

# Universal Jurisdiction and the International Criminal Court

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## I. INTRODUCTION

IN INTERNATIONAL LAW, THE TERM “JURISDICTION” refers to the aspect of a State’s sovereignty, comprising of the sum of its judicial, legislative, and administrative competences.<sup>1</sup> A State exercises its criminal jurisdiction over an act by virtue of the principles of territoriality, active personality, passive personality, as well as the protective, and the universality principles.<sup>2</sup>

The territorial linkage principle implies that a State has jurisdiction over any crime committed on its territory.<sup>3</sup> It includes jurisdiction over acts that have direct effects on a State’s territory as well as those committed on board crafts flying its flag.<sup>4</sup> The active personality (or nationality) principle gives a

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<sup>1</sup> I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1999) at 301; M. Henzelin, *Le Principe de l’Universalité en Droit Pénal International*, (Bruylant, Bruxelles: Helbing & Lichtenhahn, 2000) at 15, para. 35.

<sup>2</sup> *United States of America v. Laurence John Layton* (1981), 509 F. Supp. 212 (United States District Court for the Northern District of California) [hereinafter *Layton*]; *United States v. Yunis*, 681 F. Supp. 896 at 900 and 901.

<sup>3</sup> Henzelin, *supra* note 1 at 22; Brownlie, *supra* note 1 at 303. Among the first treaties of international law in relation to the territorial principle was the *Treaty of International Penal Law* which recognised the validity of prosecution based on territoriality irrespective of the nationality of the “actor” or the injured. See: *Treaty of International Penal Law*, signed at Montevideo on 23 January 1889, (1935) 29 A.J.I.L. at 638 [hereinafter *Treaty of International Penal Law*].

<sup>4</sup> *The Case of the S.S. “Lotus”* (1927), P.C.I.J., Ser. A, No. 10 [hereinafter *Lotus*]; *Layton*, *supra* note 2; W. Schabas, *An Introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 2001) at 60 and 63; Henzelin, *ibid.* at 24.

State jurisdiction over the perpetrator of a crime when he or she is its national or has his or her domicile or residence in that State, notwithstanding the place where the crime was committed.<sup>5</sup> A State may prosecute perpetrators for crimes committed against its nationals by virtue of the passive personality principle.<sup>6</sup> The protective principle justifies a State's jurisdiction over offences that threaten its vital interests such as its sovereignty, security, or some important governmental function.<sup>7</sup>

In situations where a State has no link over a perpetrator of a crime by way of the aforementioned principles, it may invoke the principle of universality in order to prosecute this individual.<sup>8</sup> Generally, universal jurisdiction is exercised when the perpetrator enters a State's territory and is eventually arrested.<sup>9</sup> In certain situations, the detaining State may have the option of either prosecuting this individual or extraditing him or her to another State<sup>10</sup> that has jurisdiction resulting directly from the linkage principles.

Academics, judges, and Non-Governmental Organisation ("NGO") activists all refer to the principle of universality or universal jurisdiction within the context of international criminal law but they often disagree as to the definition and scope of this principle. This is because there are three forms of the universality principle, namely unilateral, delegated, and absolute universal jurisdiction, which may overlap in certain situations.

The following essay examines the three forms of universal jurisdiction. It focuses on international crimes that protect the integrity of individuals, in times of peace and armed conflict, that are provided for by international humanitarian and criminal law. Also, it looks at violations of international human rights law that affect human dignity and integrity, and give rise to universal jurisdiction. Finally, the essay discusses the applicability of universal jurisdiction to the

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<sup>5</sup> Henzelin, *ibid.* at 24 and 25; Brownlie, *supra* note 1 at 306 and 428–432. The flag principle is a distinct principle but is related to both the territorial and active personality principles because ships and aircraft that are registered in accordance to a State's internal law have that State's "nationality" conferred onto them and are an extension of that State's territory.

<sup>6</sup> Henzelin, *ibid.* at 28; Brownlie, *ibid.* at 306.

<sup>7</sup> Henzelin, *ibid.* at 29; Brownlie, *ibid.* at 307; *Attorney General of Israel v. Eichmann* (1968), 36 ILR (District Court) at para. 30, 34, and 38, [hereinafter *Eichmann* (District Court)]. The Jerusalem District Court stated that the protective principle gave Israel, the victim nation, the right to try anyone who assaults its very existence. This referred to the Nazi crimes that were directed largely against Jews and to the fact that the State of Israel was a State of the Jewish people. In effect, the exercising of the protective principle corresponds to legitimate self-defence.

<sup>8</sup> Henzelin, *ibid.* at 29.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* at 30.

crimes contained in the *Statute of the International Criminal Court*,<sup>11</sup> in relation to cases of a U.N. Security Council referral, as well as the duty of national criminal courts in the prevention of international crimes.<sup>12</sup>

## II. UNILATERAL UNIVERSAL JURISDICTION

### A. Definition

A State has jurisdiction to unilaterally prescribe, adjudicate, and enforce laws. This amounts to firstly establishing its laws with regards to persons,<sup>13</sup> secondly applying these laws to these persons in criminal proceedings,<sup>14</sup> and finally inducing or compelling compliance or punishing non-compliance, with these laws.<sup>15</sup> Thus, when a State exercises its unilateral jurisdiction by virtue of the principle of universality, it establishes its jurisdiction over a crime without it having a link to that crime. The State in question is acting without delegation of jurisdiction, over the matter by the State that is linked to the crime, and in the absence of any delegation (fictive or real) on behalf of the international community at large.<sup>16</sup>

#### 1. *The Lotus case*

The *Lotus*<sup>17</sup> case was decided before the Permanent Court of International Justice ("PCIJ"), which saw France alleging that Turkey had violated international law by judging and condemning the French Lieutenant that commanded the SS *Lotus*, a French vessel that collided with a Turkish ship, the *Boz Kourt*, resulting in the death of eight of the latter's crew and passengers.

The Court's premise was that Turkey's action was illegal only if a rule of international law prohibited it from exercising criminal jurisdiction over the French Lieutenant.<sup>18</sup> The PCIJ indicated to this effect:

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, [international law] leaves them in this respect a wide meas-

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<sup>11</sup> *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 [hereinafter *ICC Statute*].

<sup>12</sup> *Ibid.* at Preamble para. 5 and 6.

<sup>13</sup> Henzelin, *supra* note 1 at 173; *Restatement (Third) Foreign Relations Law of the United States* (1987) § 401(a) [hereinafter *Restatement (Third)*].

<sup>14</sup> Henzelin, *ibid.*; *Restatement (Third)*, *ibid.* at § 401(b).

<sup>15</sup> Henzelin, *ibid.* at 173; *Restatement (Third)*, *ibid.* at § 401(c).

<sup>16</sup> Henzelin, *ibid.* at 63.

<sup>17</sup> *Lotus*, *supra* note 4.

<sup>18</sup> *Ibid.* at 21 and 23.

ure 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.<sup>19</sup>

The PCIJ recognised that the territorial character of criminal law does not limit States from extending their action to offences committed outside their territory.<sup>20</sup>

## 2. *Concurrent jurisdiction and forum conveniens*

When a State unilaterally exercises universal jurisdiction over an offence, it goes without saying that at least one other State has jurisdiction based on one or more of the linkage principles. Some international crimes can have their effects or results in several States.<sup>21</sup> This raises the issue of *forum conveniens*, to which academics have proposed that firstly there must be a close connection or *effective link* between the perpetrator or the act in question and the State imposing criminal liability in this respect,<sup>22</sup> and secondly, when several States claim to have jurisdiction over a crime, the State that has the least interest in comparison with the other States should yield to them.<sup>23</sup>

It is maintained that a State should only exercise unilateral universal jurisdiction when it cannot extradite a perpetrator who is on its territory and his or her mere presence troubles the public order of that State.<sup>24</sup> In this type of scenario there is no concurrent jurisdiction issue.

Thus, in *Eichmann*,<sup>25</sup> the accused contended that Germany was solely competent to try him given the fact that the acts of which he was accused were committed in the course of the Nazi regime, and therefore it had *a priori* an effective link.<sup>26</sup> The Jerusalem District Court based its jurisdiction over the crimes in question on the principle of universality, because of their universal character.<sup>27</sup> It also invoked the passive personality principle given the fact that these

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<sup>19</sup> *Ibid.* at 19.

<sup>20</sup> *Ibid.*

<sup>21</sup> Henzelin, *supra* note 1 at 220.

<sup>22</sup> *Ibid.* at 222.

<sup>23</sup> *Ibid.* at 223–224. This is the preferable link theory to which the “reasonableness” test is applied in order to determine which State has the most interest in the matter. Based on this test however, if a State has apparently less interest in the matter, this does not imply that this State’s claim was illicit in terms of international law provided that it respected the principle of non-interference.

<sup>24</sup> *Ibid.* at 224.

<sup>25</sup> *Eichmann* (District Court), *supra* note 7 at para. 28. The facts of this case are discussed below.

<sup>26</sup> *Ibid.* at para. 33.

<sup>27</sup> *Ibid.* at para. 26 and 50.

crimes were committed with the intent to exterminate the Jewish people<sup>28</sup> and the protective principle because the crimes in question concerned the “vital interests” of the State of Israel, that is to say the Jewish people.<sup>29</sup>

The Supreme Court of Israel confirmed this reasoning and relied on *Lotus* as well in stating that it was legitimate for a State to have criminal jurisdiction over acts committed by a foreign national outside its territory.<sup>30</sup> It recognised that the unilateral application of the universality principle can be justified on the one hand if it is exercised in such a manner as to avoid interference in another State’s affairs, and on the other hand if it is exercised in an auxiliary fashion in order to avoid the perpetrator from going unpunished.<sup>31</sup> However, it made a practical observation that rendered the debate on *forum conveniens* somewhat theoretical, and further justified Israel’s exercise of unilateral universal jurisdiction:

We have also taken into consideration the possible desire to try the appellant in so far as the offences contained in the indictment were committed in those countries or their injurious effects extended thereto. But the practical reason that has justified the holding of the trial here is equally applicable to them. It is to be observed that we have not heard of a single protest by any of these countries against conducting the trial in Israel, and it is reasonable to believe that in face of Israel’s exercise of jurisdiction no other State will demand the right to do so itself. What is more, it is precisely the fact that the crimes in question and their effects have extended to numerous countries that drains the territorial principle of all content in the present case and justifies Israel in assuming criminal jurisdiction by virtue of the “universal” principle. For Israel to decide to which particular country the appellant should be extradited would have meant a completely arbitrary choice.<sup>32</sup>

## B. Principle of Non-Intervention and Unilateral Universal Jurisdiction

The *Lotus* case justifies the legality of the unilateral application of universal jurisdiction. Any State that objects to such an application must prove its illegality by virtue of international customary or conventional law.<sup>33</sup> Although the PCIJ indicated that the territoriality of criminal law is not an absolute principle of

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<sup>28</sup> *Ibid.* at para. 26 and 54.

<sup>29</sup> *Ibid.* at para. 50, 52, and 54.

<sup>30</sup> *Eichmann v. Attorney General of Israel* (1968), 36 ILR at 283 and 284 (Supreme Court of Israel) [hereinafter *Eichmann* (Supreme Court of Israel)].

<sup>31</sup> *Ibid.* at 298 and 299. The Court also recognised that Eichmann’s crimes, by virtue of their nature, were punishable by universal jurisdiction.

<sup>32</sup> *Ibid.* at 303.

<sup>33</sup> Henzelin, *supra* note 1 at 147; *Eichmann* (District Court), *supra* note 7 at 57.

international law and by no means coincides with territorial sovereignty,<sup>34</sup> it also pointed out that a State may not exercise its power in any form in the territory of another State.<sup>35</sup> Thus, a State oversteps the limits provided for by international law<sup>36</sup> and violates the sovereignty of another State by exercising physical constraint on the latter's territory, without permission, in cases where the former arrests or removes an individual by virtue of its government agents.<sup>37</sup> Such actions can possibly threaten international peace and security.<sup>38</sup>

States avoid unilaterally applying the principle of universality in order to maintain the integrity of their international relations, because this could be interpreted by the State where the crime has been committed as demonstrating a lack of trust in its judicial system, a violation of its sovereignty, or interference in its internal affairs.<sup>39</sup>

Very often, States opt for extradition of the accused whenever the situation presents itself. They therefore exercise universal jurisdiction unilaterally when extradition is not a likely option<sup>40</sup> because there is no extradition treaty, or because the perpetrator is likely not to be prosecuted in his or her national state. Moreover, situations can arise where the mere presence of an unpunished person on a State's territory can be seen as a threat to its *ordre public*<sup>41</sup> or where the territorial principle is drained of all effectiveness.

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<sup>34</sup> *Lotus*, *supra* note 4 at 19.

<sup>35</sup> *Ibid.* at 18–19.

<sup>36</sup> *Ibid.* at 19.

<sup>37</sup> Henzlin, *supra* note 1 at 175. For example in *Eichmann* (District Court), *supra* note 7, where Israeli agents abducted Eichmann on Argentinean soil. Another example of abduction is the *Alvarez-Machain* case where the U.S.A. abducted a Mexican national on Mexican territory who was suspected of having tortured and assassinated an American member of the DEA. This case however did not deal with the principle of universality. See *United States v. Humberto Alvarez-Machain*, 504 U.S. 655; 112 S. Ct. 2188; 119 L. Ed. 2d 441; 1992 U.S. (Supreme Court of the United States, 15 June 1992).

<sup>38</sup> U.N. Doc. S/4349 (1960) at para. 1 and 2. The Security Council passed a resolution declaring that Eichmann's abduction affected Argentina's sovereignty, and could have endangered international peace and security if it were repeated. Also, the Security Council requested Israel to make appropriate reparations to Argentina.

<sup>39</sup> Henzlin, *supra* note 1 at 180.

<sup>40</sup> *Ibid.* at 29.

<sup>41</sup> *Ibid.* at 129.

### III. DELEGATED UNIVERSAL JURISDICTION

#### A. Definition

The original judicial competence over a crime belongs to another State, that either renounces it, yields, or delegates its jurisdiction in favour of the State where the perpetrator is found.<sup>42</sup> This principally occurs by virtue of a bilateral or multilateral treaty.<sup>43</sup>

Traditionally, piracy was prosecutable by virtue of universal jurisdiction under customary international law<sup>44</sup> given the fact that no State would have jurisdiction because these acts would be committed on the high seas. Several international conventions regarding the law of the sea have now codified this rule.<sup>45</sup>

Also, universal jurisdiction for crimes resulting from trafficking in human beings was traditionally favoured because it was often extremely difficult if not impossible to determine the place where the crime was committed, as in the case of piracy.<sup>46</sup> Several conventions were adopted in the first half of the century under the auspices of the League of Nations relating to trafficking in human beings<sup>47</sup> and slavery.<sup>48</sup>

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<sup>42</sup> *Ibid.* at 71 and 244.

<sup>43</sup> *Ibid.* at 251 and 254.

<sup>44</sup> *Ibid.* at 270. Piracy under customary international law is also subject to absolute universal jurisdiction.

<sup>45</sup> *Convention on High Seas*, U.N.T.S. 450 (29 April 1958) at 11, arts. 15 and 19; *United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF 62/122 (10 December 1982) at arts. 101, 105, and 110.

<sup>46</sup> *Treaty of International Penal Law*, *supra* note 3.

<sup>47</sup> Thus, the *International Convention for the Suppression of the White Slave Traffic*, (1910) 7 Martens NR (3d) 252, 211 Consol TS 45, and the *International Convention for the Suppression of the Traffic in Women of Full Age*, Geneva (11 October 1933), provide for the punishment of perpetrators even when the acts constituting the crime have taken place in different States. Also, the *International Convention for the Suppression of the Traffic in Women and Children*, Geneva (30 September 1921), imposes the obligations of States to search for and to punish the persons responsible for the crimes, and to adopt measures regarding extradition.

<sup>48</sup> With respect to slavery, the *Slavery Convention of 1926*, 60 L.N.T.S. 253, imposes on States the obligations to prevent and suppress the slave trade, and to adopt appropriate measures with a view to preventing and suppressing the embarkation, disembarkation, and transport of slaves in their territorial waters and upon all vessels flying their respective flags. Of the analogous United Nations conventions regarding traffic in persons and slavery which evidently outlaw these acts, only the *Convention for the Suppression of the Traffic in Persons* makes the enumerated crimes extraditable offences; See *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 96 U.N.T.S. 271 at art. 8.

### 1. *The crime of apartheid*

The *Apartheid Convention*<sup>49</sup> instates universal jurisdiction for this crime, and persons charged may be tried by a competent tribunal of any State Party which may acquire jurisdiction over the person of the accused or by an international penal tribunal.<sup>50</sup> It obliges States Parties to adopt legislative, judicial, and administrative measures to prosecute, bring to trial, and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts of apartheid, whether or not such persons reside in the territory of the State in which the acts are committed, or are nationals of that State.<sup>51</sup> Jurisdiction could also extend to nationals of some other State, and even to stateless persons.<sup>52</sup>

### 2. *The Geneva Conventions of 1949 and Additional Protocol I of 1977*

All four *Geneva Conventions*<sup>53</sup> oblige States Parties to enact legislation in order to provide effective penal sanctions both for persons committing, or ordering to be committed, any of the grave breaches defined in the *Geneva Conventions*.<sup>54</sup> This obligation makes applicable such legislation to any person who commits a grave breach, whether a national of a State Party or that of an enemy State.<sup>55</sup>

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<sup>49</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid*, (1976) U.N.T.S. 1051 at 244 [hereinafter *Apartheid Convention*]. The prohibition of apartheid has been recognised by the International Court of Justice as being customary international law; See *Barcelona Traction, Light and Power Company, Limited*, [1970] I.C.J. Reports at 51, para. 103 [hereinafter *Barcelona Traction*].

<sup>50</sup> *Apartheid Convention*, *ibid.* at art. V. The provision regarding the international tribunal was inspired from the *Genocide Convention*, art. VI, see *infra*. Unfortunately, the *Convention* has not been ratified by several States, namely: South Africa, United States, Canada, Germany, Spain, France, Italy, the United Kingdom, and Switzerland; See: Henzelin, *supra* note 1 at 347.

<sup>51</sup> *Apartheid Convention*, *ibid.* at art. IV(b).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 75 U.N.T.S. 31 at art. 49 (1) (12 August 1949) [hereinafter *Geneva Convention I*]; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, 75 U.N.T.S. 85 at art. 50 (1) (12 August 1949) [hereinafter *Geneva Convention II*]; *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 75 U.N.T.S. 135 at art. 129 (1) (12 August 1949) [hereinafter *Geneva Convention III*]; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 75 U.N.T.S. 287 at art. 146 (1) (12 August 1949) [hereinafter *Geneva Convention IV*].

<sup>54</sup> *Geneva Convention I*, *ibid.* at art. 50; *Geneva Convention II*, *ibid.* at art. 51; *Geneva Convention III*, *ibid.* at art. 130; *Geneva Convention IV*, *ibid.* at art. 147.

<sup>55</sup> J. Pictet, *Commentary I Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: International Committee of the Red Cross, 1952) at art. 49 [hereinafter *Commentary I*]; J. Pictet, *Commentary II Geneva Conventions for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of*



The *Geneva Conventions* also impose on States Parties the duty to try or extradite (*aut dedere aut judicare*) those responsible for grave breaches. This translates in the obligation to search for persons responsible for the above-mentioned acts and to bring such persons, regardless of their nationality, before their own courts.<sup>56</sup> Thus, as soon as a State Party is aware that a person on its territory has committed this type of offence, it has the duty to make sure that such person is arrested and prosecuted without delay.<sup>57</sup>

Alternatively, a State Party may, in accordance with its national 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<sup>58</sup>”. In order for an alleged perpetrator to be extradited, the requesting State must furnish evidence that the charges against the accused are “sufficient,” and the presented facts would justify proceedings being taken in the country to which application is made for extradition. Also, the pertinent provisions of the *Geneva Conventions* do not preclude surrendering the perpetrator to an international penal tribunal.<sup>59</sup>

Furthermore, *Additional Protocol I to the Geneva Conventions*<sup>60</sup> states that the provisions of the *Geneva Conventions* relating to the repression of grave breaches apply to the analogous provisions regarding the repression of grave breaches set out in the *Protocol*.<sup>61</sup> In relation to extradition, the States Parties must “give due consideration to the request of the State in whose territory the alleged offence

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*Armed Forces at Sea* (Geneva: International Committee of the Red Cross, 1952) at art. 50 [hereinafter *Commentary III*]; J. Pictet, *Commentary III Geneva Conventions relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1952) at art. 129 [hereinafter *Commentary III*]; J., Pictet, *Commentary IV Geneva Conventions relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1952) at art. 146 [hereinafter *Commentary IV*].

<sup>56</sup> *Geneva Convention I*, *supra* note 53 at art. 49(2); *Geneva Convention II*, *supra* note 53 at art. 50(2); *Geneva Convention III*, *supra* note 53 at art. 129(2); *Geneva Convention IV*, *supra* note 53 at art. 146(2).

<sup>57</sup> *Commentary I*, *supra* note 55 at art. 49; *Commentary II*, *supra* note 55 at art. 50; *Commentary III*, *supra* note 55 at art. 129; *Commentary IV*, *supra* note 55 at art. 146.

<sup>58</sup> *Geneva Convention I*, *supra* note 53 at art. 49(2); *Geneva Convention II*, *supra* note 53 at art. 50(2); *Geneva Convention III*, *supra* note 53 at art. 129(2); *Geneva Convention IV*, *supra* note 53 at art. 146(2).

<sup>59</sup> *Commentary I*, *supra* note 55 at art. 49; *Commentary II*, *supra* note 55 at art. 50; *Commentary III*, *supra* note 55 at art. 129; *Commentary IV*, *supra* note 55 at art. 146.

<sup>60</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (8 June 1977) [hereinafter *Additional Protocol I*].

<sup>61</sup> *Ibid.* at art. 85(1).

has occurred."<sup>62</sup> A State Party is free to choose whether it shall proceed with prosecution or opt for extradition instead. This is subject to the national legislation of the particular State and to any other applicable treaties to the situation,<sup>63</sup> as is the case with the *Geneva Conventions*. It must however cooperate in extradition matters when circumstances permit, by giving favourable consideration to a request for extradition from a country justifying its legal interest in the prosecution based on the territorial or passive personality linkage principles for instance.<sup>64</sup>

### 3. Torture

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>65</sup> obliges States to take the necessary measures in order to establish jurisdiction over torture when committed on a State's territory,<sup>66</sup> on a ship or aircraft registered in that State,<sup>67</sup> or when the offender,<sup>68</sup> or the victim<sup>69</sup> is a national of a State Party. The *Convention* also indicates that States Parties must adopt measures as may be necessary to establish their jurisdiction over such offences in cases where the offender is present in the State's territory and it does not extradite him or her.<sup>70</sup>

Although the *Convention* creates an obligation to prosecute or to extradite (*aut dedere aut judicare*) for offences constituting torture,<sup>71</sup> it is less demanding regarding States' obligation to prevent cruel, inhuman, and degrading treatment or punishment for it refers solely to acts committed in the territories under their jurisdiction.<sup>72</sup>

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<sup>62</sup> *Ibid.* at art. 88(2).

<sup>63</sup> C. Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at para. 3577.

<sup>64</sup> *Ibid.* at para. 3588.

<sup>65</sup> G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)] [hereinafter *Convention Against Torture*].

<sup>66</sup> *Ibid.* at art. 5(1)(a).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at art. 5(1)(b).

<sup>69</sup> *Ibid.* at art. 5(1)(c).

<sup>70</sup> *Ibid.* at art. 5(2).

<sup>71</sup> *Ibid.* at art. 6(1).

<sup>72</sup> *Ibid.* at art. 16(1).

## IV. ABSOLUTE UNIVERSAL JURISDICTION

### A. Definition

A State exercises jurisdiction over a crime the nature of which affects the interests of all States<sup>73</sup> and justifies its repression as a matter of international policy,<sup>74</sup> even against the wishes of the State having territorial or any other form of jurisdiction.<sup>75</sup>

### B. *Delicta Juris Gentium*

Crimes that may be characterised as *delicta juris gentium* can be subject to absolute universality. Thus, the Jerusalem District Court in *Eichmann* indicated that the crimes in the Israeli municipal law<sup>76</sup> incorporated universally recognised principles of international law.<sup>77</sup>

The Supreme Court of Israel in the appeal judgement indicated that the notion of *delicta juris gentium* pertains to international crimes having long been recognised by international customary law.<sup>78</sup> These crimes constitute acts which damage vital international interests, impair the foundations and security of the international community, and violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations.<sup>79</sup>

It referred to piracy *jure gentium*, as a classic example of such a crime of international customary law.<sup>80</sup> Slavery and apartheid would be other examples of these types of international crimes:

[L]'admission même que l'esclavage et l'apartheid sont prohibés par le droit international ne signifie pas encore que les États ont le droit de poursuivre et de juger selon le principe de l'universalité les personnes qui ont commis ces types d'actes.

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<sup>73</sup> M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 512.

<sup>74</sup> Brownlie, *supra* note 1 at 307.

<sup>75</sup> Henzelin, *supra* note 1 at 81. This State also may be acting by virtue of a "transcendent duty," "divine law," or "natural law."

<sup>76</sup> *Nazi and Nazi Collaborators (Punishment) Law*, 5710/1950 at arts. 1(a)(1), (2), (3), and 3(a).

<sup>77</sup> *Eichmann* (District Court), *supra* note 7 at 26. These included crimes against the Jewish people (that were considered by the Court as equivalent to genocide), crimes against humanity, war crimes, and the crime of membership of an enemy organisation.

<sup>78</sup> *Eichmann* (Supreme Court of Israel), *supra* note 30 at 291.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at 292.

*L'internationalisation de la réprobation attachée à certaines infractions ne les rend pas pour autant poursuivables et jugeables par tous les États. À l'inverse, avec le raisonnement de l'universalité absolue, la seule qualification de ces deux infractions de delicta juris gentium suffit pour les rendre poursuivable et jugeables selon le principe de l'universalité.*<sup>81</sup>

The International Tribunal for the Former Yugoslavia ("ICTY") in *Furundzija*<sup>82</sup> examined the nature of the prohibition against torture in international law and the *erga omnes* obligation of preventing this act derived from *jus cogens*, which gave rise to absolute universal jurisdiction.

### *1. The prohibition of torture in international law*

The *Furundzija* case stated that the practice of torture is of the same rank as piracy and the slave trade in that those who commit such acts are considered to be *hostis humani generis*, that is enemies of all mankind.<sup>83</sup> The eradication of torture has resulted in the creation multiple customary rules and treaties having a particularly high status in the international normative system.<sup>84</sup> Of comparable importance are the principles prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples' self-determination.<sup>85</sup>

### *2. The obligation to prevent torture*

The prohibition against torture imposes a positive obligation on States, which goes beyond simply prohibiting and punishing acts of torture.<sup>86</sup> States are obliged to prevent potential breaches of the prohibition against torture.<sup>87</sup> They are required to adopt national measures of implementation of this prohibition without failure,<sup>88</sup> and abolish any law that purports to be contrary to the prohibition against torture.<sup>89</sup>

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<sup>81</sup> Henzelin, *supra* note 1 at 381 and 382.

<sup>82</sup> *Prosecutor v. Furundzija*, Case No.: IT-95-17/1-T (Judgement, 10 December 1998) [hereinafter *Furundzija* (Trial Chamber)]; This judgement was confirmed on appeal: *Prosecutor v. Furundzija*, Case No.: IT-95-17/1-A (Appeals Judgement, 21 July 2000).

<sup>83</sup> *Furundzija* (Trial Chamber), *ibid.* at para. 147.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at para. 148.

<sup>87</sup> *Soering*, Series A 161, (1989) at para. 90.

<sup>88</sup> *Furundzija* (Trial Chamber), *supra* note 82 at para. 149.

<sup>89</sup> *Ibid.* at para. 150.

### 3. The prohibition against torture as to a peremptory norm of *jus cogens*

Because certain international crimes either threaten the peace and security of mankind or shock the conscience of humanity, it can be concluded that these crimes are part of *jus cogens*:<sup>90</sup>

The argument is less compelling, though still strong enough, if only one of these two elements is present. Implicit in the first, and sometimes in the second element, is the fact that the conduct in question is the product of state-action or state-favoring policy. Thus, essentially, a *jus cogens* crime is characterized explicitly or implicitly by state policy or conduct, irrespective of whether it is manifested by commission or omission. The derivation of *jus cogens* crimes from state policy or action fundamentally distinguishes such crimes from other international crimes. Additionally, crimes which are not the product of state action or state-favoring policy often lack the two essential factors which establish the *jus cogens* status of a particular crime.<sup>91</sup>

In determining whether an international crime has reached the status of *jus cogens* one must take into account the historical legal evolution of the crime,<sup>92</sup> the number of States that have outlawed the crime at the national level, and the number of prosecutions based on this crime, as well as their characterisation.<sup>93</sup>

The prohibition against torture is of a higher rank than other rules of international treaty and customary law,<sup>94</sup> because of its importance and the values it protects. Evidence of this lies firstly on the fact that no human rights treaty or

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<sup>90</sup> M.C. Bassiouni, "Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: *Jus Cogens* and Obligation *Erga Omnes*" (1996) 59 *Law & Contemp. Probs.* at 69–71.

<sup>91</sup> *Ibid.* Each *jus cogens* crime, however, does not necessarily reflect the co-existence of all the elements. Aggression is on its face a threat to peace and security, but not all acts of aggression actually threaten the peace and security of humankind. While genocide and crimes against humanity shock mankind's conscience, specific instances of such actions may not threaten peace and security. Similarly, slavery and slave-related practices and torture also shock the conscience of humanity, although they rarely threaten the peace and security. Piracy, almost non-existent nowadays, neither threatens peace and security nor shocks the conscience of humanity, although it may have at one time. War crimes may threaten peace and security; however, their commission is only an aggravating circumstance of an already existing condition of disruption of peace and security precisely because they occur during an armed conflict, whether of an international or non-international character. Furthermore, the extent to which war crimes shock the conscience of humanity may depend on the context of their occurrence and the quantitative and qualitative nature of crimes committed.

<sup>92</sup> *Ibid.* Thus, the more international instruments that exist to evidence the condemnation and prohibition of a particular crime support the proposition that the crime has risen to the level.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Furundzija* (Trial Chamber), *supra* note 82 at para. 153.

customary rule permit derogation from this prohibition,<sup>95</sup> and secondly that international criminal law instruments also outlaw torture:<sup>96</sup>

Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.<sup>97</sup>

Thus, characterising the prohibition against torture as *jus cogens* consequently renders void any legislative, administrative or judicial act authorising torture<sup>98</sup> and any treaty contrary thereto.<sup>99</sup> Any proposition to the contrary would drain the prohibition of all its strength. Perpetrators benefiting from such “unlawful”

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<sup>95</sup> *Ibid.* In addition to the *Convention Against Torture*, *supra* note 65, several international and regional human rights instruments expressly prohibit torture and allow no derogation thereto, such as the *International Covenant on Civil and Political Rights*, (1966) 999 U.N.T.S. 171 at art. 7; the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 (4 November 1950) art. 3; the *African [Banjul] Charter on Human and Peoples' Rights*, adopted 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) at art. 5; the *Inter-American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 at art. 5(2), the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, E.T.S. 126, entered into force 1 February 1989; and the *Inter-American Convention to Prevent and Punish Torture*, 1985, O.A.S. Treaty Series No. 87.

<sup>96</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907 at art. 4 (regarding humane treatment); *Geneva Convention I*, *supra* note 53 at arts. 3, 12, and 50; *Geneva Convention II*, *supra* note 53 at arts. 3, 12, and 51; *Geneva Convention III*, *supra* note 53 at arts. 3, 13, 14, and 130; *Geneva Convention IV*, *supra* note 53 at arts. 3, 27, 31, and 147; *Additional Protocol I*, *supra* note 60 at art. 75; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, art. 4 [hereinafter *Additional Protocol II*]; *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946 at 50–55, art. II(1)(c) [hereinafter *Control Council Law No. 10*]; *Statute of the Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (2000) at arts. 2(f), 3(a); *Statute of the International Tribunal for the Former Yugoslavia*, U.N. Doc. S/RES/827 (1993) at arts. 2(b), 5(f) [hereinafter *ICTY Statute*]; *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/RES/955 (1994) at arts. 3(f), 4(a) [hereinafter *ICTR Statute*], *ICC Statute*, *supra* note 11 at arts. 7(1)(f), 8(2)(a)(ii), 8(2)(c)(i); also, art. 55(1)(b) protects persons under investigation from torture.

<sup>97</sup> *Furundzija* (Trial Chamber), *supra* note 82 at para. 154.

<sup>98</sup> *Ibid.* at para. 155.

<sup>99</sup> *Vienna Convention of the Law of Treaties*, U.N.T.S., vol. 1155 at 331, art. 53 [hereinafter *Vienna Convention*].

national measures may nevertheless be prosecuted and held responsible for their acts either in their own State under a subsequent regime or in another State.<sup>100</sup>

#### **4. The prohibition against torture amounts to an obligation erga omnes**

The prohibition against torture imposes upon States an obligation *erga omnes* which is one that is owed towards all other members of the international community,<sup>101</sup> in contrast to an obligation *inter partes* which refers to obligations *vis-à-vis* another State.<sup>102</sup> With regards to this notion, the International Court of Justice ("ICJ") in the *Barcelona Traction* case stated:

[Obligations *erga omnes*] derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ... ; others are conferred by international instruments of a universal or quasi universal character.<sup>103</sup>

Given the fact that all members of the international community have a collective legal interest in the protection of their rights resulting from obligations *erga omnes*, the violation of this obligation can give rise to a claim of compliance on behalf of every member of the international community, to the insistence on the fulfilment of this obligation or to the discontinuance of the alleged breach.<sup>104</sup>

#### **5. The prohibition against torture and universal jurisdiction**

A logical consequence of the *jus cogens* character of the prohibition against torture is that every State has the right to investigate, prosecute, and punish or extradite alleged perpetrators of these acts who are found on their territory or any territory under their jurisdiction.<sup>105</sup>

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. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found

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<sup>100</sup> *Furundzija* (Trial Chamber), *supra* note 82 at para. 155.

<sup>101</sup> *Ibid.* at para. 151.

<sup>102</sup> Henzelin, *supra* note 1 at 395.

<sup>103</sup> *Barcelona Traction*, *supra* note 49 at 32.

<sup>104</sup> *Furundzija* (Trial Chamber), *supra* note 82 at para. 151; *Prosecutor v. Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, ICTY Appeals Chamber, 29 October 1997, online: The United Nations <<http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>> at para. 36 [hereinafter *Blaskic*].

<sup>105</sup> *Furundzija* (Trial Chamber), *ibid.* at para. 156.

by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.<sup>106</sup>

Thus, in the second *Pinochet* judgement<sup>107</sup> Lord Browne-Wilkinson, referring to *Furundzija*,<sup>108</sup> stated that the *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed,<sup>109</sup> and that such crimes are punishable by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.<sup>110</sup>

Furthermore Lord Millet,<sup>111</sup> who dissented on other grounds, referred to the authority of *Eichmann* with regards to universal jurisdiction and pointed out firstly that there is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad and secondly that the systematic use of torture, and analogous crimes such as piracy, war crimes and crimes against peace are subject to universal jurisdiction under customary international law.

## V. UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT

### A. The Jurisdiction of the International Criminal Court

During the Preparatory Committee discussions the German delegation promoted the universal jurisdiction of the International Criminal Court, based on the premise that the crimes were punishable by virtue of the principle of universality.<sup>112</sup> This was in contrast to the International Law Commission ("ILC")

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<sup>106</sup> *Ibid.*

<sup>107</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet*, [2000] 1 A.C. 147; [1999] 2 All E.R. 97; [1999] 2 W.L.R. 827 [hereinafter *Pinochet Judgement 2*].

<sup>108</sup> *Furundzija* (Trial Chamber), *supra* note 82.

<sup>109</sup> *Pinochet Judgement 2*, *supra* note 107.

<sup>110</sup> *Ibid.*, referring to *Demjanjuk v. Petrovsky* (1985), 603 F. Supp. 1468, 776 F. 2d 571; See also *Filartiga v. Pena-Irala* (1980), 630 F. 2d 876, 890 (2d Cir.), stating that a person who commits torture is equivalent in international law to a pirate or a slave trader, that is, *hostis humani generis*.

<sup>111</sup> *Ibid.* See Dissent one by Lord Millet. His dissent was because he would allow the appeal in respect of the charges relating to the offences in Spain and to torture and conspiracy to torture, wherever and whenever carried out, as opposed to the majority who considered that Senator Pinochet could be extradited only in respect of a very limited number of charges.

<sup>112</sup> R. Lee, ed., *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer, 1999) at 132 and 133; O. Triffterer, ed., *Commentary on*



Draft Statute, which provided for inherent jurisdiction only for genocide and an "opt-in" jurisdiction for crimes against humanity, aggression, serious violations of the laws and customs applicable in armed conflict, and treaty crimes such as hijacking and hostage-taking.<sup>113</sup>

At the Rome Diplomatic Conference, there were four proposals regarding the Court's jurisdiction. The German delegation continued to campaign for universal jurisdiction, irrespective of States having to separately give their consent regarding the core crimes.<sup>114</sup> The Republic of South Korea proposed that the Court have automatic jurisdiction based on the principles of territoriality, nationality, passive personality, and the jurisdiction of the custodial State.<sup>115</sup> The United Kingdom had proposed the Court have jurisdiction only when both the custodial and territorial States had consented to the exercise of jurisdiction by the International Criminal Court ("ICC").<sup>116</sup> Finally, the United States maintained that the Statute would require minimally the consent of the State of nationality of the accused, and alternatively both the consent of the State of nationality and the consent of the territorial State, in order to prosecute.<sup>117</sup>

In effect, if the ICC were to have universal jurisdiction, the Statute would have had few participants.<sup>118</sup> The proposal by the Republic of South Korea appeared to be an acceptable alternative to universal jurisdiction by several delegations,<sup>119</sup> however there was not enough support overall. As a gesture of compromise, the Bureau of the Committee of the Whole put forth a proposal that set aside the German proposal<sup>120</sup> and therefore automatic universal jurisdiction for the ICC was dead in the water.

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*the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, (Baden-Baden: Nomos Verlagsgesellschaft, 1999) at 332 and 333.

<sup>113</sup> *Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July, Chapter II.B.I., United Nations General Assembly Official Records, Forty-ninth Session, Supplement No. 10, A/49/10 (1994) at 29–140, arts. 20(e) and 21(1)(a) [hereinafter ILC Draft Statute]; Schabas, supra note 4 at 61.*

<sup>114</sup> Lee, *supra* note 112 at 132 and 133; Triffterer, *supra* note 112 at 334.

<sup>115</sup> Lee, *ibid.* at 133; Triffterer, *ibid.* at 335.

<sup>116</sup> Triffterer, *ibid.* at 335 and 336. The requirement of the custodial State giving its consent was deleted eventually due to concern that obtaining cumulative consents would be difficult.

<sup>117</sup> *Ibid.* at 336.

<sup>118</sup> Lee, *supra* note 112 at 135.

<sup>119</sup> *Ibid.* at 136.

<sup>120</sup> U.N. Doc. A/CONF.183/C.1/L.59 (10 July 1998) at 10–12. This proposal adopted the Korean suggestion regarding genocide. In relation to war crimes and crimes against humanity, three options were presented namely the Korean suggestion, the acceptance of both the

## B. Potential Universal Jurisdiction By U.N. Security Council Referral

Article 12 of the *ICC Statute* was adopted as the final result of the negotiation process. The Court's jurisdiction *ratione materiae* is limited to territoriality and active personality when a State Party refers a situation to the Court and when the Prosecutor begins an investigation *proprio motu*.<sup>121</sup> *A contrario*, the U.N. Security Council, acting under Chapter VII of the United Nations Charter, may refer a situation to the Prosecutor,<sup>122</sup> in which case there is no jurisdictional limitation. Accordingly, in these situations the Court may potentially exercise universal jurisdiction because the territory of every State in the world, including Non-Party States, becomes subjected to the Court's mechanism.<sup>123</sup> Thus, the important issue is raised regarding the applicability of universal jurisdiction to the core crimes of the *ICC Statute*. It may be argued that this debate is moot because by acting under Chapter VII of the U.N. Charter, the Security Council obliges the entire international community,<sup>124</sup> and therefore there need not be a determination as to the applicability of universal jurisdiction to ICC core crimes.<sup>125</sup> Based on the former, can it be also argued that, if the U.N. Security Council were to request the ICC to defer the commencement or continuance of an investigation or prosecution while acting under Chapter VII, that the entire international community would be precluded from prosecuting any alleged crimes as well? Does the determination of the U.N. Security Council confer or retract the applicability of universal jurisdiction to the ICC core crimes?

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territorial and custodial States, and the sole acceptance of State with active personality jurisdiction.

<sup>121</sup> *Ibid.* at art. 12(2) and 13.

<sup>122</sup> *Ibid.* at art. 12(2) and 13(b).

<sup>123</sup> L. Sadat & R. Carden, "The New International Criminal Court: An Uneasy Revolution" (2000) 88 No. 3 *Geo. L.J.* at 404.

<sup>124</sup> *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 at art. 25.

<sup>125</sup> This is analogous to the establishment of the ICTY and ICTR which were established under Chapter VII. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Appeals Chamber Oct. 2, 1995) at para. 34-36.

## C. Applicability of Universal Jurisdiction To the Core Crimes of the ICC Statute: Crimes Against Humanity and War Crimes

### 1. *The international military tribunal at Nuremberg*

The *London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*<sup>126</sup> established the International Military Tribunal (“IMT”) for the trial of war criminals whose offences had no particular geographical location.<sup>127</sup> It stated that each of the Signatories were to take the necessary steps to make available for the investigation of the charges and the trial of the major war criminals who were to be tried by the IMT, whether they were detained by them or were not in their territories.<sup>128</sup>

The *Charter of the International Military Tribunal* was considered to be “the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law.”<sup>129</sup> The IMT had jurisdiction over crimes against peace, war crimes, and crimes against humanity.<sup>130</sup> Thus, by establishing the Nuremberg Tribunal, the Signatory Powers did together what any one of them might have done singly because any nation has the right to set up special courts to administer law.<sup>131</sup> Accordingly, the IMT administered the law provided for by its Charter, and stated that, by punishing the individuals who commit crimes against international law, the provisions of this law can be enforced.<sup>132</sup>

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<sup>126</sup> *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London*, 8 U.N.T.S. 279 (8 August 1945).

<sup>127</sup> *Charter of the International Military Tribunal, Annexed to the London Agreement*, 8 U.N.T.S. 279 at art. 1 (8 August 1945) [hereinafter *IMT Charter*].

<sup>128</sup> *Ibid.* at art. 3.

<sup>129</sup> “Judicial Decisions: International Military Tribunal (Nuremberg), Judgement and Sentences, 1 October 1946” (1947), 41:1 A.J.I.L. at 216 [hereinafter *Trial of the Major War Criminals at Nuremberg*].

<sup>130</sup> *IMT Charter, supra* note 127 at art. 6; See also “Charter of the International Military Tribunal for the Far East” in, *A Decade of American Foreign Policy: Basic Documents, 1941–1949, Prepared at the request of the Senate Committee of Foreign Relations by the Staff of the Committee and the Department of State* (Washington, DC: Government Printing Office, 1950) at art. 5.

<sup>131</sup> *Trial of the Major War Criminals at Nuremberg, supra* note 129 at 216; *The Charter and Judgement of the Nuremberg Tribunal History and Analysis*, U.N. Doc. A/CN.4/5 (1949) at 80. The U.N. Secretary-General stated in this memorandum that the IMT possibly and probably considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State.

<sup>132</sup> *Trial of the Major War Criminals at Nuremberg, supra* note 129 at 221. The U.N. General Assembly unanimously adopted a resolution affirming the principles of international law

## 2. *Military tribunals*

The trials of the war criminals of the Second World War held by military tribunals of the Victorious Powers and by national courts confirmed the notion that certain crimes could be defined by international law and be judged by all States. For instance, *Control Council Law No. 10*, under which these military tribunals were established, reproduced the substantive provisions of the *IMT Charter*.<sup>133</sup> This reasoning allowed the prosecution and judging of certain criminals that could not otherwise be brought to justice because the States in question did not always have jurisdiction based on territoriality, on the nationality of the accused, nor on the nationality of the victims since they were often not nationals of the Allied Powers.

### i. *United States military tribunals*

In the *Hostages Trial*,<sup>134</sup> the U.S. Military Tribunal sitting at Nuremberg was trying several former high-ranking German army officers that were responsible for offences committed by troops under their command, that is to say the reprisal killings of civilians in the occupied territories of Greece, Yugoslavia, Albania, and Norway. The Tribunal stated that “the inherent nature of a war crime is ordinarily itself sufficient justification to attach in the courts of the belligerent into whose hands the alleged criminal had fallen.”<sup>135</sup>

The Tribunal was faced with the task of justifying its jurisdiction because the crimes in question were not committed in Germany nor against nationals of the Allied Powers. It had the option of basing its jurisdiction on the active personality principle because Allied Powers’ administration by virtue of the *Berlin Declaration*<sup>136</sup> gave them power over the German nationals, however it chose to invoke the principle of universality, exercised concurrently in this case:

[War crimes] are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at time place persons in power who are not, for one reason or another, inclined to punish the offenders. The

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recognised by both the Charter of the IMT its judgement; G.A. Res. 95, U.N. Doc. A/64/Add.1 (1946) at art. 188.

<sup>133</sup> *Control Council Law No. 10*, *supra* note 96 at art. II.

<sup>134</sup> *The Hostages Trial* (1949), 8 L.R.T.W.C. 34 [hereinafter *The Hostages Trial*].

<sup>135</sup> *Ibid.* at 54.

<sup>136</sup> Henzlin, *supra* note 1 at 410; See *The Hadamar Trial* (1947), 1 L.R.T.W.C. 46 at 53 [hereinafter *The Hasamar Trial*]. The assumption of supreme authority in Germany by the four great Powers through the Declaration of Berlin, dated 5 June 1945, the United States being the local sovereign in the United States zone of occupation and deriving jurisdiction both from the principle of territoriality and from the principle of personality, the accused being German nationals.

captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offence was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.<sup>137</sup>

The *Hadamar Trial*<sup>138</sup> saw the employees of a sanatorium, mostly doctors and nurses, charged with “violation of international law,” namely aiding and abetting the killing of 400 Polish and Soviet nationals by lethal injection and poisonous drugs.<sup>139</sup> The United States Military Commission found that its jurisdiction was based on the principles of territoriality, passive personality, and active personality. However, it also recognised the universality principle:

[T]he general doctrine recently expounded and called “universality of jurisdiction over war crimes” which has the support of the United States War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for the same reason, the criminal would otherwise go unpunished.<sup>140</sup>

In the *Trial of Lothar Eisentrager and Others*,<sup>141</sup> the accused were charged with acts of treachery in assisting Japan in waging war against the United States in violation of the laws and customs of war. They committed these acts while residing in China, between the 8 and 15 May 1945, therefore violating Germany’s unconditional surrender against the U.S. and its allies.<sup>142</sup> The accused contended that the U.S. Military Commission lacked jurisdiction because the U.S. had jurisdiction over acts in its own territory or that which it occupied, and therefore Chinese law applied to the situation.<sup>143</sup> However, the Military Commission indicated that it had jurisdiction because war crimes were crimes against the *jus gentium*, and that the laws and usages of war were of universal application.<sup>144</sup>

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<sup>137</sup> *The Hostages Trial*, *supra* note 134 at 54–55.

<sup>138</sup> *The Hadamar Trial*, *supra* note 136.

<sup>139</sup> *Ibid.* at 47.

<sup>140</sup> *Ibid.* at 53.

<sup>141</sup> *Trial of Lothar Eisentrager and Others* (1949), 14 L.R.T.W.C. 8 [hereinafter *Trial of Lothar Eisentrager*].

<sup>142</sup> *Ibid.* at 8.

<sup>143</sup> *Ibid.* at 15; Henzelin, *supra* note 1 at 411. The accused had not committed any crimes against Chinese law, and therefore China could not technically prosecute them.

<sup>144</sup> *Trial of Lothar Eisentrager*, *supra* note 141 at 15.

**ii. British military tribunals**

The *Almelo Trial* was held by a British Military Court in the Netherlands where the accused were charged with killing a British prisoner of war and a Dutch civilian during the German occupation of the latter State.<sup>145</sup> Although the Court stated that British jurisdiction was established as far as international law was concerned by virtue of the passive personality principle, it also invoked other grounds for jurisdiction.<sup>146</sup>

In contrast, the *Zyklon B*<sup>147</sup> case was held in Germany, but was more problematic because the actions of the three German industrialists charged with complicity of murdering interned and allied civilians by means of poison gas had their effects outside the British Zone of Germany, in Auschwitz, Poland.

In both these cases, the British Military Court took the approach taken by the U.S. Military Tribunal in the *Hadamar Trial* discussed above. It justified its jurisdiction in both cases by virtue of the principles of "universality of jurisdiction over war crimes," the passive personality principle derived from its "direct interest in punishing the perpetrators of crime if the victim was a national of an ally engaged in a common struggle against a common enemy," as well as the active personality principle resulting from the nationality of the Germans in the territory under its administration.<sup>148</sup>

**3. National courts**

**i. The *Rauter* case**

In *Rauter*, the Netherlands Special Court of Cassation, in confirming the decision of the Netherlands Special Court, indicated that when trying war crimes or analogous crimes, the task of the Netherlands judicature was not limited to national justice but rather in "giving expression to the sense of justice of the community of Nations, which sense had been most deeply shocked by such crimes."<sup>149</sup>

**ii. The *Demjanjuk* case**

John Demjanjuk, known as "Ivan the Terrible," was a Ukraine national who allegedly served as a guard at the concentration camp of Treblinka during the

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<sup>145</sup> *The Almelo Trial* (1947), 1 L.R.T.W.C. 35 at 42 [hereinafter *The Almelo Trial*].

<sup>146</sup> *Ibid.*

<sup>147</sup> *Zyklon B* (1947), 1 L.R.T.W.C. 93 [hereinafter *Zyklon B*].

<sup>148</sup> *The Almelo Trial*, *supra* note 145 at 42; *Zyklon B*, *ibid.* at 103.

<sup>149</sup> *Trial of Hans Albin Rauter* (1949), 14 L.R.T.W.C. 89 at 109.

Second World War. After it became known that he was a guard in a Nazi concentration camp, his U.S. certificate of naturalisation was revoked.<sup>150</sup>

Israel requested and obtained his extradition in order to try him for crimes against the Jewish people, crimes against humanity, and war crimes.<sup>151</sup> The U.S. Sixth Circuit Appeals Court stated that Israel had the authority to prosecute him based on the universality principle. It noted that that some crimes are so universally condemned that the perpetrators thereof are enemies of all people, thus allowing any State that had custody to punish them accordingly.<sup>152</sup> In effect Israel was acting on behalf of all States, which made irrelevant the issues of Israel's status in 1942-43, the nationality of the accused, and the *situs* of the alleged crimes.<sup>153</sup>

An Israeli Court found him guilty and sentenced him to death for crimes against humanity, however this judgement was eventually overturned by the Israel Supreme Court when new evidence was produced after the disintegration of the U.S.S.R.<sup>154</sup>

### iii. The *Finta* case

In *Finta*,<sup>155</sup> the accused had been charged with crimes against humanity and war crimes because he was a captain in the Royal Hungarian Gendarmerie. He was allegedly the commander of an investigative unit at Szeged when 8,617 Jewish persons were detained in a brickyard, forcibly stripped of their valuables, and deported under dreadful conditions to concentration camps as part of the Nazi regime's "final solution." He was acquitted of all charges.<sup>156</sup>

Writing for the majority, Cory J. stated that the jurisdiction of Canadian courts is, in principle limited to the principle of territoriality, in that Canada has exclusive sovereignty over all persons, citizens, or aliens, and all property, real or personal, within its own territory,<sup>157</sup> and Canadian courts may only prosecute those crimes which have been committed within the Canadian territory.<sup>158</sup>

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<sup>150</sup> *United States v. Demjanjuk* (1981), 518 F. Supp.1362 (N.D. Ohio).

<sup>151</sup> *Re Extradition of Demjanjuk* (1985), 612 F. Supp. 544 (N.D. Ohio).

<sup>152</sup> *Demjanjuk v. Petrovsky* (1985), 776 F. 2d 571 (U.S. Court of Appeals, 6th Cir.) at 582.

<sup>153</sup> *Ibid.* at 583.

<sup>154</sup> *Demjanjuk v. State of Israel*, Cr. A. 347/88 (Special Issue) at 395-396.

<sup>155</sup> *R. v. Finta*, [1994] 1 S.C.R. 701 [hereinafter *Finta*].

<sup>156</sup> *Ibid.* at para. 148. Mr. Dallos, a survivor of the brickyard who died in 1963, had given evidence at Finta's trial in absentia by the People's Tribunal of Szeged shortly after the war, regarding the existence of a Lieutenant Bodolay, who might have been in charge of the confinement and deportation of the Jews at the brickyard. The trial judge ruled that, although the evidence was of a hearsay nature, it was admissible.

<sup>157</sup> *Ibid.* Cory J. cited *Lotus* to this respect; See *Lotus*, *supra* note 4.

<sup>158</sup> *Finta*, *ibid.* at para. 170.

However, he added that the principle of universality is an exception to the principle of territoriality.<sup>159</sup> Thus crimes that are subject to universal jurisdiction under Canadian law can only be prosecuted if the following apply. Firstly, the act or omission was committed outside the territorial boundaries of Canada; secondly it constitutes a crime against humanity or a war crime; thirdly if this act or omission had been committed in Canada, it would have constituted an offence against the laws of Canada in force at the time; fourthly the provisions of the Canadian law cover this act or omission and; fifthly at the time of the act or omission, Canada, in conformity with international law, could have exercised jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and subsequent to this moment the person is present in Canada.<sup>160</sup> Thus, the nature of the act committed is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction.<sup>161</sup>

#### iv. The *Polyukhovich* case

Mr. Polyukhovich was an Australian citizen accused of committing war crimes in the Ukraine during the Second World War while it was under German Occupation. The plaintiff challenged the constitutionality of the *War Crimes Act*<sup>162</sup> and claimed that the Australian Parliament was *ultra vires* in adopting it because there was no Australian legislation in force that criminalised the conduct of an Australian citizen or resident regarding these acts in the Ukraine<sup>163</sup> when they were committed. The majority of the High Court ruled that the law was valid with respect to external affairs and did not invalidly usurp the judicial power of the Commonwealth.

Justice Toohey of the majority indicated that there appears to be general agreement that war crimes and crimes against humanity are subject to universal jurisdiction either because those committing these offences lose their national character and become subjected to any State's jurisdiction, or because the heinous and grave nature of these crimes justifies the application of the universality principle.<sup>164</sup> An international crime affects the moral interests of humanity and not only those of a particular locality. Universal jurisdiction, therefore,

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<sup>159</sup> *Ibid.* at para. 171.

<sup>160</sup> *Ibid.* at para. 173.

<sup>161</sup> *Ibid.* at para. 180.

<sup>162</sup> *The War Crimes Act 1945 (Cth)* as amended by *The War Crimes Amendment Act, 1988 (Cth)*. The jurisdiction set out in this law was restricted to individuals who were presently Australian residents or citizens.

<sup>163</sup> *Polyukhovich v. Commonwealth of Australia and Another* (1991), 101 A.L.R. 545 (High Court of Australia).

<sup>164</sup> *Ibid.*



must almost inevitably prevail in order to satisfy the need for international accountability.<sup>165</sup> However, Toohey J. was also of the opinion that there was insufficient evidence of any international obligation to seek out war criminals and bring them to trial.

## D. Applicability of Universal Jurisdiction To the Core Crimes of the ICC Statute: Genocide

### 1. *The Eichmann case*

The Jerusalem District Court analysed the international character of the crime of genocide. It referred to the *Advisory Opinion on the Question of Reservations to the Convention on Genocide* of the ICJ,<sup>166</sup> which stated that the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>167</sup> outlawed this crime in international law in times of peace and war alike.<sup>168</sup> Despite the *Genocide Convention's* clear wording on the matter,<sup>169</sup> the Jerusalem District Court concluded that the absence of a provision establishing the principle of universality together with the failure to constitute this international criminal tribunal were grave defects in the *Convention*,<sup>170</sup> and therefore did not consider the reference in Article VI to territorial jurisdiction to be exhaustive. In effect, it was the Jerusalem District Court's view that the application of universal jurisdiction to the crime of genocide was not based on the Israeli law or on the Court's broad interpretation of Article VI of the *Convention*, but was derived from the basic nature of the crime as a crime of the utmost gravity under international law.<sup>171</sup>

Based on what the Supreme Court of Israel indicated in its judgement, it can be concluded that that both absolute and unilateral universal jurisdiction

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<sup>165</sup> *Ibid.*

<sup>166</sup> *Advisory Opinion on the Question of Reservations to the Convention on Genocide*, [1951] I.C.J. Reports at 15 [hereinafter *I.C.J. Advisory Opinion on the Genocide Convention*].

<sup>167</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (1951) [hereinafter *Genocide Convention*].

<sup>168</sup> *I.C.J. Advisory Opinion on the Genocide Convention*, *supra* note 166 at 23; *Genocide Convention*, *ibid.* at art. 1.

<sup>169</sup> Article VI of the *Convention* indicates that a competent tribunal shall try persons charged with genocide by that State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction, with respect to those Contracting Parties which shall have accepted it.

<sup>170</sup> *Eichmann* (District Court), *supra* note 7 at 38 and 39. The Court compared the *Genocide Convention* to the four *Geneva Conventions of 1949*, which provide for universal jurisdiction with regard to "grave breaches."

<sup>171</sup> *Ibid.* at 39; *Eichmann* (Supreme Court of Israel), *supra* note 30 at 304. The Supreme Court of Israel confirmed this point.

applied in the matter. The former was justified by offences *jure gentium* over which every State had the power to punish,<sup>172</sup> whereas the latter was warranted in situations where a State would prosecute in order to prevent the offender from escaping punishment because extradition to the State with territorial or personal jurisdiction was not effective.<sup>173</sup>

## VI. DISCUSSION OF CONFLICTING INTERPRETATIONS

TODAY, THE REASONING ADOPTED IN *EICHMANN* regarding applicability of the universality principle to genocide is somewhat debatable.<sup>174</sup> Firstly, no customary legal norm existed, at least in 1948, recognising universal jurisdiction for genocide, as is reflected in the opposing views during the debates of the U.N. Sixth Committee.<sup>175</sup> Secondly, the *Convention* does not impose on States the duty to try or extradite (*aut dedere aut judicare*) which is a common characteristic of other international offences subject to universal jurisdiction. Thirdly, the International Law Commission ("ILC") supported universal jurisdiction regarding genocide in the 1996 *Draft Code of Crimes against the Peace and Security of Mankind*.<sup>176</sup>

According to the [ILC] commentary, this 'extension' was justified because universal jurisdiction obtained on the basis of customary international law 'for those States that were not parties to the *Convention* and therefore not subject to the restriction contained therein'. Thus, the Commission has admitted that universal jurisdiction cannot be read into the *Convention*, contrary to what many have suggested. Moreover, it seems to have taken the position that universal jurisdiction exists for States that are not party to the *Genocide Convention*, but not for those that are, a bizarre conclusion. Can it be true that States may reduce their international human rights obligations that exist at customary law by means of multilateral conventions that impose less stringent norms? A more logical result would be that widely ratified multilateral treaties tend to confirm the real content of customary international law, which will inevitably be less expansive than conventional obligations.<sup>177</sup>

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<sup>172</sup> *Eichmann* (Supreme Court of Israel), *ibid.* at 298 and 299.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures*, [1993] I.C.J. Reports at 325 [hereinafter *Application of the Convention*], see the opposing views of *ad hoc* JJ. Kreca and Lauterpacht.

<sup>175</sup> W. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000) at 362.

<sup>176</sup> United Nations, *Report of the International Law Commission on the Work of its Forty-Eight Session*, U.N. Doc. A/51/10 (6 May–26 July 1996) at 42, art. 8.

<sup>177</sup> Schabas, *supra* note 175 at 365.

Thus, French courts have not deviated from the wording of Article VI of the *Genocide Convention*.<sup>178</sup> Also, the German Federal Supreme Court held that although genocide may be prosecuted universally, German courts should only exercise jurisdiction if “legitimate points of contact” are established.<sup>179</sup> However, other caselaw supports universal jurisdiction for genocide such as the *Ntuyahaga*<sup>180</sup> case by the International Criminal Tribunal for Rwanda (“ICTR”).

Thus, the approach taken by the ICTY in *Furundzija*, mentioned above, can serve as an objective test regarding the applicability of the universality principle to the crime of genocide. Firstly, the ICJ has established that the principles contained in the *Genocide Convention* are customary law and are recognised by civilised nations as binding on States, even without any conventional obligation.<sup>181</sup> Secondly, there is an obligation in international law both to prevent and punish the crime of genocide, in times of peace and war.<sup>182</sup> Thirdly, the prohibition of genocide amounts to *jus cogens*,<sup>183</sup> in fact it has long been regarded as one of the few undoubted examples of such a peremptory norm.<sup>184</sup> In effect, the prohibition of genocide is reflected not only in the widely ratified *Genocide Convention* but also in the Statutes of the ICTY<sup>185</sup> and ICTR,<sup>186</sup> which bind all States. Fur-

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<sup>178</sup> *Ibid.* at 366; *Javor et al.*, Order of Tribunal de grande instance de Paris, 6 May 1994; upheld on appeal by the Paris Court of Appeal, 24 October 1994 and by the Court of Cassation, Criminal Chamber, on 26 March 1996; *Dupaquier et al.*, Order of Tribunal de grande instance de Paris, 23 February 1995.

<sup>179</sup> German *Bundesgerichtshof*, *Urteil vom.*, 3 StR 215/98 (30 April 1999).

<sup>180</sup> *Prosecutor v. Ntuyahaga*, *Decision on the Prosecutor's Motion to Withdraw the Indictment*, Case No. ICTR-90-40-T (18 March 1999); See also Henzelin, *supra* note 1 at 442: the *Jorgic case*, *Oberlandesgericht Düsseldorf*, 2 StE 8/96 (5 January 1998). The Court condemned Jorgic for genocide and based itself on article 6.9 of the German Penal Code which allows the universal jurisdiction for genocide or when the facts of a case fall under the scope of an international convention which obliges Germany to prosecute and judge the criminal in question, if they or their victims have no link with Germany to justify the latter's jurisdiction.

<sup>181</sup> I.C.J. *Advisory Opinion on the Genocide Convention*, *supra* note 166 at 23; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, [1996] I.C.J. Reports at 226, para. 31; *Furundzija* (Trial Chamber), *supra* note 82 at para. 147; Schabas, *supra* note 175 at 3–4; Bassiouni, *supra* note 90 at 68.

<sup>182</sup> *Genocide Convention*, *supra* note 167 at art. VIII. The latter states that any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III; Schabas, *supra* note 175 at 447–503.

<sup>183</sup> *Vienna Convention*, *supra* note 99 at art. 53.

<sup>184</sup> *Application of the Convention*, *supra* note 174.

<sup>185</sup> *ICTY Statute*, *supra* note 96 at art. 4.

<sup>186</sup> *ICTR Statute*, *supra* note 96 at art. 2.

thermore, the prohibition is also contained in the *ICC Statute*.<sup>187</sup> Fourthly, the prevention and punishment of genocide amount to obligations *erga omnes*, as stated by the ICJ in several judgements.<sup>188</sup> Thus, it was intended that the *Genocide Convention* would be universal in scope; its purpose being purely humanitarian and civilising. The contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest.<sup>189</sup>

Based on this test, one can conclude that the universality principle is applicable to genocide, specifically absolute universal jurisdiction due to the nature of the crime. Accordingly, the ICJ has indicated that the obligation each State has to prevent and to punish the crime of genocide is not territorially limited by the *Convention*.<sup>190</sup>

## VII. CONCLUSION

WHEN STATES PROSECUTE A CRIME THAT HAS NOT been committed on their territory, they usually base their jurisdiction on as many linkage principles as possible, out of an abundance of caution.<sup>191</sup> This is because universal jurisdiction is rarely exercised and therefore it has not evolved into a widely accepted practice. This cautiousness is also used to justify prosecution in cases where another State also asserts jurisdiction concurrently based on, for instance, territoriality or nationality.

Unfortunately, States have traditionally been unwilling or unable to prosecute international crimes, even in the case of *jus cogens* crimes. This reality prompted the creation of the ICC with it having jurisdiction over the most serious crimes in international law. However, when States met in the summer of 1998 and adopted the *ICC Statute*, there was not enough support for a Court

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<sup>187</sup> *ICC Statute*, *supra* note 11 at art. 6.

<sup>188</sup> *Barcelona Traction*, *supra* note 49 at 32; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia) (Preliminary Objections)*, [1996] 91 I.C.J. Reports at 616, para. 31 [hereinafter *Application of the convention (Preliminary Objections)*].

<sup>189</sup> I.C.J. *Advisory Opinion on the Genocide Convention*, *supra* note 166 at 23.

<sup>190</sup> *Application of the convention (Preliminary Objections)*, *supra* note 188.

<sup>191</sup> *Layton*, *supra* note 2. The Northern California District Court had to decide whether it lacked jurisdiction over trying the accused for events that had taken place outside the United States. Laurence Layton, an American citizen, had been indicted for criminal actions that occurred in Guyana which resulted in the death of a U.S. Congressman and the wounding of the Deputy Chief of Mission for the United States in the Republic of Guyana. The Court found that it had proper jurisdiction over the matter at hand. Although Mr. Layton was an American citizen and the jurisdiction over him was justified by virtue of the active personality principle, the Court recognised that the jurisdiction in this case could also have been based on the protective, territoriality, and passive personality principles.

having universal jurisdiction which resulted in the ICC having territorial and active personality jurisdiction. Although the *ICC Statute* is a reflection of *opinio juris* of States at the time of its adoption and a codification of existing law in many ways, it does not hinder the evolution of international customary law.<sup>192</sup>

The Preamble of the *ICC Statute* states that the Parties thereto recognise that the most serious crimes of concern to the international community as a whole must not go unpunished,<sup>193</sup> because they endanger the protected legal values of the international community<sup>194</sup> by threatening the peace, security, and the well-being of the world.<sup>195</sup> Thus, the ICC has been established and has jurisdiction not over all crimes but only the most serious crimes of concern to the international community<sup>196</sup>.

A State may exercise delegated universality with regards to some of the ICC core crimes, namely grave breaches to the *1949 Geneva Conventions*,<sup>197</sup> as well as the crimes of apartheid<sup>198</sup> and torture.<sup>199</sup> A State that is Party to both the *ICC Statute* and to the treaties recognising universal jurisdiction, cannot interpret its international obligations as being diminished because the former provides for less stringent obligations by excluding universality and by offering the possibility of opting-out with regards to war crimes.<sup>200</sup>

In addition thereto, a State may exercise unilateral and absolute universal jurisdiction regarding the entirety of these crimes. In the former case, one must prove, based on the *Lotus* precedent, that there is a rule in international law prohibiting such action in order for the jurisdiction to be invalidated.<sup>201</sup> In the latter, absolute universal jurisdiction applies given the fact that the core crimes constitute *delicta juris gentium*.

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<sup>192</sup> *ICC Statute*, *supra* note 11 at art. 10.

<sup>193</sup> *ICC Statute*, *ibid.* at Preamble, para. 4.

<sup>194</sup> Triffterer, *supra* note 112 at 9 and 26.

<sup>195</sup> *ICC Statute*, *supra* note 11 at Preamble, para. 3; See Triffterer, *ibid.* at 9. For instance, genocide, deportation, or expulsion are no longer internal affairs of States, but endanger the entire international community.

<sup>196</sup> *ICC Statute*, *ibid.* at Preamble, para. 9, art. 1; See Triffterer, *ibid.* at 11, 30–31, and 57; Bassiouni, *supra* note 90 at 74.

<sup>197</sup> *ICC Statute*, *supra* note 11 at art. 8(2)(a).

<sup>198</sup> *Ibid.* at art. 7(1)(j).

<sup>199</sup> *Ibid.* at art. 7(1)(f) and 8(2)(a)(ii).

<sup>200</sup> *Ibid.* at art. 124; Lee, *supra* note 112 at 135 and 136. This was primarily a political act of compromise, as are several other section of the ICC statute, in order to accommodate the interests of France.

<sup>201</sup> See also: M. Scharf, "Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States", (2001), 35 No. 2 *New Eng. L. Rev.* at 363.

The States Parties to the ICC *Statute* are determined to put an end to these crimes and contribute to their prevention;<sup>202</sup> they have resolved to guarantee lasting respect for and the enforcement of international justice.<sup>203</sup> The effective prosecution of these crimes requires States taking measures, such as prosecution, at the national level and international cooperation regarding the exercise of jurisdiction by the ICC.<sup>204</sup> Thus, a new trend is slowly emerging to this effect.<sup>205</sup> It is the duty of every State Party to exercise its criminal jurisdiction over those responsible for international crimes generally,<sup>206</sup> not only the core crimes enumerated in the ICC *Statute*.<sup>207</sup>

Nevertheless, one must acknowledge that there is no international customary rule with respect to the application of universal jurisdiction pertaining to the ICC core crimes.<sup>208</sup> However, "application" should be differentiated from "applicability." The ICC was created to compensate for the deficiencies of national criminal jurisdictions<sup>209</sup> based on the complementarity principle<sup>210</sup> where a State is unwilling or unable to effectively punish the crimes under the ICC *Statute*, because it cannot guarantee independent, objective, and adequate prosecutions and/or sentences.<sup>211</sup> There must be cooperation between national jurisdictions and the ICC for international criminal law to be enforced. This synergy implies that national jurisdictions may apply the principle of universality on condition that the international community has no reason to interfere, and if there is such a reason, the decision should fall with the ICC, so as to avoid competition with the latter.<sup>212</sup>

The jurisdiction of the ICC, however, is quite far from universal jurisdiction and therefore a State should in turn apply the principle of universality to counter-balance the Court's shortcomings. In effect, a State cannot permit

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<sup>202</sup> ICC *Statute*, *supra* note 11 at Preamble, para. 5.

<sup>203</sup> *Ibid.* at Preamble, para. 11.

<sup>204</sup> *Ibid.* at Preamble, para. 4; See Triffterer, *supra* note 112 at 11–12.

<sup>205</sup> Bassiouni, *supra* note 90 at 66. However this is not absolute. Besides the aforementioned cases where universal jurisdiction was applied (e.g. *Finua*, the first *Pinochet* case, etc.), there have been recent cases in Senegal, Belgium, Denmark, and France. See: R. Brody, "The Prosecution of Hissène Habré—An 'African Pinochet'" (2001) 35:2 *New Eng. L. Rev.* at 321; Henzelin, *supra* note 1 at 443–445.

<sup>206</sup> ICC *Statute*, *supra* note 11 at Preamble, para. 6.

<sup>207</sup> Triffterer, *supra* note 112 at 13.

<sup>208</sup> Schabas, *supra* note 4 at 61; Scharf, *supra* note 201 at 374; Bassiouni, *supra* note 90 at 66.

<sup>209</sup> Triffterer, *supra* note 112 at 36.

<sup>210</sup> ICC *Statute*, *supra* note 11 at art. 17.

<sup>211</sup> Triffterer, *supra* note 112 at 36.

<sup>212</sup> *Ibid.*

situations where not exercising universal jurisdiction would result in impunity, which justified this application in the *Hostages Trial* and the *Eichmann* case for instance. A State may unilaterally act upon its legal interests derived from obligations *erga omnes*.<sup>213</sup> Such exercise should be in a last resort situation, where the State in question has cautiously taken every step to ensure that the perpetrator be punished by a State having a link to the infraction, in order to respect the principle of territoriality which is also *jus cogens*.<sup>214</sup> This approach is politically realistic and ultimately ensures that impunity does not reign. However, this does not imply that a State may resort to abducting an individual. A State should not “overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”<sup>215</sup>

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<sup>213</sup> *Blaskic*, *supra* note 104 at para. 36.

<sup>214</sup> Bassiouni, *supra* note 90 at 73; *Lotus*, *supra* note 4 at 19. Nevertheless, all States have the obligation not to allow their territory not to be used for purposes of acts contrary to the rights of other States, See *Corfu*, [1949] I.C.J. Reports at 22.

<sup>215</sup> *Lotus*, *ibid*.

