles was for instance not considered to be a principle of jurisdiction according to the Harvard Research Draft on International Law and was therefore not adopted in the draft convention on jurisdiction with respect to crime. See the Harvard Research, *supra* note 57, p. 440. The passive personality jurisdiction has been disputed for a long time mainly because it implies that a state’s national carries with him the protection of his national laws and because it exposes others to the application of laws without there being any reasonable basis on which those persons might suppose that such laws apply to their conduct.

⁷³ See further discussion on the historical controversies in MCCARTY, *supra* note, 70.

2.2.2.3 *Protective Jurisdiction*

A state can, as an entity, suffer from acts that are committed abroad, by a foreigner. These acts may jeopardize the sovereignty and political independence of a state. Hence, under the protective or security jurisdiction, a state may exercise jurisdiction in respect of offences which, although occurring abroad and committed by non-nationals, are regarded as **injurious to the state's security**.⁷⁴

The nexus for this base of jurisdiction is the nature of the interest which is harmed. This jurisdiction allows a state to claim jurisdiction over offences directed against its security or vital interests, or other offences threatening the integrity of governmental functions that are generally recognized as crimes, i.e. plans to overthrow its government or counterfeiting its currency.⁷⁵ This principle is well established but it is still a matter of dispute as to how far it extends.

The principle was included in the Harvard Research on International Law draft convention where it was stated that “a state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.”⁷⁶ The latter part of this article observes the justification of the principle on the basis of a state's vital interests, since the alien might not be committing an offence under the law of the country where he is residing and extradition might be refused if it encompassed political offences.⁷⁷ Therefore the protective principle seems to be warranted as a basis for exercising jurisdiction by the state at which the act is directed, if the act, such as treason, is not

⁷⁴ If ‘security’ and ‘vital interests’ are given a broad interpretation it may lead to abuse. AKEHURST, *supra* note 24, pp. 157-158; BANKETAS, *supra* note 15, p. 342; SHAW, *supra* note 22, pp. 666-667.

⁷⁵ This, not always well observed principle, involves the application of state laws to punish politically hostile acts committed by foreigners within the jurisdiction of another state. AKEHURST, *supra* note 24, pp. 157-158; SHAW, *supra* note 22, p. 667.

⁷⁶ Harvard Research, *supra* note 57, p. 440. Moreover, the protective principle has been applied for instance in relation to terrorist offences committed (or planned) abroad which are intended to affect a state. See in this regard Art. 6(2)(b) and (d) of the 1998 International Convention for the Suppression of Terrorist Bombings; Art. 7(2)(b) and (c) of the International Convention of Terrorism. In addition, the protective principle has been upheld by several national courts. Noteworthy is the *Joyce v. DPP* since 1946 where the English House of Lords applied it in convicting an American national for treason. See House of Lords, case concerning *Joyce v. Director of Public Prosecutions*, [1946] I All E.R. I86, I93, I94.

⁷⁷ SHAW, *supra* note 22, p. 667.

punishable in the state where it originates. However, according to the protective principle, actual harm needn't have resulted from the act for a state to base its jurisdiction on it.

2.2.3 Extraterritorial Jurisdiction without a Specific Link

2.2.3.1 Universal Jurisdiction

Unlike other bases of jurisdiction in international law, as described above, universal jurisdiction requires **no territorial or national nexus** to the alleged act or actors over which a state legitimately may claim legal authority.⁷⁸ Subsequently, under this principle, each and every state has jurisdiction to try particular offences. The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole.⁷⁹ In other words, the usage of universal jurisdiction is primarily based on the gravity of the crime.⁸⁰ The purpose of the principle is not to protect the well-being of a given state or its citizens, but that of the **whole international community**.

⁷⁸ Fairly much has been written on the principle of universal jurisdiction in the past decades, but rarely in the same context. See, for example, MACEDO, S. (ed.): *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes*. Philadelphia: University of Pennsylvania Press, 2004; INAZUMI, M.: *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, 2005; PALOMBINO, F. M.: "Universal jurisdiction in absentia over genocide: some critical remarks in the light of recent Spanish jurisprudence" *Journal of Genocide Research*, Vol. 9(2), (2007); BAKER, R. B.: "Universal Jurisdiction and the Case of Belgium: A Critical Assessment" *ILSA Journal of International and Comparative Law*, Vol. 16, (2009); REYDAMS, L.: "The Rise and Fall of Universal Jurisdiction." In SHABAS, W. A., BERNAZ, N.: *Routledge Handbook of International Criminal Law*. Routledge, 2010; KONTOROVICH, E., ART, S. E.: "An Empirical Examination of Universal Jurisdiction for Piracy" *American Journal of International Law*, Vol. 104, (2010); LANGER, M.: "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes" *American Journal of International Law*, Vol. 105, (2011); KAZEMI, N.: "Justifications for Universal Jurisdiction: shocking the conscience is not enough" *Tulsa Law Review*, Vol. 49, (2013).

⁷⁹ SHAW, *supra* note 22, p. 668.

⁸⁰ For instance, Van der Vyver argues that the requirement of universal jurisdiction must be considered according to the seriousness of the crime instead of the lack of territorial jurisdiction. See VAN DER VYVER, J. D.: "Prosecution and Punishment of the Crime of Genocide" *Fordham International Law Journal*, Vol. 23, (1999), p. 322. Of the same opinion is Mann who claimed universal jurisdiction as arising from the character of crimes. His only criterion was that the crimes constitute attacks upon the international order. See MANN, *The Doctrine of Jurisdiction* (1984), *supra* note 23, p. 95. This thesis will observe the seriousness of a crime as a determinant factor for the application of universal jurisdiction in Chapter IV.

It is important to highlight that there are differences in the universality principle definition, depending on who is using the term and that the exact expression of it can take a variety of forms in the domestic legal systems. In their legislation, states tend to establish different prerequisites for the exercise of universal jurisdiction by their authorities, such as the presence of the accused in their territory. Its definition provided for in the 2001 Princeton Principles on universal jurisdiction reads as follows:

„[...]universal jurisdiction is criminal jurisdiction based *solely on the nature of the crime*, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.“⁸¹

Therefore, none of the traditional links to the prosecuting state are present in this case, which is the underlying idea common to all definitions of universal jurisdiction.⁸² As was noted by Judge Van den Wyngaert, in his Dissenting Opinion in the Arrest Warrant Case, “there is no generally accepted definition of universal jurisdiction in conventional or customary international law.”⁸³ Nevertheless, there exist a common understanding among the international community that universal

⁸¹ Commentary: “The Princeton Principles on Universal Jurisdiction”. In MACEDO, S. (ed.): *Universal jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press, 2004, p. 21 (emphasis added). The definition of universal jurisdiction varies among authors. Some define it in relation to the category of offence (piracy, genocide etc.) or the nature of the offence (international crime). See, Restatement (Third) of the American Foreign Relations Law, (1985), para. 404. Although the Third Restatement is a work by a group of scholars and is not binding law, it nevertheless has a great influence as an authoritative and prominent interpretation [hereinafter, the Third Restatement]; The Princeton Principles on Universal Jurisdiction, *supra* note 5, Principle 1. Others define it in relations to the scope of the state that may exercise it (‘every state’ or ‘any state’). See GALICKI, Z.: “Preliminary Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)”, A/CN.4/571, 7 June 2006, para. 19; RANDALL, K. C.: “Universal jurisdiction under international law” *Texas Law Review*, Vol. 66, (1987), p. 788. See also, O’KEEFE, *supra* note 21, p. 745-746; Secretariat Council “The AU-EU Expert Report on the Principle of Universal Jurisdiction”, *Council of the European Union, Brussels 16*, 8672/1/09 REV1, (2009) para. 8. Available online at http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf [retrieved 3.8.2014] [hereinafter, AU-EU Expert Report].

⁸² See, for instance, REYDAMS, Universal Jurisdiction, *supra* note 19, p. 1; ORENTLICHER, D.: “Universal Jurisdiction: A Pragmatic Strategy in Pursuit of a Moralists’ Vision.” In SADAT, L. N., SCHARF, M. P. (eds.): *The Theory and Practice of International Criminal Law, essays in honor of M. Cherif Bassiouni*. Boston: Martinus Nijhoff Publishers, 2008. p. 127; Amnesty International: “Universal Jurisdiction: The duty of states to enact and implement legislation.” Report by Amnesty International, 2001. Available at <http://www.amnesty.org/en/library/info/IOR53/002/2001> [retrieved 3.11.2014].

⁸³ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, ICJ Reports 1970, 3, para 44. (Dissenting Opinion of Judge Van den Wyngaert) [hereinafter, the *Arrest Warrant* case].

jurisdiction is exercised by states having no relation to territorial or nationality aspects. See the following chapter on a more thorough analysis on the nature and formation of principle of universal jurisdiction.

2.3 Jurisdictional Conflicts – Is There a Hierarchy?

In recent decades, the transnational movement of people and goods increases and interdependence between states or any other societies deepens. Consequently, it becomes unrealistic for a state to confine the scope of its law within its borders in order to maintain its public order. Moreover, with the emergence of the notion of community interest of international society, which is allegedly unable to be reduced to the interest of individual states, it has been recognized that there are matters of international concern even when all of the relevant factors are consummated within a territory of one state. In response to those situations, states have extended the scope of their criminal law to the activities outside of their territories. This response has inevitably generated the concurrence of jurisdictional claims among states and has, in some cases, developed into the conflict of states.

Certainly international law does ‘make an offer’ of jurisdiction. International law does not prohibit a state from applying its criminal law to events that occurred within a territory of another state. Generally, it does not either oblige a state to exercise jurisdiction on any of these grounds, at least not outside its territorial boundaries. It is a matter for the domestic law or norms of the state to decide, as long as it respects the minimum restrictions and obligations set out by international law. There is therefore a lack of hierarchy between concurrent jurisdictional claims for adjudication of international crimes between sovereign entities.⁸⁴

What matters is that the basis on which jurisdiction may be exercised, is accepted by all states and the international community as being consistent with international law. However, territorial jurisdiction still takes primacy over other jurisdictional claims

⁸⁴ In this context the emerging notion of ‘subsidiarity’, in connection to universal jurisdiction, could be applied as a guiding principle (or as a modality in the exercise of universal jurisdiction) between jurisdictional claims. See Chapter V on the ‘The Idea of Subsidiarity in the Context of Universal Jurisdiction’.

(*de facto* primacy of territoriality), mostly for practical reasons.⁸⁵ Hence, it is widely accepted today that territorial jurisdiction is the primary basis of jurisdiction.⁸⁶

The concurrence of multiple jurisdictions does certainly have advantages, but at the same time, it can be problematic. International law tends to encourage states to prepare many jurisdictional bases with the aim of enhancing possibilities for punishing offenders. Therefore, it is most likely that there is more than one national jurisdiction that can be legally exercised over a case.

Let's give an example. If a citizen from state A commits a crime in state B, against a citizen of state C, all three states may have jurisdiction. State B would have jurisdiction on the basis of the territoriality principle. Active personality principle would be practiced by state A and state C might claim jurisdiction on the basis of passive personality principle. What is more, if the crime is an international crime that gives rise to universal jurisdiction, every single state may have jurisdiction, irrespective of a nexus with the crime.

There is no rule prohibiting states from establishing domestic criminal jurisdiction on the basis of active or passive nationality, or universality over an extraterritorial situation that is already covered by the jurisdiction of other states, especially the territorial state.⁸⁷ As the PCIJ stated in its famous *Lotus* case:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law (allowing exercising jurisdiction

⁸⁵ Council of Europe, European Committee on Crime Problems, 'Extraterritorial Criminal Jurisdiction', reproduced in *Criminal Law Forum*, Vol. 3(3), (1992), pp. 458-459; AU-EU Expert Report, *supra* note 81, Rec. 9.

⁸⁶ In fact, exercising territorial jurisdiction has many advantages. First of all, a state monopolizes a prerogative power within its borders; it is thus only the territorial state that can legally conduct an investigation and arrest in its territory. In addition, in many cases, it is a territorial state within which the accused and evidence are found. Therefore, territorial states usually have an advantage in terms of the ability to investigate and arrest. Moreover, it is usually the place where the rights of the accused are best safeguarded, as the accused is expected to know the law and language of the country in which they stay. This also makes the territorial state advantageous in terms of its ability to ensure a fair trial in the criminal proceedings. In short, a territorial state is in a position to fully exercise its jurisdiction within its borders, in the sense that it is not only able to prescribe law, but also enforce that law without any restraint, which ensures the effectiveness of territorial jurisdiction. See, for instance, SHAW, *supra* note 22, pp. 652-653; CASSESE, A.: *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press, 2013, p. 275 [hereinafter CASSESE, Cassese's Law].

⁸⁷ RYNGAERT, Jurisdiction, *supra* note 20, p. 129.

outside its own territory). [...] The territoriality of criminal law [...] is not an absolute principle of international law and by no means coincides with territorial sovereignty.⁸⁸

Moreover, international customary law recognizes no hierarchy among the different types of criminal jurisdictions outlined above. There is a lack of hierarchy between concurrent jurisdictional claims for adjudication of international crimes between sovereign entities. In particular, there is no conclusive evidence regarding the existence of a rule of customary international law which may provide for the priority of the territoriality principle. However, one can recognize a tendency among states to accord priority to the principle of territoriality.

As previously stipulated, when dealing with jurisdictional conflicts, one cannot leave the discussion without mentioning the *Lotus* case (see further Section 2.3.1). Even though the case can barely be considered as representative for jurisdictional conflicts, it nevertheless has become the main standard of reference for such conflicts in all legal areas. Since *Lotus*, the PCIJ and the International Court of Justice (ICJ) have not directly addressed the doctrine of (extraterritorial) jurisdiction. This is not to say that this doctrine has not been developing, on the contrary. Yet the development has come about solely in national legal practice, without supervisory guidance by an international court or regulator.

Furthermore, in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal opined in their Separate Opinion that a state seeking to exercise universal jurisdiction “must [...] ensure that certain safeguards are in place [that] are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between states.”⁸⁹ Further it was stated that:

A State contemplating bringing criminal charges based on universal jurisdiction *must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.*⁹⁰

⁸⁸ See the *Lotus* case, *supra* note 17, pp. 18-20.

⁸⁹ The *Arrest Warrant* case, *supra* note 83, p. 80, para. 59. Even though the remark concerned universal jurisdiction *in absentia*, one might find it relevant also with regard to universal jurisdiction *per se*.

⁹⁰ *Ibid.* (emphasis added).

Similarly, the Princeton Principles on universal jurisdiction proposes that the forum state shall, when it receives a request for extradition to another state, take into account, *inter alia*, “the place of commission of the crime” and “the nationality connection of the victim to the requesting state”,⁹¹ hence proposing priority for the victim’s home state. In addition, the AU-EU Expert Report on Universal Jurisdiction recommended that when “prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes [...] primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community [...]”⁹²

In sum, even though historically the dominant jurisdictional basis was undoubtedly territorial jurisdiction (although the other jurisdictional bases were recognized to some extent, they did not receive a high degree of acceptance), at present one has to be aware that due to globalization and constant interconnection between states and its nationals that the territorially based sovereigns are facing adaptation and challenges in this new environment. Hence, it forces legal scholars and judges to ‘adapt’ and constantly reexamine traditional rules for legal jurisdiction with regard to the new economic and social environment.⁹³ Consequently, traditional legal rules are being constantly challenged by new social developments (such as cross-border activities and transnational crimes) and multiple contemporary conventions usually explicitly allow (or sometimes even obligate) states to establish various bases of national jurisdiction therefore recognizing and enhancing the usage of other non-territorial jurisdictions,⁹⁴ although some argue that jurisdiction based solely on territoriality “served the goals of ‘predictability and efficiency’”.⁹⁵

⁹¹ The Princeton Principle on Universal Jurisdiction Principle, *supra* note 5, Principle 8(b) and (d). See also MACEDO, *supra* note 81, p. 23.

⁹² AU-EU Expert Report, *supra* note 81, Rec. 9.

⁹³ Which among others are due to newly emerging crimes that do not know any boundaries, for instance, serious environmental crimes and cyberterrorism. See BERMAN, P. S.: “The globalization of jurisdiction” *University of Pennsylvania Law Review*, Vol. 151(2), (2002), pp. 326-327; BUXBAUM, H. L.: “Territory, Territoriality, and the Resolution of Jurisdictional Conflict” *American Journal of Comparative Law*, Vol. 57(3), (2009), pp. 634-635.

⁹⁴ Accordingly, in some cases, the interest in extraterritoriality became associated with attempts to enforce human rights. See PARRISH, A.: “The Effects Test: Extraterritoriality’s Fifth Business” *Vanderbilt Law Review*, Vol. 61(5), (2008), p. 1470.

⁹⁵ *Ibid.*, p. 1467.

2.3.1 Importance of the Lotus Case

In 1927, the Permanent Court of International Justice (PCIJ or the Court) delivered judgment in the *Lotus* case. This decision, which marks a turning point in jurisdictional jurisprudence, is still at present considered the most descriptive example concerning the rights of a state to exercise criminal jurisdiction: hence, constituting the basic framework of reference for questions of jurisdiction under international law.

The PCIJ was requested to settle a dispute between Turkey and France with regard to a collision on the high seas between the French steamer, *Lotus*, and the Turkish steamer, *Boz-Kourt*; as a result of which eight Turkish sailors perished. Turkey authorities commenced with proceedings against a French Lieutenant and Turkish commanders. Two days later, Lieutenant Demons, the officer of the watch of the *Lotus*, a French national, was placed under arrest. The French government asserted that Turkey acted in a manner inconsistent with the principles of international law by declaring criminal jurisdiction over the French commander. The Court was asked the following question whether Turkey did violate international law when Turkish courts exercised jurisdiction over a crime committed by a French national; outside Turkey.

The PCIJ held that Turkey had not infringed the principles of international law by asserting proceeding against the French Lieutenant. In this respect, the Court stated that:

“International law governs relations between independent states. The rules of law binding upon states therefore 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 common aims. Restrictions upon the independence of state cannot therefore be presumed. *The first and foremost restriction imposed by international law upon a state is that failing the existences of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.* It does not, however, follow that international law prohibits a State from exercising

jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on.”⁹⁶

The PCIJ further continued:

“What international law leaves to the states is a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable. In this circumstance, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”⁹⁷

On October 12, 1926, France and Turkey signed a special agreement in which they submitted the question of jurisdiction arisen in the *Lotus* case to the PCIJ. In 1927, in a controversial verdict, decided by the president’s casting vote, the PCIJ ruled that Turkey was indeed entitled to institute criminal proceedings against the French officer.

To sum up, two fundamental approaches could be taken to the question of jurisdiction in international law according to the case. One being, in short, that a state may exercise jurisdiction unless there is a rule prohibiting it, the other being that a state may not exercise jurisdiction unless there is a rule permitting it. In the *Lotus* case the PCIJ however takes both approaches. The Court makes a distinction between types of jurisdictional boundaries, as they were described previously in Section 2.1.1, namely; legislative; judicial; and enforcement jurisdiction. The Court found that according to international law, states cannot exercise their enforcement jurisdiction in another states territorial jurisdiction, unless a permissive rule exists to the contrary.⁹⁸

The Court is thus clear on its fundamental approach towards enforcement jurisdiction. A permissive rule is necessary for a state to be able to exercise this type of jurisdiction. However, the Court also stated that international law does not limit a state legislative jurisdiction. A state could therefore prescribe its rules for persons and events in another state territorial jurisdiction unless there was a prohibitive rule to the

⁹⁶ The *Lotus* case, *supra* note 17, p. 18 (emphasis added).

⁹⁷ *Ibid.*, pp. 18-19.

⁹⁸ *Ibid.*

contrary. Finally, the Court concluded, in what has become a frequently cited passage and articulates what could be described as the ‘*Lotus* principle’:

“[...] Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, *it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules*; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”⁹⁹

Finally, the result being that Turkey, by instituting criminal proceedings against Lieutenant Demons, did not violate international law. Indeed, the *Lotus* case could hardly be considered representative for jurisdictional conflicts but soon ended up as the main standard of reference for jurisdictional conflicts and issues in all legal areas. In conclusion, the *Lotus* ‘approach’ that stipulates that sovereign states may act in a way they wish so long as they do not contravene an explicit prohibition is considered a foundation of international law.

2.4 Jurisdiction of the International Criminal Court

Contrary to universal jurisdiction, the jurisdiction of the ICC is based on the territoriality and the nationality principle, founded in a treaty-based delegation of jurisdiction from its state parties. Accordingly, universal jurisdiction is connected to the competence of a state to assert the jurisdiction over persons before its own courts, instead of prosecuting those same persons before an international judicial body.¹⁰⁰ This is a core difference in the two regimes which is important to recollect. Jurisdiction over international crimes exercised by the ICC is therefore international jurisdiction, and not universal jurisdiction. Universal jurisdiction is exercised by states, not by international institutions.¹⁰¹ Nevertheless, both universal jurisdiction and

⁹⁹ *Ibid.*, p. 19 (emphasis added).

¹⁰⁰ AU-EU Expert Report, *supra* note 81, paras. 28-29.

¹⁰¹ The jurisdiction of the ICC can be divided in four categories, temporal, territorial, personal and subject matter jurisdiction. The temporal jurisdiction prohibits the Court from exercising jurisdiction over crimes committed before the Statute entered into force on 1 July 2002. Territorial jurisdiction is addressed in the Rome Statute Article 12(2) which gives the Court jurisdiction over crimes regardless of the nationality of the suspect as long as the crime was committed on the territory of any State Party. Territorial jurisdiction therefore does not apply to non-state parties (except if an *ad hoc* declaration

international criminal jurisdiction are expected to bring about justice for gross violations of human rights when there is an absence of other effective jurisdiction capable of being applied over the case. Even though the similarities in overall objectives do not automatically lead to the conclusion that the same rules apply and the two jurisdictions should be exercised in the same manner, they are expected to work in collaboration.¹⁰²

When drafting the Rome Statute the question of jurisdiction was an extremely controversial topic. There have been a number of criticisms of the ICC on the basis that it was not granted universal jurisdiction.¹⁰³ The Rome Statute provides for jurisdiction over war crimes, crimes against humanity and genocide in two primary situations, according to Article 12, which are:

“(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft

(b) The State of which the person accused of the crime is a national.”¹⁰⁴

As the Preamble of the Rome Statute establishes, 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.” Hence, the refusal by the drafters of the Statute to grant the ICC universal jurisdiction indeed seems to be contrary to the objectives set out in the Preamble. In other words one could maintain that the creators of the ICC failed to

given by a non-state party or a Security Council referral can give the Court jurisdiction over non-state parties). The active personality jurisdiction of the Court, as expressed in Art. 12(2)(b), gives the Court jurisdiction over any national of a state party. Lastly, the subject-matter jurisdiction of the Court is limited to the core international crimes listed in the Rome Statute Art. 5(1). Presently, these include genocide, war crimes and crimes against humanity. The crime of aggression is also within the Court’s jurisdiction, but is still pending ratification of the amendment of the Rome Statute (which will enter into force 2017). See the Rome Statute of the International Criminal Court (done at Rome 17 July 1998), entered into force 1 July 2002, (as of 6th January 2015 there a 123 states party to the Statute).

¹⁰² INAZUMI, *supra* note 78, pp. 120-121; GRAEFRATH, B.: “Universal Criminal Jurisdiction and an International Criminal Court” *European Journal of International Law*, Vol. 1, (1990), pp. 81-86.

¹⁰³ See SCHABAS, W. A.: *The International Criminal Court: A Commentary on the Rome Statute*. Oxford University Press, 2010, p. 47; BROWN, B. S.: “The Evolving Concept of Universal Jurisdiction” *New England Law Review*, Vol. 35, (2000), pp. 385-387; ABASS, A.: “The International Criminal Court and Universal Jurisdiction” *International Criminal Law Review*, Vol. 6(3), (2006), pp. 369-374; See also ARBOUR, L.: “Will the ICC Have an Impact on Universal Jurisdiction” *Journal of International Criminal Justice*, Vol. 1, (2003), pp. 585-588.

¹⁰⁴ Article 12(a) and (b) of the Rome Statute. In addition, Article 12(3) also provides for jurisdiction where a state accepts the jurisdiction of the Court on an *ad hoc* basis.

endow the ICC with the mandate it needs to maintain international peace and security since some of the most heinous offences may go unpunished due to its limited jurisdiction, not to mention the limited number of crimes falling under its scope.

It is essential to remember that both the Preamble to the Statute and Article 1 express a fundamental principle of the Rome Statute - which the ICC is to be 'complementary' to national criminal jurisdictions. Thus national proceedings, on the basis of one of the five jurisdictional bases listed above, are to be given primacy.

2.5 Summary

The aim of concurrent jurisdictional structure is to eliminate safe havens for criminals. The objective is obvious; to close jurisdictional gaps and deter that heinous crimes are being left unpunished due to the failure, let's say for example, of the territorial jurisdiction to effectively prosecute and punish. Thus the current legal situation of plural jurisdictions is seen as **desirable** since it greatly increases the likelihood of prosecution. Consequently, if one jurisdiction fails to be exercised, there may be another basis of jurisdiction that could be applied in order to bring about prosecution.

Certainly, every issue has two sides. Not only are there advantages, but in the multiple systems of national (as well as international) jurisdiction, there are also disadvantages, because having more than one court (domestic or international), each with a lawful jurisdictional basis, may cause difficulties and complexities. What court should actually exercise jurisdiction and proceed with prosecution? In this respect one should think about two scenarios. Firstly, even though a crime has been committed, no jurisdiction is asserted by state. This causes the heinous crime being left unpunished and stipulates to impunity. Therefore, secondly, in order to prevent this happening, it is beneficial to recognize various bases of jurisdiction. In the end, the principle of universal jurisdiction fills a gap left where other, more basic grounds of jurisdiction provide no basis for national proceedings. Whereas, international law recognizes this form of jurisdiction, states have in effect acknowledged that any other states may investigate and prosecute a given crime, even absent the usual jurisdictional link.

The four forms of jurisdiction described in this chapter require some kind of link or connection with the prosecuting state. However, the application of universal jurisdiction to a particular offence does not require any link whatsoever. In this regard the universality principle is exceptional; established without any nexus. The only prerequisite for its exercise is the heinous nature of a crime; targeted against the international community as a whole.¹⁰⁵

Where the state directly affected simply cannot assume the primary burden to prosecute crimes, either due to sheer incapacity or lack of political will, the role of other states in the international system may be invoked. As observed in the Report of the Secretary-General on the rule of law and transnational justice in conflict and post-conflict societies, “of course, domestic justice systems should be the first resort in pursuit of accountability. But where domestic authorities are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial.”¹⁰⁶

To conclude, national jurisdiction is an integral part of state sovereignty and is often claimed to be an exclusive power belonging to states, and to be within the discretion of states as a domestic matter. Thus, a state generally enjoys exclusive power within its territorial boundaries under the principle of state sovereignty. As a consequence, territoriality has been strongly emphasized as a basis for national jurisdiction. The state exercising jurisdiction is almost always the state where the crime was committed.

Indeed, international law can place some limitations on national jurisdiction, and territorial jurisdiction must be exercised within the general framework provided under international law. Therefore, there can be no doubt that the principle of territorial jurisdiction is the strongest basis for national criminal jurisdiction as well as taking into account the practicality of it. However, it does certainly not preclude other bases of jurisdiction *ipso facto*, especially in a modern society where cross-border activities increase rapidly.

¹⁰⁵ See further Chapter IV on ‘Core International Crimes that Attract the Application of Universal Jurisdiction’.

¹⁰⁶ RASTAN, R.: “Complementarity: Contest or Collaboration”. In BERGSMO, M. (ed.): *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*. Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 122.

Now, after having established an outline of the various criminal jurisdictional bases accepted in international law and demonstrated how exceptional the principle of universal jurisdiction is; it is time to comprehensively analyze the nature and scope of the universality principle and the milestones in its historical evolution.

3 Formation and Implication of Universal Jurisdiction

Before starting with an inquiry on actual aspects of the universality principle it is important to retrace the system from which the principle emerged. Thus, the history and evolution of universal jurisdiction is essential, since the justifications for its current scope are rooted in the history of its development, largely by analogy to earlier applications.¹⁰⁷

The concept of universal jurisdiction, which developed significantly following the Second World War, gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit, or implicit, clauses on universal jurisdiction. The idea that in certain circumstances, sovereignty could be limited for heinous crimes became gradually accepted as a general principle. Later on, other international conventions, and to some extent, rules of customary law enlarged the principle's scope of application. The international community has since then recognized that certain crimes are so inherently odious that they must be treated differently from ordinary offences. These are crimes against the universal interest, which offend universal conceptions of public policy and must be universally condemned. Therefore the international community is entitled – and even obliged - to bring to justice any individual who commits such a crime.¹⁰⁸

This chapter will begin by illustrating how universal jurisdiction has expanded considerably over the years, not only in theory, but also in practice; hence providing a brief historical excursion on its nature and scope. It will be observed how universal jurisdiction has gained expectation and support in a situation where states, specially the territorial states, were unable or reluctant to effectively exercise jurisdiction and where no international criminal court was available. For the purpose of clarification

¹⁰⁷ For instance, noteworthy are the two alternative methods of examining the historical development of universal jurisdiction put forward by Kravtman; on the one hand a 'traditional' historical model (which reveal a few sources of law to support the use of universal jurisdiction for many modern crimes), and on the other, a 'lesser-employed' historical approach, that according to Kravtman, reveals more solid foundations that can be used to defend a moderate version of universal jurisdiction. See KRAYTMAN, Y. S.: "Universal Jurisdiction – Historical Roots and Modern Implications" *Brussels Journal of International Studies*, Vol. 2, (2005), pp. 94-124.

¹⁰⁸ PHILIPPE, X.: "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?" *International review of the Red Cross*, Vol. 88(862), (2006), p. 377; GENEUSS, J.: "Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction" *Journal of International Criminal Justice*, Vol. 7(5), (2009), pp. 951- 953; BROOMHALL, B.: *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press, 2003, p. 107 [hereinafter BROOMHALL, International Justice].

the most significant milestones in the evolution of the universality principle will be briefly described. The author finds it appropriate to divide the historical evolution into three evolutionary stages or periods, namely:

1. Origins of the principle (starting from piracy);
2. Development following the Second World War;
3. Modern application (from the *Arrest Warrant*¹⁰⁹ case and beyond).

At the same time, the gradual acceptance of universal jurisdiction both in conventional and customary international law will be observed by listing some of the applicable instruments available for universal jurisdiction. Doctrinally the rationale for universal jurisdiction is based on the idea that certain crimes are so heinous that they affect the whole international community. In addition, the crimes in question are universally condemned and/or injurious to international interests. Hence, the outcome being that states are required to bring proceedings against the offender.¹¹⁰ In a way, universal jurisdiction has been viewed as an additional complementary mechanism in the collective system of criminal justice.¹¹¹

When describing the evolution and formation of the universality principle and its' decisive elements in shaping the nature of it, one has to consider other related, yet distinct, international law norms and concepts in correlation with the evolving nature of universal jurisdiction. According to the author these related principles and concepts are of great relevance, mainly due to two reasons;

- A) The principles (that will be described and dealt with within this chapter) all together have the aim of fighting serious offences, or at least stipulating to the enforcement of justice, and closing the impunity gap. Accordingly, one has to consider them as pillars in the same struggle along with universal jurisdiction;

¹⁰⁹ See Section 3.1.3.

¹¹⁰ UNGA, Report of the Secretary-General prepared on the basis of comments and observations of Governments, Sixty-fifth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/65/181, *supra* note 6.

¹¹¹ *Ibid.*, p. 5.

B) These principles (such as the doctrine of *aut dedere aut judicare*) and concepts can be considered as an enforcement mechanism that stipulates and impels the principle of universal jurisdiction.

Although much has been written on the connection on one hand, between the universality principle and, on the other, the obligation *aut dedere aut judicare* only a few commentators have actually studied them in correlation - as interrelated pillars in the fight against impunity.¹¹² Therefore, this chapter will be finalized by emphasizing the close linkage between these two principles.

The historical examination undertaken below is as chronological as possible; from traditional international law to modern applications. However, this study seeks only to clarify the most significant milestones in the evolution of universal jurisdiction necessary for the purposes of this thesis thus keeping the description objective and targeted.

3.1 From Piracy to Modern Application of *Jus Cogens* Crimes

3.1.1 Origins of Universal Jurisdiction

“Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge.”¹¹³

This wording illustrates, among others, that the origins of the universality principle can be traced far back. To be more specific, it was in the sixteenth century when a number of Dutch scholars, most importantly Grotius, advocated universal jurisdiction

¹¹² Reydamas, for instance, began his historical analysis on universal jurisdiction with the *Lotus* case and from there examined various national practices involving jurisdiction over foreign nationals. Reydamas did not mention piracy – the supposed origin of universal jurisdiction – but rather his understanding of universality is intertwined with extradition and the development of *aut dedere aut judicare*. See REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 11-42; AU-EU Expert Report, *supra* note 81, para. 11.

¹¹³ A noteworthy comment made by President Guillaume of the ICJ on the thinking of classical scholars. See the Separate Opinion of President Guillaume to the Judgment of 14 February 2002, in the *Arrest Warrant* case, *supra* note 83, para. 4.

over crimes that violated the law of nature and shocked the *societas generis humani*, namely, the crime of piracy.¹¹⁴ Piracy is the oldest offence to be subject to universal jurisdiction. By 1928, Donnedieu de Vabres, stated that the system of universal jurisdiction was being recognized as a principle by the international community, but that it remained to be organized in practice.¹¹⁵ Ironically as it sounds, still today within the modern international law there is uncertainty on the application and exercise of the universality principle.

States were all eager to prosecute pirates since all nations were affected by them, and universal jurisdiction turned out to be a neat compromise to settle “potentially innumerable [...] conflicts of jurisdiction.”¹¹⁶ Any state that apprehended a pirate could try him in its courts. What is more, for centuries, no commonly accepted definition existed over the crime of piracy thus leading to several definitions by each state. The first definition of piracy, under international law, was provided for in Article 15 of the 1958 Geneva High Seas Convention, which describes the act of piracy as any illegal act of violence or depredation which is committed for private ends on the high seas or without the territorial control of any state.¹¹⁷ The same definition was later repeated in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Moreover, at present, the customary international law of universal jurisdiction on the high seas over piracy is codified in Article 105 of the

¹¹⁴ Universal jurisdiction has been traced to the first general treatise on modern international law and international relations. Covarruvias in the 16th Century, Grotius in the 17th, and de Vattel in the 18th, these so-called ‘founding fathers’ all elaborated on the question of crime and punishment in the emerging Westphalian order. See REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 35-37; BASSIOUNI, M. CH.: “Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice” *Virginia Journal of International Law*, Vol. 42, (2001), pp. 108-109 [hereinafter BASSIOUNI, *Universal Jurisdiction*]; COWLES, W. B.: “Universality of Jurisdiction over War Crimes”. *California Law Review*, Vol. 33, (1945), pp. 181-194.

¹¹⁵ RYNGAERT, *Jurisdiction*, *supra* note 20, p. 108.

¹¹⁶ BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, p. 83.

¹¹⁷ Art. 15 of the 1958 Geneva Convention on the High Seas. The full provision is as follows;
“(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.”

1982 UNCLOS.¹¹⁸ This provision contains the essential feature of universal jurisdiction, namely, that every state has jurisdiction without regard to territory or other links, such as nationality of the victim or suspect. Consequently, universal jurisdiction over piracy is tied to it being committed on the high seas - *terra nullius* - in a territory over which no state has explicit jurisdiction.¹¹⁹

In modern international law, the most cited rationale for universal jurisdiction over the crime of piracy lay partly in the fact that piracy often occurred on the high seas, outside of the territorial jurisdiction of any state. Under the principle of the freedom of the high seas, every state had an equal right to navigate on the high seas and could therefore patrol the high seas for pirates without violating any other state's territorial sovereignty.¹²⁰ Today, it is widely accepted that states may exercise universal jurisdiction over piracy as a crime under international law. Moreover, in the modern context, hijacking has been compared to piracy but universal jurisdiction over hijacking is provided for in Article 4 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, in the form of *aut dedere aut judicare* (which will be dealt with later in this Chapter).¹²¹

¹¹⁸ Art. 105 of the UNCLOS codify the customary law rule on universal jurisdiction to try pirates. The full text of the article on "seizure of pirate ship or aircraft" provides:

"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."

¹¹⁹ Grotius, an advocate of freedom on the high seas - *mare liberum* - posited the principle that ships on the high seas were an extension of the state's territoriality. In this respect Bassiouni has maintained that "[i]t was not, therefore, an application of universal jurisdiction whereby any and all states could exercise their jurisdiction over any and all pirates. Instead, it could be said that it was the recognition of the universal application of the flag state's jurisdiction in its right to defend against pirates and eventually to pursue them as both a preventive and punitive measures." See BASSIOUNI, *History of Universal Jurisdiction*, *supra* note 34, p. 109.

¹²⁰ RANDALL, *supra* note 81, pp. 791-794; AKEHURST, *supra* note 24, p. 160; BOWETT, *supra* note 25, p. 11.

¹²¹ AKEHURST, *supra* note 24, p. 161-162. Counterarguments can be found in BOWETT, *supra* note 25, p. 5. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention), done at The Hague on December 16, 1970. Article 4 reads as follows:

"1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence [...]
2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him [...]"

Furthermore, Randall, for instance, has observed that a more accurate rationale for universal jurisdiction over piracy is the fundamental nature of piratical acts. Pirates are regarded as enemies of all people and piracy is punishable by every state since their act is often committed against vessels and nationals of numerous states and especially when viewed cumulatively, piratical acts could disrupt commerce and navigation on the high seas. At the time universal jurisdiction over piracy was developing, the effects of piracy were especially harmful given the importance of the high seas for commerce and navigation, thus rendering piracy of concern to all states. Nowadays, this rationale is considered questionable and debatable.¹²²

There were therefore two fundamental rationales explaining why universal jurisdiction was recognized for the crime of piracy under international law. Firstly, it was related to the gravity of the crime, amounting to '*hostis humani generis*'. This meant that states were motivated to acknowledge that the punishment for the crime of piracy provided the interests of a single state that represented the interests of international community as a whole.¹²³ Secondly, it was related to the lack of jurisdiction or the doubtfulness to which a state had jurisdiction over a case. This uncertainty arose because the high seas had to be considered a non-area. In turn, this meant that any state could exercise its jurisdiction to punish and prosecute acts committed on the high seas. As a result of this situation, it was admitted that any state that was able to capture and prosecute suspects could capitalize on that opportunity without missing the chance to battle the crime of piracy.¹²⁴

However, it must be noted, that despite the universal acceptance of the practice of universal jurisdiction over piracy, there has always been debate among legal scholars about the nature of the crime and how it gave rise to universal jurisdiction. This debate is nowadays very relevant to understanding the historical weaknesses of relying on piracy for justification of modern universal jurisdiction. Although innumerable scholars and judges have called piracy a crime against the law of nations, it seems this is actually a misstatement that has come into usage from convenience and not legal accuracy as will be further articulated within Chapter IV.

¹²² See Chapter IV on the 'Core International Crimes that Attract the Application of Universal Jurisdiction'.

¹²³ INAZUMI, *supra* note 78, p. 50.

¹²⁴ *Ibid.*, p. 51.

Nevertheless, because of the gravity of the crime, the prosecution of piracy was recognized as a common interest among states. Hence, any state capable of capturing, prosecuting and punishing a suspect of piratical act was allowed to exercise jurisdiction. As a result, universal jurisdiction over the crime of piracy was established under customary international law.

In sum, among the main historical reasons for applying universal jurisdiction to piracy, has been;

- a) Statelessness of pirates;
- b) The act of piracy is committed on the high seas – *terra nullius*;
- c) The heinousness of the offence, thus constituting *hostis humani generis* (but one might question this rationale under modern international law);
- d) The crime of piracy is considered clearly defined, at least under international law.

Additionally to the crime of piracy, some states began, in the middle of the nineteenth century, to exercise universal jurisdiction over slave trading even though the 1926 Slavery Convention does not explicitly provide for universal jurisdiction in Article 2 (in comparison to Article 3 which clearly prescribes territorial jurisdiction).¹²⁵ Since then, there has been a gradual development to include slavery and slave related practices within international law relying on the same type of universal condemnation that exists with respect to piracy.¹²⁶

In conclusion on the first evolutionary stage of the universality principle one can fairly expect that since then the fundamental values and norms of the international system have evolved along with the number of crimes established by international law. As a result, the scope of universal jurisdiction has also grown and now not only encompasses acts of piracy but also applies to the most heinous crimes defined by international law as will be demonstrated in the next evolutionary stage.

¹²⁵ Slavery and other prohibited acts relating to slavery are defined in Art. 1 of the Slavery Convention which provides that:

“(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves- rights of ownership are exercised.”

¹²⁶ BASSIOUNI, History of Universal Jurisdiction, *supra* note 34, p. 49.

3.1.2 Development following the Second World War

Following the Second World War, universal jurisdiction reached several offences other than piracy and slave trading. The concept of universal jurisdiction developed significantly, gaining ground due to the establishment of the International Military Tribunal (IMT).¹²⁷ Trials involving major war crimes were conducted in the IMT at Nuremberg and Tokyo.¹²⁸ Advocates of universal jurisdiction firmly cite the principles that emerged from Nuremberg and were affirmed by the United Nations General Assembly as the foundation of the present-day application of universal jurisdiction to crimes against humanity, war crimes and genocide.¹²⁹ However, more critical analysis of the use of universality in the Nuremberg trials cast doubt on the solidity of this legal foundation. Nevertheless, despite these dubious initial foundations which universal jurisdiction obtained for war crimes during the Nuremberg trials, even with the UN affirmation of the principles, it received a firmer boost in the subsequent Geneva Conventions of 1949.¹³⁰

Thereafter, due to the occurrence of certain major international crimes, various scholarly opinions have it that since Nuremberg the scope of universal jurisdiction has thus expanded significantly from piracy and slavery to incorporate war crimes, crimes against humanity, genocide, torture, terrorism, crimes against peace, apartheid,

¹²⁷ The Protocol for establishing the International Military Tribunal provides, among others, a definition of its jurisdiction. Only three categories of crimes were to be punished: 1) Crimes against Peace (planning, preparing and waging aggressive war); 2) War Crimes (condemned in Hague Conventions of 1899 and 1907); and 3) Crimes Against Humanity (such as genocide) which by their magnitude shock the conscience of humankind. See the Charter of Nuremberg Tribunal, available online at http://legal.un.org/ilc/documentation/english/a_cn4_5.pdf [retrieved 2.2.2015]; FERENCZ, B. B.: "International Criminal Courts: The Legacy of Nuremberg" *Pace International Law Review*, Vol. 10, (1998), p. 211.

¹²⁸ The Nuremberg trials were a series of military tribunals, held by the Allied forces after World War II, most notable for the prosecution of prominent members of the political, military, and economic leadership of Nazi Germany. The trials were held in the city of Nuremberg, Germany. See, for instance, HELLER, K. J.: *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford University Press, 2011. Furthermore, the IMT for the Far East, also known as the Tokyo Trials, the Tokyo War Crimes Tribunal, was convened on April 29, 1946, to try the leaders of the Empire of Japan for three types of war crimes.

¹²⁹ GA Resolution on Nuremberg Principles, GA Res. 95, 11 December 1946, in RANDALL, *supra* note 81, p. 835; Nuremberg Principles (1950), UNGAOR, 5th Session, Supp. No.12, in VAN DEN WYNGAERT, CH.. (ed.): *International Criminal Law: A collection of international and European instruments*, 2nd ed. The Hague: Kluwer Law International, 2000, pp. 203-204.

¹³⁰ MORRIS, M. H.: "Universal Jurisdiction in a Divided World: Conference Remarks" *New England Law Review*, Vol. 35, (2000), p. 346.

and others.¹³¹ Not all academics agree on all of these categories in their writings, and some conservative interpreters of international law argue that universal jurisdiction has not expanded at all, with Nuremberg being an exercise of sovereign occupational power and not one of universal jurisdiction.¹³² The individual conclusions of scholars and practitioners of international law depend on which side of the rift they occupy in their observation of the development of customary international law and its application in domestic courts of law. Indeed, when analyzing the most cited crimes under universal jurisdiction, one can see that there is only a small treaty base for any exercise of universal jurisdiction, even when considering the Geneva Conventions.

A considerable number of international conventions were established but most important are the Geneva Conventions of 1949.¹³³ The Geneva Conventions are paramount in this regard, providing in unmistakable terms for universal jurisdiction over grave breaches of those Conventions. International crimes were no longer to remain unpunished. The idea that in certain circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle. The Geneva Conventions provide as follows:

“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

¹³¹ RANDALL, *supra* note 81, p. 815; FERENZC, *supra* note 127, pp. 219-235; BROOMHALL, B.: “Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law” *New England Law Review*, Vol. 35, (2000-2001), pp. 403-404 [hereinafter BROOMHALL, Towards the Development].

¹³² SCHEFFER, D. J.: “Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Opening Address” *New England Law Review*, Vol. 35, (2001), p. 233. Furthermore, for instance, Judge Koroma lists war crimes, crimes against humanity, slavery, and genocide. See the *Arrest Warrant* case, *supra* note 83, Separate Opinion of Judge Koroma, p. 9.

¹³³ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV). [Hereinafter, all referred to as the 1949 Geneva Conventions]. Since their drafting, the Geneva Conventions have become the cornerstone of the law of war, international criminal law and humanitarian law.

High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”¹³⁴

The majority of commentators view this provision, which is found in all four conventions and oblige state parties to search for and try suspect in their own courts, as a prescription of universal jurisdiction.¹³⁵ Others however, claim that since universal jurisdiction is not mentioned explicitly, it is not prescribed.¹³⁶

In addition, these conventions included an *aut dedere aut judicare* obligation either to exercise jurisdiction over suspects in their territories or to extradite them to state parties able and willing to do so, or to surrender suspects to an international criminal court. Hence, the principle of *aut dedere aut judicare*, became a standard judicial argument for those attempting to bring to justice perpetrators of war crimes all over the world.¹³⁷

Several treaties are considered to establish universal jurisdiction with regard to the conduct they regulate. Prior to 1945, the jurisdictional clauses adopted a rather limited universality principle, as can be demonstrated by the 1936 Geneva Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.¹³⁸ Its Article 8 reads: Foreigners who are in the territory of a High Contracting Party and who have committed abroad any of the offences set out in Article 2 shall be prosecuted and punished as though the offence had been committed in that territory if the following conditions are realized – namely, that: (a) Extradition has been requested and could not be granted for a reason independent of the offence itself; (b) The law of the country of refuge considers prosecution for offences committed abroad

¹³⁴ Art. 49, Art. 50, Art. 129 and Art. 146 of the 1949 Geneva Conventions.

¹³⁵ DINSTEIN, Y.: The Universality Principle and War Crimes. In SCHMITT, M., GREEN, L. (eds.). *The Law of Armed Conflict: Into the Next Millenium*, 1998, p. 21; ŠTURMA, P.: “Univerzální jurisdikce a postih závažných porušení ženevských úmluv z r.1949” *Acta Universitatis Carolina – IURIDICA*, Vol. 4 (2009), pp. 175-178; MORRIS, *supra* note 130, p. 346.

¹³⁶ BOWETT, *supra* note 25, p. 12. Moreover, French courts, for instance, have ruled that the Geneva Conventions do not create a basis for the exercise of universal jurisdiction. See STERN, B.: “International Decision: *In re Javor* and *In re Munyeshyaka*” *American Journal of International Law*, Vol. 93, (1999), pp. 525-527.

¹³⁷ The principle of *aut dedere aut judicare* will be described further in Section 3.4, but it is my view that discussion on the relationship between *aut dedere aut judicare* and universal jurisdiction is highly relevant for the present discussion within modern international law.

¹³⁸ Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 LNTS 299, partly reprinted in BASSIOUNI, M. CH., WISE, E. M.: *Aut dedere aut judicare: the Duty to Extradite or Prosecute in International Law*. London: Martinus Nijhoff Publishers, 1995.

by foreigners admissible as a general rule. Therefore, the Drug Trafficking Convention permits universal jurisdiction as a subsidiary means of prosecuting the prohibited conduct, only after the extradition has been sought and rejected, and moreover, makes it dependent upon the provisions of the domestic law.

Similarly strict conditions were included in the 1937 Convention for Prevention and Punishment of Terrorism.¹³⁹ These conventions represent the early version of the *aut dedere aut judicare* formula.

If the post-1945 conventions¹⁴⁰ are analyzed, one can clearly see a departure from the sanctity of the notion of state sovereignty which explains the previous practice of attaching very strict conditions to prosecutions based on the universality principle. This trend can probably be explained by the rising desire to avoid the existence of safe havens for perpetrators of serious criminal offences of international concern.¹⁴¹ In addition, in a vast majority of these post-1945 conventions, universal jurisdiction is provided for through the above mentioned *aut dedere aut judicare* formula, which is typically construed as follows:

“The State party in territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall [...], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”¹⁴²

¹³⁹ The 1937 Convention for Prevention and Punishment of Terrorism, Art. 10. The Convention for the Prevention and Punishment of Terrorism, which was adopted by 24 member states of the League of Nations on November 16 1937, never came into effect.

¹⁴⁰ Treaties providing for universal repression include, among others, Geneva Conventions of 1949; 1982 Convention on the Law of the Sea; 1973 International Convention for the Suppression of the Crime of Apartheid; 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft; 1970 European Convention on the Suppression of Terrorism; 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment .

¹⁴¹ See for example Preambles to the 1973 Convention for the Suppression of Unlawful Seizure of Aircraft; 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment. For more exhaustive list of treaties including this formula, see BASSIOUNI and WISE, *supra* note 138.

¹⁴² The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7(1), (Torture Convention or CAT). The terms of the provisions embodying the obligation to extradite or prosecute modelled on the so-called ‘Hague formula’, which was developed in the Convention for the Suppression of Unlawful Seizure of Aircraft (the 1970 Hague Convention). This formula combines the options of extradition and prosecution by providing that the state party in the territory of which the alleged offender is found is obliged to submit the case to its competent authorities for the purpose of prosecution if it does not extradite the alleged offender. This formula

This obligation is usually preceded by the provisions requiring the establishment of jurisdiction over respective offences:

“1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4, in the following cases: (a) When the offences 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 offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him [...]

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”¹⁴³

Even though these provisions are copied from the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention or CAT) they appear in the same manner in other treaties mentioned above. Indeed, the relevant paragraphs make no express mention of universal jurisdiction however it can be clearly derived from their wording by means of interpretation.¹⁴⁴ Paragraph 2 above does not mention any specific link necessary for the exercise of jurisdiction and the only condition required is the presence of an alleged offender in any territory under a state party’s jurisdiction.¹⁴⁵ However, the strict textual meaning of the article allows for more interpretations as to whether a prior request for extradition is necessary before the obligation to proceed with prosecution arises or if the obligation exists even without such a request. Nonetheless,

requires states parties to assert jurisdiction over the prohibited conduct even in the absence of any link between itself and such conduct (universal jurisdiction).

¹⁴³ Torture Convention, Article 5.

¹⁴⁴ NOWAK, M., MCARTHUR, E.: *The United Nations Convention against Torture: A commentary*. Oxford: Oxford University Press, 2008, p. 255; BURGERS, J. H., DANELIUS, H.: *The United Nations Convention against Torture. A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*. Boston: Martinus Nijhoff Publishers, 1988, p. 133.

¹⁴⁵ *Ibid.*

it is clear from the analysis of *travaux préparatoires*¹⁴⁶ that the second option is correct and leading commentaries also take this position.¹⁴⁷

With respect to universal jurisdiction, later on, other international conventions and, to some extent, rules of customary law enlarged the principle's scope of application. Enabling all states to share the right to jurisdiction in this way is meant to function as a guarantee against impunity and prevent the alleged perpetrators of heinous crimes from 'finding a safe haven in third countries'. Arguably, universal jurisdiction over offenses may derive from developments in international criminal law and the obligations *erga omnes* and *jus cogens* doctrines. This argument, of course, relates to our prior discussion of those developments. If one asserts that "violations of certain [...] obligations are breaches of customary law obligations *erga omnes*," it follows "that such violations of basic rights [...] may be punishable by any State under the universality principle. Thus, universal jurisdiction over additional human rights and terrorist offenses might arise upon showing that those acts are international crimes and violations of obligations *erga omnes* and *jus cogens* norms."¹⁴⁸

As a result of these developments, universal jurisdiction came to be seen as applying to a broader range of crimes than it had done before; including war crimes, crimes against humanity, genocide and torture. It has been argued that the prosecution of international crimes under universal jurisdiction is the application of a different and relatively new principle that used to prosecute the original crimes to which the principle applied. However, a better view is that the application of universal jurisdiction to international crimes is merely an evolution of the same concept. This evolution occurred concurrently with the creation of the United Nations and the increased acceptance of international influences into the domestic space.

¹⁴⁶ It was suggested by some delegations (i.e. Brazil) that the exercise of universal jurisdiction should be made dependent upon the refusal of a request for extradition, but this idea was rejected during the discussions. For the overview of *travaux préparatoires* see BURGERS & DANELIUS, *supra* note 144, pp. 31- 110; NOWAK, M., MCARTHUR, E., *supra* note 144, pp. 257-274.

¹⁴⁷ NOWAK, M., MCARTHUR, E., *supra* note 144, p. 133; BURGERS, J. H., DANELIUS, H., *supra* note 144, p. 255; BOULESBAA, A.: *The UN Convention on Torture and the Prospects for Enforcement*. The Hague: Martinus Nijhoff Publishers, 1999, p. 222. See also GUENGUENG, S. *et al.*, Committee Against Torture, Decision, Communication no. 181/2001, para 9 available online at <http://www.globalhealthrights.org/africa/suleymane-guengueng-et-al-v-senegal/> [retrieved 3.11.2014].

¹⁴⁸ See BASSIOUNI, M. CH.: "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'" *Law and Contemporary Problems*, Vol. 59, (1996), p. 63 [hereinafter BASSIOUNI, *Jus Cogens and Obligatio Erga Omnes*]. In addition, on further clarification on *jus cogens* and *erga omnes* obligations see Section 3.4.1 within this thesis.

It was not only the establishment of multiple conventions and the adding of new offences to the list of crimes falling under the scope of universal jurisdiction, but also that during this period universal jurisdiction was stipulated in practice especially in relation to the *aut dedere aut judicare* provisions. Many important and highly relevant proceedings, which also lay the foundation for today's discussion on universal jurisdiction, took place. The most remarkable being the Eichmann precedent.

3.1.2.1 The Eichmann Trial and its Reliance on Universal Jurisdiction

One of the milestones in the prosecution of crimes against humanity is the well-known Eichmann Trial.¹⁴⁹ The Eichmann Trial in Jerusalem in 1962, is one of the most significant judicial precedents where the court relied on the universality principle and is considered to be the most prominent demonstration for universal jurisdiction over genocide. It involved the prosecution of Adolf Eichmann who was suspected of ordering the mass murder of Jews during the War. He was abducted by the Israeli secret police in 1960 from Argentina where he was hiding and indicted by an Israeli domestic court in accordance with Israeli law – the Nazis and Nazi Collaborators (Punishment) Act of 1950. This domestic law was modelled on the Genocide Convention, and was intended to prosecute such crimes committed against the Jews. What was extraordinary was that Israel exercised its jurisdiction over Eichmann, who was not an Israeli national or resident, for crimes committed outside its territory before the existence of the State of Israel. Eichmann appealed against his conviction by the District Court of Jerusalem in 1961.¹⁵⁰

The District Court of Jerusalem relied on two distinct bases for jurisdiction – the universal character of the crimes in question and their specific character to

¹⁴⁹ The Eichmann Trials consist of two decisions, on the one hand a decisions by the District Court of Jerusalem, and on the other hand a decision by the Supreme Court of Israel. *Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, 12 December 1961. *International Law Report*, Vol. 36 [hereinafter *Eichmann case, Dist. Ct.*] and 29 May 1962 [hereinafter *Eichmann case, Supr. Ct.*].

¹⁵⁰ As chief of the Gestapo's Jewish Section, Eichmann had primary responsibility over the persecution, deportation, and extermination of hundreds of thousands of Jews. One of Eichmann's responsibilities was supervising the 'final solution' of the Jewish question" – a plan to evacuate and to exterminate some eleven million Jews and others in Germany.

exterminate a Jewish population.¹⁵¹ As to the validity of the universality principle, the District Court confirmed that:

“These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta iuris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. *The jurisdiction to try crimes under international law is universal.*”¹⁵²

The Israeli District Court clearly expressed its view on the legality of universal jurisdiction under international law. It is fair to point out that the Court phrased the right to punish as based on two cumulative sources, the second being, according to the Court’s words, the protective or the passive personality principle.¹⁵³ Due to this aspect of the decision, some scholars view it as a weak support for universal jurisdiction.¹⁵⁴ However, nothing in the District Court’s judgment seems to indicate that it would consider the universality principle standing alone insufficient. Quite to the contrary, it referred to it as the “broadest possible, though not the only” basis for jurisdiction.¹⁵⁵

Furthermore, the Supreme Court of Israel, in its subsequent judgment, fully concentrated on the universality principle, particularly with regard to the fact, that some of the crimes in question were directed against non-Jewish groups, such as Poles, Slovenes, Czechs and gypsies.¹⁵⁶ The Supreme Court reiterated the “harmful and murderous effects [...] so embracing and widespread as to shake the international community to its very foundations.”¹⁵⁷ Additionally stating that:

¹⁵¹ *Eichmann case*, Dist. Ct., para. 11.

¹⁵² *Ibid.*, para. 12 (emphasis added).

¹⁵³ *Ibid.*, para 30.

¹⁵⁴ Bowett doubts the reasoning of the courts and claims that the Eichmann Trial was an extraordinary case where no basis was for universal jurisdiction. See BOWETT, *supra* note 25, p. 12. Moreover, Bowett opposed the extension of national jurisdiction based on universal jurisdiction. *Ibid.*, p. 14.

¹⁵⁵ *Eichmann case*, Dist. Ct., para. 30.

¹⁵⁶ *Eichmann case*, Supr. Ct., para. 12.

¹⁵⁷ *Ibid.*

“The State of Israel [...] was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.”¹⁵⁸

The Supreme Court therefore upheld that it was sufficiently justifiable to apply universal jurisdiction because of the characteristics of the crime dealt with in this case. It further stated that the same arguments justifying universal jurisdiction over piracy – the important interest of the international community – justified the Israeli jurisdiction over the present case as including war crimes.¹⁵⁹ As a result, both the District Court and the Supreme Court upheld Israeli universal jurisdiction.¹⁶⁰ The ruling of the Israeli courts met with little or no opposition. Most importantly, Germany, as a country of nationality of the accused, did not protest against Israeli jurisdiction.

Finally, whether or not the Eichmann trial can be interpreted as a precedent for universal jurisdiction will remain a point of controversy and it will be up to each scholar to decide. Nevertheless, my view being that the Eichmann trial has indeed influenced the future claims of universal jurisdiction and nowadays, many people cite the judgment as an indication of universal jurisdiction over genocide becoming customary international law.

3.1.2.2 From Demjanjuk to Pinochet

In 1983, Israel requested extradition of John Demjanjuk from the United States to stand trial on charges connected to his alleged service in the ‘*Schutzstaffen*’¹⁶¹ (SS) at the Treblinka concentration camp in Poland during the Second World War.¹⁶² Demjanjuk objected to the legality of Israeli jurisdiction pleading that he was neither

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, para. 13(c).

¹⁶⁰ Additionally it should be mentioned that as the basis of the Israeli jurisdiction the Courts recognized three jurisdictions: passive personality jurisdiction, protective jurisdiction, and universality jurisdiction. See, for instance, Amnesty International: *Eichmann Supreme Court Judgment: 50 years on, its significance today*, (2012), available online at <http://www.amnesty.org/en/documents/IOR53/013/2012/en/> [retrieved 3.3.2015].

¹⁶¹ *Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (e. Protection Squadron).

¹⁶² *John Demjanjuk v. Joseph Petrovsky*, United States Court of Appeals (Sixth Circuit, 1985) 776 F 2d 571 [hereinafter *Demjanjuk case*].

an Israeli national nor resident; the alleged crime was committed in the territory of Poland; and because the nation of Israel did not exist at the time of the alleged commission of the crime.¹⁶³

The US extradition request could only be granted if the crimes in question were committed within the jurisdiction of the requesting state. Consequently, the US courts had an opportunity to pronounce on the legality of universal jurisdiction. The 6th Circuit Court of Appeals stated that

“Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial.”

In addition stating that:

“This universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people [...] neither the nationality of the accused or the victim(s), nor the location of the crimes is significant. The underlying assumption is that the crimes are offences against the law of nations or against humanity and that the prosecuting nation is acting for all nations.”¹⁶⁴

These passages represents a clear confirmation of the universality principle by US courts and the affirmation that it is a matter of the international community as a whole to fight war crimes. The courts in the *Demjanjuk* case thus affirmed Israeli jurisdiction based solely on universal jurisdiction, compared to the Eichmann trial, in which the court recognized protective and passive personality jurisdiction, in addition to universal jurisdiction. Some tend to claim that a shift of emphasis can be noticed over the time elapsed between these two cases towards more acceptance of universal jurisdiction.¹⁶⁵

¹⁶³ *Ibid.*, p. 580.

¹⁶⁴ *Ibid.*

¹⁶⁵ INAZUMI, *supra* note 78, p. 80.

A few years later, in 1998, the *Pinochet*¹⁶⁶ case became the most noteworthy within the development of international criminal law.¹⁶⁷ The former Chilean head of state Augusto Pinochet was arrested in London following an extradition request by Spain to prosecute him on allegations of genocide, terrorism and torture under the 1984 Torture Convention.¹⁶⁸

The decision was ground-breaking because the majority of the U.K. House of Lords held that, under the Torture Convention, a former head of state could be extradited to a third state (Spain), for alleged torture committed in another state (Chile) against nationals and non-nationals of the third state while the accused held office. Even though the main issue at hand was whether Pinochet, as a former head of state, enjoyed immunity from prosecution, a remark made by Lord Browne Wilkinson with respect to universal jurisdiction expressed that:

“The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”¹⁶⁹

Lord Millet also agreed that there exists a rule of international customary law under which international crimes attract universal jurisdiction.¹⁷⁰ Lord Phillips pointed to the recent developments in international criminal law and concluded that it remained an open question whether international law at the given time recognized universal jurisdiction.¹⁷¹ Taking into account the differences in the opinions of the law lords, commentators differ in their views on what overall impact the Pinochet judgment has

¹⁶⁶ The Pinochet case is comprised of many court proceedings in various states, such as Britain, Chile and Spain. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others* (Ex parte Pinochet), House of Lords, 24 March 1999 [hereinafter Pinochet III].

¹⁶⁷ Hailed as “signal[ing] the birth of a new era for human rights”. See Press Release, Amnesty International: Pinochet decision: The Birth of a New Era for Human Rights, 9th December 1998, available online at <http://www.commondreams.org/pressreleases/Dec98/120998f.htm> [retrieved 3.2.2015].

¹⁶⁸ Signed on 10th December; effective since 26 June 1987.

¹⁶⁹ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others* (Ex parte Pinochet), House of Lords, 24 March 1999, opinion of Lord Browne-Wilkinson. [Hereinafter Pinochet III].

¹⁷⁰ *Ibid.*, Opinion of Lord Millet.

¹⁷¹ *Ibid.*, Opinion of Lord Phillips.

had on the acceptance of the universality principle.¹⁷² However, the reaction of the international community to the Pinochet judgment has been that the issuing of an arrest warrant by Spain against Pinochet symbolized the recognition of the interest of the international community in ending impunity of individuals who have committed heinous human rights offences.

During the Pinochet period the jurisdictional system underwent a great transition in conjunction with the development of international criminal and humanitarian law. The two *ad hoc* tribunals, namely the ICTY and ICTR, were established.¹⁷³ Even though their Statutes did not explicitly suggest the exercise of universal jurisdiction by states, they have made a great impact on universal jurisdiction. Consequently, encouraged by the establishment and function of the two *ad hoc* tribunals the effort to establish a permanent international criminal court gained momentum. As a result, the ICC Statute was adopted on 17 July 1998.¹⁷⁴

In sum, the period after the Second World War revealed the expansion of universal jurisdiction for core international crimes to its contemporary scope, but indeed its current features are reflected in the dramatic development of international criminal law and human rights consciousness in the aftermath of the Second World War. This expansion derived from the growing world consensus condemning such crimes.

One can therefore conclude, from the foregoing analysis on the second evolutionary stage, that apart from piracy and slavery, universal jurisdiction was only truly recognized following World War II, and further harmonized when *aut dedere aut judicare* became an accepted instrument in multilateral treaties.

¹⁷² See for instance, ORENTLICHER, *supra* note 82, pp. 138-139; REYDAMS, Universal Jurisdiction, *supra* note 19, p. 209; BASSIOUNI, Universal Jurisdiction, *supra* note 114, p. 81.

¹⁷³ See further on the establishment of the two *ad hoc* tribunals CASSESE, International Criminal Law, *supra* note 28, pp. 258-261; BANTEKAS, *supra* note 15, pp. 403-422.

¹⁷⁴ The General Assembly created *Ad Hoc* Committee on the Establishment of an International Criminal Court in 1995. In order to formulate the committee's work and make a generally accepted instrument the GA decided to establish another committee – the Preparatory Committee on the Establishment of an International Criminal Court. See Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court UN GAOR, 50th Session, Supp. No. 22, UN Doc A/50/22 (1995); GA Res.50/46 (11 December 1995).

3.1.3 Modern Application

This development has led some scholars to claim that once a crime rises to the level of a violation of *jus cogens*¹⁷⁵, it is automatically subject to universal jurisdiction; states have an obligations *erga omnes* to prevent such a crime to go unpunished.¹⁷⁶ While others, along with domestic courts on the whole, have not accepted this argument, declining to use universal jurisdiction in the absence of specific legislature implementing international treaty obligations, and such legislation is not common even in the presence of wide treaty ratification.¹⁷⁷

The establishment of the ICC has further fuelled the debate, as it is the first international court whose jurisdiction is not limited to a particular conflict as the rest of the *ad hoc* tribunals are. It is the first such treaty to house jurisdiction over the most notable *jus cogens* crimes under one roof. It is, however, limited only to crimes committed after 2002 on the territory of member states or by their nationals, and most importantly, it does not actually exercise true universal jurisdiction as priority is given to the state where the crime was committed or the state of which the accused is a national. States that have ratified that Statute have been forced to reexamine their criminal codes and make changes to bring themselves in line with the Rome Treaty.

3.1.3.1 The Belgian Law and the Arrest Warrant case

The Belgian law (or Statute) of 1993 and 1999 has to be mentioned but they are considered as among the most far-reaching national laws on universal jurisdiction. Belgium adopted a domestic law in 1993 to punish grave breaches of the Geneva Conventions. According to this law, the Belgian courts had jurisdiction irrespective of the place of the commission of such offences as well as the nationality of the suspect or victim. In February 1999, Belgium amended the law to include explicitly genocide and crimes against humanity. As a result, universal jurisdiction over genocide became

¹⁷⁵ The notion of *jus cogens* in international law encompasses the notion of peremptory norms in international law. In this regard, a view has been formed that certain overriding principles of international law exist which form 'a body of *jus cogens*'. These principles are those from which it is accepted that no state may derogate by way of treaty. This concept of peremptory norms was codified in Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT). See BASSIONI, *Jus Cogens and Obligatio Erga Omnes*, *supra* note 148, pp. 65-66.

¹⁷⁶ INAZUMI, *supra* note 78, p. 124.

¹⁷⁷ BASSIOUNI, *Jus Cogens and Obligatio Erga Omnes*, *supra* note 148, p. 63.

laid down in the Belgian law. What is extraordinary is that Belgium attributed to itself a so-called universal jurisdiction in absentia thus enabling its courts to hear any case where the suspect is alleged to have committed a crime listed in the law, even without the presence of the suspect.¹⁷⁸ The attribution of such a wide scope of universal jurisdiction – namely the universal jurisdiction *in absentia* - to the Belgian courts affected diplomatic relations with some states, resulting in oppositions towards the law. This resulted in the Belgian law being amended dramatically in 2003 and universal jurisdiction in absentia put ‘aside’.¹⁷⁹ However, as Langer has observed in his recent article “Universal Jurisdiction Is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’”, universal jurisdiction trials over core international crimes did in fact not diminish after the amendments to the Belgian law in 2003 and, the same applies to the Spanish law in 2009. Thus, the practice of universal jurisdiction has declined, although not substantially. According to Langer’s research, after the Belgian amendments, both national and international courts heard 21 of the 39 universal jurisdiction trials over at least one core international crime committed during the period of 1961–2013. According to this, in the ten-year period of 2004–2013, 53.8% of all universal jurisdiction trials over core international crimes were held.¹⁸⁰

The International Court of Justice dealt with a case filed by the Democratic Republic of Congo against Belgium in October 2000, but Belgium had issued an arrest warrant against the Congolese Minister of foreign affairs at that time, Yerodia Abdoulaye Ndombasi. Even though this case dealt mainly with the question of immunity and the ICJ did not rule on the legality of universal jurisdiction in absentia asserted by Belgium, this question was nevertheless discussed at the hearings where the judges displayed their different views on the subject.¹⁸¹ Belgium, among others, upheld at

¹⁷⁸ REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 102-109; ŠTURMA, *supra* note 135, p. 181; INAZUMI, *supra* note 78, pp. 93-94; 96-97.

¹⁷⁹ The new Belgian law required that the foreigner who wishes to submit a case, to be residence in Belgium for a minimum of 3 years. Until very recently, also Spain allowed for a wide universal jurisdiction of its courts with regard to genocide and several other treaty crimes. However, the law changed in October 2009 and recently the prosecution is only allowed when the victims are Spanish nationals or when the perpetrator is present in the Spanish territory.

¹⁸⁰ LANGER, M.: “Universal Jurisdiction Is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction” *Journal of International Criminal Justice*, Vol. 13, (forthcoming 2015), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567036

¹⁸¹ The *Arrest Warrant* case, *supra* note 83, para. 21.

the hearing that it also had a clear and reasonable link with the acts in question because of the Belgian nationality or residence of the victim of those acts.¹⁸²

Several judges expressed views on the subject in their individual opinions; some in favour of universal jurisdiction but others did not approve of it. In particular, the widely cited joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal concluded that universal jurisdiction is available with regard to piracy, war crimes and crimes against humanity affirming that there was no law prohibiting it.¹⁸³ For instance, Judge Van den Wyngaert maintained that “[t]he term ‘universal jurisdiction’ does not necessarily mean that the suspect should be present on the territory of the prosecuting State. Assuming the presence of the accused, as some authors do, does not necessarily mean that it is a legal requirement.”¹⁸⁴ On the other hand, the existence of universal jurisdiction was denied by both President Guillaume and Judge Rezek.¹⁸⁵ President Guillaume stated that “international law does not accept universal jurisdiction; still less does it accept universal jurisdiction in absentia.”¹⁸⁶ The issue of universal jurisdiction *in absentia* will be further clarified in Section 3.2.1 of this study. However, from the opposing views given by the judges in this case the scope of the rules applicable to universal jurisdiction are still unclear.

3.1.3.2 The Princeton Principles on Universal Jurisdiction

In 2001 a group of international criminal law scholars formulated the ‘Princeton Principles on Universal Jurisdiction’.¹⁸⁷ The Princeton Principles consist of fourteen points which establish guidelines for the use and development of universal

¹⁸² *Ibid.*, para. 25. This stipulates that the arrest warrant was based on passive personality jurisdiction.

¹⁸³ *Ibid.*, Joint Separate Opinion, para. 60-61.

¹⁸⁴ *Ibid.*, Dissenting Opinion of Judge Van den Wyngaert, para. 53.

¹⁸⁵ *Ibid.*, Separate Opinion of Judge Rezek, para. 6. He concluded that an examination of international law demonstrated that, as it currently stands, law does not permit the exercise of criminal jurisdiction by domestic courts in the absence of some connecting circumstance with the exercising state.

¹⁸⁶ *Ibid.*, Separate Opinion of President Guillaume, para. 16. See also more recent situations in which arrest warrants or indictments were made in the exercise of universal jurisdiction by national courts. For instance, in 2008, Rwanda’s Chief of Protocol was arrested in Germany by German officials and handed to the French. The French court had issued a warrant for his arrest and was trying him on the basis of universal jurisdiction on charges of ‘complicity to murder in relation to terrorism’. In the same year Spanish Courts indicted former and current military officials of Rwanda over genocide, war crimes and crimes against humanity.

¹⁸⁷ Princeton Principles, *supra* note 5.

jurisdiction. It enumerates the fundamentals of universal jurisdiction and the crimes subject to universal jurisdiction, mentioning: “piracy, the crime of slavery, war crimes, and crimes against peace, crimes against humanity, genocide and torture.”¹⁸⁸

The purpose of these Principles was to advance the continued evolution of international law and establish parameters for the usage of universal jurisdiction. Unfortunately, this document *merely* provides guidance and it has not grown to have substantive influence on the development of universal jurisdiction, although it has provided some directions to courts invoking universal jurisdiction. Perhaps if the Princeton Principles would have received wider attention as a document establishing the basis for universal jurisdiction; universal jurisdiction might have turned out to be more accepted and less controversial.

3.1.3.3 Debates undertaken by the UN General Assembly Sixth Committee

It is so that the laws and practices relating to universal jurisdiction are still in transition in the twenty-first century. Discussions are still being undertaken at international forums on the principles’ scope, application and legal position. These continuing debates indicate how sensitive and complicated the principles are, and at the same time, it reveals the willingness of the international community to *at least try* to reach a consensus on the subject.

The most noteworthy discussions and reports on the principle have been undertaken by the UN General Assembly on the item ‘*the scope and application of the principle of universal jurisdiction*’. These reports have been prepared pursuant to GA multiply resolutions by which the Assembly requested the Secretary-General to prepare reports on the basis of information and observations received from Member States and relevant observes on the subject of universal jurisdiction.

In October 2009, the Sixty-fourth session of the UN General Assembly Sixth Committee started its first debate on the principle of universal jurisdiction through a proposal raised by the representative of Rwanda on behalf of the Group of African

¹⁸⁸ *Ibid.*, Principle 2 on ‘Serious Crimes Under International Law’.

States.¹⁸⁹ Due to the diversity of opinion no consensus could be reached. This demonstrates that nations have different views on the legal status and application of universal jurisdiction. By a resolution adopted at the session each member state was invited to express its opinion on universal jurisdiction. In 2010, comments from almost 44 governments were received which highlighted the fact that there are still major differences among states on the topic.¹⁹⁰ Governments nevertheless agreed that major achievements had been made in international law and international cooperation was constantly being strengthened, thus resulting in “[...]concrete outcomes, giving practical recognition to international criminal jurisdiction, as well as to prosecute based on universal jurisdiction.”¹⁹¹

At its Sixty-sixth session the attention had shifted from considering solely the concept of universal jurisdiction into emphasizing, in particular, on the conditions, restrictions and limitations on the exercise of universal jurisdiction (for instance, immunities, the presence of the suspect and that priority should be accorded to territoriality as basis for jurisdiction). It was, among others, concluded that if these limitations would be respected, states would avoid impairing friendly relations.¹⁹² In addition, it was noted that a focus should be put on distinguishing universal jurisdiction from the principle of *aut dedere aut judicare*.¹⁹³ In 2012 (at the Sixty-seventh session) the discussions were concluded by representatives highlighting that universal jurisdiction should only be a last resort in combating impunity and should only be used in exceptional circumstances.¹⁹⁴ It was stated that “states should only turn to the principle of universal jurisdiction [...] when other States had failed to act”¹⁹⁵ and representatives

¹⁸⁹ UNGA, Report of the Sixth Committee. Sixty-fourth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/62/425 (16 December 2009); UNGA, Sixty-fourth Session, Agenda 84, Resolution adopted by the General Assembly on 16 December 2009 [on the report of the Sixth Committee (A/64/452)], No. A/RES/64/117, (15 January 2010).

¹⁹⁰ UNGA, Report of the Secretary-General prepared on the basis of comments and observations of Governments. Fifty-fifth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/65/181, *supra* note 6.

¹⁹¹ *Ibid.*, p. 4.

¹⁹² UNGA, Report of the Secretary-General. Sixty-sixth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/66/93, (20 June 2011).

¹⁹³ Comment made by the Argentinian government. *Ibid.*, p. 28.

¹⁹⁴ UNGA, Report of the Secretary-General. Sixty-seventh session on “*the scope and application of the principle of universal jurisdiction*”, No. A/67/116, (28 June 2012).

¹⁹⁵ Comment made by Malaysia’s delegate. See General Assembly meeting coverage and press releases, 18 October 2012. Available online at <http://www.un.org/press/en/2012/gal3442.doc.htm> [retrieved 2.2.2015].

warned against selective and political use of the principle, which undermines the sovereignty of states.¹⁹⁶ Moreover, during the Sixty-eighth session it was pointed out that the application of universal jurisdiction should be regulated at the international level to avert any unwarranted and selective use.¹⁹⁷

During last summer, at the Sixty-ninth session, delegates turned to the essential elements of the principle, namely, that the scope and application of universal jurisdiction must be *clearly defined* to avoid abuse of the principle which might otherwise endanger international law and order. Many representatives called for a way to find consensus on the subject, pointing out that the topic had appeared on the General Assembly's agenda due to abuse and 'politicization' of the principle, particularly with regard to the African states.¹⁹⁸ It seems that finding a holistic definition on universal jurisdiction had once again become an issue.

3.2 Universal Jurisdiction – Clarifying the Basic Concept

Universal jurisdiction is indeed an exceptional principle of a special character which implies that a state may invoke universal jurisdiction over serious crimes committed by individuals without any nexus what so ever – thus usually being defined negatively. Unlike the other heads of jurisdiction, there is generally no accepted definition of universal jurisdiction at the present. Multiple definitions and commentaries have been set out by scholars and academics in order to clarify the concept, all of which usually have defined universal jurisdiction by an 'absence' of the normal jurisdictional link to the national legal system attempting to exercise universal jurisdiction.¹⁹⁹

¹⁹⁶ *Ibid.*

¹⁹⁷ UNGA, Report of the Secretary-General. Sixty-eighth session on "*the scope and application of the principle of universal jurisdiction*", No. A/68/113, (26 June 2013).

¹⁹⁸ UNGA, Report of the Secretary-General. Sixty-ninth session on "*the scope and application of the principle of universal jurisdiction*", No. A/69/174, (23 July 2014). See also General Assembly meeting coverage and press releases, 15 October 2014. Available online at <http://www.un.org/press/en/2014/gal3481.doc.htm> [retrieved 12.2.2015].

¹⁹⁹ For instance, Reydams suggest that universal jurisdiction means "that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit." REYDAMS, *Universal Jurisdiction*, *supra* note 19, p. 5; O'Keefe defines it as "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct." O'KEEFE, *supra* note 21, p. 745.

The main purpose of universal jurisdiction is linked to the idea that international crimes affect the international community as a whole and are of such gravity to lend the exercise of the universality principle, as can be concluded from the case law inquiry on the historical development of the universality principle.

Accordingly, the principle is often justified on the basis that the offence in question, whether a crime under international law or a crime of international concern, is an attack on fundamental values shared by the international community. A few states have pointed out that it is the heinous nature of the crimes concerned that makes universal jurisdiction acceptable under international law. For instance, as was explained in the *Demjanjuk* case (involving a request for the extradition of a person charged with war crimes and crimes against humanity during the Second World War):

“This universality principle is based on the assumption that *some crimes are so universally condemned* that the perpetrators are the *enemies of all people*. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences.”²⁰⁰

The same rationale was cited in the *Eichmann* case where the District Court of Jerusalem noted that:

“The *abhorrent crimes* struck at the *whole of mankind* and shocked the conscience of nations.”²⁰¹

These passages specify that the *ratio legis* of universal jurisdiction is justified on two main ideas. Firstly, some crimes are so grave that they harm the entire international society. Secondly, the gravity of these crimes implies that no safe haven should be available for those who commit them. In sum, the essence of universal jurisdiction is therefore the absence of a link between the crime and the prosecuting state.²⁰²

Moreover, when observing the universality principle the traditional approach is to distinguish between two types (or rather situations) on which universal jurisdiction is comprised of. Primarily, whether the prosecuting state may exercise universal

²⁰⁰ *Demjanjuk* case, *supra* note 162, para. (emphasis added).

²⁰¹ *Eichmann* case, *supra* note 149, para. 26 (emphasis added).

²⁰² In addition, O’Keefe also captures all the essential elements of universal jurisdiction when stating that “it is sufficiently well agreed that universal jurisdiction amount to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.” See O’KEEFE, *supra* note 21, p. 745.

jurisdiction only when the alleged perpetrator (after the commission of the alleged crime and at the time of the initiation of the exercise of the jurisdiction) is present in, or becomes a resident or citizen of, the prosecuting state; so called conditional universal jurisdiction. Secondly, whether there does not have to exist any such link with the prosecuting state; so called ‘absolute’ or ‘pure’ universal jurisdiction.

3.2.1 Conditional or Absolute Universal Jurisdiction

Conditional universal jurisdiction is the narrower notion of the principle, under which a state may prosecute a person only if he or she is present on the territory of that state.²⁰³ The issue essentially is whether, for the exercise of universal jurisdiction, the presence of the accused on the territory (so-called ‘*forum deprehensionis*’) is required as a condition.

Some commentators have argued that different degrees of ‘presence’ are also available, for example, simple capture or residence, with one writer stating that “[i]t would be self-defeating to add conditions which would render universal jurisdiction akin to a traditional connecting factor, and thus lose its specific and *raison d’être*.”²⁰⁴ In addition, conditional universal jurisdiction is usually associated with the condition that the suspect was not, or cannot be, extradited to a state having jurisdiction and that is able and willing to prosecute.²⁰⁵

It can be asserted from international instruments as well as state practice that the narrower or conditional notion, of universal jurisdiction is a more preferred way. For instance, conditional universal jurisdiction was also supported by Cassese, who wrote that universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting state at the time charges are brought and criminal investigations commence. In his own words, “[...] universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting state. It would seem contrary to the logic of current state relations to authorize any state of the world to institute criminal proceedings (commence investigations, collect

²⁰³ RASTAN, *supra* note 106, p. 137.

²⁰⁴ ABI-SAAB, G.: “The Proper Role of Universal Jurisdiction” *Journal of International Criminal Justice*, Vol. 1, (2003), p. 596.

²⁰⁵ ŠTURMA, *supra* note 135, p. 180.

evidence and lay out charges) against any foreigner or foreign state official allegedly culpable of serious international crimes.”²⁰⁶ In addition, from the UN General Assembly sixty-ninth session it seems that there is a tendency among states to be more in favor of the restrictive exercise of universal jurisdiction. Hence, some states require a link between the accused and the forum state; that link being at least the presence of the suspect in the prosecuting state.²⁰⁷

On the other hand, absolute universal jurisdiction refers to jurisdiction when no link whatsoever is required between the crime and the state exercising jurisdiction over it. The state may prosecute the person irrespective of where the crime occurred or the nationality of the perpetrator or victim, and what is more, even regardless of the presence of the accused on the territory of that state.²⁰⁸ It is widely agreed that “universal jurisdiction in absentia can be roughly defined as the conducting of an investigation, the issuing of an arrest warrant, and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state. This definition does not include adjudication of the case.”²⁰⁹ Accordingly, this concept of universal jurisdiction allows state authority to commence investigation of a person suspected of serious international crimes and to gather evidence, even without the suspect being in the territory (*in absentia*).²¹⁰

The exercise of absolute universal jurisdiction is accepted only within the criminal codes of a few states, notably that of Belgium and Spain. The best known codification of absolute universal jurisdiction was the Belgian Law from 1993 with respect to serious violations of humanitarian law, regardless of their commission. In 1999, the Belgian Law was amended adding genocide and crimes against humanity to the list. However, in 2003 significant changes were made to the Belgian Law reducing the applicability of it.²¹¹

²⁰⁶ CASSESE, *Is the Bell Tolling*, *supra* note 1, pp. 592; 594.

²⁰⁷ UNGA, Report of the Secretary-General. Sixty-ninth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/69/175, (23 July 2014), p. 14.

²⁰⁸ CASSESE, *International Criminal Law*, *supra* note 28, pp. 286-287.

²⁰⁹ COLANGELO, A. J.: “The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes” *Georgetown Journal of International Law*, Vol. 36(2), (2005), p. 543 [hereinafter COLANGELO, *The New Universal Jurisdiction*].

²¹⁰ ŠTURMA, *supra* note 135, p. 180.

²¹¹ This was, *inter alia*, because actions were brought against the former president of the USA, George W. Bush, and other USA representatives. Now the Belgian Law on universal jurisdiction has been

3.2.1.1 Pros and Cons of Absolute Universal Jurisdiction

Currently there are high objections to the exercise of universal jurisdiction *in absentia*.²¹² There are both political and practical obstacles when it comes to the exercise of absolute universal jurisdiction. Consequently, it may easily lead to infringement of the sovereignty of foreign states and to undesirable competition between jurisdictions of different states (which might lead to ‘judicial chaos’). Among the main political reasons are immunities of high ranking state official. Thus diplomatic and political tension might arise between the state seeking to commence proceeding against the foreign Head of State or Prime minister of the forum state. Additionally, the opponents of universal jurisdiction *in absentia* also submit that the presence requirement would reduce the risk that the exercise of universal jurisdiction might be abused by states for their own political ends²¹³ and that it would “create a chaotic and arbitrary method of enforcing international law,”²¹⁴ permitting a particular state “[...]to act as a ‘policeman’ of the world.”²¹⁵ Furthermore, practical obstacles such as gathering and obtaining evidence, calling witnesses and requesting mutual legal assistance.

In contrast, there are also those who favor the exercise of universal jurisdiction *in absentia*. These commentators claim that the exercise of absolute universal jurisdiction is essential for the effective enforcement of international criminal law.²¹⁶ Firstly, in this regard, Colangelo for instance maintained that “universal jurisdiction

significantly reduced, and can only be applied with respect to Belgian nationals or foreigners having resided in Belgium for at least three years. See further ŠTURMA, *supra* note 135, p. 181.

²¹² See for instance the Separate Opinion of Judge Guillaume to the judgment of the ICJ in the *Arrest Warrant* case, in which he came to the conclusion that “neither treaty law nor international customary law provide a State with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory.” paras. 9-10; Anne-Marie Slaughter has observed that the exercise of universal jurisdiction *in absentia* “is actually quite rare,” pointing to “the desire of many judges to insist on ‘universal jurisdiction plus’-the plus provided by some element of one of the more traditional bases of jurisdiction.” See SLAUGHTER, A.M.: “Defining the Limits: Universal Jurisdiction and National Courts”. In MACEDO, S. (ed.): *Universal Jurisdiction: National Courts and the prosecution of serious crimes under international law*, 2004, p. 170.

²¹³ RABINOVITCH, R.: “Universal jurisdiction in absentia” *Fordham International Law Journal*, Vol. 28, (2004), pp. 502; 521-522.

²¹⁴ COLANGELO, The New Universal Jurisdiction, *supra* note 209, p. 550 (addressing arguments against the exercise of universal jurisdiction *in absentia*).

²¹⁵ REYDAMS, Universal Jurisdiction, *supra* note 19, pp. 175-176.

²¹⁶ COLANGELO, The New Universal Jurisdiction, *supra* note 209 p. 571. Colangelo argues that “by enabling states to conduct investigations and issue arrest warrants *in absentia* over grave violations of international law, universal jurisdiction *in absentia* advances the fight against impunity.”

in absentia serves as a type of punishment of offenders, keeping them in hiding and preventing them from moving freely within the international community.”²¹⁷ Secondly, the exercise of universal jurisdiction *in absentia* may, “through a combination of a wake-up call and embarrassment,”²¹⁸ induce the state preserving a suspect on its territory, to terminate the impunity granted to such a perpetrator. Ryngaert elaborates:

“[T]he mere initiation of an investigation [by the state exercising universal jurisdiction] [...] could set in motion a flurry of investigative and prosecutorial activity in the territorial state. The bystander state's investigation may indeed bring to light a past that was not particularly bright, and strengthen the hand of progressive domestic powers that want to bring the presumed offenders (often belonging to a former regime) to justice in the territorial state. At the end of the day, that state also wants to *maintain its reputation on the international scene*.”²¹⁹

Commentators often refer to such impact on the state harboring the perpetrators as the ‘Pinochet effect’, pointing to the increased willingness of Chilean authorities as well as other states throughout Latin America to prosecute and punish perpetrators belonging to former dictatorial regimes in the wake of the proceedings undertaken in several European countries against former Chilean dictator Augusto Pinochet under a doctrine of universal jurisdiction.²²⁰ Lastly, the exercise of universal jurisdiction *in absentia* is often essential in order to preserve a record and evidence of the crime. Commentators have noted that “if a state forestalls investigations and evidence gathering because the offender is not within its borders, crucial time-sensitive evidence may disappear before a thorough investigation can be conducted and a sound case brought. This delay could wipe out the possibility of conviction and result in an effective grant of impunity.”²²¹ Hence, proposing the exercise of universal

²¹⁷ *Ibid.*, pp. 572-573.

²¹⁸ RYNGAERT, Jurisdiction, *supra* note 20, p. 174.

²¹⁹ *Ibid.*, pp. 173-174 (emphasis added); See further, ROHT-ARRIAZA, N.: “Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction” *New England Law Review*, Vol. 35, (2001), pp. 315-316; RABINOVITCH, *supra* note 213, p. 520 (citing Naomi Roht-Arriaza for the proposition that exercise of jurisdiction *in absentia* can spur the perpetrator's home country to reconsider prosecution).

²²⁰ RYNGAERT, Jurisdiction, *supra* note 20, p. 174.

²²¹ COLANGELO, The New Universal Jurisdiction, *supra* note 209, p. 576.

jurisdiction *in absentia* “would increase the likelihood of conviction, since it would facilitate the gathering of evidence and testimony.”²²²

While many commentators favor the view that the exercise of universal jurisdiction in absentia is not prohibited under current customary international law,²²³ most states are currently reluctant to pursue such practice.²²⁴ Under the laws of several states, a perpetrator’s mere presence in a state is sufficient basis for the exercise of universal jurisdiction by that state, even where the perpetrator only intended such presence to be brief.²²⁵

Underlying state reluctance to exercise universal jurisdiction *in absentia* are legitimacy concerns. The presence requirement adopted by many states “suggest[s] a general discomfort with the notion that States can prosecute anyone for international crimes regardless of any traditional nexus.”²²⁶ By insisting on the presence requirement, courts “try to create such a nexus, however thin or after the fact.”²²⁷

It is so, that the application of absolute universal jurisdiction has only been applied in relatively few cases. Presumably the two best known cases where absolute universal jurisdiction was applied are the Eichmann in Israel and Pinochet in United Kingdom, both dealing with crimes against humanity and torture. Moreover, in the *Arrest Warrant* case, three of the ICJ judges explicitly distinguished between universal jurisdiction in absentia and trials *in absentia*, observing that “some jurisdictions

²²² RABINOVITCH, *supra* note 213, p. 525.

²²³ *Ibid.*, p. 511. Rabinovitch reviews municipal case law that upholds assertions of universal jurisdiction *in absentia*. *Ibid.*, p. 515. See Colangelo, who stated that “the accused need not be present on the territory of the state when universal jurisdiction is asserted provided that certain safeguards against abuse are followed.” COLANGELO, *The New Universal Jurisdiction*, *supra* note 209, p. 548; Further, O’Keefe, notes that if universal jurisdiction is permissible, then “exercise *in absentia* is logically permissible as well.” O’KEEFE, *supra* note 21, p. 830; Kresß asserts that the Resolution of the Institute of International Law “contains the drafter’s view that the power of states to exercise universal jurisdiction includes investigative acts in absentia,” see KREß, C.: “Universal Jurisdiction over International Crimes and the Institut de Droit International” *Journal of International Criminal Justice*, Vol. 4(3), (2006), p. 576.

²²⁴ RABINOVITCH, *supra* note 213, p. 507, who stated that “[a] majority of the States that have implemented the various conventions establishing universal jurisdiction in their national legislation expressly require the presence of the offender on their territory before asserting jurisdiction.”

²²⁵ REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 86-179. For instance, under Australian law, “the mere presence (as opposed to residence) of a foreigner is a sufficient basis for jurisdiction over offenses committed abroad.” *Ibid.*, p. 88. Similarly, under Canadian law, “universal jurisdiction requires the voluntary presence in Canada of a foreign offender.” *Ibid.*, pp. 124 - 125.

²²⁶ SLAUGHTER, *supra* note 212, p. 173.

²²⁷ *Ibid.*

provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with basis of jurisdiction recognized under international law.”²²⁸ The perpetrators of international crimes often find harbor in a state (typically, their home state) that is unwilling to extradite them to another state exercising universal jurisdiction.²²⁹

3.2.2 Variations of Additional Classification

As the universality principle has been gaining attention, some commentators have tried to categorize the principle further by describing additional characteristics that universal jurisdiction might entail according to their view. Even though universal jurisdiction has traditionally been classified as only being either conditional or absolute, some authors have sought to distinguish universal jurisdiction further. These classifications are provided in order to facilitate the understanding of universal jurisdiction.

For instance, Reydams distinguishes three different forms of universal jurisdiction namely; 1) co-operative general universality principle; 2) co-operative limited universality principle; and 3) unilateral limited universality principle.²³⁰ Reydams aggregated this categorization from a historical observation. To begin with, the co-operative general principle of universality applies to all serious crimes, for instance, conduct which is criminal and is severely repressed in jurisdiction of most states. Here, Reydams withheld that no distinction is made between acts punishable under international law and by national law. The notion of ‘co-operative’ refers to the international context in which jurisdiction is exercised – the *judex loci deprehensionis* enters the proceedings, which would otherwise result from the impossibility of

²²⁸ The *Arrest Warrant* case, *supra* note 9, para. 56. (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal). Few Spanish cases also exist where the Courts allowed criminal proceedings to be brought even where the accused was not present in Spanish territory, such as in the *Scilingo, Adolfo Francisco*, Spanish Central Criminal Court (*Audiencia Nacional*), Order (auto), (No. 1998/22605), rec. 173/1998, 5 November 1998 (*Scilingo* case) and the *Cavallo* case, *Audiencia Nacional*, Criminal Chamber, 20 December 2006, 9 YBIHL.

²²⁹ KIRBY, M.: Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points”. In MACEDO, S. (ed.) *Universal Jurisdiction: National Courts and the prosecution of serious crimes under international law*, 2004, p. 251.

²³⁰ REYDAMS, Universal Jurisdiction, *supra* note 19, pp. 28-42.

extradition.²³¹ Co-operative limited universality principle differs from the aforementioned in that it applies only to international crimes. Thus some offenses, although they might be severe according to national law, are excluded.²³² Furthermore, the unilateral limited universality principle applies only to international crimes and does not require any connection between acts committed and the prosecuting state. The only condition here is international nature of the criminal activity or as Reydams argues “jurisdiction is truly ‘universal’ because *any* State may unilaterally launch an investigation, even *in absentia*.”²³³ On this third type of universal jurisdiction, Reydams notes, that the original purpose of this class of principle of universality was to fill a gap in international criminal law, which now has already been filled with the creation of the ICC. Therefore it would not seem right to attribute more power to national courts, than to the ICC. Ironical as this last passage seems, national courts are still the most suitable forum to deal with the prosecution of criminals; not to mention if international cooperation among states is at hand.²³⁴

Inazumi, approached the subject from another perspective. He categorizes universal jurisdiction into two aspects which demonstrate the different nature of universal jurisdiction. Firstly, Inazumi mention that universal jurisdiction can be characterized by being permissive or obligatory, and secondly, whether it is supplemental or primary.²³⁵ Starting with the most classic understanding of ‘supplemental permissive universal jurisdiction’, which in his opinion can be understood as a right and that states are entitled to exercise universal jurisdiction if they choose, they are however not obliged to do so. This categorization regards universal jurisdiction as an additional right supplementing other national jurisdictions.²³⁶ The second category is ‘primary permissive universal jurisdiction’ which is no longer supplemental to other jurisdictions. In this case, if there is any extradition request from other states there is no need to give priority to that request. Hence it can exercise its jurisdiction freely.²³⁷ ‘Supplemental obligatory universal jurisdiction’ is the third category and ‘primary

²³¹ *Ibid.*, pp. 28-29.

²³² *Ibid.*, p. 35.

²³³ *Ibid.*, p. 38. Similar view is withheld by RANDALL, *supra* note 81.

²³⁴ UNGA, No. A/69/174, *supra* note 198, p. 15. See further Chapter VI ‘Toward a more Effective Usage of Universal Jurisdiction’.

²³⁵ INAZUMI, *supra* note 78, pp. 28-30; 105.

²³⁶ *Ibid.*, pp. 29; 105.

²³⁷ *Ibid.*

obligatory universal jurisdiction' the fourth, both of which oblige states to extradite or prosecute; only the last category does not require that states exhaust the effort to extradite before exercising universal jurisdiction.²³⁸

3.3 Universal Jurisdiction and *Aut Dedere Aut Judicare*

One of the related principles influencing the scope and development of universal jurisdiction throughout the years is the principle of *aut dedere aut judicare* (the obligation to extradite or prosecute). These two impelling and urgent doctrines of international law help the international society to adapt to changing conditions in the constantly transforming legal order.

It is noteworthy, concerning the issue of the distinction between universal jurisdiction and the principle of *aut dedere aut judicare*, that the latter was subject of a study undertaken by the International Law Commission (ILC) (with its final report published in 2014). Making a clear distinction between the two concepts had previously been a salient issue for the ILC. Although it was understood that in some cases both concepts could apply, the ILC decided to focus on the principle of *aut dedere aut judicare*.²³⁹ Similarly, while the study undertaken by the working group created by General Assembly resolution 65/33 should recognize and explore the relationship between universal jurisdiction and other concepts, it focuses on the elements inherent in the principle of universal jurisdiction.²⁴⁰ Accordingly, these two principles share a number of important characteristics and thus it may prove useful to examine the parallels between them.

²³⁸ *Ibid.*, pp. 29-30; 105-106.

²³⁹ See the Final Report of the International Law Commission on “*the obligation to extradite or prosecute (aut dedere aut judicare)*”. Available online at http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf [retrieved 16.2.2015] [hereinafter, ILC Final Report on *aut dedere aut judicare*].

²⁴⁰ UNGA, Report of the Secretary General. Sixty-fifth session on “*the scope and application of the principle of universal jurisdiction*”, No. A/RES/65/33, (10 January 2011). See online at <http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml> [retrieved 16.2.2015].

3.3.1 Conceptual Contradiction and Common Misconception

Universal jurisdiction under customary international law is often analyzed in connection to the *aut dedere aut judicare* principle, which is embodied in several multilateral treaties aimed at prosecuting serious international crimes. The principle is considered as being of a more obligatory nature than universal jurisdiction.

As seen from the historical overview in the beginning of this chapter, universal jurisdiction has for decades been coupled with the principle of *aut dedere aut judicare*.²⁴¹ These two rules are related but yet distinct. In other words, the obligation to extradite or prosecute does not amount *per se* to universal jurisdiction, as many commentators tend to think. Rather whenever a foreigner present in the state is suspected of committing a crime abroad against another foreigner, *aut dedere aut judicare* rule may require the exercise of universal jurisdiction. Therefore in modern international law these two principles should be considered as a part of one another usage; not as one and the same principle.

As described above universal jurisdiction is the **ability** of the court of any state to try persons for serious crimes committed outside its territory having no link whatsoever with the suspect. Under the *aut dedere aut judicare* principle, a state may not shield a person suspected of these serious crimes, and it is therefore **required** to either prosecute or extradite.²⁴² Accordingly, universal jurisdiction cannot, and should not, be analyzed without also considering the principle of *aut dedere aut judicare*, since the purpose of both concepts is to combat impunity for certain types of crimes defined in international legal instruments. Although, *aut dedere aut judicare* is distinct from universal jurisdiction, the obligation remains relevant and should be considered together, or as stated in the AU-EU Expert Report:

“The obligation *aut dedere aut judicare* is nonetheless relevant to the question of universal jurisdiction, since such a provision compels a state party to exercise the underlying universal jurisdiction that it is also obliged to

²⁴¹ The expression *aut dedere aut judicare* is a modern adaptation of a phrase used by Hugo Grotius: *aut dedere aut punire* (either to extradite or punish). However, for instance, Bassiouni claims that the expression of *aut dedere aut punire* is inconsistent with the principle of legality and suggest that it shall be changed to *aut dedere aut judicare*. See BASSIOUNI, M. CH.: “Human Rights in the Context of Criminal Justice” *Duke Journal of Comparative and International Law*, Vol. 3, (1973), p. 235; BASSIOUNI and WISE, *supra* note 138, pp. 3-4.

²⁴² See Amnesty International Report, *supra* note 65, p. 11.

provide for by the treaty. In short, a state party to one of the treaties in question is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extradition.²⁴³

The expression *aut dedere aut judicare* is commonly used to the alternative obligation to extradite or prosecute, which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of multilateral conducts. The obligation is phrased in different ways in different treaties, but essentially it requires a state holding someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own courts.²⁴⁴ In other words, the principle obliges the state having custody of a suspect to either extradite the person to a state having jurisdiction over the case, or to investigate its own judicial proceeding.

The universality principle is often confused with that of *aut dedere aut judicare*. Although there is a considerable overlap between these notions, in a strict theoretical sense they are different notions. The objective of the principle is to avoid crimes being left unpunished because there is no extradition or prosecution. According to this principle, if there is no extradition, the state will be obligated to refer the case to its appropriate prosecuting authorities. However, this principle itself does not specify which basis of jurisdiction should be exercised. It does not imply any jurisdictional preferences either. Therefore, strictly speaking, it does not matter which jurisdictional basis is employed, as long as a suspect is prosecuted within a state where the person is present in the absence of extradition, the principle of *aut dedere aut judicare* is fulfilled.

The ILC was created to promote the progressive development of international law and its codification. Its position as a possible source of international law has been based primarily on its role in codifying existing customary law, or progressively developing an area of law through its detailed consideration of a topic. The ILC incorporated the principle in its 1996 Draft Code of Crimes against the Peace and Security of Mankind, and explained its rationale as follows:

²⁴³ AU-EU Expert Report, *supra* note 81, p. 11.

²⁴⁴ BASSIOUNI and WISE, *supra* note 138, p. 3.

“The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of ‘an individual alleged to have committed a crime’.”²⁴⁵

A few commentators have argued that the principle is a rule under customary international law²⁴⁶, but there are those who oppose such a claim²⁴⁷. Additionally, ILC was rather divided in its conclusion (within its newly released report from 2014) on the customary nature of the obligation to extradite or prosecute and whether it could be inferred from the existence of customary rules prescribing specific international crimes thus leading to no result on the principles status.²⁴⁸

²⁴⁵ 1996 Draft Code of Crimes, Commentary to Article 8, para. 3. International Law Commission: Report of the International Law Commission on the Work of its Forty-eight session, 51 UNGAOR Supp. N.10, at 9, UN Doc. A/51/10 (1996).

²⁴⁶ WISE, E. M.: “The Obligation to Extradite or Prosecute” *Israel Law Review*, Vol. 27, (1993), pp. 268-270; COLLEEN, E. B., FRIED, A.: “Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law” *McGill Law Journal*, Vol. 43, (1998), p. 613; MAZZOCHI, S.: “The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and For All” *Northern Illinois University Law Review*, Vol. 32, (2011-2012), pp. 93-97; BYERS, M.: “Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective” *Michigan Journal of International Law*, Vol. 17, (1995), pp. 109-118. In addition, Bassiouni stresses that the principle *aut dedere aut judicare*, as a customary norm, encounters its limits towards third State not bound by Treaties. BASSIOUNI and WISE, *supra* note 138, p. 340.

²⁴⁷ For instance, Stigall notes that “some contemporary scholars hold the opinion that *aut dedere aut judicare* is not an obligation under customary international law but rather “a specific conventional clause relating to specific crimes”. Stigall further holds that it is an obligation that only exists when a state has voluntarily assumed the obligation by treaty. STIGALL, D. E.: “Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law” *Notre Dame Journal of International and Comparative Law*, Vol. 3, (2013); TIRIBELLI, C.: “*Aut dedere Aut Judicare*: a response to impunity in international criminal law” *Sri Lanka Journal of International Law*, Vol. 21, (2009), pp. 242-244.

²⁴⁸ ILC Final Report on *aut dedere aut judicare*, *supra* note 239, paras. 51-52.

3.3.2 Interplay of Principles - Filling the Impunity Gap

In view of the foregoing, it is accepted that the principle of *aut dedere aut judicare* may overlap with universal jurisdiction when a state has no connection to a crime other than the mere presence of the suspect in its territory and, in application of the principle of *aut dedere aut judicare*, chooses not to grant extradition and consequently must base its prosecution of the case on the principle of universal jurisdiction. It is understood that it is only in such a case that the two concepts overlap. In other words, it is in this case that universal jurisdiction plays a decisive role in the full application of the principle of *aut dedere aut judicare*. Thus, the obligation of *aut dedere aut judicare*, provides that a state may not shield a person suspected of certain categories of crimes in a territory subject to its jurisdiction. Instead, it is required to either exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so, or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.²⁴⁹

According to some commentators, the principle of *aut dedere aut judicare* is obligatory in nature, while universal jurisdiction is only considered permissive.²⁵⁰ Analysis of international treaties, domestic legislation and judicial practice on these issues must take into account the distinction between universal jurisdiction and the principle of *aut dedere aut judicare* to avoid risking erroneous conclusions. The principle is not just the corollary principle of universal jurisdiction, but an autonomous principle separated by that of universal jurisdiction.

Universal jurisdiction involves a criterion for the attribution of jurisdiction, whereas the obligation to extradite or prosecute is an obligation that is discharged once the accused is extradited or once the state decides to prosecute an accused on any of the existing bases of jurisdiction (those described in Chapter II). The obligation to extradite or prosecute could be established in a treaty for any type of crime, without

²⁴⁹ Amnesty International Report, *supra* note 65, pp. 11-12; TRIBELLI, *supra* note 247, p. 234. See further on the principle *aut dedere aut judicare* also PLATCHA, M.: “Aut Dedere Aut Judicare: An overview of Modes of Implementation and Approaches” *Maastricht Journal of European and Comparative Law*, Vol. 6(4), (1999).

²⁵⁰ ŠTURMA, *supra* note 135, p. 179; On ‘permissive’ universal jurisdiction see INAZUMI, *supra* note 78, pp. 105-106.

such crimes necessarily being subject to universal jurisdiction. Nevertheless, both principles should be considered together and not in isolation from each other (or other principles of international criminal law for that matter).

Indeed, analysis of various international instruments shows that the principle of *aut dedere aut judicare* generally occurs in connection, among others, with the principle of universal jurisdiction.²⁵¹ There is therefore a thin line between the principles. For instance, the widely ratified fourth Geneva Conventions of 1949 and the 1984 Torture Convention, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another state for the purpose of prosecution. From the text of the Geneva Conventions one might assert that the principle of *aut dedere aut judicare* is represented by the wording that state parties “[...] shall be under the obligation to search [...] and it may also, if it prefers [...] hand such persons over for trial [...]”, and universal jurisdiction might be detected from this passage, “enact any legislation necessary.”²⁵² The scheme contained in this provision is very close to a special category of *aut dedere aut judicare* based on the wording of Article 7 of the Hague Convention for the Suppression of Unlawful Seizure of Aircrafts of 1970. According to the current

²⁵¹ Examples of conventions that enshrine the duty to prosecute or extradite, and simultaneously implicitly authorize the exercise of universal jurisdiction when they provide that “the present Convention does not exclude any criminal jurisdiction exercised in accordance with national law”, hence allowing states to establish, for instance, universal jurisdiction in their domestic legislation. Such provisions appear, among others, in the following multilateral treaties; 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1994 Convention on the Safety of United Nations and Associated Personnel; 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 2006 International Convention for the Protection of All Persons from Enforced Disappearance. In addition, the principle of *aut dedere aut judicare* is included in the majority of multilateral treaties on combating transnational crime, as, for example, in the 13 international conventions on counter-terrorism; 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; 2000 United Nations Convention against Transnational Organized Crime; and 2003 United Nations Convention against Corruption, among others.

²⁵² Article 49, second paragraph, of the 1949 Geneva Convention I; Article 50, second paragraph, of the 1949 Geneva Convention II; Article 129, second paragraph, of the 1949 Geneva Convention III and Article 146, second paragraph, of the 1949 Geneva Convention IV: “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.”

interpretation of the Article 7 the obligation to prosecute arises *ipso facto* when the alleged offender is present in the territory of the state of apprehension.

Nevertheless, one has to keep in mind that the obligation of *aut dedere aut judicare* is conceptually distinct from universal jurisdiction. The establishment of jurisdiction, universal or otherwise, is logically a prior step. Therefore, a state must first vest its courts with competence to try the suspect. It is only when such competence has been established that the question of whether to prosecute or extradite arises.²⁵³ Put generally, a state party to one of the treaties in question is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extradition. According to Bassiouni, international crimes that rise to the level of *jus cogens* constitute legal obligations. This, in his opinion, stipulates that the legal obligations which stem from grave breaches include, among others, the duty to prosecute or extradite. Thus a state that simply does not wish to prosecute or extradite suspects, can and often does, ignore its non-derogable *jus cogens* duty of *aut dedere aut judicare*; resulting in granting the accused individuals impunity for their crimes.²⁵⁴

In this context, it is relevant to briefly address the ICJ Judgment, of 20 July 2012, in the case concerning “Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*)” in which the ICJ found Senegal in violation of the 1984 Convention against Torture (CAT) due to its failure to try or extradite the former president of Chad, H. Habré.²⁵⁵ Two notable issues, with respect to this study, are raised by the court. First, the ICJ reiterated the importance of universal jurisdiction in eliminating the risk of impunity.²⁵⁶ In determining the effect of Article 5(2) CAT on Article 6(2) and Article 7(1) of the CAT, the ICJ highlighted the significance of fulfilling the obligation to establish universal jurisdiction of its courts over the crime of torture: “[It] is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1). The purpose of all these obligations is to

²⁵³ AU-EU Expert Report, *supra* note 81, para. 11.

²⁵⁴ BASSIOUNI, Universal Jurisdiction, *supra* note 114, pp. 148-151.

²⁵⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 I.C.J. 422, 426-27 (Jul. 20) [hereinafter Hissené Habré case]

²⁵⁶ *Ibid.*, at 443 (noting how universal jurisdiction serves as an “alternative way” to combat impunity).

enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding immunity for the perpetrators of such acts.”²⁵⁷ The Court then further observed that;

“[T]he obligation for the State to criminalize torture and to *establish its jurisdiction* over it [...] as soon as it is bound by the Convention, has in particular a *preventive* and *deterrent* character [...] to *eliminate any risk of impunity* [...] The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.”²⁵⁸

In other words, it was held that the establishment of universal jurisdiction represents an integral part of the duty to prosecute as contained in the CAT and the party failing to do so would entail international responsibility. Moreover, the Court stated that Article 7(1) of the Convention requires the state on whose territory the alleged perpetrator is found to submit the case to its competent authorities for the purpose of prosecution, “irrespective of the existence of a prior request for the extradition of the suspect”, and that “the extradition is an option [...] whereas prosecution an international obligation under the Convention, the violation of which is wrongful act engaging the responsibility of the State.”²⁵⁹ With this passage the court stipulates the current interpretation of the obligation to prosecute *ipso facto*, regardless of extradition request.²⁶⁰ Furthermore, the Court stated that the crime of torture indeed constitutes a *jus cogens*, but did not find it important to examine whether the obligation to extradite or prosecute constitutes a customary rule.

The universal duty represented by the principle does not present any considerable threat to state sovereignty since there is no hierarchy between the inherent options to either extradite or prosecute the individual. *Aut dedere aut judicare* only minimally

²⁵⁷ *Hissené Habré* case, *supra* note 255, at 451.

²⁵⁸ *Ibid.*, (emphasis added).

²⁵⁹ *Ibid.*, paras. 94 - 95.

²⁶⁰ *Ibid.*, paras. 90 and 94. See further ŠTURMA, P.: “Povinnost aut dedere aut judicare a nový smíšený trestní tribunal pro stíhání zločinů podle mezinárodního práva v Čadu.” *Jurisprudence*, Vol. 4, (2014), p. 13.

forces the will of the international community on an individual state that is merely obliged to act in a certain way.

It has also been pointed out that universal jurisdiction could be applied through the obligation *aut dedere aut judicare*, under which, if the perpetrator of an offence that was so serious that it merited prosecution outside the territory of the state in which it was committed was apprehended in the territory of another state, that state shall be obligated to extradite the suspect to the state claiming jurisdiction in order to prosecute him or her, or to bring proceedings against that person in its courts. Although this was not the application of the principle of universal jurisdiction *stricto sensu*, because states can decide not to prosecute but to extradite, it was unquestionably one mechanism through which states could cooperate with one another in order to combat impunity for serious offences and to achieve the goal of universal jurisdiction.

The principle of *aut dedere aut judicare* thus attaches a selective yet obligatory nature to universal jurisdiction. It is therefore by linking the two concepts together that the nature and application of universal jurisdiction might become clearer. In order to conclude, the importance of *aut dedere aut judicare* in enhancing the exercise of the universality principle becomes impulsive when a crime is allegedly committed abroad, with no nexus to the forum state, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction.²⁶¹ Elevated by the *aut dedere aut judicare* principle, states have increasingly implemented the principles of universal jurisdiction in a more systematic and concrete manner through their national legislation.

3.4 Legal Status of Universal Jurisdiction under International Law – Finding an ‘Obligatory’ Nature?

Traditionally the principle of universal jurisdiction requires no action by states; it only allows them the option of prosecuting certain crimes.²⁶² However, one might assert that when a serious offence is committed that breaches multilateral treaties and

²⁶¹ The obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other jurisdictional bases. Therefore, if a state can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.

²⁶² BROWN, B. S.: “The Evolving Concept of Universal Jurisdiction” *New England Law Review*, Vol. 35, (2000), pp. 391-392.

is of such gravity that it shocks the whole international community, then the exercise of universal jurisdiction might indeed be considered as obligatory.²⁶³

3.4.1 *Jus Cogens* and Obligations *Erga Omnes*

As already stipulated, universal jurisdiction is often associated with other concepts, such as *jus cogens* or obligations *erga omnes*. It is therefore important at this point to further describe these solutions and analyze the distinctive factors but reciprocity of these doctrines can be a positive factor in establishing a more comprehensive framework for deterring impunity.

The heinousness rationale of crime parallels the international law theory of *jus cogens*, the idea that some international norms override any contrary positive law or agreement between states.²⁶⁴ All three doctrines; universal jurisdiction, *jus cogens* and obligations *erga omnes*, involve compelling principles of law creating rights or obligations for every state. Additionally, *erga omnes* and *jus cogens*, may give support to the view that nonparties to some of the hijacking, terrorism, apartheid or torture conventions have the jurisdictional right to prosecute for those offences. Therefore, universal jurisdiction has often been coupled with the norms of *jus cogens* and obligations *erga omnes*.

It has been presumed that any act violating a peremptory norm which is *jus cogens* will *ipso facto* be the subject of universal jurisdiction, and, what is more, that the

²⁶³ AKEHURST, *supra* note 24, p. 160.

²⁶⁴ See BASSIOUNI, *Jus Cogens* and *Obligatio Erga Omnes*, *supra* note 148, p. 104 (arguing that the same moral criteria that support *jus cogens* support universal jurisdiction, and thus the two categories are congruent); RANDALL, *supra* note 81, pp. 829–830. *Jus cogens* have a strong natural law favor, as it insists that moral rules derived from abstract principles trump positive law. Similarly, jurisdiction over an offense ‘becomes’ universal, trumping positive notions of sovereignty- based jurisdiction, because of the abstract evil of the offense. Furthermore, the norms that publicists have identified as *jus cogens* closely track universal offenses. *Ibid.*, p. 830. The ICTY explicitly linked the concepts of *jus cogens* and universal jurisdiction.

“One of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish [...] individuals accused of torture [...]. Indeed, it would be inconsistent on the one hand to prohibit torture to such an 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.”

ICTY, *Furundžija* case, Judgment, No. IT-95-17/1, (10 December 1998), at 156.

exercise of universal jurisdiction is *erga omnes*. Obligations *erga omnes* means literally “obligation towards all.” As indicated by dictum in the *Barcelona Traction* case:

“[A]n 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. [...]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 obligation *erga omnes*.”²⁶⁵

On the other hand, *jus cogens* means ‘compelling law’. The concept refers to “peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between states to the extent of the inconsistency with any of such principles or norms.”²⁶⁶ In other words, the term refers to a body of so-called ‘peremptory’ norms – norms that are of such paramount importance that they cannot be set aside by acquiescence or agreements of the parties to a treaty.

Bassiouni has invoked the norms of *jus cogens* and of obligations *erga omnes*, and distinguishes the two doctrines as follows:

“*Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of certain crime’s characterization as *jus cogens*.”²⁶⁷

He suggests that states should have a duty to prosecute crimes of universal jurisdiction, and not just an optional right.²⁶⁸ In doing so he raises a number of issues

²⁶⁵ *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 4, para. 33 (Judgment of 5th Feb.).

²⁶⁶ RANDALL, *supra* note 81, p. 830. See also Article 53 of the Vienna Convention on the Law of the Treaties (VCLT). For further general discussion on the role of *jus cogens* see CASSESE, *International Law*, *supra* note 47, pp. 198-212.

²⁶⁷ BASSIOUNI, *Jus Cogens and Obligatio Erga Omnes*, *supra* note 148, p. 63.

²⁶⁸ As Bassiouni has noted that “[t]his threshold question of whether *obligation erga omnes* carries with it the full implications of the Latin word *obligatio*, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine” To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. BASSIOUNI, *Jus Cogens and Obligatio Erga Omnes*, *supra* note 148, p. 65.

on the relationship between universal jurisdiction and *jus cogens* and obligations *erga omnes*.

In addition, each of the principles applies only to a very limited, and vaguely defined, range of situations. Hence, one might conclude that in a logically coherent and integrated legal order these three legal concepts might be different sides of the same coin, essentially coextensive and generally overlapping.

The crimes falling under the scope of universal jurisdiction usually raise to the level of *jus cogens* and obligations *erga omnes* due to their heinous nature.²⁶⁹ Therefore, when the territorial or nationality states fail to prosecute, the usage of universal jurisdiction might then be considered as a responsibility (obligation) and means of accountability (a right) for states to protect the most fundamental human rights.²⁷⁰ For instance, in the *Furundžija* case, the International Tribunal for the former Yugoslavia confirmed the existence of universal jurisdiction. The court stated that the crime of torture (which was the subject of these proceedings) was promoted by the international community as constituting *jus cogens*, and therefore each state is empowered to investigate, prosecute and punish or extradite the suspect.²⁷¹ Accordingly, the seriousness of the crime in question is one of the essential rationales for universal jurisdiction.²⁷² An inquiry into the crimes falling under the principles' scope and the gravity "threshold" will be further dealt with in Chapter IV.

3.4.2 Conventional and Customary International law

Although the explicit inclusion of universal jurisdiction in international conventions is still rather scarce a positive sign is in the vast number of treaties implicitly allowing states to apply universal jurisdiction in their national legislation. In other words, to what extent can it be said that universal jurisdiction has been established in national

²⁶⁹ For instance, Bassiouni and Wise used the phrasing that "[i]n large part, the rules prohibiting [offenses that are universally condemned] constitute *jus cogens* norm." BASSIOUNI and WISE, *supra* note 138, p. 24.

²⁷⁰ Šturma, *supra* note 135, p. 183.

²⁷¹ ICTY, *Furundžija* case, *supra* note 264, at 156.

²⁷² However, it is not the only one. In my view another important rationale for the exercise of universal jurisdiction arises after the commission of the heinous offence in question; especially what jurisdictional bases will be applicable – using the notion of subsidiarity to decide which state is willing and able to genuinely prosecute. This is further explained in Chapter V.

legislation? For instance, with regard to national legislation, the survey of Amnesty International reveals that while at least 136 (approximately 70.5%) UN member states have made provisions for universal jurisdiction over war crimes, the number drops to 80 (approximately 41.5%) for crimes against humanity, 94 (approximately 48.7%) for genocide and 85 (approximately 44%) for torture.²⁷³ Moreover, it should be noted that most of the states that have already provided for universal jurisdiction over war crimes and torture are also parties to the Geneva Conventions and the Convention Against Torture, both of which require state parties to establish universal jurisdiction.²⁷⁴ It can be withheld that both of these conventions put an obligation on states to exercise universal jurisdiction. However, it is important to note that within these conventions we can find the obligation to extradite or prosecute (*aut dedere aut judicare*).²⁷⁵

Hence, on the question whether universal jurisdiction is permissive or obligatory; the question was raised, for instance, in the Report of the Special Rapporteur On the Obligation to Extradite or Prosecute - with respect to *aut dedere aut judicare* - and while not many states expressly commented on the issue, those who did, specifically mentioned that universal jurisdiction merely enables a state to establish jurisdiction and that universal jurisdiction has a permissive rather than mandatory nature.²⁷⁶ Nonetheless, if the *aut dedere aut judicare* formula within applicable conventions is interpreted as imposing an obligation to prosecute *ipso facto*, it may be considered that there exists a general obligation to exercise universal jurisdiction (provided the presence of the alleged perpetrator in the territory of the prosecuting state), unless the state proceeds to extradite. Therefore the two above mentioned conventions, not only establish a right for states, but also obligation, to either extradite or prosecute, which might entail the application of universal jurisdiction.²⁷⁷ However, it is a noteworthy

²⁷³ Amnesty International Report, *supra* note 65, pp. 12-13.

²⁷⁴ KAZEMI, *supra* note 78, p. 16.

²⁷⁵ ŠTURMA, *supra* note 135, p. 180.

²⁷⁶ Report of the Special Rapporteur on the obligation to extradite or prosecute. Documents no. A/CN.4/571, June 2006 (Preliminary Report), A/CN.4/585, June 2007 (Second Report), A/CN.4/603, June 2008 (Third report). Available at http://untreaty.un.org/ilc/guide/7_6.htm [retrieved 2.2.2015].

²⁷⁷ CASSESE, International Criminal Law, *supra* note 28, pp. 285-286; Amnesty International: "Ending Impunity: Developing and implementing a global action plan using universal jurisdiction", p. 16. Available online at <https://www.amnesty.org/en/documents/IOR53/005/2009/en/pdf> [retrieved 2.3.2015].

point that no convention has actually prescribed that universal jurisdiction is an obligation upon states *without* mentioning the alternative of extradition to other states.

Additionally, with respect to universal jurisdiction *in absentia*, at the present stage, it has not been manifested in a single convention. For instance, President G. Guillaume of the ICJ declared that “none of the texts [of the treaties] has contemplated established jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.”²⁷⁸ States seem to be reluctant to expand their jurisdiction beyond what they are obliged to from treaty provisions.²⁷⁹ Therefore the exercise of absolute universal jurisdiction is somewhat exceptional and is only regarded as permissive in nature, rather than mandatory.

3.5 Summary

Theories behind jurisdiction, including territoriality, required a connection between the state asserting jurisdiction and the offence. Universal jurisdiction, however, arose from a new and different type of jurisdictional theory — universality — which lacked proper legal backing at both the national and international levels. That principle assumed that each state had an interest in exercising jurisdiction to prosecute offences which all nations had condemned. Hence, the rationale for the universality principle was in the nature of the offences, which affected the interest of all states (the whole international community), even when they were unrelated to the state assuming jurisdiction.

Piracy on the high seas, as the first crime falling under the scope of universal jurisdiction, was the only crime that fulfilled these ‘criteria’ at the time and thus claims of universal jurisdiction over it were undisputed under international law. In the case of other grave crimes, international treaties, including the 1949 Geneva

²⁷⁸ Separate opinion of President G. Guillaume in the *Arrest Warrant* case, *supra* note 83, paras. 7-8.

²⁷⁹ See the separate opinion of Judge Abraham in the *Hissené Habré* case (2012), *supra* note 255, paras. 30-31. Moreover, on the basis of information received from the report of the Secretary-General the main conditions is that the perpetrator is presented within the state seeking to exercise universal jurisdiction. See UNGA, No. A/66/93, *supra* note 192, pp. 13-17.

Conventions, had provided for universal jurisdiction. That initiated the discussion of whether jurisdiction in certain treaties could be extended to a wider range of offences. Furthermore, despite the uncertainties and doubts, such as, regarding the scope of universal jurisdiction or admissibility of its performance *in absentia*, it can be said that universal jurisdiction still remains a very important tool in the fight against crimes under international law. This can for instance be concluded from the fact that the principle has, to date become a topic of discussion of the UNGA Sixth Committee where most UN member states recognized universal jurisdiction as an effective tool in the fight against impunity.

Several treaties obliged states to either try a suspect or hand over that person for trial to a party that was willing to do so thus starting the debate on the relationship between universal jurisdiction and other principles (mainly the obligation to extradite or prosecute).

Nonetheless, it has generally been accepted that the use of absolute universal jurisdiction is less desirable than that of conditional universal jurisdiction. Indeed, the use of a narrower notion of universal jurisdiction has been advanced by a number of commentators as a more sensible, realistic and politically convenient approach. It should be noted that applying the concept of universal jurisdiction in a more restrictive way, by requiring the presence of the suspect on the territory of the prosecuting state, should be considered better practice, especially in a case where it would stipulate to a more positive usage of universal jurisdiction and not undermine its main aim. Accordingly, it has been further argued that universal jurisdiction should only be used as a ‘default jurisdiction’. Meaning, that unless the territorial state or state of nationality is unable or unwilling to carry out proceedings, another state should not assert jurisdiction based on universality.²⁸⁰

From the analytical discussion, on the relationship between the universality principle and *aut dedere aut judicare*, one can see how these principles ‘cooperate’ within the international criminal justice system in order to prosecute universal crimes and close the impunity gap. While the purpose of the latter is to prevent impunity when extradition of the alleged perpetrator is not granted by the required state; universal jurisdiction constituted in itself a basis for exercise of jurisdiction grounded in the

²⁸⁰ See Chapter V on ‘The Idea of Subsidiarity in the Context of Universal Jurisdiction’.

nature of the offence. Nonetheless, both principles, even though conceptually distinct, can be seen as pillars in the fight against impunity. Although the explicit inclusion of universal jurisdiction in international conventions is limited, more treaties implicitly allow for states to apply for universal jurisdiction in their national legislation. The principle *aut dedere aut judicare*, on the other hand, can be found in most multilateral treaties dealing with transnational crimes. It can be said, that discussion on universal jurisdiction is based on greater emphasis of *aut dedere aut judicare* and their interconnected relationship.

Hence, after having described the formation of the universality principle and established its essential components, it is time to engage in a more detailed discussion on the main substance of this thesis. Hence let us now turn to the core of universal jurisdiction, namely, the crimes and their heinous character that makes universal jurisdiction the exceptional principle that it is (see the following Chapter), and thereafter (within Chapter V) the newly emerging idea of ‘subsidiarity’ in the application of universal jurisdiction.

PART II - SPECIFIC PART: SCOPE AND APPLICATION OF UNIVERSAL JURISDICTION

4 Core International Crimes that Attract the Application of Universal Jurisdiction²⁸¹

Ending impunity by perpetrators of *crimes of concern to the international community* is a necessary part of preventing the recurrence of atrocities.²⁸²

In other words, this statement clearly manifests the necessity of deterring the commission of the utmost abhorrent crimes that are threatening to the whole international society. It is within the interest of the international community to end the impunity of individuals who are responsible for gross human rights violations. One can agree that the idea behind the above mentioned manifesto is reflected in one of the underlying criteria, or constitutive elements, for the application of universal jurisdiction, namely the **nature of the offence**. It is the danger that these crimes pose on all nations within the international community that provides the primary basis for all states to exercise universal jurisdiction over such crimes under international law. The principle of universal jurisdiction has been regarded necessary and justifiable in instances where the crimes committed affected the whole international community, and national justice systems allowed the perpetrator to continue.²⁸³

²⁸¹ At the outset it is important to make a distinction between the terminologies, or concepts, with respect to crimes. I have decided to follow the terminology as it is understood for instance by ŠTURMA, P. in his recent publication. Firstly, ‘International crimes’ are crimes that constitute a serious breach of international law evoking state responsibility *erga omnes*. Secondly, ‘crimes under international law’ are those crimes of *jus cogens* nature committed by high-ranking state officials, or other state agents, evoking individual responsibility. Thirdly and finally ‘transnational crimes’ or conventional offences defined by international treaties (especially multilateral), for instance, certain terrorist acts, drug dealing etc. See ŠTURMA, P.: “Metamorfózy mezinárodních zločinů: příběh s otevřeným koncem”. In ŠTURMA, P. (ed.) *et al.: Odpověď mezinárodního práva na mezinárodní zločiny*. Praha: Univerzita Karlova, Právnická Fakulta, 2014, pp. 11-12.

²⁸² Chautauqua Declaration, signed by the prosecutors of the Nuremberg International Military Tribunal, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Sierra Leone Special Court and the Extraordinary Chambers of the Courts of Cambodia, August 29, 2007, see http://www.asil.org/chaudec/index_files/frame.htm, [retrieved 24.2.2015] (emphasis added).

²⁸³ In particular, see for instance the report of the Secretary-General on “*the scope and application of the principle of universal jurisdiction*” where it was observed from some comments of Governments that doctrinally the rationale for universal jurisdiction has been based on the idea that certain crimes were so serious that they affected the whole international community. Moreover, these crimes were universally condemned or were harmful to international interests thus obliging states to bring proceedings against the perpetrators. UNGA, Sixty-Fifth Session, No. A/65/181, *supra* note 6.

For decades the nature or exceptional gravity of crimes has been a joint concern of the international community in the fight against impunity.²⁸⁴ Therefore, one of the main factors in order to get the principle of universal jurisdiction working one needs, among others, a clear definition of the offence, or at least its constitutive features.²⁸⁵ But the question of which crimes are subject to universal jurisdiction under international law is not yet explicitly settled.²⁸⁶ This chapter will dedicate its discussion to the core international crimes that give rise to the application of universal jurisdiction and their definitional elements. Moreover, this chapters seeks to illustrate the effect of the recent developments in the conceptualization of universal jurisdiction.

A few scholars tend to speak about ‘**modern**’ or ‘**new**’ **universal jurisdiction** which is said to stem from the exceptional gravity of the crime. It is the recent expansion of modern universal jurisdiction to human rights offenses which distinguishes it from the ‘**old**’ or ‘**traditional**’ **universal jurisdiction** that historically applied only to piracy.²⁸⁷ This new or modern universal jurisdiction arises from the nature and the gravity of the crime, but those crimes considered as grave international crimes are genocide, crimes against humanity, war crimes and torture. The author of this thesis, as is strongly indicated within this chapter, agrees with those commentators who tend to classify universal jurisdiction into ‘modern’ (consisting of serious human rights violation), on the one hand, and ‘old’ universal jurisdiction (covering the crime of piracy), on the other.

All of these serious human rights offences can be found, both in international treaties and, even more importantly in relation to the exercise of universal jurisdiction, in customary international law, demonstrated by state practice and *opinion juris*. This is said to be the modern version of the principle, arising from the severity of the crime. Universal jurisdiction is not asserted on the basis of any nexus with the forum state,

²⁸⁴ UNGA, Sixty-Fifth Session, No. A/65/181, *supra* note 6, at. 4.

²⁸⁵ In addition to this above mentioned step there are two more steps needed to be taken in order to get the principle of universal jurisdiction working; primarily the existence of a specific ground for universal jurisdiction; and secondly, national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes. See PHILIPPE, *supra* note 108, p. 379.

²⁸⁶ See the opinions of states summarized in the 2010 UN Secretary General Report, *supra* note 281.

²⁸⁷ ARAJÄRVI, N.: “Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?” *Tilburg Law Review*, Vol. 16, (2011), pp. 7-8; KONTOROVICH, E.: “The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation” *Harvard International Law Journal*, Vol. 45, (2004) [hereinafter KONTOROVICH, Piracy Analogy].

but by virtue of common interests which threaten the international community as a whole and in which all states have an interest in their repression.²⁸⁸ This echoes the well-known dictum in the *Barcelona Traction* case regarding the observance of obligations *erga omnes*. A limited number of crimes attract universal jurisdiction. The crime of piracy is the classical instance but the modern day classification can be said to include grave crimes such as genocide, war crimes, torture and certain acts of terrorism. For instance, Kontorovich in his article, from 2004, on “The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation”, challenges the generally accepted view that piracy was universally cognizable because of its heinousness. His article manifests that the rationale for piracy’s unique jurisdictional status had nothing to do with the heinousness or severity of the offense whereas piracy had little to do with human dignity at all, unlike modern human rights offenses.²⁸⁹

4.1 The Characteristics of Universal Jurisdiction Crimes – Observing the Universal Character

Several crimes are particularly odious offences and are of concern to the international community as a whole. Such abhorrent atrocities, that constitute attacks on the rule of law and human dignity, are usually linked to abuse of political or military systems. In addition, they mainly occur in the context of war or as an aggressive behavior of high-ranking state official, political or military leaders (or other powerful state actors). These crimes can be referred to as ‘universal’ crimes.

Traditionally, offences subject to universal jurisdiction are considered universal crimes and differ from common delicts in several ways. Primarily, they have a different legal basis: universal crimes must have a foundation not only in law, but also in international law. Secondly, universal crimes are of such magnitude or gravity that they shock the consciousness of human beings irrespective of their location; connection to the victims; or to the place where the crimes were committed. These crimes are therefore labeled ‘universal’ because they reflect the core of common

²⁸⁸ RASTAN, *supra* note 106, pp. 122-123.

²⁸⁹ KONTOROVICH, Piracy Analogy, *supra* note 287, pp. 185-188.

moral perceptions and normative standards or as the preamble to the Rome Statute of the ICC stipulates to “atrocities that deeply shock the conscience of humanity.”²⁹⁰

The main characteristics of crimes subject to universal jurisdiction are among others; their uniform condemnation; these crimes threaten or harm many nations and the heinousness or exceptional gravity of those crimes. But this last point mentioned, will be further clarified within the next section.²⁹¹

Consequently universal jurisdiction is only applicable to a particular set of crimes that are considered exceptionally grave. Therefore clarification of the ‘nature of the crime’ is necessary.²⁹²

The next section will address the question what crimes are generally accepted as giving rise to universal jurisdiction in modern international law; what is their legal basis; and what do these crimes have in common?

4.1.1 Seriousness of a Crime as a Determinant Factor – the ‘gravity threshold’

Universal jurisdiction only applies to “crimes that are so universally condemned that the perpetrators are the enemies of all people.”²⁹³ As such, these crimes are deemed to threaten the security and well-being of all nations.²⁹⁴ Unlike the other jurisdictional bases, universal jurisdiction is founded exclusively on the nature of the offence, the magnitude and particular gravity of which affect the very foundation of the national and international legal order and, in particular, the recognition of and respect for dignity as a basic value. Universal jurisdiction therefore finds basis in the especially heinous characteristics of some crimes.²⁹⁵ Is it possible to draw a conclusion, and thus

²⁹⁰ Rome Statute, *supra* note 9, Preamble, para. 2.

²⁹¹ KONTOROVICH, E.: “A positive theory of universal jurisdiction.” *Bepress Legal Series*, (2004), pp. 10-33, available online at <http://law.bepress.com/cgi/viewcontent.cgi?article=1515&context=expresso> [retrieved 25.3.2015].

²⁹² See discussion in UNGA, Sixth Committee, Sixty-seventh session, 28 December 2012, A/C.6/67/SR.24

²⁹³ *Demjanjuk* case, *supra* note 162, at 582.

²⁹⁴ *Ibid.*

²⁹⁵ ZEMACH, A.: “Reconciling Universal Jurisdiction with Equality Before the Law” *Texas International Law Journal*, Vol. 47, (2011), pp. 145-146.

establish where the ‘gravity threshold’ lay? How has the sole concept of ‘gravity’ of crime relating to the exercise of universal jurisdiction changed?

Owing to the fact that universal jurisdiction is based primarily on the ‘nature’ of the crime, it is essential to make an analysis of what constitutes a ‘heinous offence’ and enumerate, both already accepted as well as newly emerging crimes – modern threats – subject to universal jurisdiction. It is so, that the discussion is not an easy one and to decide upon the boundaries of severity of a crime can be a difficult task.

The idea of gravity has played a pivotal role in justifying the elaboration of international crimes and the usage, among other, the principle of universal jurisdiction. However, the failure to elaborate what is meant by gravity is not merely a consequence of the difficulty of the definitional task. In light of the serious repercussions of labeling an international crime ‘grave’ one might expect the concept of gravity to have reasonably well-defined and accepted content in international law. In fact, as is with the principle of universal jurisdiction the opposite is true. Individuals who write and apply about international criminal law invariably reference the seriousness of the crimes at issue but rarely specify what they mean;²⁹⁶ thus making gravity an ambiguous concept.

In this regard, the Geneva Conventions introduced the application of universal jurisdiction to violations characterized as ‘grave breaches’ without explicitly stating what the word ‘grave’ constitutes. In the Princeton Principle view, the definition of universal jurisdiction would be “universal jurisdiction **based solely on the nature of the crime** without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the state exercising jurisdiction.”²⁹⁷ Thus for states considering the exercise of universal jurisdiction the gravity of the case, whether in terms of its nature, its qualification, its severity or its broader impact, acts as a relevant indicator for determining whether the state should assert universal jurisdiction. One might declare that this gravity linkage (or certain threshold) serves as a filtering mechanism to determine which cases rise to the level of establishing universal jurisdiction.

²⁹⁶ DEGUZMAN, M. M.: “How Serious are International Crimes? The Gravity Problem in International Criminal Law” *The Gravity Problem in International Criminal Law*, Vol. 51, (2012), p. 21.

²⁹⁷ Princeton Principles, *supra* note 5, Principle 1(1).

There are certain serious crimes under international treaties that have questions and controversies related to them, including the range of crimes that would fall under its jurisdiction, as well as conditions for its application. In this regard there are two lines of argument. Firstly, there are those that deduce universal jurisdiction from the *jus cogens* nature of crimes. Secondly, there are those who are more positivist oriented; they base the application of universal jurisdiction on international law and deny (or at least do not look at it as a primary source) that there might exist a general rule that universal jurisdiction is solely based on the heinousness of crime. Both of these views will be looked at. However, let us first turn in the next Section to the crime of piracy, which is the classical instance as falling under universal jurisdiction. Nevertheless at present, as this thesis will argue, acts of piracy seems to cause some controversies within modern international law when discussing crimes falling under the umbrella of universal jurisdiction.

When assessing the gravity of the crime for the purpose of selecting situations to be investigated, the ICC Prosecutor has adhered to a single-factor quantitative test of gravity (i.e., the number of victims).²⁹⁸ The ICC Prosecutor also seems to attribute great importance to the quantitative dimension in determining which high-ranking officials are selected for prosecution. Upon issuing the five arrest warrants against the leaders of the Lord's Resistance Army (an Ugandan rebel organization) the Prosecutor released a statement pointing mainly to the quantitative test as the basis of his decision to focus investigative and prosecutorial efforts on crimes perpetrated by the rebel forces rather than on those perpetrated by government forces.²⁹⁹ However, both the Pre-Trial Chamber and the Prosecutor have observed that “the gravity of a given case should not be assessed only from a quantitative perspective, for instance, by

²⁹⁸ HELLER, K. J.: “Situational Gravity Under the Rome Statute”. In STAHN, C, VAN DEN HEREK, L. (eds.): *Future Directions in International Justice*, 2009, noting that “[I]n practice, the number of victims is the only factor that has played a significant role in the OTP's situational gravity determinations [. . .],” pp. 227-253.

²⁹⁹ Statement of Luis Moreno-Ocampo, Chief Prosecutor on the Uganda Arrest Warrants, International Criminal Court, The Hague (October 14, 2005), at 2-3. (“The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the Lord's Resistance Army (LRA) and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA”).

considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.”³⁰⁰

According to ICC Prosecutor Regulations and policy papers published by the ICC Prosecutor, factors relevant to assessing gravity for the purpose of selecting cases for prosecution include: a) the scale of the crimes; b) the nature of the crimes; c) the manner of commission of the crimes; d) the impact of the crimes.³⁰¹ The application of these factors has recently been approved by the Pre-Trial Chamber,³⁰² which observed that in assessing the gravity of the crime both the Prosecutor and the Court should look to “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behavior and the means employed to execute the crime.”³⁰³ However, there are always two sides of the coin and therefore some commentators have criticized this approach taken by the ICC Prosecutor in assessing gravity, advocating the adoption of a flexible qualitative test of gravity.

Thus, it is possible to argue that the exercise of jurisdiction over persons who have committed a crime with no direct link with the prosecuting state can be justified by the heinousness of the crime in question.³⁰⁴ In the case of universal jurisdiction, the necessary legitimizing linkage turns on the nature of the crimes that are, in the words of Justice Jackson's statement at Nuremberg, “so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”³⁰⁵ An argument invoking such threat to the international community as a whole as a legitimizing linkage supporting universal jurisdiction loses credibility where states exercising such jurisdiction over certain

³⁰⁰ *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, para. 31 (Feb. 8, 2010) (stating agreement with the Prosecutor's view).

³⁰¹ Regulations of the Office of the Prosecutor, *supra* note 161, Reg. 29; ICC Prosecutorial Strategy, at 6; Report on Prosecutorial Strategy, (2006), para. 2(b).

³⁰² *Prosecutor v. Abu Garda*, *supra* note 297, para. 31.

³⁰³ *Ibid.* para. 32.

³⁰⁴ MACEDO, S.: “Introduction”. In MACEDO, S. (ed): *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under Interational Law*, (2004), p. 4. See also MANN, *supra* note 23, p. 95; *Demjanjuk* case, *supra* note 162, at. 582.

³⁰⁵ Trial of the major War Criminals before the IMT, (1947), at. 98-99. Available at <http://www.loc.gov/rr/frd/Military.Law/pdf/NT-Vol-II.pdf> [retrieved 3.3.2015].

atrocities readily ignore other equally atrocious crimes “where it [is] considered politically expedient to do so.”³⁰⁶

4.1.1.1 Piracy Analogy

Universal jurisdiction as it existed for hundreds of years constitutes jurisdictional exception unique to piracy. The modern version of the principle (if one decides to separate the two into the old universal jurisdiction and the new or modern version) concerns itself primarily with human rights violations.

Generally, it is believed that piracy became the subject of universal jurisdiction as a matter of pragmatism, not because piracy was a particularly heinous offence; especially if one considers modern threats such as genocide, war crimes and crimes against humanity. This point will be further clarified later in this chapter, but first the characteristics of crimes subject to universal jurisdiction will be described. Thus it can be argued that the level of ‘gravity’ has certainly changed its meaning through time.

Accordingly, many have claimed that piracy is not the right measurement for universal jurisdiction. In this context, it has been argued that piracy is not an international crime since it lacks the gravity of other international criminal law offenses.³⁰⁷ For instance, Kontorovich asserts that application of universal jurisdiction based on the piracy analogies were wrongly grounded on the assumption that piracy was subject to universal jurisdiction due to its heinousness.³⁰⁸ He notes that piracy was actually not considered especially heinous and therefore could not have been the reason it became subjected to universal jurisdiction. Universal jurisdiction over pirates was more a matter of theory than of practice.³⁰⁹ Furthermore, Cassese makes this distinction, asserting that the international criminalization of piracy, unlike

³⁰⁶ CRYER *et al.*, *supra* note 35, p. 198 (“International criminal law is more susceptible to claims of unfair selectivity than domestic law. This is not just because international criminal law is more selectively enforced than domestic law (although it is). Arguments about selectivity strike at the rhetoric of international criminal law and its institutions.”).

³⁰⁷ KONTOROVICH, Piracy Analogy, *supra* note 287, p. 183 (arguing the legality of privateering, which essentially amounts to piracy authorized by a state, undercuts the gravity of the offense of piracy).

³⁰⁸ *Ibid.*, pp. 191-192; 204-208.

³⁰⁹ *Ibid.*, p. 192.

crimes against humanity or war crimes, does not serve a community value and therefore does not meet the definition of an international crime as set forth in his writings.³¹⁰

One of the viewpoints that support deducing the basis of universal jurisdiction from the nature of a crime makes an analogy of piracy. In light of pirates being historically referred to as *hostis humani generis* ('an enemy of mankind'), and the fact that any state can seize them on the high seas and bring them to trial before their domestic court, this view argues that the exercise of jurisdiction over persons who have committed a crime with no direct link with the prosecuting state can be justified by the heinousness of the crime in question.³¹¹ They were referred to as *hostis*, which made them distinct from criminals under Roman law. Additionally, these communities were in an enduring state of war against neighboring states due to this non-declaration of war. Thus formulated, this term was originally used to indicate a common belligerent to people in Rome and its allies, and accordingly it did not carry any connotation associated with the nature of the crime. Although the term *hostis humani generis* survived in the course of the later development in the conceptualization of piracy, it has lost substance and has gradually become subordinate to the concept of acts of piracy.

As for the concept of acts of piracy itself, the scale of activity ranged from mere theft to massive battles throughout the history of piracy until the nineteenth century, and not all acts of piracy were regarded to be as heinous as genocide or other serious international crimes. Moreover, they could not be indiscriminately subject to universal jurisdiction. Indeed, via a gradual process and by the nineteenth century, acts of piracy had gradually been conceptualized as being subject to the exercise of universal jurisdiction. The justification for it was not based on the nature of the crime, but was to be found in the fact that piracy was committed on the high seas and 'under conditions that render it impossible or unfair to hold any state responsible for its

³¹⁰ CASSESE, *International Criminal Law*, *supra* note 28, pp. 10–12. (asserting "piracy was (and is) not punished for the sake of protecting a community value."); Cassese defines an international crime as the cumulative presence of four elements: (1) a violation of international customary rules which are (2) intended to protect community values; and where (3) there exists a universal interest in repressing these crimes; and (4) the absence of state immunity. He asserts that piracy fails to satisfy the second element because the penalization of piracy does not protect a community value. He also excludes the slave trade and trafficking in women because such is only provided for in treaty, not in customary law.

³¹¹ MACEDO, *supra* note 302, p. 4. See also, MANN, *The Doctrine of Jurisdiction* (1964), *supra* note 23, p. 95; *Filártiga v. Peña-Irala*, United States Court of Appeals (Second Circuit, 1980) 630 F 2d 876; *Demjanjuk* case, *supra* note 162, at 582.

commission'.³¹² In other words, the grounds for justifying universal jurisdiction over acts of piracy in the nineteenth century was based on the fact that pirates were not under the authority and protection of any state, rather than the gravity or nature of the crime itself. In fact, similar depredations were conducted by privateers who had first obtained a license from a state (a letter of marque), but these were not regarded as acts of piracy by virtue of the permission given by the state.³¹³

However, the continued validity of this perception may be considered questionable due to, for instance, the extraordinary growth of piracy off the coast of Somalia since 2008 and in the Gulf of Guinea more recently. The UN Security Council (SC) in a dozen Resolutions and reports, declared that it is “[g]ravely concerned by the threat that acts of piracy and armed robbery against vessels pose [...]” and notes that such conduct “exacerbate[s] the situation in Somalia which continues to constitute a threat to international peace and security in the region.”³¹⁴ Even so, this thesis seeks to argue that piratical acts do not amount to the same severity as crimes, such as for instance genocide.

Insofar, as the need to transport goods in international commerce over the high seas is an interest of all states and any attempt to circumscribe this right may ultimately lead to conflict. An attack on the principle of high seas freedoms is an attack against the peace of mankind—thus justifying the application of the term *hostis humani generis*. Nevertheless, the justification for it was not based on the nature of the crime, but was to be found in the fact piracy was committed on the high seas and “under conditions

³¹² Hackworth observed: It has long been recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them. Hackworth’s *Digest of International Law* (1941), p. 681.

³¹³ HALL, W. E.: *A Treatise on International Law*, 8th ed., 1924, p. 317. Actually the remedy was obtained from the state, which issued a letter of marque when the privateer acted beyond the extent of permission.

³¹⁴ See, for instance, SC Resolution 1816, 62nd Session, 5902d Mtg., U.N. Doc. S/RES/1816 (June 2, 2008). [It is] Gravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation [. . .] [and] Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region. *Id.* In any event, the gravity of particular acts of piracy may not be the chief concern in this regard as the shared-interest of the international community that is eroded by the perpetration of acts of piracy is the infringement on the free flow of international commerce. This shared community value may serve as the basis under Cassese’s framework for considering piracy to be an international crime.

that render it impossible or unfair to hold any state responsible for its commission.”³¹⁵ Put differently, the grounds for justifying universal jurisdiction over acts of piracy in the nineteenth century was based on the fact that pirates were not under the authority and protection of any state, rather than the gravity or nature of the crime itself.³¹⁶ One might conclude that piracy is not a crime of universal jurisdiction based on the heinousness of the crime, as is the case with the core international crimes (discussed below), but rather a crime of concurrent municipal jurisdiction based on the stateless nature of the crime. As Kreß noted “it should go without saying that piracy does not even come close to match the “heinousness” of genocide or crimes against humanity, the former crimes, in terms of gravity, being comparable rather to ordinary robbery.”³¹⁷

The *Filártiga v. Peña-Irala*³¹⁸ case, which is among the initial cases that helped expand universal jurisdiction to new offences, illustrates the centrality of heinousness in analogizing piracy in connection to modern offenses (in this context the act of torture). The *Filártiga* plaintiffs were Paraguayan citizens who alleged that the defendant, a Paraguayan official, had wrongfully caused their family member’s death by torture. The only connection *Filártiga* drew between the pirate and the torturer was that both committed crimes widely regarded as violations of “fundamental human rights.”³¹⁹ While the court explained that torture was an extraordinarily heinous offense, and universally regarded as such, it took no such pains regarding piracy.³²⁰ Moreover, Judge Kaufman in his opinion did not try to prove that piracy was universally cognizable because it was regarded as heinous.

³¹⁵ HALL, *supra* note 313, pp. 310-311. See also, BECKETT, W.E.: “The Exercise of Criminal Jurisdiction over Foreigners” *British Yearbook of International Law*, Vol. 6, (1925), p. 45.

³¹⁶ KONTOROVICH, Piracy Analogy, *supra* note 287, p. 183.

³¹⁷ KREß, *supra* note 223, p. 569.

³¹⁸ *Filártiga v. Peña-Irala*, *supra* note 311, at 890.

³¹⁹ *Ibid.*, at 890.

³²⁰ *Ibid.*, at 882-885. Moreover, the Second Circuit held that, based on universal jurisdiction, it had subject matter jurisdiction to hear the action. It declared in a now-famous passage: “for purposes of civil liability, the torturer has become—like the pirate [...] before him— *hostis humani generis*, an enemy of all mankind.” *Ibid.*, at 890.

4.2 The Source for the Application of ‘Modern’ Universal Jurisdiction

4.2.1 Defining Elements of a Universal Offence

In the contemporary context the concept of ‘grave breaches’ was articulated within the already mentioned Geneva Conventions of 1949. These draw a contrast between grave breaches and other less severe breaches of these conventions by enumerating specific acts that are considered to be grave breaches.³²¹

According to ICC Prosecutor Regulations and policy papers published by the ICC Prosecutor, factors relevant to assessing gravity for the purpose of selecting cases for prosecution within the jurisdiction of the Court, it includes: a) the scale of the crimes; b) the nature of the crimes; c) the manner of commission of the crimes; d) the impact of the crimes.³²² The application of these factors has been approved by the Pre-Trial Chamber, which observed that in assessing the gravity of the crime both the Prosecutor and the Court should look to “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behavior and the means employed to execute the crime.” In this regard, perhaps one might use similar approach or evaluation when analyzing the fundamental elements of crimes subject to universal jurisdiction.

Traditionally, the *ratio legis* of universal jurisdiction is justified on two main ideas. Firstly, some crimes are so grave that they harm the entire international community. Secondly, the gravity of these crimes implies that no safe haven should be available for those who commit them. Subsequently the idea of universal jurisdiction grew to include crimes on the grounds of their gravity instead of the practical considerations of denying criminals safe haven. In other words, there exist two rationales for exercising universal jurisdiction, traditionally, the lack of any state’s jurisdiction over the *locus delicti*, and secondly, the modern version arising from the gravity of the crime.³²³

³²¹ EINARSEN, T.: *The Concept of Universal Crimes in International Law*. Oslo: Torkel Opsahl Academic EPublisher, 2012, p. 66.

³²² Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 29, 33 (April 23, 2009), Reg. 29; ICC Prosecutorial Strategy, at 6; Report on Prosecutorial Strategy (2006), para. 2(b).

³²³ KONTOROVICH, Piracy Analogy, *supra* note 287, pp. 204-207; 233-237.

Given the points set out above regarding piratical acts the exercise of universal jurisdiction over pirates in the nineteenth century was based on two rationales: first, that enforcement took place on the high seas and beyond the reach of any sovereign; and second, that enforcement occurred on a subject that was not under the protection of any state. In other words, as it was built on the fact that the exercise of jurisdiction over pirates would not be in conflict with any other state's claim, it was therefore not based on the nature of the crime itself.³²⁴ The structure of such an exercise of jurisdiction was later adopted in the provisions for the repression of piracy under the 1958 Convention on the High Seas and the 1982 UNCLOS. Both conventions provide two requirements for illegal acts of violence, detention, or depredation to constitute an act of piracy: first, the act was committed on the high seas, against another ship or aircraft in a place outside the jurisdiction of any state; and second, the act was committed for private ends by the crew of a private ship or a private aircraft (Article 15 of the Convention on the High Seas, Article 101 of UNCLOS). It should be noted that due to this formulation, the exercise of jurisdiction over an act of piracy would not coincide with the claim of another state.

The specific characteristics of universal jurisdiction are in that it involves a principle that sanctions the prosecutions of serious crimes and can be applied without territorial or personal links to the perpetrator or the victim. The seriousness of a crime for the purposes of applying universal jurisdiction is determined by the extent to which it harms legal rights protected by specific international agreements or rules of international law, or has the potential to seriously impair universally recognized human rights. Some countries legislation tend to enumerate crimes in respect of which universal jurisdiction might be applied, rather than base the application on whether the acts committed were sufficiently harmful to the international community as a whole, based on the above criteria. Additionally, beyond customary and treaty law, there are also the fundamental peremptory norms incorporated in the doctrine of *jus cogens* as described in Section 3.4.1. Another view based on the nature of crime relies on the concept of *jus cogens*. This view is premised on the recognition of values shared by the international community, which cannot be reduced to the interests or values of individual states. The *jus cogens* norm is regarded as embodying such collective value interest, and accordingly, it is alleged that all states as members of

³²⁴ KONTOROVICH, Piracy Analogy, *supra* note 287, p. 183.

the international community are entitled to punish conduct that violates *jus cogens* norms.³²⁵ It is necessary to clarify the concept of *jus cogens* and its role and context in the existing international legal system.

At present, the core crimes falling under the scope of universal jurisdiction, and this thesis considers as such, are namely, war crimes, crimes against humanity, genocide and torture; all of which constitute *jus cogens* international crimes and thus carry the obligation to prosecute or extradite.³²⁶ It allows states to rely on universality for prosecution, punishment, and extradition.

War Crimes

Atrocities committed during the Second World War lead among others to the recognition of war crimes; as crimes grave enough to warrant universal jurisdiction. They are serious violations of customary or treaty rules belonging to international humanitarian law (also called international law of armed conflict).³²⁷ The prohibition of war crimes is a *jus cogens* and an obligation *erga omnes*.³²⁸

The definition of war crimes, as a core international crime, is included in a number of instruments that enumerate a wide range of prohibitions and regulations. War crimes subject to universal jurisdiction constitute a serious violation of international humanitarian law during international armed conflict (including both crimes defined under customary international law and those defined in treaties). The most comprehensive codification of prohibitions and regulations are enshrined in the 1949 four Geneva Conventions and their two Additional Protocols.³²⁹ There are no provisions in these conventions that specifically refer to universal jurisdiction.

³²⁵ BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, p. 107; JORDAN, J. B.: “Universal Jurisdiction in a dangerous world: a weapon for all nations against international crime” *Michigan State University-D.C.L. Journal of International Law*, Vol. 9, (2000), pp. 8-9; BROOMHALL, *Towards the Development*, *supra* note 131, pp. 405-406.

³²⁶ BAUMRUK, P.: “Universal Jurisdiction: A Tool against Impunity” *Czech Yearbook of Public and Private International Law*, Vol. 4, (2013), pp. 206-207.

³²⁷ CASSESE, *Cassese’s Law*, *supra* note 86, p. 65. The term ‘international humanitarian law’ has now largely replaced the term ‘law of armed conflict’. (Even earlier terms were ‘laws and customs of war’ and the ‘laws of war’).

³²⁸ See Section 3.4.1 on thorough discussion obligations *erga omnes*.

³²⁹ BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, pp. 115-116.

However, one might assume that state parties have the right to exercise universal jurisdiction because it stems from the obligation to prevent and repress “grave breaches” enshrined within the Geneva Convention and Protocol I.³³⁰

The modern concept of war crimes was developed under the auspices of the Nuremberg Trials based on the definition in the London Charter (or Nuremberg Charter)³³¹. Article 6(b) of the Charter defines war crimes as:

“[...]violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”³³²

According to article 6, leaders, organizers and others who participate in the execution of a scheme that might evolve, among others, into war crimes, are responsible³³³ and thus can be held accountable without freeing themselves from the responsibility (no immunity for perpetrators).³³⁴

An important case where universal jurisdiction was of great significance and was relied on in the prosecution of war crimes is the previously mentioned *Eichmann* case.³³⁵ In this case the district court Jerusalem concluded that the universality principle allowed Israel to define and punish Eichmann’s crimes under Israeli law, by claiming that: “the jurisdiction to try crimes under international law is *universal*”.³³⁶

³³⁰ BASSIOUNI, History of Universal Jurisdiction, *supra* note 34, pp. 50-52.

³³¹ The 1945 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (also called ‘London Charter’).

³³² Article 6(b) of the London Charter.

³³³ Article 6 of the London Charter.

³³⁴ Article 7 of the London Charter.

³³⁵ See section 3.1.2.1 of this thesis.

³³⁶ p. 26. See also the previously mentioned *Demjanjuk* case, where the court found that a Nazi prison guard (known as Ivan the Terrible) could be extradited to Israel based on Israel’s exercise of universal jurisdiction over him. This case provided firm establishment on the concept of universal jurisdiction over war crimes. See *Demjanjuk* case, *supra* note 162, at 582-583 (emphasis added).

Crimes against Humanity

However it is not until recently that the legal prohibition on crimes against humanity has emerged and the precise contours of the crime clarified.³³⁷ Article 6(c) of the London Charter defined crimes against humanity as:

“[...]murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious ground in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.”

Article 5 of the statute of the ICTY adds imprisonment, torture and rape to the definition of crimes against humanity. Similar form of definition is in Article 3 of ICTR and Article 7 of the ICC, which adds enforced disappearance and apartheid to the list and specifies that the crimes in question must have been committed as a part of widespread or systematic attack; not just the individual, but, by their very nature on humanity itself.³³⁸ As the Trial Chamber of the ICTY declared in the *Erdemovi* case in 1996, that crimes against humanity;

“are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are *inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community*, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the *concept of humanity* as victim which essentially characterizes crimes against humanity.”³³⁹

Accordingly, crimes against humanity constitute an severe attack on the fundamental rights of the individual. What is more, according to the above mentioned statement,

³³⁷ Initially the law of crimes against humanity was created to fill certain gaps in the law of war crimes. See CRYER *at el.*, *supra* note 35, p. 230.

³³⁸ Many of these acts can both constitute war crimes and crimes against humanity. However, what distinguishes these crimes is the fact that war crimes do need to take place during an armed conflict. Crimes against humanity have to be committed as part of a widespread or systematic attack, and to be committed against any civilian population. SHAW, *supra* note 22, p. 438; Amnesty International Report, *supra* note 65, Chapter Five, p. 1.

³³⁹ *Prosecutor v. Erdemovi*, Sentencing Judgment, Case No. IT-96-22-T (Trial Chamber I, 29 November 1996), para. 28 (emphasis added).

an attack on the individual constitutes an attack on the whole international community thus making evident the characteristics of the offence.

Furthermore, with respect to universal jurisdiction, one cannot maintain that there is a conventional law providing for it with respect to this category of crime. Nevertheless, crimes against humanity as a *jus cogens* international crimes are presumed to carry the obligation to prosecute or extradite, and thus allowing states to rely, for example, on universal jurisdiction when prosecuting for this heinous offence.³⁴⁰ As was stated in the decision of the *Tribunal de première instance*, when determining it had jurisdiction over Augusto Pinochet, clearly recognized universal jurisdiction over crimes against humanity; “[w]e consider that there exists a customary rule of international law, indeed *jus cogens*, recognizing universal jurisdiction and authorizing national authorities to prosecute and bring to justice, in all circumstances, persons suspected of crimes against humanity.”³⁴¹

Genocide

The often quoted 1949 Genocide Conventions, whose substantive rules may largely be considered as declaratory of customary international law and now has a large number of ratifications³⁴², was an important step in the process of condemning the act of genocide.³⁴³ Indeed, at present the prohibition of genocide is considered to be *jus*

³⁴⁰ BASSIOUNI, Universal Jurisdiction, *supra* note 114, p. 119.

³⁴¹ Decision of the *Tribunal de première instance*, Brussels, 6 November 1998 determining that it had jurisdiction over Augusto Pinochet. Moreover, in the *Tadić* case the Trial Chamber of the ICTY stated that the crimes against humanity were indeed also not only a matter of domestic jurisdiction but fall also within the Tribunal’s jurisdiction with the following statement: “[...] are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community”. *Prosecutor v. Tadić*, Decision on the defense motion on jurisdiction, Case No. IT-94-1-T (Trial Chamber 10 August 1995), para. 42.

³⁴² As of 2014, 146 states have ratified or acceded to the treaty, most recently Malta on 6 June 2014. One state, the Dominican Republic, has signed but not ratified the treaty.

³⁴³ CASSESE, Cassese’s Law, *supra* note 86, p. 109; BAUMRUK, *supra* note 326, pp. 208-209.

cogens; thus constituting a peremptory norm of general international law which cannot be modified or revoked by treaty.³⁴⁴

The definition of genocide has been adopted *verbatim* in the statutes of the ICTY (Article 4), ICTR (Article 2) and ICC (Article 6). Article 2 of the Genocide Convention defines genocide as:

“[...] any of 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.”

According to Article 3 the following acts shall be punishable, namely: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.³⁴⁵

Article 2 limits the parameters of the victim groups to only four, namely belonging to a national, ethnical, racial or religious group.³⁴⁶ Many have criticized this narrow focus by claiming that since the negotiation of the Convention, international law has undergone major transformation, especially with respect to the development of the

³⁴⁴ See in this context a declaratory statement made by the ICJ that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation[...]and]the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such odious scourge’”. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Rep. 1951, p. 23. Further, see the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, further request for provisional measures, Order of 13 September 1993, ICJ Rep (separate opinion of *Ad Hoc* Judge Lauterpacht, para. 100 where it was stated that “the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.”

³⁴⁵ In addition see also Article IV of the 1949 Genocide Convention, Article 2 of the Statute of the ICTR, and Article 6 of the Statute of the ICC. These are the material elements of the crime of genocide. According to the case law of the ICTR in *Akayesu* case three criteria must be combined; 1)the victim is dead; 2) the death results from an illegal act or from an illegal omission of the accused or from his subordinate; 3) at the time of the commission of the murder, the accused or his subordinate were inhabited by the intention to kill the victim or to carry grave infringement in his physical integrity, knowing that this infringement could entail the death and it was indifferent to him that the death of the victim results from it or not. See ICTR, *Prosecutor v. Jean-Paul Akayesu*, T. Ch. I. Judgment, (ICTR-96-4-T), 2 September 1998, at. 589.

³⁴⁶ CRYER *et al.*, *supra* note 35, pp. 208-211; CASSESE, Cassese's Law, *supra* note 86, pp. 119-123.

doctrine of human rights. Thus proposals have been made to expand the list of victim groups in order to include others, such as cultural and political groups, but unsuccessfully. In addition, there might be other acts than those listed in Article 3 that can be committed with a view to destroy one of the protected groups.³⁴⁷

A necessary element which distinguishes it from all other international crimes is that of intent to destroy a group. The specificity of genocide is not exhausted solely with regard to the four groups that may become the target of genocide, but its importance lies mainly on the basis of the particular *mens rea* of the perpetrator, whose intention must be to destroy in whole or in part anyone of the enumerated groups. This element renders genocide a specific intent (*dolus specialis*) and differentiates it from all other international crimes.³⁴⁸ Consequently, genocide is regarded as having a particular seriousness which is underlined by the fact that its prohibition has therefore attained the status of a *jus cogens* norm and an *erga omnes*³⁴⁹ obligation and has been described as the ‘ultimate crime’ or ‘crime of crimes’.³⁵⁰ This supports the view that any state has the right to fulfill their obligation by exercising universal jurisdiction over persons suspected of committing such crimes when other states are unable or unwilling to take effective steps to repress the crimes.³⁵¹

Subsequently, even though Article 6 of the Geneva Convention, with respect to jurisdiction - especially universal jurisdiction - does not speak of universal jurisdiction *per se*³⁵², such jurisdiction over the crime of genocide can still be found under customary law. Universal jurisdiction over genocide has been recognized under

³⁴⁷ CASSESE, Cassese's Law, *supra* note 86, pp. 110; 113; 119; CRYER *et al.*, *supra* note 35, p. 208; See also BAUMRUK, *supra* note 326, p. 209.

³⁴⁸ BANTEKAS, *supra* note 15, p. 207; CRYER *et al.*, *supra* note 35, p. 203; See also BAUMRUK, *supra* note 326, p. 209.

³⁴⁹ See for instance *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Order of 11 July 1996, ICJ Rep. 1996, at para. 31 (“It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”).

³⁵⁰ Amnesty International Report, *supra* note 65, Chapter Seven, pp. 2-3; CRYER *et al.*, *supra* note 35, pp. 203-204; BANTEKAS, *supra* note 15, p. 203.

³⁵¹ See in this context Chapter V on ‘The Idea of Subsidiarity in the Context of Universal Jurisdiction’.

³⁵² According to William A. Schabas, Article VI “was a pragmatic compromise reflecting the state of the law at the time the Convention was adopted” and “although universal jurisdiction, and the related concept of *aut dedere aut judicare*, had long been recognizes for certain crimes, committed by individual outlaws, few in 1948 wanted to extend it to crimes which would, as a general rule, involve State complicity.” SHABAS, W. A.: *Genocide in International Law*. Cambridge: Cambridge University Press, 2000, p. 548.

customary law, for example, in the previously mentioned *Eichmann* judgment.³⁵³ Moreover, the ICTR, in *Prosecutor v. Akayesu*, rendered the first ever modern genocide conviction for an individual.³⁵⁴ In addition, in the *Tadic* case the ICTY's Appeals Chamber stated, in connection with genocide, that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes."³⁵⁵ Similarly, the ICTR held in the case of *Prosecutor v. Ntuyahaga* that universal jurisdiction exists for the crime of genocide.³⁵⁶

Torture

Universal jurisdiction over torture is provided for within the 1984 Convention against Torture (CAT). Article 1 of the CAT defines crime of torture as follows:

"For the purpose 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 an act he or a third person has committed or is suspected of having committed, or intimidation of any kind, when such pain or suffering is inflicted by or at the instigation 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."

This definition reflects customary international law. A similar definition of torture can be found in the 1987 Inter-American Convention on Torture.³⁵⁷

³⁵³ *Eichmann* case, *supra* note 149.

³⁵⁴ *Akayesu*, case, *supra* note 345, appeal rejected 1 June 2001.

³⁵⁵ *Tadić* case, *supra* note 341, para 62.

³⁵⁶ *Prosecutor v. Ntuyahaga*, Case No, ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, Mar 18, 1999.

³⁵⁷ Article 2 of the Inter-American Convention on Torture defines torture as follows:

"For the purposes of this Convention, torture shall be understood to be an act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purposes. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

Within Article 5(1) of the CAT there is a general duty of state parties to take necessary measures to establish jurisdiction. In addition, Article 5(2) of the Convention requires each state party to take measures to establish universal jurisdiction over persons suspected of torture, unless it does not extradite the suspect.³⁵⁸ In the *Filártiga* case the US Court of Appeals for the Second Circuit held that “the torturer has become, like the pirate or the slave trader before him, *hostis humani generis*, an enemy of all mankind.”³⁵⁹ Moreover, in the already mentioned *Furundžija* case, the ICTY (after having addressed the human rights treaties and the resolutions of international organizations prohibiting torture) stated the following:

“[t]he existence of this corpus of general treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.”³⁶⁰

Now, after having briefly addressed the core crimes of international law that give rise to universal jurisdiction, one can indeed conclude, that all of these enumerative examples of categories of core crimes and their descriptive elements show that the gravity of a crime in question matters. Therefore, the severity or gravity of an act, constitutes a distinguishing element in the application of universal jurisdiction.

One can notice that the primary justification for invoking universal jurisdiction is undoubtedly the nature, namely the severity, of the crime in question. Indeed, proponents of the ‘modern’ or ‘new’ universal jurisdiction see heinousness as describing only a narrow class of offenses. While it may be impossible and unnecessary to reduce this standard to a formulation more precise than ‘heinous,’³⁶¹ it must be remembered that the heinousness in question is an extraordinary or

³⁵⁸ In addition, Article 12(2) of the Inter-American Convention on Torture also provided for universal jurisdiction:

“Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite in accordance with Article 11.”

³⁵⁹ *Filártiga v. Peña-Irala*, *supra* note 311, at 980.

³⁶⁰ *Furundžija* case, *supra* note 264, at 146.

³⁶¹ KONTOROVICH, Piracy Analogy, *supra* note 287, p. 207.

aggravated heinousness as enshrined within the above mentioned provisions and all offences constitute a large-scale or widespread criminal conduct.

In addition, while academics and scholars agree that the exercise of universal jurisdiction is generally reserved for the most serious international crimes a number of additional crimes which are not considered as constituting *jus cogens* have become the subject of universal jurisdiction by way of treaty.³⁶² In this context three offences should be mentioned, namely, aircraft hijacking, hostage-taking and acts of terrorism. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention) defined hijacking as an international crime and established a series of guidelines as to how it should be conducted.³⁶³ The 1979 International Convention Against taking of Hostages created and defines hostage-taking as an international crime and calls in states parties to make hostage-taking a domestic offence and to establish appropriate penalties.³⁶⁴ Additionally, a series of terrorism conventions were adopted between 1997 and 2005 to address terrorist bombing³⁶⁵, terrorism financing³⁶⁶ and risk of nuclear terrorism³⁶⁷. These crimes, however, have not yet risen to the level of *jus cogens* and even the level of gravity is perhaps not as high as

³⁶² BASSIOUNI, Universal Jurisdiction, *supra* note 114, p. 108.

³⁶³ The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, Articles 4; 6-7.

³⁶⁴ The 1979 International Convention against Taking of Hostages. Available online at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-5&chapter=18&lang=en [retrieved 4.4.2015].

³⁶⁵ The 1997 International Convention for the Suppression of Terrorist Bombings proscribes the delivery, placement, or detonation of an explosive or other lethal, device against a public or government facility with the intent to cause death, bodily injury, or extensive destruction. Available online at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&lang=en [retrieved 4.4.2015].

³⁶⁶ The 1999 International Convention of the Financing of Terrorism defines the crime of terrorism financing as “directly or indirectly unlawfully and willfully” providing or collecting funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” act prohibited by any of the other U.N. anti-terrorism conventions. See Article 2(1). Further the Convention proscribes the financing of “acts intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or international organization to do or to abstain from doing any act.” See Article 2(b).

Available online at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en [retrieved 4.4.2015].

³⁶⁷ The 2005 International Convention for the Suppression of Acts of Nuclear Terrorism which criminalizes under international law the possession of radioactive material with intent to cause death, injury, or property damage. See Article 2. Available online at https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=IND&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&lang=en [retrieved 4.4.2015].

is with the core international crimes. Nevertheless, their founding instruments explicitly (or implicitly) provide for universal jurisdiction.³⁶⁸

4.2.2 Rising Category of Newly Emerging Threats?

Initiating a discussion on modern threats that might fall under the umbrella of universal jurisdiction is certainly something worth addressing. Even though being a more theoretical discussion, nowadays the discussion is indeed relevant. The dynamic nature of international law keeps the fundamental values and principles of the international system continually evolving, and so do the number of crimes deserving its attention. What is more, there are different views concerning the offences that constitute crimes under international law which might be subject to universal jurisdiction; thus open for its evolvement.³⁶⁹ In fact, these newly emerging threats could become subject to universal jurisdiction as a matter of treaty obligation stipulating for usage of such a principle.

Cyberterrorism and Serious Environmental Crimes

At present, with the continuously globalizing world, cyberterrorism has become one of the most significant threats to the national and international security of the modern state, and cyberattacks are occurring with increased frequency.³⁷⁰ The internet not

³⁶⁸ Since the end of Second World War, a substantial growth and developments of treaty based universal jurisdiction where states have actively chosen to create universal jurisdiction through their assent to relevant treaties, even in the absence of customary international law. See BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, p. 125.

³⁶⁹ BAUMRUK, *supra* note 326, pp. 210-211.

³⁷⁰ Cyberterrorism has, for instance, been described as constituting a “[p]sychological, political, and economic forces [that] have combined to promote the fear of cyberterrorism. From a psychological perspective, two of the greatest fears of modern time are combined in the term “cyberterrorism.” The fear of random, violent victimization blends well with the distrust and outright fear of computer technology. An unknown threat is perceived as more threatening than a known threat. Although cyberterrorism does not entail a direct threat of violence, its psychological impact on anxious societies can be as powerful as the effect of terrorist bombs. Moreover, the most destructive forces working against an understanding of the actual threat of cyberterrorism are a fear of the unknown and a lack of information or, worse, too much misinformation.” United States Institution of Peace, Special Report “Cyberterrorism: How Real Is the Threat?”, (2004), p. 3. Available online at <http://www.usip.org/sites/default/files/sr119.pdf> [retrieved 4.4.2015]. Roughly defined, cyberterrorism can be described as the ability of terrorists to use the internet to hijack computer systems, to bring down international financial system, or to commit analogous terrorist action in cyberspace. See

only makes it easier for terrorists to communicate, organize terrorist cells, share information, plan attacks, and recruit others but also is increasingly being used to commit cyberterrorist acts. It is clear that the international community may only ignore cyberterrorism at its peril since these threats will not be eradicated easily. In the absence of feasible prevention, deterrence of cyberterrorism may at least be the best alternative. The most feasible way to deter cyberterrorists might be to prosecute them under the universality principle.

States, private industry, and international organizations are taking important legal, policy and technological steps to combat cyberterrorism. Nonetheless, these steps taken are insufficient and therefore the need for greater international cooperation arises. In addition to cyberterrorism one can also mention great international environmental crimes, such as transboundary pollution, which might be added to the list of crimes as falling under the scope of universal jurisdiction.

However, it is so that the notion of *hostis humani generis* may not always be clear and indeed, as such does not necessarily constitute a human rights offence (as is with the previously mentioned core crimes) and usually does not constitute direct attack (or threat of violence) on human rights.³⁷¹ One might ask whether it is in the way that those actions are executed and the motivation behind them that have changed; making it a crime that seriously undermines the national and international security?

As regarding to cyberterrorism, because of the very nature of the crime – irrespective of how we ultimately define it – the need for a truly universal jurisdiction may present itself with even greater emphasis than before; traditional crimes can almost always be addressed through some other method: territoriality, nationality, right of protection etc.; but these concepts may not prove sufficient in the case of cybercrime.³⁷² Moreover, as Kanuck stated “cyberspace and information alike transcend the physical boundaries, thereby requiring a legal paradigm that looks

GABLE, K. A.: “Cyber-Apocalypse Now: Securing the Internet against Cyberterrorism and Using Universal Jurisdiction as a Deterrent.” *Vanderbilt Journal of Transnational Law*, Vol. 43, (2010), p. 4.

³⁷¹ BAUMRUK, *supra* note 326, p. 210.

³⁷² See further “The Rule of Law in the Global Village. Issues of Sovereignty and Universality” Symposium on the Occasion of the signing of the UN Convention against Transnational Organized Crime” Panel on the Challenge of Borderless Cyber-Crime. Palermo, Italy, (14 December 2000) Available online at http://legal.un.org/ola/media/info_from_lc/cybercrime.pdf [retrieved 4.11.2014].

beyond merely the locus of events.”³⁷³ One can thus draw a conclusion that the prosecution of cyberterrorism under universal jurisdiction would be a more effective deterrent than territorial or other jurisdictional bases, due to both the broad reach of universal jurisdiction and the inherent practical difficulties caused by the suspected offenders in cyberspace.³⁷⁴

Serious environmental crimes, as a separate crime, have been considered among others within the first international conference on universal jurisdiction in Madrid (2014).³⁷⁵ There it was suggested (within the so-called proposal of Madrid Principles on Universal Jurisdiction) that universal jurisdiction should be applicable to “serious crimes against nature and the environment [...] seriously and generally affecting the fundamental rights of individuals and the community, such as food fraud, price gouging on staples for the survival or health of a generality of persons, [...] illegal exploitation of natural resources that seriously affect the health, life or peaceful coexistence of people with the natural environment in the area where exploitation occurs, the illicit diversion of international funds approved to alleviate humanitarian disasters [...] the irreversible destruction of ecosystems and any others defined as such in international agreements or treaties.”³⁷⁶

Questions can be raised concerning, among others, the sources of international law that could support inclusion of a crime on that list, and whether certain crimes have the same degree of seriousness as others on the ‘list’ of the core crimes. Therefore, the arguments for extending universal jurisdiction to cyberterrorism and serious environmental offences are many and varied. For instance, regarding the heinousness and severity of the crime in question (as discussed above regarding the core crimes) provides a strong justification for universal jurisdiction over cyberterrorism and serious environmental crimes. The rationale for heinousness states that “what should

³⁷³ KANUCK, S. P.; “Information Warfare: New Challenges for Public International Law” *Harvard International Law Journal*, Vol. 37, (1996), p. 288.

³⁷⁴ GABLE, *supra* note 370, pp. 43-44. See in this context Bassiouni who maintained that “Universal jurisdiction is the most effective method to deter and prevent international crimes by increasing the likelihood prosecution and punishment of its perpetrators. This approach to international criminal accountability is also believed to be a factor in reducing impunity for the perpetrators of these crimes.” BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, p. 153.

³⁷⁵ Congress on “Universal Jurisdiction on the XXI Century Madrid” Congress took place last May 2014 in Madrid. It was organized by the Baltasar Garzón International Foundation. Available online at <http://www.fibgar.org/congreso-jurisdiccion-universal/english/index.html>

³⁷⁶ See Madrid Principles, Principle 2. Available online at <http://baltasargarzon.org/nosotros/first-international-conference-universal-jurisdiction/> [retrieved 11.12.2014].

be of most concern is [...] the enormity of [the] acts”, including the destruction of social structures, physical and psychological damage to victims, and the concern “that the perpetrators of such serious international crimes may carry out such acts again.”³⁷⁷ This version of the heinousness analysis certainly does apply to cyberterrorism both because of the potential for serious disruption of entire governments and of world commerce, and as a result of technological methods available the apprehension of the cyberterrorist is very difficult.

As to the serious environmental offences, the enormity of the harm caused is so severe and widespread that it justifies the usage of universal jurisdiction. This is not to say that territorial jurisdiction or other jurisdictional bases could not be used to prosecute for these crimes, but it is merely to say that universal jurisdiction is likely to be the most feasible manner of prosecution and deterrence, since deterrence is the primary aim of universal jurisdiction.³⁷⁸ In conclusion, these newly emerging threats certainly allow for new consideration on universal jurisdiction and perhaps one can conclude in stating that these evolvments suggest that the scope of universal jurisdiction is expanding.

4.3 Can Universal Jurisdiction be Solely Deduced from the Nature of a Crime?

4.3.1 Deductive or Inductive Approach³⁷⁹

It is so that state practice on universal jurisdiction have been either scarce or inconsistent - thus lacking coherence.³⁸⁰ At the same time, some crimes are not

³⁷⁷ MARKS, J. H.: “Mending the web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council” *Columbia Journal of Transnational Law*, Vol. 42, (2003), p. 445.

³⁷⁸ GABLE, *supra* note 370, p. 52.

³⁷⁹ In general, the inductive method, or approach, may be defined as “inference of a general rule from a pattern of empirically observable individual instances of State practice and *opinio juris*. Induction is a process of going from the specific to the general. It is a systematic process of observation and empirical generalization.” In contrast to the deductive method, or approach, that may be “defined as inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle. Deduction is a process of going from the general to the specific.” See TALMON, S.: “Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion.” Bonn Research Papers on Public International Law, Paper No 4/2014, (24 July 2014), p. 5. Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470994 [retrieved 12.1.2015].

covered explicitly by the jurisdictional ground provided by relevant conventional regime, for instance, as is the case with genocide (as described above).³⁸¹ Hence, these two approaches seek to establish an entitlement to the exercise of universal jurisdiction.

There are mainly two approaches that seek to overcome this scarcity of state practice. The first one emphasizes the nature of crimes that are targeted by the assertion of universal jurisdiction and seeks to deduce a jurisdictional ground for universal jurisdiction from the very nature of the crimes (deductive approach). The second one is more in line with traditional scholarship and seeks to establish a customary rule which provides a ground for universal jurisdiction (inductive approach). However, state practices were either scarce or inconsistent, which would not have been sufficient for a customary rule to be confirmed.³⁸²

As to the deductive approach, proponents of universal jurisdiction have tended to seek its justification within the nature of crimes; the heinousness of crimes by drawing analogy to piracy or the violation of *jus cogens* norms, in order to deduce a basis for universal jurisdiction. There seems to be at least a strong indication in the case law analysis above (with respect to the core international crimes). International crimes that amount to the violation of *jus cogens* norms may be subject to the assertion of universal jurisdiction. For instance, Lord Brown-Wilkinson stated in the *Pinochet* case in the House of Lords that “[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.”³⁸³ Lord Brown-Wilkinson did not make any detailed arguments on this issue but merely referred, among others, to the *Furundžija* case where the Trial Chamber observed that:

“it would be *inconsistent* on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States

³⁸⁰ REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 223-224.

³⁸¹ See Article 6 of the 1949 Genocide Convention.

³⁸² REYDAMS, *Universal Jurisdiction*, *supra* note 19, pp. 223-224.

³⁸³ *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, Ex parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97 (H.L.), at. 104 (emphasis added).

and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.”³⁸⁴

In other words, one might consider whether the entitlement of universal jurisdiction can be generally viewed as a logical consequence of the peremptory nature of the prohibited act (in this case the crime of torture).³⁸⁵ On one hand, from this one can at least draw the indication that international crimes that amounting to the violation of *jus cogens* norms may be subject to the assertion of universal jurisdiction, but on the other hand, at the same time one may still argue whether this is truly a logical consequence of the peremptory nature of these types of crimes. From this the question may arise, whether assertion of universal jurisdiction should be mandatory rather than merely a right (permissive). This consideration is premised on the postulation that since those offences by their very nature undermine the foundations of the international order, and are thus of concern of all states. Hence in order for the absolute nature of the prohibition to be effectuated, all states must cooperate in bringing those perpetrators to justice. In fact, many proponents of the deductive approach express support for the *idea* of mandatory universal jurisdiction.³⁸⁶

Contrary to the deductive approach, the inductive approach seems to be gaining more support. The inductive approach includes inducing the basis for universal jurisdiction by confirming ordinary customary rules. A few developing factors seem to provide for obvious evidence for assessing the exercise of universal jurisdiction in the context

³⁸⁴ *Furundžija* case, *supra* note 264, at 156 (emphasis added).

³⁸⁵ See further on this the *Tadić* case where the Appeal’s Chamber of the ICTY was tasked with ruling on the plea of sovereign equality raised by the appellant, who alleged that no state could assume jurisdiction to prosecute crimes committed on the territory of another state without any justification by a treaty or customary international law. Based on this proposition, the appellant argued that the same requirement applied to the exercise of jurisdiction of an international tribunal, which suggests the principle of state sovereignty would have been violated in that case. The chamber rejected this plea, relying instead on the *nature of the crime*, with explicit reference to the jurisprudence of the *Eichmann* case. See *Tadić* case, *supra* note 341, para. 55.

³⁸⁶ See on this, among others, STEVENS, L. A.: “Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations” *Virginia Journal of International Law*, Vol. 39, (1998-1999), pp. 444-447; KAZEMI, *supra* note 78, pp. 41-44; ORENTLICHER, *supra* note 82, pp.148-150. Nevertheless, the proposition of mandatory universal jurisdiction does not seem to have gained enough support to be a mainstream argument. In contrast, an examination of international practice shows a strong indication in favour of the permissive nature of universal jurisdiction. Additionally, statements made in the case law analyzed within this thesis usually speak of, and use terms such as, ‘entitlement’ or ‘interest’ of the assertion of universal jurisdiction; thus in doing so they hint rather at the permissive nature of universal jurisdiction.

of customary international law.³⁸⁷ In other words, this approach seeks to mitigate the conditions for the establishment of customary international law, based on the understanding that the foundation or support for universal jurisdiction must be established in international law that governs relations between states.

Indeed, at present there are a growing number of states that have adopted legislation that empowers their courts to exercise universal jurisdiction over core international crimes, as well as increasing number of criminal proceedings. Under a modern positivist understanding of customary international law formation, in order to identify customary norms in the fields of human rights and humanitarian law where state practice is scarce, emphasis may be laid on unambiguous *opinio juris* as may be derived from international institutional practice.³⁸⁸ Along with those national legislation and judicial practices, many states have made declarations in favour of universal jurisdiction. Of particular importance are those that were made during a debate of the General Assembly's Sixth Committee on the agenda of the scope and application of the principle of universal jurisdiction. Overall, it has been generally acknowledged that universal jurisdiction is enshrined in international law and/or an

³⁸⁷ TAKEUCHI, M.: "Beyond Dichotomy between Deduction and Induction —Critical Appraisal on the Approaches to Universal Jurisdiction." *Okayama Law Journal*, Vol. 64(2), (2014), p. 360.

³⁸⁸ Customary International Law (CIL) has been defined as "one which is created and sustained by the constant and uniform practice of states and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future." As the definition shows, there are basically two important elements to CIL: (1) state practice, which is an objective presence of state acts, and (2) *opinio juris* – a subjective state of mind of a state indicating that it believes that it is "conforming to what amounts to a legal obligation." See the Final Report of the Committee on Formation of Customary (General) International Law. International Law Association, London Conference (2000), p. 8. Available online at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> [retrieved 2.2.2015]. Moreover, the ICJ has stressed the important of these two elements in the determination of whether an international custom has come into existence. For instance, in the *North Sea Continental Shelf*, in response to submission of Denmark and the Netherlands that certain delimitation agreements between states that were not parties to the Geneva Convention on the Continental Shelf 1958 was indicative of a new customary norm regarding delimitation, the court stated thus:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."

North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 at 44 (Feb. 20), para. 77; and further in *Continental Shelf case (Libya v. Malta)* (1985) ICJ Rep 13, para. 27. Where the court reiterated the position.

important tool for the fight against impunity, while concerns have been constantly raised on the possibility of its abusive use

In sum, doctrines have sought to establish the ground of universal jurisdiction in order to meet the need of the fight against impunity. The deductive approach (especially in the context of the *jus cogens* doctrine) places an emphasis on the absolute nature of individual responsibility from which the ground of universal jurisdiction can be deduced, thereby eliminating the need to rely on state practice or *opinio juris*. Unlike the inductive method that relies heavily on states practice, the technique of deductive logic is both convoluted and abstract, extracting rules of international law from more general propositions.

4.4 Appraisal

The source for the application of universal jurisdiction is the gravity of the crime – the crimes affect the international community as a whole – thus allowing for universal jurisdiction to be applicable. For instance, it was the gravity of those crimes that provided the theoretical and political justifications for the first international criminal trials at Nuremberg.

In light of the serious repercussions of labeling an international crime ‘grave’ one might expect the concept of gravity to have reasonably well-defined and accepted content in international law. In fact, as is with the principle of universal jurisdiction, the opposite is true. Individuals who write and apply about international criminal law invariably reference the seriousness of the crimes at issue but rarely specify what they mean.³⁸⁹ Thus gravity being an ambiguous concept.

The failure to elaborate what is meant by gravity is not merely a consequence of the difficulty of the definitional task (although it is certainly an important factor), rather the concept has been left undefined because its ambiguity has served a productive function in the regime’s development; to mediate between the competing pulls of state sovereignty and the burgeoning human rights movement.

³⁸⁹ DEGUZMAN, *supra* note 296, p. 21.

Piracy was not considered a substantively graver offense than many other crimes that were not subject to universal jurisdiction. While piracy was certainly a serious crime, it was not thought to be the worst, and thus heinousness fails to explain its universal cognoscibility.

After World War I, there was some discussion of establishing a court to prosecute crimes against humanity, but the world was not yet ready for the necessary limitation of sovereignty and the effort was abandoned. World War II proved to be the turning point. Gravity provided the primary justification for the creation of the International Military Tribunal at Nuremberg. Therefore, when the defendants objected that some of the charges violated the principle of legality, the judges demurred, invoking the gravity of the crimes. No one felt a need to explain what made the crimes of the Holocaust grave – and the same does apply to the other heinous offences. Nevertheless, the opposing tug of sovereignty was felt even in the face of the worst crimes the world had ever seen. The gravity of the crimes committed in World War II thus solidified the idea. Therefore the gravity threshold, with respect to universal jurisdiction, might ensure that states do exercise universal jurisdiction only over sufficiently serious offences, thus retaining the principle of state sovereignty.

As regarding the application of universal jurisdiction, the doctrine has not changed since its foundations. A violation of *jus cogens* remains central, rendering the criminal a *hostis humanis generis* and subject to universal jurisdiction. What has changed with the modern era is, rather the substance of *jus cogens*.

Traditionally, universal jurisdiction can be invoked merely on the basis of the gravity of the crime and in older cases of piracy, the crimes committed in *terra nullius*. Hence, the modern universal jurisdiction arises from the nature and the gravity of the crime even though the gravity criteria of the crime and its concern to the international community was not the foundation or the *raison d'être* of the original concept of universal jurisdiction. In sum, it can be concluded that the idea of universal jurisdiction grew, and has grown or developed, to include crimes on the grounds of their gravity instead of the practical consideration of denying criminals safe haven. In other words, it can be claimed that there exist two rationales for exercising universal jurisdiction; traditionally, the lack of any state's jurisdiction over the locus delicti; and the modern version arising from the gravity of the crime.

It follows that one can wonder whether heinousness is a poor standard for asserting universal jurisdiction and whether it is the right approach. In fact, one can also consider why our current approach to universal jurisdiction lacks coherence.

To conclude on the crimes that fall, or perhaps might fall (such as severe environmental crimes) under the umbrella of universal jurisdiction it is so that the seriousness of a crime, for the purposes of applying universal jurisdiction, is and should be, determined by the extent to which it harms legal rights protected by specific international agreements or rules of international law; or as the potential to seriously impair universally recognized human rights. Consequently, this thesis advocates that by defining and specifically enumerating crimes in respect of which universal jurisdiction might be applied is thus perhaps not the best solution but rather, such application should depend on whether the acts committed are sufficiently harmful to the international community as a whole, based on specific criteria (for instance that the offences constitute a large-scale or widespread criminal conduct).

Hence, after having established the fundamental source, namely the gravity of a crime, and described briefly the crimes falling under its scope, the rules for adhering or exercising universal jurisdiction in relation to other possible jurisdictional bases will be considered in the following chapter.

5 The Idea of Subsidiarity in the Context of Universal Jurisdiction

At the inter-state level there is no general rule of international law establishing a hierarchy between the various bases of jurisdiction where different national authorities want to prosecute the same conduct.³⁹⁰ Bassiouni, for instance, advocates the development of consensus principles on universal jurisdiction that establish “jurisdictional priorities” and provide “rules for resolving conflicts of jurisdiction” and minimize “the exposure of individuals to multiple prosecutions, abuses of process, and denial of justice.” In this regards, Bassiouni further notes that harmonizing universal jurisdiction with other jurisdictional theories, as well as, developing principles that clarify legitimate usage of universal jurisdiction is a necessary step forward in order to make the application of the universality principle more transparent.³⁹¹

Premised on these remarks one can consider whether the notion of subsidiarity in the context of universal jurisdiction might be such a ‘guiding tool’. In recent years, as will be clarified in this chapter, there has been a growing support for the notion of subsidiarity as a ‘guiding principle’ or ‘modality’ in the exercise of universal jurisdiction; hence establishing a hierarchical order between concurrent jurisdictions. Accordingly, the idea of subsidiarity as a guiding rule might bring foreseeability in the exercise of universal jurisdiction and balance the principle of state sovereignty.

This observation of appropriateness of exercising universal jurisdiction in relation to other jurisdictional bases clarifies the role that universal jurisdiction is expected to play in modern jurisdictional regime. In this context it is important to remember the fact that universal jurisdiction is rather unusual (as was clarified in Chapter III regarding the principles’ nature and scope) considering other jurisdictional bases, especially the dominant (or more preferable) territorial jurisdiction. The absence of effective jurisdiction capable of prosecuting serious offences is one of the shortcomings deriving exactly from the dominance of territorial jurisdiction. This is the very reason why universal jurisdiction has been developed in practice and law in order to fill this lacuna of jurisdiction and to end, or at least deter, that serious crimes

³⁹⁰ As was stated in Chapter II, there is no hierarchy between jurisdictional bases, even though it is acknowledged that territorial jurisdiction has a special role; not from a firm rule of international law but rather as a matter of policy and due to practical reasons.

³⁹¹ BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, pp. 82; 155.

are left unpunished.³⁹² Consequently, universal jurisdiction has to be exercised when there is no other jurisdiction that is capable of effective prosecution. In fact, it is crucial for the legitimacy and viability of universal jurisdiction that the territorial or national state is accorded the first opportunity to prosecute. In this way, a more pragmatic and homogeneous implementation of the universality principle will be enhanced.

Nevertheless, considering that the area of international law that governs the attribution and distribution of jurisdiction remains undeveloped, it is difficult to agree that subsidiarity has become entrenched as a legal principle. Rather, it can be seen as a policy consideration that functions in such a way that it renders the exercise of universal jurisdiction feasible and more workable. It may be argued that it is exactly due to the fact that the exercise of universal jurisdiction occurs in a somewhat *ad hoc* nature (even while its *raison d'être* cannot be denied), that the necessity of such a discussion has to be brought up. At the same time, because of subsidiarity's arguable status and function as a policy consideration, it is even more necessary to clarify the rationale behind the principle and to define its scope and role within the existing legal system of international law.

The emerging notion of subsidiarity will be reflected on in relation to the complementary principle of the ICC.³⁹³ It will be advocated that the principle of complementarity can be of guidance on how the notion of subsidiarity might be addressed and applied in the exercise of universal jurisdiction. In addition, it will be demonstrated how it could rely on its general acceptance to further its efficiency and implementation. In other words, subsidiarity has been compared to the operation of complementarity between states, thus complementarity might stipulate to the notion of subsidiarity, which might be a way of better enforcing the goal pursued by universal jurisdiction and enabling universal jurisdiction to be more pragmatically

³⁹² INAZUMI, *supra* note 78, pp. 218-219.

³⁹³ The complementarity principle, on which the ICC is based, entails that the Court can only investigate and prosecute certain core international crimes that fall under its jurisdiction when national jurisdictions are unable or unwilling to do so genuinely. The principle is understood, primarily, as an admissibility principle governing case allocation between competing jurisdictions (Art. 17 of the Rome Statute) in regard to the relationship between the ICC and states as a contest. See, for instance, RASTAN, *supra* note 106, pp. 83-84; In addition, the complementarity principle is also understood as a burden-sharing principle governing case allocation between competing jurisdictions, see STAHN, C.: "Complementarity: A Tale of Two Notions" *Criminal Law Forum*, Vol. 19, (2008), pp. 87-113.

enforced.³⁹⁴ Accordingly, this chapter seeks to analyze the possible function of subsidiarity as a policy consideration in the exercise of universal jurisdiction.

As one will see, this thesis is in favor of the application of a subsidiarity ‘test’. Nevertheless, as far as reasonably possible, states seeking to exercise universal jurisdiction should give priority to a state with a stronger nexus to the situation - the territorial or the national state.³⁹⁵ It is so that the territorial or national state may indeed be a better forum for prosecution in light of proximity to the evidence, the knowledge of the accused and the victims and a better perspective on all circumstances surrounding the crime.³⁹⁶ Therefore, subsidiarity should not be invoked as a justification for inaction based on unclear intentions of the territorial state or the national state and/or vague investigations.³⁹⁷ It should come into play when a state where a suspect is present is confronted with a concrete choice between prosecution in its own courts or transfer to the ‘more practical’ forum.

5.1 Existence of Subsidiarity in International Law

Although an act may have been committed by a foreigner against a foreign target outside the territory of a state, jurisdiction is asserted as a matter of international public policy. Hence, it is indispensable to have guidelines for the application of

³⁹⁴ PHILIPPE, *supra* note 108, p. 376. In addition, Ryngaert describes the notion of subsidiarity in other term. He calls it “horizontal complementarity” (contrary to the “vertical complementarity”) and it refers to the complementarity prosecutorial role played by “bystander” states. He further adds that “these states are states that do not have a strong nexus with an international crime situation and that are exercising universal jurisdiction, *vis-à-vis* states that are directly concerned with such a situation, for example, because the situation occurred on their territory or because the crimes were perpetrated by the nationals.” See RYNGAERT, C.: “Complementarity in Universal Cases: Legal-Systemic and Legal Policy Considerations.” In BERGSMO, M. (ed.): *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*. Oslo: Torkel Opsahl Academic EPublisher, 2010, p. 165 [hereinafter RYNGAERT, Complementarity].

³⁹⁵ “A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.” See the *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* note 83, para. 54.

³⁹⁶ In addition, the entrenchment of the rule of law in states with historically weak judicial systems, (typically developing countries) requires that states with stronger judicial systems (generally industrialized countries) enable the former states to assume their responsibility of prosecuting for heinous offences. See RYNGAERT, C.: “Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle” *Criminal Law Forum*. Vol. 19, Springer Netherlands, (2008), p. 156 [hereinafter RYNGAERT, Applying the Rome Statutes Complementarity].

³⁹⁷ *Ibid.*, p. 157.

universal jurisdiction in order to avoid jurisdictional conflicts, disruptions of world order (in particular balancing state sovereignty), abuse and denial of justice, and to enhance predictability of jurisdictional priorities (mainly foreseeability) and consistency in jurisdictional disputes and outcomes. The emerging notion of subsidiarity could be a significant contribution for the exercise of universal jurisdiction, and thus enhancing its usage and deterring political misuse by advocating means of better enforcing the goal pursued by universal jurisdiction.

5.1.1 The Principle of Subsidiarity – Content and Objective

The origins of subsidiarity may be traced to the history of Western political thoughts, but it was the Catholic socialism that modernized its rationale. In the teaching of Catholic socialism, subsidiarity aims to mediate the individual and social aspects of the human person. It asserts the human person as inherently social in the sense that the fulfillment of individuals cannot be realized without being in association with others but at the same time, human flourishing inherently requires freedom. Therefore, subsidiarity respects autonomy of individuals in the pursuit of their fulfillment and encourages intervention by larger entities only when individuals cannot achieve their ends by themselves and only for the purpose of the realization of those ends.³⁹⁸

It is because of its applicability to all social relationships, that subsidiarity has drawn attention in many fields and in fact has materialized in many contexts as a principle of social ordering of constituent parts in order to serve and achieve the common good.³⁹⁹ As a political principle, it establishes a preference for the entities closer to the stakeholders, premised on that they achieve the proposed objectives more efficiently. At the same time, it allows larger entities to enter in if those objectives cannot be

³⁹⁸ CAROZZA, P. G.: “Subsidiarity as a Structural Principle of International Human Rights Law” *American Journal of International Law*, (2003), pp. 40-42.

³⁹⁹ The European Union has adopted the principle of subsidiarity as one of its main constitutional principles. SCHÜTZE, R.: *From Dual to Cooperative Federalism*. Oxford: Oxford University Press, 2009, p. 246; BARBER, N. W.: “The Limited Modesty of Subsidiarity” *European Law Journal*, Vol. 11(3), (2005), p. 315; BERNARD, N.: “The Future of European Economic Law in the Light of the Principle of Subsidiarity” *Common Market Law Review*, Vol. 33(4), (1996), p. 653; BERMANN, G. A.: “Taking Subsidiarity Seriously: Federalism in the European Community and the United States” *Columbia Law Review*, Vol. 94(2), (1994), p. 339.

achieved equally well by the former entities. It thus provides the conditions and the reasons for preferring one level of authority to exercise power in a given context.⁴⁰⁰

Furthermore, with respect to subsidiarity as a requirement of international law, Cassese has considered in certain writings that the subsidiarity principle is a rule of customary international law. In this regard he noted that:

“it would seem that, at least at the level of customary international law, universal jurisdiction may only be exercised to substitute for other countries that would be in a better position to prosecute the offender, but from some reason do not [...] In other words, under customary international law, universal jurisdiction may only be triggered if those other states [territorial and active nationality states] fail to act, or else have legal systems so inept or corrupt that they are unlikely to do justice. Universality operates, then, as a *default jurisdiction*.”⁴⁰¹

From the above noted, the role of subsidiarity is thus flexible.⁴⁰² Subsidiarity has been proposed as an effective vehicle for the exercise of universal jurisdiction. This would accord forum determination to a foreign state only where the state with a stronger nexus fails to **adequately** deal with a particular case. In other words, states should exercise appropriate restraint in case the home state is able and willing to investigate and prosecute a situation in which a heinous offence has been committed.

During the debate in the Sixth Committee on the agenda of ‘*the scope and application of universal jurisdiction*’, many delegates emphasized that the primary responsibility for prosecution should always rest with the state where the crime had been perpetrated. For the reason that the state where the crime was committed enjoys

⁴⁰⁰ Subsidiarity as a political and economic principle. See for instance, BARBER, *supra* note 399, p. 312; SWAINE, E.: “Subsidiarity and Self-Interest: Federalism at the European Court of Justice” *Harvard International Law Journal*, Vol. 41(1), (2000), p. 52.

⁴⁰¹ CASSESE, Is the Bell Tolling, *supra* note 1, p. 593 (emphasis added). This interpretation is supported by a few commentators, see, for instance, KREß, *supra* note 223, p. 579; COLANGELO A. J.: “Double Jeopardy and Multiple Sovereigns: a Jurisdictional Theory” *Washington University Law Review*, Vol. 86, (2008), p. 835; while others are less assertive, for instance, GENEUSS, *supra* note 108, p. 957; RYNGAERT, Applying the Rome Statutes Complementarity, *supra* note 396, pp. 173; 176; STIGEN, J.: “The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes”. In BERGSMO, M. (ed.): *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, 2010, p. 141.

⁴⁰² CAROZZA, *supra* note 398, pp. 42-46; See also TSAGOURIAS, N.: “Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity” *Leiden Journal of International Law*, Vol. 24(3), (2011), p. 548.

convenient access to the evidence; is closer to the aggrieved parties; and benefits most from the transparency of a trial and the accountability of a verdict. At the same time, the delegates also supported that if the territorial state was unable or unwilling to exercise jurisdiction, universal jurisdiction provided a complementary mechanism to ensure that individuals who committed grave crimes did not enjoy a safe haven anywhere in the world.⁴⁰³ Moreover, as applied in the area of international crimes to date, Spanish and German courts have applied subsidiarity as a principle of judicial restraints to hold that their national courts are able to exercise universal jurisdiction if the state that has a direct link (on the basis of territoriality or active personality) fails to do so, or does not do so genuinely.⁴⁰⁴

That said, the crucial issue is how to identify cases or situations of inability and willingness on the part of territorial states. It should be noted here that the principle of subsidiarity in itself cannot serve the purpose of identifying cases of inability and willingness. The identification of those cases involves resolving questions such as how to define the common good, and how to identify the scope of powers possessed by each entity. Yet, to a certain extent, they are defined and identified at a prior stage and through a different process that forms part of a certain political order in which the idea of subsidiarity is applied.⁴⁰⁵

In sum, subsidiarity is a principle that the international community has recently come to consider as an appropriate mechanism for effectively achieving the common good of the society in a way that is less intrusive, given the differences in the ability and willingness of the entities involved. Put differently, subsidiarity provides a reason for other states to intervene, but does not in the process of its functioning identify what constitutes inability and unwillingness. Given that the assessment of inability and unwillingness is ultimately left to the states exercising universal jurisdiction, and certainly constitutes the condition for the exercise of jurisdiction by these states, it is all the more crucial to identify these cases or situations. This will be the focus of the next section.

⁴⁰³ UNGA, Sixth Committee, Sixty-Seventh Session on “*the scope and application of the principle of universal jurisdiction*”, No. A/C.6/67/SR.12, (6 December 2012). See, namely, New Zealand (on behalf of the Canada, Australia, and New Zealand (CANZ countries)), para. 15; Chile, para. 36; Norway, para. 6; Argentina, para. 6. Further in document No. A/C.6/67/SR.13, (24 December 2012), South Africa, para. 3; Sri Lanka para. 20; Brazil, para. 33; Azerbaijan, para. 40; Malaysia, para. 43.

⁴⁰⁴ RYNGAERT, Jurisdiction, *supra* note 20, pp. 211-218.

⁴⁰⁵ TSAGOURIAS, *supra* note 402, p. 548.

5.2 The Application of Subsidiarity Criteria in Connection to Universal Jurisdiction

In the context of universal jurisdiction as understood here, subsidiarity is the idea that universal jurisdiction is merely a **secondary mechanism** and should be exercised only if the territorial or national states are unable or unwilling to exercise their jurisdiction.⁴⁰⁶ It might seem that the idea of subsidiarity provides a feasible mechanism for overcoming the deficiencies observed in the existing frameworks due to the fact that it respects the primacy of territorial or nationality states and indicates when other states may intervene.

In fact, at present there is a growing support for the notion of subsidiarity in connection to universal jurisdiction, not only from legal doctrine and writings of academics but also from instruments prepared by experts⁴⁰⁷ and statements made by states.⁴⁰⁸ This increasing support has led some commentators to conclude that the notion of subsidiarity has already attained the status of customary international law. However, it would perhaps be too hasty to conclude that it has. This dissertation chooses rather to agree, for example with, Stigen who argues that subsidiarity “is in the process of being developed.”⁴⁰⁹ He further asserts that, while “currently not amounting to a duty under international law”, it is a right of the forum state to offer the case as a matter of policy to the territorial state or the suspects’ home state when that state is willing and able to prosecute. In this way, subsidiarity can be a feasible framework for the exercise of universal jurisdiction, avoiding unilateral and selective exercise of universal jurisdiction, and thus preventing the misapplication of the principle. It has been argued that universal jurisdiction is precisely based on the

⁴⁰⁶ Further clarification on the criteria of ‘inability’ and ‘unwillingness’ will be provided in the following section.

⁴⁰⁷ CASSESE, Is the Bell Tolling, *supra* note 1, p. 593; KREB, *supra* note 223, p. 580; LAFONTAINE, F.: “Universal Jurisdiction—the Realistic Utopia” *Journal of International Criminal Justice*, Vol. 10, (2012), p. 1286; STIGEN, *supra* note 401, pp. 137-153.

⁴⁰⁸ See for instance UNGA, Sixth Committee, Sixty-seventh session on “*the scope and application of the principle of universal jurisdiction*”, A/C.6/67/SR.12, (6 December 2012) and A/C.6/67/SR.13, (24 December 2012).

⁴⁰⁹ STIGEN, *supra* note 401, p. 141.

subsidiarity principle, and that it thus only functions as a last resort solution so as to prevent impunity from arising.⁴¹⁰

Subsidiarity as a guiding principle or modality in the usage of universal jurisdiction prevents its selective and manipulative usage of the principle and simultaneously respects the principles enshrined in the UN Charter, in particular the principles of sovereign equality, political independence and non-interference in the international affairs of another state. But all of these factors are of vital importance in the application of the principle of universal jurisdiction and usually cause a restraint on its exercise.

Furthermore, a number of scholars and academics are of the view that when the territorial state is willing and able to genuinely conduct a *bona fide* prosecution, other states should generally defer to do so and retain the supplemental characteristics of universal jurisdiction.⁴¹¹ For instance, Broomhall holds that “[i]f the territorial state is demonstrably willing and able to prosecute the accused in a fair manner, or if there is another, clearly more appropriate forum, the state considering universal jurisdiction should ordinarily defer to its courts.”⁴¹² Cassese asserts that “universal jurisdiction may only be exercised substitute for other countries that would be in a better position to prosecute the offender, but for some reason do not [...]”⁴¹³ The same view is for instance withheld in the Report of the International Law Association (ILA) which recommends that gross human rights offenders should preferably be brought to justice

⁴¹⁰ RYNGAERT, Jurisdiction, *supra* note 20, p. 5. Moreover, see the conceptual underpinnings of the principle of subsidiarity; LEGIDO, A. S.: “Spanish Practice in the Area of Universal Jurisdiction” *Spanish Yearbook of International Law*, Vol. 8, (2001-2002), p. 41, where he states that “[the] stance, taken in Spanish practice, based on recognition of the priority of the judge in the place where the crime was committed, is fully coherent with the foundation upon which [...] the universality principle is based.”

⁴¹¹ RANDALL, *supra* note 81, pp. 829-831; JOYNER, CH. C.: “Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability” *Law and Contemporary Problems*, Vol. 59(4), (1996), pp. 165-170; INAZUMI, *supra* note 78, pp. 217-218.

⁴¹² BROOMHALL, Towards the Development, *supra* note 131, p. 416.

⁴¹³ CASSESE, Is the Bell Tolling, *supra* note 1, p. 593. See further DONNEDIEU DE VABRES, H.F.A.: *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, p. 169 (arguing in favor of a rigorous hierarchy of criminal jurisdiction, with the territorial state and the state of the nationality of the perpetrator having priority over the bystander state); STRAPATSAS, N.: “Universal Jurisdiction and the International Criminal Court” *Manitoba Law Journal*, Vol. 29, (2002), p. 31 (arguing that a national court exercising universal jurisdiction should be a venue of last resort “in order to respect the principle of territoriality which is also *jus cogens*.”)

in the state in which they committed their offences, thus suggesting that universal jurisdiction should only be considered in the absence of such proceedings.⁴¹⁴

With respect to the conditions applicable for the exercise of subsidiarity in the context of universal jurisdiction, some more clarification is provided by instruments that have been prepared by academic experts. For instance, the preamble of the Resolution of the Institut de droit international (2005),⁴¹⁵ refers to the ‘primary responsibility’ of all states to effectively prosecute the international crimes committed within their jurisdiction or by persons under their control. It provides in Article 3(c) that a custodial state should, before commencing a trial on the basis of universal jurisdiction, inquire the territorial or national state on whether it is prepared to prosecute that person, unless these states are manifestly unwilling or unable to prosecute, in which case the inquiry would not be required.⁴¹⁶

Similarly, the AU-EU Report (2009) sets forth slightly more detailed and nuanced conditions, albeit as a matter of policy. While the Report does not recognize any hierarchy among doctrines as a positive obligation of international law, it recommends to accord priority to territoriality as a basis of jurisdiction taking into consideration the fact that it is the territorial states that would be mostly affected by crimes that should be subjected to universal jurisdiction.⁴¹⁷ This is in accordance with the general view that universal jurisdiction should function as a secondary mechanism. Furthermore, Recommendation 10 of the Report provides that a state considering the exercise of universal jurisdiction may initiate criminal proceedings when they have a serious reason to believe that the territorial state and the suspects’

⁴¹⁴ Committee on International Human Right Law and Practice: “*Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*”. ILA, London Conference (2000), pp. 20-21.

⁴¹⁵ The Resolution of *Institut de Droit International* on universal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (2005). Available online at http://www.idi-iiil.org/idiF/resolutionsF/2005_kra_03_fr.pdf (retrieved 3.2.2015) [hereinafter, Resolution on Universal Jurisdiction]. Moreover, in 2003, the Spanish Supreme Court found in the *Guatemalan Genocide* case, that Spanish Courts could apply universal jurisdiction only if there were legal impediments or prolonged judicial activity in the territorial state or the home state of the perpetrator. In *Tribunal Supremo*, (25 February 2003), Case No. 327-2003, section II, para. 6. It was further stated that “in the present case, from the documentation presented by the complaint and validated by the investigating judge, it is manifestly clear that many years have passed since the occurrence of these acts, and for some reason or another, the courts in Guatemala have not been able to effectively exercise jurisdiction with regard to genocide of the Mayan population.” The *Guatemalan Genocide* case, para. 4.

⁴¹⁶ Resolution on Universal Jurisdiction, *supra* note 415, Art. 3.

⁴¹⁷ AU-EU Expert Report, *supra* note 81, Rec. 9.

and victims' national states are manifestly unwilling or unable to prosecute the suspect.⁴¹⁸

In this context one can note that for instance Spanish courts and prosecutors have conducted a subsidiarity analysis at least since 1998 (even though the application of the principle of subsidiarity to the prosecution of international crimes is not a statutory requirement).⁴¹⁹ As an example, in the 2003 *Peruvian Genocide* case, the Spanish Supreme Court applied the subsidiarity principle but termed it the “principle of necessity of jurisdictional intervention”.⁴²⁰ Furthermore, in the *Guatemalan Genocide* case, from 2003, where the Spanish Supreme Court found that Spanish Courts could apply universal jurisdiction only if there were legal impediments or prolonged judicial activity in the territorial state or the home state of the perpetrator.⁴²¹ It was stated within the minority's opinion that

“[i]n the present case, from the documentation presented by the complaint and validated by the investigating judge, it is manifestly clear that many years have passed since the occurrence of these acts, and for some reason or another, the courts in Guatemala have not been able to effectively exercise jurisdiction with regard to genocide of the Mayan population.”⁴²²

In addition, similar talk was taken in the *Al-Daraj* case, regarding alleged war crimes in Gaza in 2002, where the *Audiencia Nacional* in 2009, when deciding on the applicability of universal jurisdiction, noted that “the judicial authorities of Israel have not initiated any criminal proceedings with the objective of determining if the events denounced could entail some criminal liability”.⁴²³ Hence it is seems that

⁴¹⁸ AU-EU Expert Report, *supra* note 81, Rec. 10.

⁴¹⁹ National Criminal Court, Pinochet, Rulings of 4 and 5 November 1998, available at <http://www.derechos.org/nizkor/arg/espana/juri.html> “[Article 6 of the Genocide Convention] imposes subsidiarity status upon actions taken by jurisdictions different from those envisioned in the precept. Thus, the jurisdiction of a State should abstain from exercising jurisdiction regarding acts constituting a crime of genocide that are being tried by the courts of the country in which said acts were perpetrated or by an international court.”

⁴²⁰ *Tribunal Supremo*, Judgment No. 712/2003, 20 May 2003 (*Peruvian Genocide* case). Supreme Court of Spain, *Peruvian Genocide*, 42 I.L.M. 1200 (2003).

⁴²¹ In *Tribunal Supremo*, 25 February 2003, Case No. 327-2003, section II, para. 6 (*Guatemalan Genocide* case).

⁴²² *Ibid.*, para. 4. Nevertheless, one has to add that the majority rejected the subsidiarity test on the basis that it was unduly burdensome for the victims and thus the Court only abandoned subsidiarity from a legal point of view, but not from a practical point of view.

⁴²³ *Audiencia Nacional*, Preliminary Proceedings No. 157/2008, 4 May 2009 (*Al-Daraj* case).

Spanish courts will defer from exercising its jurisdiction only if the case is being genuinely dealt with by the territorial state.

Various instruments likewise propose for the priority of the territorial state. For example, the Princeton Principles on universal jurisdiction proposes that the forum state shall, when it receives a request for extradition to another state, take into account *inter alia*, “the place of commission of the crime” and “the nationality connection of the victim to the requesting state.”⁴²⁴ Likewise, one might also mention, Article 4(2) of the African Union Model National Law on Universal Jurisdiction over International Crimes (2012)⁴²⁵ provides that, in exercising universal jurisdiction, “the [c]ourts shall have priority of the court of the State in whose territory the crime is alleged to have been committed provided that the State is willing and able to prosecute.” This last instrument is one of particular note, because it was adopted during the nineteenth summit of the African Union in May 2012 and later approved by its Executive Council in July 2012, where the Council encouraged “Member States to fully take advantage of this Model National Law in order to expeditiously enact or strengthen their national laws in this area.”⁴²⁶ Given that the African Union has been critical of the abusive exercise of universal jurisdiction for quite some time, this approval seems to indicate that the idea of subsidiarity is considered to be acceptable to African countries and can be applied in these countries as a guiding principle that may prevent the abusive use of universal jurisdiction.

From all of these various statements (whether scholarly writings, case law or other legal instruments) one can certainly note a divergent view on the scope and tone of the subsidiarity linkages to universal jurisdiction, but one can also conclude that they share the same fundamental assumption that the territorial states are to be given primacy. At the same time, they allow other entities to step in where the territorial state is not **genuinely** able or willing to exercise its jurisdiction, without the need to obtain consent from the state. Doubtlessly, this seems reasonable because while territorial states have been regarded as entities that are closer to the relevant

⁴²⁴ Princeton Principles, *supra* note 5, principle 8(b) and (d).

⁴²⁵ African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI REV 1.

⁴²⁶ Decision on the African Union Model National Law on Universal Jurisdiction over International Crimes EX.CL/Dec.731 (XXI)c. Available online at http://legal.au.int/en/sites/default/files/MODEL%20LAW%20FINAL-EN_0.pdf (retrieved 1.4.2015).

stakeholders and have more effectiveness in the exercise of jurisdiction, their dysfunction or limitation has been the rationale for the exercise of universal jurisdiction as a tool for the fight against impunity. What is more, only when the directly affected states fail to investigate and prosecute appropriately; they lose their legal interest in primary prosecution and thus enable a third state to fill the prosecutorial vacuum in order to protect and withhold the interests of the international community.

As already stated, the subsidiarity criterion might be said to resemble the principle of complementarity, set forth in Article 17 of the ICC Statute, pursuant to which the ICC only declares a case admissible when a state fails to genuinely investigate and prosecute it. That said, the following sections will make an inquiry into how the complementarity mechanism of the ICC works, and it will be shown how it could be considered as a 'model' for the application of the subsidiarity principle.

5.2.1 Drawing a Parallel with the Complementarity Principle of the ICC

Thirteen years after being established, the International Criminal Court has proven successful in promoting peace and international justice, and today enjoys international acceptance and respect. One might indicate whether the entry into force of the Rome Statute is about more than the establishment of a new court; hence creating a global compliance system for the enforcement of international criminal law. Within this system, the ICC operates as the exemption and not the norm (at the vertical level), and the same can be said to apply for universal jurisdiction (at the horizontal level), where the primary responsibility for the repression of international crimes resides with domestic institutions, primarily within the territorial state.⁴²⁷ In this section it will be demonstrated how the ICC's principle of complementarity can serve as a useful model on how the subsidiarity criterion for universal jurisdiction should be defined and applied. This makes it all the more important that the most essential aspects of the complementarity principle, aimed at safeguarding the integrity of states *vis-à-vis* the ICC, are applied *mutatis mutandis* to the exercise of universal jurisdiction.

⁴²⁷ RASTAN, *supra* note 106, pp. 97-104; 131-132.

It is just relatively recently that a small number of academics and scholars have considered the fact that the complementarity principle of the ICC might be looked at as a paradigm for the emerging principle of subsidiarity in the application of universal jurisdiction.⁴²⁸ However, it is worth noting that the concept of complementarity has a much longer history than just within the ICC regime. Indeed, one might believe that the principle of complementarity was genuinely negotiated for the first time with the initiation of the 1994 ILC Draft Statute for the ICC.⁴²⁹ However, as the drafting history of the 1949 Genocide Convention makes evident, this is far from the truth and the concept can for instance be reflected within the *travaux preparatoires* of the Genocide Convention. It was the *ad hoc* Committee's chair, Maktos of the United States, who proposed a rule of subsidiarity or complementarity, by which an international court would only have jurisdiction if the state with territorial jurisdiction could not, or had failed to act. The *ad hoc* Committee adopted the principle of complementarity by four votes to none, with three abstentions.⁴³⁰

Contrary to universal jurisdiction, the jurisdiction of the ICC is based primarily on the territoriality and the nationality principle, founded in a treaty-based delegation of jurisdiction from its state parties. This is a core difference in the two regimes.⁴³¹ Furthermore, pursuant to Article 17 of the Rome Statute of the International Criminal Court, the ICC will only exercise its jurisdiction if a state fails to genuinely investigate and prosecute a situation in which crimes against international humanitarian law have been committed. The jurisdiction of the ICC is thus complementary to the jurisdiction of states. In the absence of relevant decisions by the ICC Prosecutor or the Court on the issue, the complementarity principle has been the subject of a heated scholarly debate.⁴³² Both the Preamble to the Statute and

⁴²⁸ RYNGAERT, Complementarity, *supra* note 394, pp. 153-157; STIGEN, *supra* note 401, pp. 142-156; PHILIPPE, *supra* note 108, pp. 380-389.

⁴²⁹ Report of the International Law Commission on the Work of Its Forty-Sixth Session, Draft Statute for an International Criminal Court, U.N. GAOR, 49th Sess., Supp. No. 10, at 44 U.N. Doc. A/49/10, (1994).

⁴³⁰ EL ZEIDY, M. M.: "The principle of complementarity: A new machinery to implement international criminal law" *Michigan Journal of International Law*. Vol. 23, (2002), pp. 877-878.

⁴³¹ Even though proposals were made to give the ICC a certain form of universal jurisdiction they were largely criticized, especially by the US. The broadest proposal being from the German delegation, which would grant the ICC universal jurisdiction over any offence, committed anywhere, irrespective of whether the suspect was present in the territory of a state party to the statute.

⁴³² See *inter alia* STAHN, C.: "Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court" *Journal of International Criminal Justice*, Vol. 3(3), (2005), pp. 695-672; YANG, L.: "On the Principle of Complementarity in the Rome

Article 1 express a fundamental principle of the Rome Statute: that the Court is to be “complementary” to national criminal jurisdictions.⁴³³

Even though complementarity is not defined as an analysis of the articles on admissibility, it demonstrates that complementarity does not mean “concurrent” jurisdiction. Instead the Court may exercise jurisdiction only if: (1) national jurisdictions are “**unwilling or unable**” to; (2) the crime is of **sufficient gravity**; and (3) the person has **not already been tried** for the conduct on which the complaint is based.⁴³⁴

The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiarity body when the main body fails to exercise its primary jurisdiction. Admissibility to the ICC is based on a principle of complementarity. An alternative to this would be to base the jurisdiction of the ICC on universal jurisdiction, where a case would be admissible regardless of national proceedings. A contextual interpretation of complementarity inferred from the other provisions of the Rome Statute suggests that the ICC can assume jurisdiction over certain crimes only when the Court is satisfied that domestic authorities are “unable” or “unwilling” to exercise jurisdiction through investigations or prosecution. This is one of the cornerstones of the ICC, manifested in the Preamble and Art. 1 of the Rome Statute.⁴³⁵

As stressed by El Zeidy, the principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiarity manner for curbing crimes of international law; when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.⁴³⁶

Statute of the International Criminal Court” *Chinese Journal of International Law*, Vol. 4(1), (2005), pp. 121-132; BENZING, M.: “The complementarity regime of the international criminal court: international criminal justice between state sovereignty and the fight against impunity” *Max Planck Yearbook of United Nations Law Online*, Vol. 7(1), (2003), pp. 591-628.

⁴³³ See Rome Statute, *supra* note 9, Preamble, Art. 1.

⁴³⁴ Rome Statute, Art. 17(1)

⁴³⁵ Preamble and Art. 1 of the Rome Statute. An ordinary meaning of the term ‘complementarity’ can be interpreted as a condition where different parts relate to one another, and thereby supplies each other’s deficiencies, forming a unit. When applied to international law, complementarity can therefore be seen as a bridge between the national and international jurisdiction.

⁴³⁶ EL ZEIDY, *supra* note 430, p. 870.

5.2.2 The Standard of ICC Article 17 as a Guiding Principle

As previously stated, the complementarity principle can be used as a standard in the usage of the subsidiarity principle in its application for universal jurisdiction. As an admissibility principle, complementarity forms part of the statutory scheme foreseen in Article 17 for determining whether a particular case should be heard before the court. The ICC Appeals Chamber has characterized the Statute's admissibility as "referable in the first place to complementarity (Article 17(1)(a) to (b)), in the second to *ne bis in idem* (articles 17(1)(c), 20) and thirdly to the gravity of the offence (Article 17(1)(d)". Complementarity thus assumes the existence of an interested state or states with a competing claim to jurisdiction with the Court.⁴³⁷ The complementarity principle is to assess - in a similar way as the notion of the subsidiarity principle should do with respect to jurisdictional claims *vis-à-vis* states - who should exercise jurisdiction where two or more forums are available for prosecution.

Article 17(1)(a) further stipulates when a case is inadmissible before the ICC by stating that "the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is **unwilling** or **unable genuinely** to carry out the investigation or prosecution". According to this wording, and particularly in regard to the element of unwillingness, the lack of efforts to genuinely prosecute the crime needs to be determined positively; it is not sufficient that investigations or prosecutions might merely be conducted more effectively by the ICC or – in the case of third party prosecutions – by other states. References for this interpretation are contained in Article 17(2) of the Rome Statute:

"In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- a) The proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person* concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

⁴³⁷ RASTAN, *supra* note 106, p. 84.

b) There has been an *unjustified delay* in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

c) The proceedings were not or are *not being conducted independently or impartially*, and they were or are being conducted in *a manner which, in the circumstances, is inconsistent with an intent* to bring the person concerned to justice.”⁴³⁸

It follows that, while there is a growing support for the idea of subsidiarity, the assessment of inability and unwillingness, apparent ‘common’ interest in the fight against impunity may turn into a source of confrontation. Therefore, it is all the more important to articulate a feasible framework. Bearing this in mind, the next section tries to elaborate on the criteria of inability and unwillingness. The material and procedural rules governing the ICC’s principle can serve as a useful model for how a subsidiarity criterion for universal jurisdiction should be defined and applied.

In sum, at this point one can already notice the similarities between the notions of subsidiarity and complementarity, in that both regard the unwillingness and inability as a threshold for other entities to enter in. Where there is a concurrent exercise of jurisdiction over a particular case at the international or national level, the judges of the ICC will need to make an assessment as to the genuineness of the domestic proceeding in question. In this regard, the Court needs to engage in its assessment of unwillingness and inability; but what do these two criteria consist of? Nevertheless, while the objectivity of judgment on inability and unwillingness of states can be secured in the ICC through procedural mechanism challenging the admissibility of a case, there is no equivalence in the subsidiarity between states. Therefore, it is all the more crucial regarding the notion of subsidiarity between states (at the horizontal level) to acquire the objectivity of the assessment. Let us now examine these two criteria.

⁴³⁸ Rome Statute, *supra* note 9, Article 17(2) (emphasis added).

5.2.1.1 What Constitutes a ‘Genuine’ Investigation?

Unwilling

The meaning of ‘unwillingness to act’ is provided in Article 17(2) of the ICC Statute. Within these provisions three criteria are laid down for determining whether unwillingness exists, namely: (a) shielding a person from criminal responsibility; (b) unjustified delay in the proceedings which is inconsistent with the intent to bring the person to justice; and (c) proceedings not conducted independently or impartially and in a manner inconsistent with bringing the person to justice.⁴³⁹ Stemming from this, one can see that the notion of unwillingness shows a state’s lack of a positive attitude towards prosecuting and trying perpetrators of international crimes.

On the inter-state level, in determining the ‘good faith’ of prosecutorial efforts in the territorial state the complementarity principle of Article 17 of the Rome Statute is a useful reference as it establishes the preconditions that a state has to meet in order to avoid the ICC exercising its jurisdiction. Notwithstanding that the horizontal relation between two states is different from the vertical relation between a state and the ICC,⁴⁴⁰ the standards established by the complementarity principle can be taken into consideration and may be, as a guiding principle, transferred to inter-state relations.

On an inter-state level a positive determination whether another state is genuinely conducting an investigation or prosecution should be made. A state cannot refuse investigations simply pointing to another state and claiming it is carrying out an investigation. A state has to consider whether universal standards of investigations are met by the other state. Only with an affirmative answer to that question can a state invoke the priority of the territorial state’s jurisdiction as a matter of policy.⁴⁴¹

When analyzing case law one can notice that state practices apparently reflect the idea of subsidiarity, which will also serve to demonstrate the condition for exercise of jurisdiction based on subsidiarity. For instance, the decision of the German General

⁴³⁹ Rome Statute, *supra* note 9, Art. 17(2).

⁴⁴⁰ JESSBERGER, F.: “Universality, Complementarity, and the Duty to Prosecute Crimes under International Law in Germany”. In KALECK, W., RATNER, M., SINGELSNTEIN, T. and WEISS, P. (eds.). *International Prosecution of Human Rights Crimes*. Springer Berlin Heidelberg, 2007, p. 221.

⁴⁴¹ In this regard see Section 5.2.3.

Federal Prosecutor on *CCR v. Rumsfeld* is worth examining.⁴⁴² In this case, the General Federal Prosecutor expressly relied on the principle of subsidiarity built in §153(f) StPO (*Strafprozessordnung* or the German Code of Criminal Procedure), in considering whether there was room for the German investigative authorities to take action. As a first step, the General Prosecutor observes:

Only if criminal prosecution by primarily competent states, or an international court, is not assured or cannot be assured, for instance if the perpetrator has removed himself from criminal prosecution by fleeing abroad, is the subsidiary jurisdiction of German prosecutorial authorities implicated. This hierarchy is justified by the special interest of the state of the perpetrator and victim in criminal prosecution, as well as by the usually greater proximity of these primarily competent jurisdictions to the evidence.⁴⁴³

According to this principle, it must be left up to the primarily competent states as to what order and with what means they carry out an investigation of the overall series of events. Thus, other states may only intervene if the investigation is being carried out “only for the sake of appearances or without a serious intent to prosecute.” It was concluded that there were no indications that the US authorities and courts “[were] refraining, or would refrain, from penal measures as regards the violations described in the complaint”, since there had already been several proceedings conducted against co-perpetrators. Thus, the means and the time frame for the investigation of further possible suspects were considered to be left up to the judicial authorities of the United States.⁴⁴⁴ Although the Federal Prosecutor did not specify what exactly falls into the category of the investigation conducted “only for the sake of appearances or without a

⁴⁴² Decision of the General Federal Prosecutor at the Federal Court of Justice, 10 February 2005. English translation is reproduced in, 45 ILM (2006), 119-121. This is a case in which a criminal complaint was filed in the name of the Center for Constitutional Rights (CCR) and four Iraqi citizens against the then incumbent US Secretary of Defense, Donald Rumsfeld and other senior officials, accusing them of having participated in the abuses and mistreatments of Iraqi prisoners by US soldiers in the prison of Abu Ghraib in Iraq. This case did not amount to raising an issue of immunity which could have been enjoyed by the defendants, as it was decided that there was no room for German authorities even to initiate an investigation.

⁴⁴³ *Ibid.*, p. 120.

⁴⁴⁴ *Ibid.*, p. 121. It should, however, be noted that the Prosecutor’s interpretation of the concept of ‘prosecution of a crime’ was criticized by a commentator, because of its dependence on the concept of ‘situation’ in Article 14 (1) of the Rome Statute, which eventually resulted in conferring a broad discretion to the primary jurisdiction. According to Ambos, the notion of ‘situation’ in Article 13 and 14 of the Statute refers to ‘the initiation or triggering of the jurisdiction of the ICC, which is foreign to national legislation and proceedings’. See RYNGAERT, *Applying the Rome Statutes Complementarity*, *supra* note 396, p. 177.

serious intent to prosecute”, it can at least be inferred from the decision that a broad discretion is given to the primary responsible states as far as the former’s judicial system is functioning normally. Additionally, in German legislation, with regard to universal jurisdiction, it is clearly inspired by the complementarity principle. For instance, the federal prosecutor may hand over a case to an international or foreign national court when it constitutes “*zulässig und beabsichtigt*” (admissible or intended).⁴⁴⁵ The German legislator has explained that the “jurisdiction of third-party states must in any case be understood as subsidiary jurisdiction which should prevent impunity, but not otherwise inappropriately interfere with the primary responsible jurisdiction.”⁴⁴⁶

In order to explore further the substance of the notion of unwillingness, let’s look into Spanish case law, where series of cases (namely regarding amnesty law) exist where the examination of unwillingness was constructed. It should be noted that the Spanish legislation does not establish the subsidiarity principle, but in the previously mentioned *Guatemala Genocide* case the subsidiarity character of universal jurisdiction was confirmed. The Supreme Court found that the Spanish Courts could apply universal jurisdiction only if there were legal impediments or prolonged judicial activities in the territorial state or the home state of the perpetrator. It thus continued to declare in the inactivity of the territorial state by stating that the lack of activity of the state (here namely the legislative branch) can be detected from the fact that the “laws have been passed to shield the accused from prosecution so that the domestic courts are prevented by their own legislation from initiating proceedings against them [...]”⁴⁴⁷

Another important decision in this regard is the decision of the Criminal Chamber of *Audiencia Nacional* on the *Pinochet* case.⁴⁴⁸ In light of its interpretation of Article VI of the Genocide Convention, the Chamber concluded that Article VI would not exclude other jurisdictions, such as the Spanish jurisdiction based on Article 23 (4) of

⁴⁴⁵ In StPO, Section 153f(2). (Available in English online at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.htm).

⁴⁴⁶ Referentenentwurf: Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 2001, p. 85. Available online at www.lrzmuenchen.de/~satzger/unterlagen/V3D.pdf [retrieved 3.11.2014].

⁴⁴⁷ *Audiencia Nacional*, Criminal Chamber, Plenary Session, Decision, 13 December 2000. English translation is reproduced in, 3 YbIHL, (2000), pp. 691-697.

⁴⁴⁸ *Audiencia Nacional*, Criminal Chamber, Order, 5 November 1998. Original Spanish text is available at: <http://www.derechos.org/nizkor/chile/juicio/audi.html>

LOPJ, than those it stipulates, while suggesting that the former jurisdictions is made subsidiary to the latter.⁴⁴⁹ After having confirmed the ground of jurisdiction, the Chamber further examined the fact that the Chilean courts declared the cases in question dismissed with prejudice (*el sobreseimiento definitivo*). Accordingly, the Chamber had to address whether it would amount to the Spanish court's lacking of jurisdiction for failure to meet the requirement of Article 23(2)(c) of LOPJ (*Ley Orgánica del Poder Judicial* or Spanish Judiciary Act), which provided 'the criminal has not been acquitted, pardoned, or punished abroad or, in the latter case, has not served the sentence' in order for Spanish courts to exercise jurisdiction. In answering this in the negative, the Chamber stated:

“The offenses to which reference has been made *should be deemed not to have been judged*. Independent of the fact that Decree-law 2,191 of 1978 could be considered contrary to *jus cogens*, this Decree-law should not be considered a true pardon pursuant to the Spanish law applicable in this proceeding, and can be characterized as a provision decriminalizing certain conduct for reasons of political convenience, such that its application does not render the accused one who has been acquitted or pardoned abroad (Article 23(2) of the Organic Law on the Judicial Branch), except in the case of conduct that is not punishable, because of a later decriminalizing provision, in the country in which the offense was committed (Article 23(2)(a), LOPJ), which is of no relevance in the cases of the extraterritoriality of Spanish jurisdiction by application of the principles of universal protection and prosecution, having seen the provision of Article 23(5) of the Organic Law on the Judicial Branch.”⁴⁵⁰

Here, the Chilean Decree-law of 1978 was regarded as a provision decriminalizing certain conduct for reasons of political convenience and thus a decision based on its application was not interpreted as a product of proper administration of criminal justice.

Similarly, the modes of the investigation may be included in the assessment of 'unwillingness'. For instance, in the previously observed *Al-Daraj* case (regarding

⁴⁴⁹ *Ibid.*, 98. According to the Chamber, “a State must refrain from exercising jurisdiction over acts that constitute genocide where they are already being tried by the courts of the country in which they occurred or by an international penal tribunal.”

⁴⁵⁰ *Ibid.*, pp. 105-106 (emphasis added).

alleged war crimes by the Israeli Defense Forces in Gaza in 2002) the *Audiencia Nacional* granted leave to proceed with the investigation on 29 January 2009. At this stage, it succinctly noted that there had been no evidence that any proceedings had been brought to investigate the facts. Challenged by the public prosecutor, the *Audiencia Nacional* reconsidered the case on 4 May 2009. This time it went further into the assessment of the modalities of the investigation that had actually taken place in Israel, noting that “the judicial authorities of Israel have not initiated any criminal proceedings with the objective of determining if the events denounced could entail some criminal liability.”⁴⁵¹ Consequently, the court pronounces that the Israeli authorities who had conducted the investigation and concluded that there was no need to initiate a criminal investigation were not independent or impartial, none of their decisions made a legal assessment of the event, and actually there had been no criminal investigation since 2002. In response, Israel informed the Spanish authorities that the case was subject to the proceedings in Israel. After another challenge by the public prosecutor, in July 2009, the Appeals Court reversed the decision to prosecute by a 14-4 vote, referring to the Israeli investigation. As one might expect, this prompted widespread criticism, condemning the Spanish judiciary and claiming it had yielded to political pressure from the Spanish Ministry for Foreign Affairs and Israel.⁴⁵²

All of the above mentioned decisions suggest that Spanish courts will abstain from investigation and prosecution only if the case is being **adequately** dealt with by the territorial state.

Unable

It is not difficult to identify the practices which reflect the notion of inability, as this can be based on a judgment of fact; a *de facto* dysfunction of the judicial system. Under Article 17(3) of the ICC Statute the notion of inability is defined. It first includes the non-functioning of a judicial system to such an extent that investigation,

⁴⁵¹ *Audiencia Nacional*, Preliminary Proceedings No. 157/2008, 4 May 2009, English translation available at www.pchgaza.org/files/PressR/English/2009/04-05-2009-2.html.

⁴⁵² A similar principle was applied by the Spanish Court in the *Peruvian Genocide* case referred to as a “principle of necessity of jurisdictional intervention.” See *Tribunal Supremo*, Judgment No. 712/2003, 20 May 2003, Spanish text available at www.derechos.org/nizkor/peru/doc/tsperu.html.

prosecution and trial of perpetrators are impossible. For example, in the Austrian case of *Public Prosecutor v. Cvetjkovic*, there was no functioning judicial system in Bosnia due to the ongoing war and the ICTY was not yet available.⁴⁵³ This reason underpinned the Austrian Supreme Court's interpretation of the Genocide Convention, which amounted to justifying Austria's exercise of universal jurisdiction:

Article VI of the Genocide Convention, which provides that persons charged with genocide or any of the acts enumerated in Article III shall be tried by a competent tribunal of the State where 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, is based on the fundamental assumption that there is a functioning criminal justice system in the *locus delicti* (which would make the extradition of a suspect legally possible). Otherwise - since at the time of the adoption of the Genocide Convention there was no international criminal court - the outcome would be diametrically opposed to the intention of its drafters and a person suspected of genocide or any of the acts enumerated in Article III could not be prosecuted because the criminal justice in the *locus delicti* is not functioning and the international criminal court is not in place or its jurisdiction has not been accepted by the State concerned.⁴⁵⁴

According to the Court, it is the existence of a functioning criminal justice system that confers the *locus delicti* a primacy over other jurisdiction. This seems to demonstrate the notion of inability in the subsidiarity approach. In addition, a territorial state in such a situation would not protest against third states' assertion of jurisdiction in any way, as was exactly the situation with Bosnia in this case.

What is more, inability can also include situations in which it is impossible to conclude trials. Such situations could stem from exceptional circumstances usually resulting from a crisis. Here, the judicial system can still function but cannot face the challenge.

⁴⁵³ *Public Prosecutor v. Dusko Cvetjkovic*, Supreme Court (Oberstern Gerichtshofs) OS 99/94-6, 13 July 1994. Available online at <http://www.ris.bka.gv.at/>

⁴⁵⁴ The 1949 Geneva Conventions, *supra* note 133.

5.2.2.2 *Ne Bis In Idem*

In this context one should also mention the interest of the international community in prosecuting and punishing the individual responsible for serious crimes under international law. These proceedings should be achieved through fair and impartial trials. Fairness and impartiality are beginning to be emphasized, for instance, in the application of the principle of *ne bis in idem*. Truly, the universal jurisdiction is considered a tool for promoting greater justice, but the rights of the accused must also be protected. Hence one of the most important guarantees is the principle of *ne bis in idem*, which protects persons against multiple prosecutions for the same crime. Hence, the most difficult case may arise where the alleged perpetrators have already been subjected to criminal proceedings in other states. Generally it is recognized in a domestic context that courts are not allowed to prosecute a defendant who has already been convicted, acquitted, or pardoned. This is the principle of *ne bis in idem* or the prohibition of double jeopardy, which is enshrined in international human rights instruments.⁴⁵⁵

It is so that states cannot protect a person from being subject to prosecution before a court in another state (or an international criminal court) by means of a sham trial in its domestic courts. This has been observed in the proposition to exclude a sham trial from the applicability of the principle of *ne bis in idem*; which signifies that no one shall be tried twice for the same offence.⁴⁵⁶ The national *ne bis in idem* principle is established as an individual right in international human rights legal instruments, such

⁴⁵⁵ The principle is established as an individual right in international human rights legal instruments, such as the International Covenant on Civil and Political Rights of 19 December 1966, in Article 14(7). At the regional level, Article 8(4) of the American Convention of Human Rights (1969) and Article 4 (I) of the Seventh Protocol of the European Convention of Human Rights merit mention. (In Europe, the *ne bis in idem* principle is enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985).

⁴⁵⁶ RYNGAERT, Complementarity, *supra* note 394, pp. 170-172; PHILIPPE, *supra* note 108, pp. 383-384; See further EL ZEIDY, *supra* note 430, pp. 930-940; DE LA CUESTA, J. L.: "General Report, Concurrent National and International Criminal Jurisdiction and the Principle "ne bis in idem." *Revue internationale de droit penal*, Vol. 73(3), (2002), pp. 707-736. Moreover, 'sham trials' are defined within Art. 20(3) of the ICC Statute as trials held:

- (a) ... for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially ... and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

But the *ne bis in idem* rule is closely inter-related with the complementarity determinations before the ICC. In particular, article 17(1)(c) cross-references article 20(3) to govern cases where a person has already been tried at a national level, but the trial is debased by a lack of genuineness.

as the International Covenant on Civil and Political Rights of 19 December 1966, in Article 14(7). At the regional level, Article 8(4) of the American Convention of Human Rights (1969) and Article 4 (I) of the Seventh Protocol of the European Convention of Human Rights merit mention. In Europe, the *ne bis in idem* principle is enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985, which prohibits the initiation of a second trial for the same offence when final judgment has been imposed upon a person by a court of a contracting party.⁴⁵⁷ However, there is no such principle in an international context.⁴⁵⁸ While most states seem to recognize the principle, there are so many qualifications and restrictions to it that it is difficult to describe its status in international law.⁴⁵⁹ The principle comes primarily into play in relation to the initiation of proceedings by the state, acting under the universality principle, in situations where the territorial or nationality state has already started investigations which resulted in conviction or acquittal of the defendant.⁴⁶⁰

In this context, one can at least mention the Princeton Principle. Within the Principle 9(1), it is recognized that *ne bis in idem* when “the prior criminal proceedings or other accountability proceeding have been conducted in good faith and in accordance with international norm and standards” and “[s]ham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.” This holds that a person, who has been tried and convicted or acquitted of a serious crime under international law

⁴⁵⁷ The European Court of Justice (ECJ) has recognized in several cases that it is really difficult to assess the congruity of facts for the purpose of *ne bis in idem* within the transnational context. For instance, in the *Van Esbroeck* case, the issue of what amounts to the same facts was raised. In this case the accused had been convicted in one state for importing drugs and was subsequently prosecuted in another state for exporting the same amount of drugs. The ECJ held that in doing so, the *ne bis in idem* principle was violated. European Court of Justice, 9 March 2006, C – 469/2003, criminal proceedings against Van Esbroeck.

⁴⁵⁸ The absence of the principle of *ne bis in idem* at the international level was confirmed, for instance, by the Human Rights Commission in *A.P. v. Italy*, in which A.P. claimed to be the victim of a violation of article 14(7) of the ICCPR, when it pointed out that “article 14, paragraph 7 of the Covenant does not guarantee *ne bis in idem* with regard to the national jurisdiction of two or more states”, while observing that this provision prohibits double jeopardy with regard to the offence adjudicated in a given state. See *A.P. v. Italy*, Communication No.204/1986, UN Doc. CCPR/C/OP/2 (2 November 1987), 67 (para. 7.3).

⁴⁵⁹ VAN DEN WYNGAERT, CH., ONGENA, T.: “*Ne bis in idem* Principles, Including the Issue of Amnesty”. In CASSESE, A., GAETA, P. and JONES, J. (eds.): *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 706.

⁴⁶⁰ RYNGAERT, Complementarity, *supra* note 394, pp. 170-171.

before national court, may not be tried again “except if the proceedings were of a sham character.”

The principle of *ne bis in idem* ensures fairness and impartiality in the exercise of jurisdiction and constitutes a newly emerging part of the still developing system of international criminal law endorsed by new concerns. The principle of *ne bis in idem* is gaining ground in international criminal law and works as a criterion to ensure the actual exercise of jurisdiction to prosecute crimes, and what is more, to ensure fairness and impartiality in the exercise of jurisdiction. It may not only provide conditions for the exercise of universal jurisdiction (in case the accused person has already been acquitted or even pardoned in a foreign country), but it might also serve to restrict an unlimited exercise of universal jurisdiction. In this context relevant is the statement made by Bassiouni that the key component of the strategy to reconcile the interest of victims, with those of states, is to harmonize universal jurisdiction “with other jurisdictional theories”.⁴⁶¹

5.2.3 Who Should Determine the ‘Genuineness of Action’ taken by States?

After having enumerated and established the criteria for a genuine prosecution, a most complicated issue may arise on the question of who is competent to determine whether the proceedings in the priority states are inadequate and thus yielding a third state to launch proceedings on the basis of universal jurisdiction. As within the ICC regime, the final decisions on the genuineness of proceedings lie with the ICC itself.⁴⁶²

Within the ICC regime, the final word lies with the ICC according to Article 119(1) of its Statute.⁴⁶³ For obvious reasons a state which is unwilling or unable to conduct

⁴⁶¹ BASSIOUNI, Universal Jurisdiction, *supra* note 114, p. 82.

⁴⁶² Regarding the burden of proof of the genuineness of the domestic proceedings, Article 17 of the Rome Statute mention the threshold of ‘probability’. Moreover, the burden of proof rests with the ICC Prosecutor who must show that the admissibility criteria in Article 17 are met. Exactly the opposite should be the case when a bystander state seeks to exercise universal jurisdiction and the state invoking subsidiarity should be required to demonstrate that its proceedings are genuine. See STIGEN, *supra* note 401, pp. 155-156; BLEICH, J. L.: “Complementarity.” In BASSIOUNI, M. CH. (ed.): *The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee and Administrative and Financial Implications, Nouvelles Études Pénales*. Vol. 13, (1997), p. 242.

⁴⁶³ Art. 119(1) of the Rome Statute on settlement of disputes leaves the final authority to settle “any disputes concerning the judicial functions of the Court” with the Court.

genuine proceedings cannot be entrusted with the authority to determine whether its own proceeding have been genuine, and *vis versa*, the state seeking to invoke the subsidiarity principle cannot make the final determination either. Both the forum state and the bystander state, seeking to exercise universal jurisdiction, might not be viewed as making independent and impartial decisions. Moreover, these states most probably lack the means and resources to conduct a thorough and holistic evaluation of another state's proceedings.

In order to avoid accusations, misunderstandings and diplomatic conflicts, it has been suggested to entrust an international judicial organ, such as the ICC, with the authority to make this decision.⁴⁶⁴ For instance, Kreß maintains that an international judicial organ should be entrusted with the power to decide on the genuineness of the proceedings at the forum state, where such a decision is necessary in order to decide as to whether another state was or is unwilling or unable to prosecute. What is more, Kreß has put forward the idea that this function could possibly be assumed by the ICC.⁴⁶⁵ Another possible choice would perhaps be, to turn to the ICJ. This means that the bystander state, contesting the exercise of jurisdiction of the forum state, could seek guidance within the ICJ or as Stigen suggest that “[a]lternatively, presupposing that clear rules on subsidiarity are established, the state contesting the exercise of jurisdiction could always turn to the ICJ, arguing that the forum state has violated the principle.”⁴⁶⁶ Having an international arbiter thus seems as a most reasonable and suitable solution when deciding on the fulfillment of the criteria, because if a state where to assess the genuineness of the proceedings of another state, the outcome might stipulate to inter-state tension and create disruption in international relations.

At this point, it is important to note that the rationale underpinning subsidiarity is the respecting of the autonomy of territorial or national states. This autonomy could entail discretion in deciding whether to initiate criminal proceedings and in what mode such proceedings should be conducted. It could be argued that this is the main reason behind the growing support that subsidiarity has been attracting from states,

⁴⁶⁴ KREß, *supra* note 223, p. 584; JESSBERGER, *supra* note 440, p. 220.

⁴⁶⁵ Kreß further remarks that an international system of accreditation could be established allowing for a preventive screening of state seeking to exercise universal jurisdiction has fulfilled all the ‘conditions’ necessary, see KREß, *supra* note 223, p. 584; STIGEN, *supra* note 401, p. 157; See further GENEUSS, *supra* note 108, pp. 958-959.

⁴⁶⁶ STIGEN, *supra* note 401, p. 157.

(including the African states that have been critical of the potential abuse of the principle of universal jurisdiction).

5.2.4 When Should Subsidiarity be Applied?

Another aspect is when subsidiarity is to take effect and be applied; should it be once an investigation starts, after the investigation or before a trial begins? There seems to be a broad agreement among commentators that the principle of subsidiarity should not be applied at the initial investigative stage.⁴⁶⁷ This position also finds support in the Joint Separate Opinion in *Congo v. Belgium*, which only calls for the application of the subsidiarity principle where a state contemplates prosecuting a particular suspect on the basis of universal jurisdiction.⁴⁶⁸ According to this view, “investigations can be initiated simultaneously in different countries and the results and evidentiary material collected can be shared in legal assistance to the forum state of prosecution.”⁴⁶⁹

Consequently, it seems reasonable to distinguish between a case where proceedings are already being conducted (in a state with primary jurisdiction) and the case where no action has yet been taken. If proceedings have started, subsidiarity should bar the opening of any additional investigation on the basis of universal jurisdiction. When no action has been taken by the state having primary jurisdiction, the initiation of an investigation in a third state should be possible without further delay.⁴⁷⁰

However, for instance, in the already mentioned *CCR v. Rumsfeld* case the German Federal Prosecutor applied the subsidiarity principle before the opening of an investigation. Even though this might seem appropriate, the forum state still does not

⁴⁶⁷ JESSBERGER, *supra* note 440, p. 239. “It is difficult to assert that the principle of subsidiarity already applies at the initial investigative stage,” citing KREß, *supra* note 223, p. 580.

⁴⁶⁸ The *Arrest Warrant* case, *supra* note 83, para. 59 (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal).

⁴⁶⁹ ZEMACH, *supra* note 295, p. 186.

⁴⁷⁰ According to the AU-EU Expert Report, Recommendation 10 if “those national criminal justice authorities considering exercising universal jurisdiction have *serious reasons to believe* that the territorial state and the suspects and victim’s national states are manifestly unwilling or unable to prosecute the suspect[...]”, *supra* note 81, (emphasis added).

need to apply subsidiarity that early. It would be more reasonable to first allow the forum state to conclude its investigation.⁴⁷¹

5.3 Appraisal

The above, somewhat comparative analysis of the harmonization of the modalities on the application of the complementarity and subsidiarity principles in the context of universal jurisdiction has been advocated. The process of determining willingness and ability of the territorial or national state was briefly addressed.

As a matter of law, the exercise of criminal jurisdiction over a territory is reflective of one of the most traditional aspects of sovereignty – contradicting the basic principles of non-intervention. As a rule, the exercise of the principle of universal jurisdiction should remain the exception, to be triggered where warranted by circumstances;

- a) based on an assessment of the inaction of the territorial state (or based on other jurisdictional bases) and/or;
- b) their unwillingness or inability to conduct proceedings for the most serious crimes of international concern.

Thus if the state closer to the crime does not act, the responsibility will fall to the international community to foster the conditions necessary to enable proceedings to take place by third states.⁴⁷² Consequently, where the state directly affected simply cannot assume the primary burden to prosecute crimes, either due to sheer incapacity or lack of political will, the role of other states in the international system may be invoked.⁴⁷³

⁴⁷¹ This is supported by the Joint Separate Opinion of Higgins, Koojimans and Buergenthal in the *Arrest Warrant* case, noting that “commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles”, *supra* note 83. See further, STIGEN, *supra* note 401, pp. 153-154.

⁴⁷² On the notion of a collective responsibility to enforce core crimes norms see RASTAN, R.: “The Responsibility to Enforce: Connecting Justice with Unity”. In STAHN, C., SLUITER, G. (eds.): *The Emerging Practice of the International Criminal Courts*, Martinus Nijhoff Publishers, 2009, pp. 163-182.

⁴⁷³ *Inter alia* as observed in the UN Security Council, Report of the Secretary-General on “*the rule of law and transnational justice in conflict and post-conflict societies*”, “[o]f course, domestic justice systems should be the first resort in pursuit of accountability. But where domestic authorities are

The emerging principle of subsidiarity with respect to the universality principle enables states to exercise their jurisdiction on different grounds without prescribing a hierarchy between those types of jurisdiction. However, one can recognize a policy rule to accord priority to the principle of territoriality in combination with a model of conditional subsidiarity of universal jurisdiction once an investigation is concluded. The conditionality of the exercise of universal jurisdiction, while not settled conclusively, may be based on the ‘good faith’ exercise of the primary jurisdiction and may be construed following the case law of human rights courts and the basic concept established by Article 17 of the Rome Statute for the vertical state-ICC relation.

It follows that, if the territorial state is unwilling or unable to genuinely conduct investigations or if the investigations or prosecutions are no more than sham proceedings to shield the perpetrator, then a third state may initiate its own criminal proceedings. For an investigation to be considered genuine, it must meet the universal standards of effectiveness, promptness, independence and impartiality. As a result, an international body or mechanism tasked with assessing the legitimacy and legality of procedures undertaken on the basis of universal jurisdiction might serve to decide on these criteria and simultaneously alleviate some of the international tension related to the perceived abuses of the jurisdictional basis and to legitimize both specific prosecutions and universal jurisdiction *per se*.

This analysis has shown that a subsidiarity principle for universal jurisdiction can be convenient both for states seeking to combat international crimes and for states reluctant to interfere in other states’ affairs. Furthermore, the idea was demonstrated by using the ICC’s principle of complementarity as a model for many points on subsidiarity. It was shown how the rules governing the principle of complementarity can serve as a useful model for how a subsidiarity criterion for universal jurisdiction should be understood and applied.

Subsidiarity criterion can, on one hand, justify the exercise of universal jurisdiction by stressing that neither the territorial state nor the perpetrator’s home state is willing or able to proceed with an investigation. On the other hand, it can also justify non-

unwilling or unable to prosecute violators at home, the role of the international community becomes crucial.” See the *Rule of Law Report* notes, No. S/2004/616, (23 August 2004), para. 40. Available online at <http://www.unrol.org/doc.aspx?n=2004+report.pdf> [retrieved 4.3.2015].

interference by referring to it as an unqualified rule of priority for the affected states. It would indeed limit the interference in state sovereignty (thus respect state autonomy) and advance **foreseeability** in the exercise of universal jurisdiction, especially when it comes to resolving jurisdictional conflicts.⁴⁷⁴ Consequently, the main rationale behind universal jurisdiction will be better reflected. Attaching a sensibly formulated subsidiarity criterion to the exercise of universal jurisdiction will promote the purpose underlying such jurisdiction, if of course the *forum state* proceeds genuinely with the case. It will give the forum state a subsidiarity right to prosecute when necessary to prevent impunity, not an unconditional right to prosecute *only* on the grounds of the seriousness of the crime (as analyzed in Chapter IV) thus stipulating to an enhanced application of universal jurisdiction within the modern jurisdictional regime.

Finally, while the subsidiarity principle does not *yet* amount to a duty under international law, it can be said that it constitutes a right of the forum state. For instance, Colangelo notes that:

“It is probably premature to conclude that state practice and *opinio juris* already have combined to definitely establish that a State with territorial or national jurisdiction has adjudicative priority over States with only universal jurisdiction. Nonetheless, *a legal trend appears to be developing in this direction.*”⁴⁷⁵

From all of the above it is fair to suggest that a subsidiarity principle as modality in the exercise of universal jurisdiction is in the process of being developed; using the ICC’s principle of complementarity as a useful model for its application. One can certainly argue that having subsidiarity as a guiding principle in the exercise of universal jurisdiction, would enhance its usage while ensuring the balance between avoiding impunity and safeguarding the sovereignty of the state affected.

In conclusion, if one pretends that international law submits the exercise of universal jurisdiction to the notion of subsidiarity then it is to conclude that general international law provides for a hierarchy within the different jurisdictional bases accepted in modern international law.

⁴⁷⁴ RASTAN, *supra* note 106, p. 101.

⁴⁷⁵ COLANGELO, *False Conflict*, *supra* note 52, p. 900 (emphasis added).

PART III – CHALLENGES AND RESPONSES

6 Toward a more Effective Usage of Universal Jurisdiction

6.1 Universal Jurisdiction as a Bridge between the International Criminal Justice System and the National Criminal Justice System

Cooperation amongst national governments and existing international courts (or other institutions and NGOs) would reinforce international justice and the international legal order.⁴⁷⁶ There is a need to look at the principle of universal jurisdiction from another point of view – in a much wider context. Improving international judicial cooperation and national cooperation (consistent with their international obligations and national practice) and provide all means of support to each other, including mutual legal assistance to ensure the expedient and effective investigation and prosecution of individuals responsible for grave crimes, would consolidate the application of universal jurisdiction.

Moreover, although it has been stated from the previous discussion on the principle of *aut dedere aut judicare*, that universal jurisdiction, international criminal jurisdiction and the obligation to extradite or prosecute are different legal institutions that should not be confused with one another, they should nevertheless be considered as complementary institutions - not seen in isolation from each other - in order to enhance the effort to end impunity.

In fact, many states are parties to treaties containing the obligation to extradite or prosecute. Universal jurisdiction could be applied through the obligation *aut dedere aut judicare*, under which, if the perpetrator of an offence that was of such a gravity that it merited prosecution outside the territory of the state in which it was committed was apprehended in the territory of another state, that state shall be obligated to extradite the suspect to the state claiming jurisdiction in order to prosecute him or her, or to bring proceedings against that person in its courts.⁴⁷⁷ Although this is not the

⁴⁷⁶ Human rights advocates and groups, for instance Non-Governmental Organizations (NGOs), have played a crucial role in the litigation of universal jurisdiction cases by presenting universal jurisdiction complaints, bringing evidence before the investigating judge or prosecutor and becoming civil parties or private prosecutors in universal jurisdiction proceedings. See generally LANGER, *supra* note 180, pp. 8-12.

⁴⁷⁷ TIRIBELLI, *supra* note 247, pp. 101-102.

application of the principle of universal jurisdiction *stricto sensu*, because states can decide not to prosecute but to extradite, it is unquestionably one mechanism through which states can cooperate with one another in order to combat impunity for serious offences and to achieve the goal and purpose of universal jurisdiction. Thus putting a greater emphasis on the parallels between those two principles.

Furthermore, the international community will continually need to rely on national prosecutions, where universal jurisdiction plays a pivotal role, unless an *ad hoc* criminal tribunal will be established with exclusive, comprehensive jurisdiction over those crimes that will be considered as serious offences under international law.⁴⁷⁸ Until that becomes a reality, universal jurisdiction remains the most suitable solution where national courts play a primary role.

6.1.1 Sharing the Responsibility of Investigation and Prosecution – the State Incentive to Cooperate is Vital

The exercise of universal jurisdiction by national courts is not likely to disrupt or jeopardize international relations, instead it may powerfully contribute to the consolidations of international justice. If both the conditions on which the exercise of universal jurisdiction were made contingent and the other limitations restraining this exercise, laid down in a treaty, much of the current uncertainties surrounding customary law would be dispelled.

However, at present the cooperation among governments is still scarce and assistance mechanisms, that facilitate the exercise of universal jurisdiction, are lacking. With sufficient international coordination and cooperation, universal jurisdiction prosecutions can be an essential part of a safety net against impunity and denial of safe havens to perpetrators of international crimes. While several treaty provisions oblige states parties to cooperate in the investigation of international crimes, such as

⁴⁷⁸ As mentioned previously the jurisdiction of the ICC is limited to certain crimes (*ratione materiae*) and insofar as the jurisdiction *ratione temporis* is concerned the ICC has jurisdiction only for crimes committed after the entry into force of the Rome Statute (1st of July 2002) according to the Statute. In addition, the jurisdiction of the two *ad hoc* criminal tribunals (ICTY and ICTR) is also limited to certain crimes under international law and limited to certain time periods, but also, to crimes committed in two limited geographic areas. Yugoslavia Statute, Arts 1 to 5; Rwanda Statute, Arts 1-4. In addition according to the Rwanda Statute, Art. 1, the jurisdiction of the Rwanda Tribunal is further limited when the conduct occurred outside Rwanda to crimes committed by Rwanda citizens.

Article 88 of the First Additional Protocol to the Geneva Conventions⁴⁷⁹ and Article 9 of the CAT convention⁴⁸⁰, the practical mechanisms for information and exchange have been largely absent.

Additionally, the exercise of universal jurisdiction also requires procedural conditions to be fulfilled because with the prosecution and trial of offences occurring abroad the difficulties are profound with respect to the availability and safekeeping of evidence, respect for the rights of defendants, and the protection of witnesses and victims.⁴⁸¹ The need for procedural guarantees when exercising universal jurisdiction in order to facilitate investigations and collection and evaluation of evidence is profound. Therefore, in this regard international judicial cooperation and assistance is vital. Mutual legal assistance in the application and exercise of universal jurisdiction is thus a key factor. Subsequently, placing the investigation in a framework where it has some independent meaning, as well as, having a set of procedure when it comes to prosecution on the basis of universal jurisdiction would stipulate to a more coherent application of the principle. In fact, such an approach would permit universal jurisdiction to become a far more effective component of a global anti-impunity strategy.

As stipulated so many times before in scholarly writings and debate, the cooperation among states is the primary factor of competing impunity. It is the main power source in the struggle against perpetrators that commit heinous offences. What is more, it is a main factor when it comes to the application of universal jurisdiction. But, why are states so reluctant to cooperate in matters that should matter the most – protecting human rights and deter serious human right violations. Will governments ever get out of the political ‘bubble’?

⁴⁷⁹ Article 88 of the First Additional Protocol reads:

“1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.” See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force December 7, 1978.

⁴⁸⁰ Article 9 of the Torture Convention reads:

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings

⁴⁸¹ AU-EU Expert Report, *supra* note 81, para. 25.

In the end it all comes down to the ‘sensitive’ notion of state sovereignty. For example, when discussing whether to include the principle of universal jurisdiction in the Rome Statute, the most powerful states objected. *Ironically*, had the ICC been granted universal jurisdiction it could have been reasonable to expect that fewer states would ratify the Statute. Accordingly, if fewer states would ratify the Statute it would lead to a smaller budget for the Court, and thus fewer instances in which the Court could take action.

6.2 When is Universal Jurisdiction a Legitimate and Proper Form of Jurisdiction?

It is important to consider the issue on the desirability and appropriateness of universal jurisdiction within the modern jurisdictional regime. Seeking an answer to the question when and how can universal jurisdiction be exercised responsibly, is thus relevant.

As outlined in Chapter II primacy has been given to territorial jurisdiction and nationality jurisdiction, and universal jurisdiction considered as retaining supplemental character. For instance, as Cassese noted, under customary international law “universal jurisdiction may only be exercised to *substitute for other countries* that would be in a better position to prosecute the offender, but for some reason do not [...]”⁴⁸² Many scholars agree with this statement and contend that when the territorial state is willing and able to conduct out *bona fide* prosecution, other states should refrain from it.⁴⁸³ From the historical overview (provided for in Chapter III) universal jurisdiction emerged in international law as an **exception**, its goal being to end impunity and establish accountability. Accordingly, the primacy should be given to a state having a closer nexus to the offence when the trial can be exercised in an effective, fair and impartial manner.

⁴⁸² CASSESE, *Is the Bell Tolling*, *supra* note 1, p. 593.

⁴⁸³ RANDALL, *supra* note 81, pp. 829-31; BROOMHALL, *Towards the Development*, *supra* note 131, pp. 416. Judges Higgins, Kooijmans and Buergenthal argued that primacy should be given to the jurisdiction of the suspect’s state of nationality. Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, the *Arrest Warrant* case, *supra* note 83, para. 59. Cassese further explains that ‘conditional universality’ is the moderate conception of universality as a default jurisdiction, and that such jurisdiction may only be triggered when the territorial or national state fails to act, and provided the prosecuting state shows an acceptable link with the offence. CASSESE, *Is the Bell Tolling*, *supra* note 1, pp. 593-595.

The sole purpose of universal jurisdiction is to deny a safe haven for criminals and being a means of last resort when states with a closer nexus are incapable of conducting a trial. It is in light of those statements that this thesis seeks, among others, to establish a guiding framework within which conflicts relating to jurisdictional claims, which resulted from claims of universal jurisdiction, be evaluated and guided with the notion of subsidiarity. As this thesis maintains, subsidiarity in the context of universal jurisdiction, has been gaining support in designating universal jurisdiction as a default mechanism. In general, it is important that jurisdiction, irrespective of its basis, is applied in good faith and consistently with other principles of international law in order to enhance the rule of law and stipulate, among others, to a more uniform usage of universal jurisdiction.⁴⁸⁴ In other words, it is essential that the goal of ending impunity does not contradict or generate abuse with other existing rules of international law.

Universal jurisdiction, if regulated at the international level, might prevent its unwarranted use in a selective and unilateral manner. What is more, politically motivated decisions might be averted. Therefore guidelines in the exercise and applications of universal jurisdiction, such as the notion of subsidiarity analysis in Chapter V, might stipulate and establish clearly when and under what conditions universal jurisdiction might be invoked.⁴⁸⁵ Hence, establish international consensus in this respect.

In fact, in order for the principle to be effectively and coherently applied, one has to consider as well and look at those deterring factors, or the arguments, against the exercise of universal jurisdiction. Accordingly, in order to have the principle of universality functional, one has to be aware of its obstacles. The next section will deal with these constraints.

⁴⁸⁴ UNGA, Sixty-Fifth Session on “The Scope and Application of the Principle of Universal Jurisdiction, A/65/181, *supra* note 6, pp. 3-4.

⁴⁸⁵ In this respect, for instance, Bassiouni advocates the development of consensus principles on universal jurisdiction that establish “jurisdiction priorities” and provide “rules for resolving conflicts of jurisdiction” and minimize “the exposure of individuals to multiple prosecutions, abuses of process, and denial of justice.” See BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, p. 155.

6.3 Continuing Restraints on Universal Jurisdiction in the 21st Century

At present, significant limitations remain which hinder the effective exercise of universal jurisdiction. These limitations have either spread with the evolving principle of universal jurisdiction over the past years; or they are obstacles that have been coupled with the principle for decades. These continuing obstacles are not necessarily inherent in the nature of universal jurisdiction and thus with sufficient political will could be overcome and the lack of transparency in the exercise of universal jurisdiction could be diminished.

6.3.1 The Constant Tension between State Sovereignty and Universal Jurisdiction

Hugo Grotius believed that sovereignty was not absolute with regard to “injuries [that] excessively violate the law of nature or of nations.”⁴⁸⁶ Hence, one can consider how should we then mediate between the competing claims of state sovereignty and the application of universal jurisdiction in deterring impunity? Or looking at it from a bigger perspective; the fact to be considered is the interest of the international community as a whole versus safeguarding of state sovereignty. From the analysis made in this thesis, one can see that universal jurisdiction may be a positive and important tool in the efforts to vindicate the fundamental values of the international community; to promote and to protect human rights and to fight impunity. However, its negative side is that the exercise of universal jurisdiction is in tension with the principle of sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations. What does the exercise of universal jurisdiction mean for international relations?

Nowadays it seems that there are two main currents of thought in respect to state sovereignty. On one hand, there are some attempts in the international community to restrain state sovereignty in favor of international cooperation between and among sovereign states and for universal values, such as, human rights and the environment. On the other hand, there is the conservative tendency among some states jealously to

⁴⁸⁶ GROTIUS, H.: *The Law of War and Peace: De Jure Belli Ac Pacis, Libri Tres*. Oceana Publications, 1946, bk. II, ch. XX, para XL. 1, in 2 *The Classic of International Law* 504.

retain their sovereignty in the face of allegedly unfavorable circumstances in the world.⁴⁸⁷

There is a need for balancing between the interests of the international community (in punishing those accused of heinous crimes) and the will of states to safeguard their sovereignty and shelter their nationals from foreign interference. Would the exercise of universal jurisdiction by national courts disrupt or jeopardize international relation, or rather, does it contribute to the consolidation of international justice? Indeed, sovereignty of each nation is equal. Accordingly, every nation may decide to exercise jurisdiction based on the principles described in Chapter II which might cause that two or more nations might have a certain link to the offence causing unavoidable conflicting jurisdiction among different nations. Under these circumstances, any state that exercises its jurisdiction purely out of its own will, regardless of the fact that opinions and propositions of some nations, may offend the sovereignty another. In other words, the state which exercises jurisdiction might be breaching the principle of equality of sovereign nations, thus causing conflicts between nations. Hence, as such one can argue that underlying idea behind state sovereignty, hinders (not in purpose) the protection of human rights. ..., as this thesis stipulates the contemporary meaning of 'sovereignty' has lost much of its normative and/or descriptive meaning, primarily due to the fact that states are bound by an increasingly dense network of formal and informal rules and regimes.

State sovereignty is affected when universal jurisdiction is exercised by developed countries that may entail the danger of imposing Western values on developing countries in which most serious international crimes are committed. It is still predicted that countries that dominate in the military, economic, and political arena will continue to hold their values as binding on smaller or weaker states. Permitting powerful states to exercise universal jurisdiction could therefore allow it to be used as a political means of arbitrarily influencing weaker countries. The principle of equality of states may be breached when the people on trial and their actions are equated to the acts of the state of the alleged criminal. More importantly, these acts could instigate a

⁴⁸⁷ See *inter alia* CRYER, R.: "International Criminal Law vs State Sovereignty: Another Round?" *The European Journal of International Law*, Vol. 16(5), (2006), pp. 981-988; MIYOSHI, M.: "Sovereignty and International Law", pp. 4-8 available online at https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf.

violent reaction from the territorial nation in which bilateral or even multilateral diplomatic relations would be damaged.

Consequently the need to ‘strike the right balance’ between interests of the international community in punishing perpetrators accused of grave offences, and the will of states to safeguard their sovereign prerogatives and shelter their nationals from foreign interference becomes the essential issue. For instance, as Bassiouni believes the way forward is to clarify the legitimate usages of universal jurisdiction. In his view, consensus on the principles that guide legitimate use of universal jurisdiction must take due account of long established grounds of jurisdiction that are squarely grounded in bedrock principles of state sovereignty.

6.3.2 Other conflicting Norms and Limits – Can Universal Jurisdiction be without Limits?

In addition to the constant tension between the principle of state sovereignty and universal jurisdiction, other obstacles have to be addressed. In this manner, Bassiouni believes the way forward is to clarify the legitimate usages of universal jurisdiction. In his view, consensus on the principles that guide legitimate use of universal jurisdiction must take due account of long established grounds of jurisdiction that are squarely grounded in bedrock principles of state sovereignty.

Immunities of high-ranking state officials and amnesties have been among the most debated obstacles to the exercise of universal jurisdiction. With respect to immunities, an official position is not a defense and cannot be a basis to negate the criminal responsibility of a person who would otherwise be guilty of an international crime, even if the crime was committed in the course of his or her official duties.⁴⁸⁸ However, the ICJ held for instance in the *Arrest Warrant* case that certain officials of

⁴⁸⁸ Immunities of high-ranking states officials are further divided into ‘functional immunity’ (or *ratione materiae*) and ‘personal immunity’ (or *ratione personae*). The former, applies to all states agents discharging their officials duties and stipulates that a person performing acts on behalf of a sovereign state may not be held responsible for any offence of international law he/she may have committed in his/hers official capacity. This is so even after the person ceases to hold office. The latter, personal immunity, provides immunity while the official is in office but terminates with the cession of the given act or mission on behalf of the state. See more thorough analysis on immunities in the work of the ILC, on the topic “*Immunity of State officials from foreign criminal jurisdiction*”, *supra* note 13; BAUMRUK, P.: “International Law on Immunities accorded to High-Ranking State Officials” *Czech Yearbook of Public and Private International Law*, Vol. 3, (2012), pp. 173-190.

foreign governments, such as accredited diplomats, current heads of state (or heads of government such as prime ministers) and current foreign ministers, are entitled to a temporary procedural immunity from the criminal jurisdiction of foreign states which lasts for as long as the person holds the post. Once an individual ceases to hold the position of head of state/government or foreign minister, he or she loses immunity from the criminal jurisdiction of foreign states.⁴⁸⁹ At present, the lack of respect for immunities is in fact the main concern expressed by the African Union in its ongoing tirade on the ‘abuse’ of universal jurisdiction.⁴⁹⁰ Indeed, to allow states to arrest and prosecute a sitting high-level official can only seriously disrupt international relations and undermine the necessary interstate cooperation and friendly relations needed to attain the common goal of universal jurisdiction – accountability for the most severe crimes. For instance, in 2003, a French court rejected an application for an arrest warrant against Robert Mugabe for torture because he enjoyed immunity from prosecution as the current head of state of Zimbabwe. Interviews with French officials revealed that French judicial authorities refer cases with potential immunity issues to a special unit of the Foreign Affairs Ministry, which decides on the matters. This raises the concern that political, rather than legal, standards may be applied when determining whether a suspect is entitled to immunity from French jurisdiction.

6.3.2.1 Obstacles to the Legitimacy of Universal Jurisdiction

Concerns that arise in relation to political abuse or otherwise imprudent exercise of universal jurisdiction, have a bearing on international relations, the principle of equality among sovereigns, and the fairness of criminal proceedings.⁴⁹¹ Bassiouni has observed that “if used in a politically motivated manner or simply to vex and harass leaders of other states, universal jurisdiction could disrupt world order and deprive individuals of their basic rights.”⁴⁹² As noted by commentators, the likelihood that domestic courts exercising universal jurisdiction will become a means of furthering the political agenda of the country in which they sit or of particular interested groups within that country “is high since the crimes involved are often committed in the

⁴⁸⁹ The *Arrest Warrant* case, *supra* note 83, paras. 53-55; 60-61.

⁴⁹⁰ See i.e. the AU-EU Expert Report, *supra* note 81, p. 34.

⁴⁹¹ Amnesty International Report, *supra* note 65, pp. 52-54.

⁴⁹² BASSIOUNI, History of Universal Jurisdiction, *supra* note 34, p. 39.

context of protracted political and military conflicts in which the interests of third countries, including the one exercising universal jurisdiction, are usually involved.”⁴⁹³ In view of this reality, the former President of the ICJ, Judge Guillaume, contended that permitting states to assert absolute universal jurisdiction would “encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined international community. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.”⁴⁹⁴

The profound inequalities most likely to arise in the exercise of universal jurisdiction do not merely concern its use by states as a political weapon aimed at shaming and denouncing other states or influencing their policies in various areas of international relations.⁴⁹⁵ The inequalities also include states’ reluctance to exercise universal jurisdiction “when citizens of allied and/or powerful nations are involved.”⁴⁹⁶ Commentators have observed that such reluctance has been exemplified by the refusal of German and French authorities to commence an investigation under the principle of universal jurisdiction regarding the role of high-level U.S. officials in the torture of detainees under U.S. control in Iraq and elsewhere.⁴⁹⁷ Since 1994, more than thirty individuals have been tried in national courts on the basis of universal jurisdiction.⁴⁹⁸ None of them was a national of a Western country.⁴⁹⁹ Indeed,

⁴⁹³ BOTTINI, G.: “Universal Jurisdiction after the Creation of the International Criminal Court” *New York University Journal of International Law and Politics*, Vol. 36, (2004), p. 555.

⁴⁹⁴ The *Arrest Warrant* case, *supra* note 83, para. 15, (Separate Opinion of President Guillaume).

⁴⁹⁵ MORRIS, *supra* note 130, p. 354. (“criminal trials for war crimes, genocide, and crimes against humanity do not exist in isolation from those other aspects of interstate relations [...] states may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflict.”).

⁴⁹⁶ KALECK, W.: “From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008” *Michigan Journal of International Law*, Vol. 30, (2009), p. 973; see also MOGHADAM, T.: “Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissené Habré” *Columbia Human Rights Law Review*, Vol. 39, (2008), p. 486. (“Heads of state or other high-ranking officials targeted by universal jurisdiction cases can deter their own prosecution by exerting powerful political pressure. As a result, states with a statutory basis (or legal obligation) to detain, extradite, or prosecute those suspected of relevant crimes frequently refuse to do so for fear of political reprisals.”).

⁴⁹⁷ BOTTINI, *supra* note 493, pp. 558-559 (pointing to the reluctance of European states to exercise universal jurisdiction over US officials, Bottini observed, “It is when [...] the accused is the national of a powerful country, and often when he is also a current or former member of the government of this state [...] that the inability of universal jurisdiction to bring accused persons to justice is more striking, even if the prosecuting state is a developed one”).

⁴⁹⁸ For a review of the exercise of universal jurisdiction worldwide since 1994 see *inter alia*, RIKHOF, J.: “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity” In BERGSMO, M. (ed.): *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*. Oslo: Torkel Opsahl Academic EPublisher, 2010, pp. 45-64.

⁴⁹⁹ See RYNGAERT, Applying the Rome Statutes Complementarity, *supra* note 396, p. 165.

inequality of individuals before the law in the exercise of universal jurisdiction has much to do with a *de facto* inequality of sovereigns. It has been observed that, “[i]n practice, universal jurisdiction appears inconsistent with the notion of sovereign equality among states [...]. Currently, universal jurisdiction is generally exercised by powerful countries over acts that occurred in developing countries and that were committed by persons from such countries.”⁵⁰⁰

Despite its problematic nature, universal jurisdiction has its place in international law. Means should be sought, for instance by the ILC comments, in order to clarify its scope and enhance its usage. Having a principle that can, if used appropriately in the fight against the commission of serious crimes of international concern, be so ‘powerful’. Bassiouni argues that “unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexation purposes.”⁵⁰¹

Limitations primarily concerning legitimacy, authenticate a genuine concern in respect to whether courts exercising universal jurisdiction, have the legitimacy in order to operate on the worldwide platform. Among others, one obstacle to the successful investigation and prosecution of international crimes is the relative lack of familiarity with the investigation and prosecution of such cases at the national level.

Some of the countries examined in this report have responded to these challenges by creating units within police and prosecutorial authorities that specialize in the investigation and prosecution of transnational crimes, including universal jurisdiction cases. Mutual legal assistance arrangements are complex and can result in lengthy delays in the investigative process. Nevertheless, investigators interviewed by Human Rights Watch indicated that, once the formalities had been completed, local authorities in the territorial state did afford the necessary cooperation to enable the investigation to proceed in most cases.

The **legitimacy of national courts** to exercise universal jurisdiction at the international level is a crucial point to be considered. All courts have to contend with the issue of legitimacy. State can and should have some form of universal

⁵⁰⁰ BOTTINI, *supra* note 493, pp. 555-556.

⁵⁰¹ BASSIOUNI, *Universal Jurisdiction*, *supra* note 114, p. 82.

jurisdiction. The ability to observe it has to be given to legitimacy. Without it the jurisdiction of the court would be undermined.

Moreover further limitation and shortcoming on the universality principle can be mentioned, for example, when the legal basis is adequate, the question of who makes the decision to proceed and based on which factors, are likely to become pivotal as universal jurisdiction shifts from an aspiration to a working legal reality. Whereas, these questions will determine how often universal jurisdiction will be exercised, and on what conditions, they call for a more sustained examination. In order for these proceedings to withstand criticisms regarding them being politically motivated will clearly be affected by the manner in which discretion is exercised in the prosecuting state.⁵⁰² Indeed, most of the national courts have never faced such extremely extensive cases and therefore there is a need to look more closely and establish precedent and guiding points on the handling of such cases (of course each case is different when it comes to the matter at hand, but the basic procedural elements remain the same).

What is more, other practical problems such as procedural **rights of the suspect** and **double jeopardy** need to be more coherently defined and guaranteed when exercising universal jurisdiction since there is a potential lack of due process in the principles' application. These rights of the suspect are important for the international community, states and the defendant himself for the purposes of understanding the nature of due process during the investigation process. From this follows that more attention should be placed on the investigation as an independent procedure and report. Nevertheless, these procedural rules are not clear since there is a lack of a set of clear and consistent procedure that relates to the exercise of universal jurisdiction, which need to be established. In fact, without a comprehensive system of laws and regulations at the national level, universal jurisdiction cannot be expected to function properly in practice.⁵⁰³ Indeed, this calls for further considerations on the issue of how much will the rights of suspected persons be protected in case of universal jurisdiction.

⁵⁰² BROOMHALL, *International Justice*, *supra* note 108, pp. 123-125.

⁵⁰³ UNGA, Sixty-Ninth Session on "the scope and application of universal jurisdiction", A/69/174, (23 July 2014), p. 15; Sixty-Fifth Session, A/65/181, (29 July 2010), p. 16; 19; BROOMHALL, *International Justice*, *supra* note 108, p. 119.

In sum, by overcoming the above mentioned obstacles and threat to the legitimacy of universal jurisdiction (such as, inadequate legislation, inadequate knowledge in the criminal justice system, lack of political will, amnesties and immunities, and ineffective international monitoring) or at least emphasizing in addressing these limiting constraints with respect to universal jurisdiction, the universality principle might become a more effective and transparent rule for all nations to use in the global fight against impunity. It is only when one looks at and addresses these shortcomings, that effective usage can be obtained.

6.4 A New Approach to Universal Jurisdiction – Looking Ahead

There are some obstacles that still remain and prevent full implementation of universal jurisdiction. A positive sign on the exercise of universal jurisdiction came in 1998 after the groundbreaking *Pinochet* case and it seems that there were a few steps that could be built on with respect to universal jurisdiction.⁵⁰⁴ Nevertheless, at present it rather seems that the principle has been under a negative ‘attack’ from scholars⁵⁰⁵ (who wonder whether the principle has only stipulated to false expectations) as well as politically motivated countries which have hampered its exercise.⁵⁰⁶

The search for means to assure effective functioning of the exercise of universal jurisdiction must continue through scholarly writing and discussions at international and national forums and also continue to establish guiding rules for its applications and exercise, such as the subsidiarity criteria and making clarification on the scope of the principle. Universal jurisdiction has to be openly accepted and internationally supported and for that we need to have certain standards to follow. Therefore, in order to ‘revive’ or resume the principle one needs to start looking into the basic components and identify and clarify the descriptive elements that make universal jurisdiction as ‘exceptional’ as it is.

An important factor for future enhancement of the principle are the actors connected to the application of universal jurisdiction, namely, the victims of crimes. The need to

⁵⁰⁴ See the Princeton Principles, *supra* note 5; the *Eichmann* case, *supra* note 149; The Belgian Law, Section 3.1.3.1.

⁵⁰⁵ For instance, CASSESE, *Is the Bell Tolling*, *supra* note 1. Limitation and amendments on the law in Belgium and Spain (2003 and 2014), see Section 3.1.3.1.

⁵⁰⁶ So called ‘politicization’ being the worst drawback of universal jurisdiction.

take into account the perspective of victims and allowing them to participate is essential.

Universal Jurisdiction should not be looked at in isolation from other principles that might enhance its effectiveness (such as the principle of *aut dedere aut judicare*) but at the same time one should also take due diligence to limiting principles (such as the principle of state sovereignty and immunities of state officials). When looking at the principle as a part of the whole international justice system, and as an international criminal justice response to atrocious crimes beyond the reach of existing mechanisms one can certainly notice that the universality principle undoubtedly *deserves* its place within the modern international law as has been demonstrated in this thesis. The only incentive needed is for states to be truly willing and ready to apply it and enforce it.

According to the words of the Nigerian delegate to the GA, who stated that “[t]he time has come for us to narrow our views and agree on real substance, especially as it concerns the assertion of criminal jurisdiction by a state for certain grave offenses.”⁵⁰⁷ Indeed, building on this statement further clarification and consensus-building would not only strengthen the application of universal jurisdiction, but would, most importantly, give legitimacy and credibility to its usage. Leaving interpretation of international crimes to national courts could have adverse effects on the integrity of international law.

A crucial point to remember is that the site of most international criminal law enforcement is not intended to be international courts, which have only arisen because of the failure, or the absence, of national justice efforts, but they are not meant to replace them. One of the major roles which international judicial mechanisms have is the promotion of the more effective use of national criminal justice systems. If international criminal law is to be effectively enforced, the national systems must take a greater part in the prosecution of international crimes.⁵⁰⁸

⁵⁰⁷ EYOMA, G. (Nigeria) delegate to the GA. Press release on “Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, Seek Further Guidance from International Law Commission”, (17 October 2012) <http://www.un.org/press/en/2012/gal3441.doc.htm> [retrieved 3.3.2015].

⁵⁰⁸ CRYER *et al.*, *supra* note 35, p. 580.

Likewise, the issue of the presence of the suspect on the territory of the prosecuting state and the discretionary power of the prosecuting authorities, limits the scope of jurisdiction. Finally, one must not forget that the use of universal jurisdiction implies that another state has also jurisdiction according to the classic criteria of jurisdiction and as such, could have primacy over the case. This is the reason why the practice of universal jurisdiction might be associated to a prerequisite of subsidiarity.

7 Conclusions

At present, it is impossible to look at each state as an isolated unit. Cooperation and collaboration between both international and national actors is an important factor in the fight against impunity which could facilitate linkages and create synergies for pursuing suspected offenders. The principle of universal jurisdiction is only a small pillar in this struggle. The experience of universal jurisdiction demonstrates that it may give rise to complex legal, political and diplomatic questions.

One can certainly speak of a ‘rise and fall’ of universal jurisdiction. With a rise to its peak in 1998 with the arrest of Augusto Pinochet in London, and the fall coming with the amendments of Belgium’s universal jurisdiction amendments in 2003, or with the amendments of Spain’s universal jurisdiction regulations in 2009 and 2014. From the principle’s beginnings - primarily as a means of maritime states to assert jurisdiction over piracy – there has been a gradual expansion of its content to encompass other heinous acts, such as war crimes, genocide and torture. The expansion has had unavoidable implications for a range of other long established concepts of international law, such as state sovereignty, equality of states and/or immunities. The principle of state sovereignty has been throughout history, and still continues to be, one of the major barriers on the effective exercise of universal jurisdiction. Hence, even if it is a ‘sensitive’ matter, striking a balance between these two concepts, as well as other limiting principles of international law, is the only way forward.

Where there is no prospect for criminal trials being undertaken in the state(s) directly affected by the crimes, or in situations falling outside of the jurisdiction of the ICC, the exercise of universal jurisdiction may offer the only prospect for holding perpetrators accountable. What is more, the assertion of jurisdiction by a foreign court may stipulate to public debate and a re-examination of domestic immunities or amnesties in the territorial state.⁵⁰⁹ Undoubtedly, for some states this may be a reactive posture to protect vested interests under the cloak of national sovereignty. However, for an **increasing** number of states it appears to arise out of concern for the viability of a sustainable rule of law system. Even though one thinks that after having analyzed the principle of universal jurisdiction and searched for some sort of

⁵⁰⁹ Such domestic debates were e.g. triggered by the well-known proceedings in third states against, *inter alia*, Augusto Pinochet or Hissène Habré.

clarification on the topic it might become clearer, but it is usually so when dealing with universal jurisdiction that it raises more questions than it answers. It is for this fact that the principle will **continue** to form a significant component of an overall global strategy to combat impunity and evolve further within international law. Moreover, clarifications, continuous improvements and discussion are necessary to achieve the objective of a properly functional principle. This thesis hopefully added some.

The purpose of the principle of universal jurisdiction is to avoid loopholes in the prosecution of core international crimes. Although the principle seems well established both in conventional and customary international law (as described in Chapter III and partially within Chapter IV) its application remains controversial and complex and according to the analysis undertaken, parties to the multilateral conventions obligate themselves to prosecute or extradite some of today's '*hostis humani generis*'.⁵¹⁰ However, the gap between the existence of the principle and its application still remains quite wide. This is due to various factors as described within this thesis. Therefore when applying the principle of universal jurisdiction, four factors should be considered. These factors are among others;

- a) Universal jurisdiction may only be exercised and applied over the most serious international crimes;
- b) Universal jurisdiction is supplemental to other jurisdictional bases that have a stronger link to the crime, such as territorial jurisdiction or national jurisdiction. In the event the state where the crime occurred or the state of nationality of the alleged perpetrator or the state of nationality of the victim is able to prosecute the crime in question, universal jurisdiction should not be exercised;
- c) Any state having custody over an alleged perpetrator, before exercising universal jurisdiction, should consult the state where the crime occurred and the state of nationality of the person concerned to determine whether either state is preparing to prosecute the alleged perpetrator. The custodial state

⁵¹⁰ In addition, state non-parties have the jurisdictional right to prosecute such offenders of serious crimes, as supported by the adoption of those conventions by international organizations, as well as by developments in international criminal law and the *erga omnes* and *jus cogens* doctrines.

should extradite the person concerned to either of those states for prosecution if requested. If those states are unable or unwilling to exercise their jurisdiction over the crime in question, the custodial state may proceed with its universal jurisdiction.

Hence it should never be exercised as a primary basis (only as a subsidiary to the other jurisdictional bases) if the forum state is genuinely able and willing to proceed with the prosecution. Thus consensus principles on universal jurisdiction that establishes 'jurisdictional priorities' and provides rules for resolving conflicts of jurisdiction, hence minimizing the exposure to multiple prosecutions and denial of justice, is of great importance.

d) Universal jurisdiction should never be considered in isolation from other principles of international law but always in accordance with accepted international standards (both standards that enhance its usage and that limit its scope and exercise).

The legitimacy and credibility of the universality principle depends upon its consistent application with respect to other principles and rules of international law.

Despite several breakthroughs for universal jurisdiction in the past years, some obstacles remain and prevent its full implementation. It is necessary to reach a shared understanding on the principle of universal jurisdiction in order to apply it properly and avoid its selective application. It is therefore important to consider primarily, to what kind of crimes universal jurisdiction applies and in this respect analyze their definitional elements and legal basis, and secondly, consider its status within the jurisdictional bases (its subsidiarity character). This thesis sought to remedy partially on this shortfall or at least give some clarification on its exercise, such as; 1) Obligatory nature (looking at the principles together); 2) Crimes (gravity threshold – looking at the basic elements of a crime – *jus cogens*); 3) Jurisdictional conflicts (subsidiarity) - Universal jurisdiction is an exceptional principle that has a special character and should only be applied as a last resort and complementary to other jurisdictional bases.

The principle of universal jurisdiction is still evolving and it will continue to do so and adapt to the changing nature of international law and the changing nature of crimes. International cooperation is vital when considering a topic so big as

international justice and the fight against impunity. The principle of universal jurisdiction is just a small, but extremely important, part of the whole system. Therefore, when analyzing the universality principle one cannot, and should not, look at it in isolation. Although states have clearly stated that universal jurisdiction, international criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) are different legal institutions that should not be confused with one another; it is the view of this author that they are complementary institutions in the effort to end impunity.

International cooperation between different jurisdictions may increase the efficiency and viability of launching criminal proceedings on the basis of universal jurisdiction. The discussion and analysis in this thesis on the principle of universal jurisdiction manifest that it may give rise to complex legal, political and diplomatic questions. Nonetheless, where there is no prospect for criminal trials being undertaken in the state(s) directly affected by the crimes (or in situations falling outside of the jurisdiction of the ICC) the exercise of universal jurisdiction may offer the *only* prospect for holding perpetrators accountable. Accordingly, nowadays states are becoming more aware of the fact that no safe haven should be allowed for perpetrators of grave and severe offences. Greater clarification of the nature of the crimes falling under the scope of universal jurisdiction was necessary as well as describing the constituent elements.

Certainly, universal jurisdiction is not the only way to fight serious crimes and deter impunity; it is a part of a wider system that aims to enhance the deterrent effect of punitive measures. Universal jurisdiction should be exercised only where national courts that could exercise jurisdiction on basis of territoriality or active or passive personality were unable or unwilling to do so (and where international courts did not have the jurisdiction to deal with the case). As was described and clarified in Chapter V, the emerging idea of subsidiarity as a guiding principle within the lacuna of jurisdictional bases and claims of jurisdiction, might stipulate to a more coherent and transparent usage of universal jurisdiction.

Concluding Remarks

Universal jurisdiction has existed for hundreds of years – on one hand, a jurisdictional exemption unique to piracy – on the other, the modern universal jurisdiction concerning itself primarily with human rights violations. One can certainly conclude that there are not only diverse opinions on the principles scope and applicability but in fact, also on its viability and justification within modern international law. Consequently, there is a need to reconcile the diverging positions on the universal principle among states.

Nowadays, pragmatical, political and other legal considerations sometimes pose obstacles to the exercise of universal jurisdiction. Universal jurisdiction should be exercised objectively (in order to ensure its none-selective implementation) and for that reason uniformity is needed, as well as harmonization with some terms and concepts of international law in order to achieve an even wider acceptance of universal jurisdiction. It is so, that only general and uniform practice can create a basis for common recognition of universal jurisdiction as a binding rule of customary international law.

Nevertheless, apart from these constrains one has to keep in mind that the principle of universal jurisdiction - an *exceptional* rule - is an important part of the international criminal justice system, as well as its history which is constantly clarifying and evolving.

Summary

In a globalizing world where states are increasingly interdependent, the exercise of universal jurisdiction enables the international community to bring an end to, or at least deter, the commission of serious crimes that harm human dignity. From the principle's beginnings, primarily as a means for states to assert jurisdiction over piracy, there has been a gradual expansion of its content and scope to encompass other heinous acts such as war crimes, crimes against humanity and genocide. As the international criminal law continues to formulate, so do its principles; thus rendering the universality principle an important status within modern international law.

At present, despite a wide acceptance of the principle of universal jurisdiction, it is not applied homogeneously, nor is its application implemented without difficulty, due to its complex issues of legal and political nature - thus remaining one of the most confusing doctrines of modern international law. There is a wide range of views on the principle, in particular its content, scope and implementation but all of these different views hinder the substantial progress on the topic. This thesis argues that the principle of universal jurisdiction is still transforming and various newly emerging factors can be taken under consideration in order to balance the principle and enhance its usage.

The aim of the present study is three folded, namely, two issues are dealt with pertaining to the nature and scope of universal jurisdiction and the third one in connection to its application and exercise. Primarily, universal jurisdiction should be conceptually distinguished, but not isolated, from other accepted principles of international law, especially that of *aut dedere aut judicare* (the obligation to extradite or prosecute). Secondly, universal jurisdiction should be invoked only for the most heinous crimes (characterized as of *jus cogens* nature) that have been universally condemned by the international community. Thirdly and finally, the thesis seeks to locate the assertion of universal jurisdiction within the modern jurisdictional regime – thus playing a complementary role - and simultaneously balancing its application with the principle of state sovereignty.

The dissertation is divided into three main parts which are further divided into seven chapters (including Introduction and Conclusions). The first part ('general part') will deal with the nature and scope of universal jurisdiction by reexamining the

jurisdictional framework that the universality principle is stemming from; following up with historical overview of the principle. Part two ('specific part') will make a survey into the core international crimes that attract the application of universal jurisdiction and the values upon which those crimes infringe. Thereafter, an inquiry into an effective implementation and enhancement of the usage of universal jurisdiction will be provided. Lastly, part three (on 'challenges and responses') will discuss certain limitations to the exercise and application of universal jurisdiction where the weight of the thesis is rather on the theoretical aspect of universal jurisdiction with a critical examination drawn out in the end.

In Chapter II on "Jurisdictional Regime in International Law" an outline is established of the various criminal jurisdictional bases accepted in international law and demonstrated how exceptional the principle of universal jurisdiction is. Moreover, the principle of state sovereignty is described and it is argued that the fundamental meaning behind the concept of state sovereignty is gaining new understanding in the twenty-first century in connection to the application of universal jurisdiction.

Within Chapter III "Formation and Implication of Universal Jurisdiction" an examination of the historical background of the principle of universal jurisdiction is undertaken - tracing its origins and main milestones; to modern application. The descriptive components of universal jurisdiction and its legal status under international law and case law inquiry are provided. Special attention is given to the relationship between universal jurisdiction and the principle of *aut dedere aut judicare* in order to manifest that these principles cannot be seen in isolation from each other and it is maintained that these two principles are interrelated, yet distinct principles, and should not be seen in isolation from each other but as a parallels in deterring commission of heinous offences. It is concluded that the obligation to extradite or prosecute strengthens the usage and exercise of universal jurisdiction; hence rendering it an obligatory nature.

Crimes falling under the exercise of universal jurisdiction in modern international law and their characteristics are the objective of Chapter IV on "Core Crimes that Attract the Application of Universal Jurisdiction". Its heinous nature and *jus cogens* status and consideration are brought up on how the concept of 'gravity' of crimes has changed from covering piratical acts, to include much more serious offences such as

war crimes. A study into relevant conventions, case law and academic debate shows that the primary source for the application of universal jurisdiction is the gravity of the crime - crimes that affect the international community as a whole – thus allowing for universal jurisdiction to be applicable. Further, newly emerging threats that might be considered as falling under the umbrella of universal jurisdiction are mentioned.

Chapter V on the “The Idea of Subsidiarity in the Context of Universal Jurisdiction” describes the newly emerging idea of subsidiarity as a guiding principle in the application of universal jurisdiction. The usage of subsidiarity in the exercise of universal jurisdiction can be guided by the complementarity principle of the ICC, thus employing the complementarity principle as a model for the notion of subsidiarity in the application of universal jurisdiction. The Chapter concludes that the notion of subsidiarity can constitute a guiding criterion or a modality in the application of universal jurisdiction within the lacuna of jurisdictional bases, and simultaneously avoiding misuse in its exercise and foster foreseeability of the universality principle within the modern jurisdictional regime. Accordingly, subsidiarity criterion can, on one hand, justify the exercise of universal jurisdiction by stressing that neither the territorial state nor the perpetrator’s home states are willing or able to proceed with an investigation. On the other hand, it can also justify non-interference by referring to it as an unqualified rule of priority for the affected states.

Finally, within Chapter VI “Toward a More Effective Usage of Universal Jurisdiction” considerations are made on contemporary challenges and restraints on the scope and application of universal jurisdiction, such as concerns that arise in relation to political abuse or otherwise imprudent exercise of universal jurisdiction; concerns related to international relations; the principle of equality among sovereigns; and the fairness of criminal proceedings. Improving international judicial cooperation and national cooperation (consistent with their international obligations and national practice) and provide all means of support to each other, including mutual legal assistance to ensure the expedient and effective investigation and prosecution of individuals responsible for grave crimes, would consolidate the application of universal jurisdiction.

Resumé (Czech)

V globalizovaném světě, kde jsou státy na sobě stále více závislé, umožňuje výkon univerzální jurisdikce, aby mezinárodní společenství ukončilo závažné trestné činy, které poškozují lidskou důstojnost. V počátku rozvoje pomáhala univerzální jurisdikce jednotlivým státům především proti pirátství. Postupem doby došlo k následnému rozšiřování jejího obsahu a rozsahu i na další hanebné činy, jako jsou například válečné zločiny nebo zločiny proti lidskosti a genocida. Vzhledem k tomu, že se mezinárodní trestní právo nadále vyvíjí, vyvíjejí se spolu s ním i jeho všeobecné principy, které mají své důležité místo v rámci rozvoje moderního mezinárodního práva.

V současné době, i přes široké uplatnění principů, není univerzální jurisdikce aplikována rovnoměrně kvůli složitým otázkám, jak právní tak i politické povahy, a ani není její použití bez problémů. Kvůli tomu zůstává univerzální princip jedním z nejvíce matoucích doktrín moderního mezinárodního práva. Široká škála názorů je zejména na jeho obsah, rozsah a realizaci a tyto různé pohledy zabráňují jeho vývoji. Z této práce vyplývá, že zásady univerzální jurisdikce se stále vyvíjejí pod vlivem různých nově vznikajících faktorů a tím se zvyšují možnosti jejího využití.

Tato práce se skládá ze tří částí, první dvě se zabývají problémy týkajícími se povahy a rozsahu univerzální jurisdikce a třetí část pak návazností na její uplatňování a aplikaci. Univerzální princip by měl být koncepčně rozlišen, jak je uvedeno v první části. Neměl by být izolován od ostatních uznávaných principů mezinárodního práva, a to především ne, od zásady *aut dedere aut judicare* (povinnost vydat osobu nebo trestně stíhat). V druhé části je uvedeno, že by univerzální jurisdikce měla být uplatňována pouze pro ty hanebné zločiny (označené jako *jus cogens* povahy), které byly všeobecně odsouzeny mezinárodním společenstvím. A konečně v třetí části, se práce snaží ukázat, že univerzální jurisdikce v moderním režimu – hraje doplňkovou roli – ale současně vyváženou a související s principem státní suverenity.

Tyto tři hlavní části, jsou rozděleny do sedmi kapitol (včetně úvodu a závěru). První část ('Obecná část'), se zabývá povahou a rozsahem univerzální jurisdikce a zkoumá jurisdikční rámec, princip jurisdikční univerzálnosti a to v návaznosti na historický přehled o vývoji principu. Druhá část ('Zvláštní část'), analyzuje závažné mezinárodní zločiny, které souvisejí s aplikací univerzální jurisdikce a zároveň s

hodnotami, které tyto zločiny porušují. Jsou zde poskytnuty informace, jak lze účinně přispět k lepšímu rozvoji ve využití univerzální jurisdikce v praxi. Třetí část ('Výzvy a odpovědi') rozebírá možnosti omezení uplatnění a použití univerzální jurisdikce, a důraz této práce je spíše kladen na teoretický aspekt univerzální jurisdikce s kritickým přezkoumáním, který je podrobně vypracován v závěru práce.

V kapitole II. o 'Jurisdikční režimy v Mezinárodním Právu', jsou nastíněny různé základy trestní jurisdikce přijaté v mezinárodním právu. Poukázáno je zde na to, jak výjimečný je princip univerzální jurisdikce. Současně, je popisován princip státní suverenity, ze kterého například vyplývá (jak tato práce nadále argumentuje) že původní význam pojmu státní suverenity má jiný smysl v 21. století, a to zejména při uplatňování univerzální jurisdikce.

V rámci kapitoly III. 'Vznik a Důsledek Univerzální Jurisdikce' je analyzován historický vývoj principu univerzální jurisdikce; jak jeho historické kořeny a hlavní milníky, tak i moderní aplikace principu. Dalé jsou analyzovány popisné složky univerzální jurisdikce a její právní postavení podle mezinárodního práva a vyšetřování soudních procesů. Zvláštní pozornost je věnována vztahu mezi univerzální jurisdikcí a zásadou *aut dedere aut judicare*. Důraz je kladen na tvrzení, že na tyto dva principy nelze nahlížet odděleně od sebe. Tyto dva principy jsou vzájemně propojené, a přestože se v mnohém liší, musí být posuzovány jako paralely určené k zastavení nejhanebnějších trestných činů. Zdůrazněno je, že povinnost vydat nebo stíhat posiluje úlohu a využívání univerzální jurisdikce. Proto je důležitá její interpretace.

Zločiny, které souvisejí s uplatněním univerzální jurisdikce v moderním mezinárodním právu a jejich charakteristika, jsou hlavním cílem kapitoly IV. 'Závažné Mezinárodní Zločiny, které přitahují uplatnění Univerzální Jurisdikce'. Jejich hanebný charakter a stav *jus cogens* si vyžadují svojí 'závažností' u trestných činů velkou pozornost. Ta se rozšiřuje z původního krytí pirátských zločinů a zahrnuje v současnosti mnohem více závažných trestných činů, jakými jsou například válečné zločiny. Studie příslušných dohod mezinárodního práva a akademických debat ukazuje, že prvotním důvodem pro použití univerzální jurisdikce je závažnost trestného činu. Na trestné činy, které mají vliv na mezinárodní společenství jako celek, lze tedy univerzální jurisdikci uplatnit. Kromě toho jsou také, v rámci této

kapitoly, uvedeny nově se objevující současné hrozby, které by mohly být řešeny právě pod záštitou univerzální jurisdikce.

Kapitola V. nazvaná ‘Myšlenka Subsidiarity v Kontextu Univerzální Jurisdikce’ popisuje nově vznikající myšlenku subsidiarity jakožto zásady pro uplatňování univerzální jurisdikce. Využití subsidiarity pro výkon univerzální jurisdikce se může řídit zásadou komplementarity Mezinárodního trestního soudu, a to s využitím principu doplňkovosti. Lze dospět k závěru, že pojem subsidiarity může být použit jako možnost pro uplatňování univerzální jurisdikce v rámci soudní pravomoce základních složek, a zároveň zamezit zneužití v jejím výkonu a podporovat předvídatelnost při uplatňování univerzální jurisdikce v moderním jurisdikčním režimu. V souladu s tím, může kritérium subsidiarity na jedné straně ovlivnit výkon univerzální jurisdikce, tak že ani územní stát ani domovské státy nejsou ochotni nebo schopni pokračovat ve vyšetřování. Na druhou stranu, může také stanovit pravidlo nevměšování se jako bezvýhradné pravidlo priority pro postižené státy.

A konečně, v rámci kapitoly VI. ‘Efektivnější využití Univerzální Jurisdikce’ jsou podány úvahy reagující na současné výzvy a omezení, ale i na rozsah a aplikaci univerzální jurisdikce. Jsou to například obavy, které vznikají v souvislosti s politickým zneužíváním nebo jinak nerozvážného rozhodnutí univerzální jurisdikce, jako například obavy týkající se mezinárodních vztahů, zásady rovnosti mezi suverénními státy a nebo spravedlnost trestního řízení. Zlepšení mezinárodní spolupráce v trestních věcech na mezinárodní úrovni (v souladu s mezinárodními závazky a vnitrostátními postupy), a poskytnutí veškeré podpory navzájem (včetně vzájemné právní pomoci) by vedlo k upevnění aplikace universální jurisdikce, a k rychlému a účinnému vyšetřování a stíhání osob odpovědných za závažné zločiny.

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Abstract

Key words: universal jurisdiction, universality principle, state sovereignty, *jus cogens*, international crime, *aut dedere aut judicare*, complementarity principle, International Criminal Court, subsidiarity

The present study describes the nature, scope and application of universal jurisdiction as an important tool against impunity in international criminal law, in a straight forward manner, where inquiry into the recent developments of universal jurisdiction is undertaken. Forthwith, the formation of the principle of universal jurisdiction - especially its practical application - must be guided by international consensus, not through advocacy action of states with short term and narrow objectives. The thesis seeks to identify and observe how far the law of universal jurisdiction has actually evolved and how far we should expect it to evolve in the near future, considering its restraints and challenges. It is argued that the concept of state sovereignty, which constitutes the greatest impediment on the exercise of universal jurisdiction, has seen various changes to its fundamentals elements in the 21st Century. The aim is to look at the universality principle, not as an isolated part, but as part of a broader framework in modern international law and thus special attention is given to the relationship between universal jurisdiction and the principle of *aut dedere aut judicare*. These principles are interrelated, yet distinct, parallels in deterring commission of the most heinous offences of international concern and should be studied together. In addition, the recently emerging notion of subsidiarity in the context of universal jurisdiction is introduced; hence using subsidiarity as a modality to enhance the exercise and foreseeability in the application of universal jurisdiction within the modern jurisdictional regime.

Anotace (Czech)

Klíčová slova: univerzální jurisdikce, univerzální princip, státní suverenita, *jus cogens*, mezinárodní zločin, *aut dedere aut judicare*, princip komplementarity, Mezinárodní trestní soud, subsidiarity

Předkládaná práce se zaměřuje na princip univerzální jurisdikce jako nástroj proti beztrestnosti v mezinárodním trestním právu. Povaha, rozsah a aplikace jsou popsány na základě aktuálního vývoje zásady. V současné době se utváření principu univerzality, hlavně jeho praktické uplatňování, musí řídit všeobecným konsenzem, nikoliv obhajobou států s krátkodobými a úzkými cíli. Účelem práce je popsat a prozkoumat, do jaké míry se univerzální jurisdikce skutečně vyvinula a do jaké míry lze předpokladat, že se v blízké budoucnosti bude nadále vyvíjet vzhledem k omezujícím normám, zejména principu státní suverenity. V 21. století se dá říci, a tato práce konstatuje, že pojem státní suverenity, v souvislosti s univerzální jurisdikcí, změnil svůj význam. Hlavním cílem předkládané práce je analyzovat princip univerzální jurisdikce v souvislosti a souladu s jinými koncepty mezinárodního práva. Zvláštní pozornost se věnuje vztahu mezi univerzální jurisdikcí a zásadou *aut dedere aut judicare*. Tyto dva principy jsou vzájemně propojené a přestože se v mnohém liší, musí být posuzovány jako paralely určené k zastavení nejhanebnějších trestných činů mezinárodního zájmu. Na závěr se dizertační práce zabývá analýzou subsidiarity v souvislosti s univerzální jurisdikcí. Proto se doporučuje možnost použití subsidiarity jako modality pro uplatnění univerzální jurisdikce a taktéž předejití zneužívání a zvýšení předvídatelnosti při výkonu univerzální jurisdikce v rámci moderních jurisdikčních režimů.