

Modalities of the Exercise of Universal Jurisdiction in International Law

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Abstract

It has become a trend today that states adopt universal jurisdiction in their domestic law. At the same time, the actual exercise of universal jurisdiction has often led to a dispute among states. While there are many ‘international’ aspects relating to this phenomenon, there is still no consensus among international scholars even over the scope of crimes that are subject to universal jurisdiction, let alone the modalities of its exercise. This confusion is caused by the way in which jurisdiction is conceptualized: while prevailing view sees jurisdiction as a right or entitlement attributed by international law, this view is premised on a particular understanding of the legal system of jurisdiction that sees it as a set of permissive rules of international law. However, it may not capture the reality of jurisdiction, where international law does not always regulate the assertion of prescriptive jurisdiction, while the actual exercise of jurisdiction is still subject to several restraint either in relation to other states or with regard to the rights of accused individuals.

Against this background, Part I of the dissertation re-examines the legal system of jurisdiction and applies it to the specific framework of universal jurisdiction. First, this study seeks to find the elements that actually restraint the exercise of jurisdiction in general. It concludes that the exercise of jurisdiction should be examined from the perspective of whether and to what extent it may secure effectiveness of enforcement, legitimacy (necessity) of claim, and foreseeability of law and forum. Building on this analysis, this study further seeks for a justifying ground of universal jurisdiction by applying the general framework of jurisdiction. It is suggested that at least the legitimacy (necessity) of claim is provided by the fact that states have been less interested in tolerating impunity for certain types of international crimes and also been more aware of the necessity for the exercise of jurisdiction in order to compensate for the failure of territorial or national states of the offender in the suppression of these crimes.

With those insights, Part II further explores a framework in which the conflict resulting from the concurrent claims of jurisdiction. The focus is on the idea of subsidiarity, which designates universal jurisdiction as a default mechanism. While this idea has been gaining support, it is pointed out that the feasibility of subsidiarity depends on how situations of inability and unwillingness are identified in a decentralized discourse. Regarding this, this study argues that the notion of obligation to prosecute can play a key role: a state of non-performance of obligation to prosecute can be conceived as an abusive use of power on the part of territorial or national states, thereby vesting the assessment of inability and unwillingness with certain objectivity. This provides a ground for legal discourse between territorial or national states and states exercising universal jurisdiction.

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List of Abbreviations

AJIL	American Journal of International Law
AIDI	Annuaire de l'Institut de Droit International
BYIL	British Yearbook of International Law
CLR	Criminal Law Review
EC	European Community
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
FRUS	Foreign Relations of the United States
GYIL	German Yearbook of International Law
Harv Int'l LJ	Harvard International Law Journal
Harv L Rev	Harvard Law Review
Hum Rts Q	Human Rights Quarterly
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILR	International Law Reports
ICLQ	International and Comparative Law Quarterly
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
Mich L Rev	Michigan Law Review
Modern L Rev	Modern Law Review
NYIL	Netherlands Yearbook of International Law
PCIJ	Permanent Court of International Justice
RdC	Recueil des Cours de l'Académie de droit international
RGDIP	Revue général de droit international public
YbIHL	Yearbook of International Humanitarian Law
YbILC	Yearbook of International Law Commission
ZaöRV	Zeitschrift für Ausländisches Öffrentliches Recht und Völkerrecht

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution

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Introduction

Universal criminal jurisdiction¹ is the assertion of jurisdiction over conduct committed outside the territory of the state asserting jurisdiction over the actions of a national of one state against a national of another. It is the assertion of jurisdiction over an act that has no link to the state exercising it in terms of the locus of the crime or the nationality of the offenders or victims. Having traditionally been asserted only with piracy, this basis of jurisdiction has been revitalised in the aftermath of the grave violations of human rights that have occurred since the 1990s.

At the same time, this phenomenon of judicial activism has caused conflict between states. Belgium's Law Relative to Serious Violations of International Humanitarian Law (adopted in 1993 and extended its scope in 1999; also known as 'the Act of 1993/1999')² provides a salient example in this regard. Many complaints were filed against both former and incumbent state officials under this law, which not only led to protests from the home states of those officials, but also gave rise to a novel situation amounting to an international litigation.³ Although Belgium subsequently amended the Act of 1993/1999 to renounce its

¹ The definition of universal jurisdiction varies among authors. Some define it in relation to the category of offence (piracy, genocide) or the nature of the offence (international crime). See, Restatement (Third) of the US Foreign Relations Law (1985), §404; The Princeton Principle on Universal Jurisdiction (2001), Principle 1, at 28. Others define it in relations to the scope of the state that may exercise it ('every state' or 'any state'). See, Z. Galicki, 'Preliminary Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', A/CN.4/571, 7 June 2006, para. 19; Randall (1988), at 788. The present study tries to avoid any preconceptions with regard to whether and how these elements are related to universal jurisdiction, which will be examined later, and prefers the definition focusing on the modality of exercising jurisdiction as presented above. See also, O'Keefe (2004), 745-746; The AU-EU Expert Report on the Principle of Universal Jurisdiction (2009), 8672/1/09 REV1, para. 8.

² Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, *Moniteur Belge*, 5 août 1993, 1775; *Moniteur Belge*, 23 mars 1999, 9286. This law established universal jurisdiction over acts of genocide, crimes against humanity, and war crimes, and also provided that the principle of individual immunity will not be applied to those crimes. See, Vandermeersche (2002), 80-99.

³ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 20 July 2012, ICJ Reports 2002, 3 [hereinafter Arrest Warrant case].

claim of universal jurisdiction, the repeal of the Act did not bring an end to the controversy over universal jurisdiction. Indeed, the theoretical problems as to the basis of and conditions for the exercise of universal jurisdiction are far from being resolved. At the same time, it has become increasingly common for states to enact legislation by which they establish universal jurisdiction over specific international crimes, such as acts of genocide or crimes against humanity. In these situations, the actual exercise of jurisdiction in application of that law still raises conflicts with the state where the crime was committed or the national state of the perpetrator.

On the other hand, there seems to be a growing awareness—if not consensus—among states that universal jurisdiction can be a useful tool for the fight against impunity with regard to certain serious crimes, such as genocide or crimes against humanity. In fact, it is the abusive use of universal jurisdiction, rather than its *raison d'être*, that has been the dominant source of concern today. Interestingly, states have started to seek a feasible framework for the modalities of the exercise of universal jurisdiction, arguing that it would prevent its abusive use.⁴ Given that an increasing number of states have adopted universal jurisdiction in their domestic law, it seems all the more vital to establish clear and feasible guiding principles for the exercise of jurisdiction.

That said, there remain controversies over the source of this principle, its nature and status in the international legal system, and the relevance to the other principles of international law, including sovereign equality, non-interference in internal affairs and the immunity of state officials. The diversity of opinions on these controversies and ambiguities, in fact, renders the common understanding of this principle almost impossible.

⁴ Algeria, A/C.6/67/SR.12, para. 43 (2012); Nigeria, A/C.6/67/SR.12, para. 68(2012); China, A/C.6/67/SR.13, para. 11 (2012); Botswana, A/C.6/67/SR.13, para. 13(2012).

In order to address these complex issues, it is important to highlight at the outset that, international law scholars have distinguished universal jurisdiction from other jurisdictional claims due mainly to the fact that the former lacks a link with crimes in question that other jurisdictional claims have, and that it is exercised over serious crimes such as genocide or crimes against humanity. Moreover, it is exactly the latter aspect—the nature of crimes or the values upon which those crimes infringe—that has been alleged to compensate the relative scarcity of state practice. At the same time, such a claim has been strenuously challenged by the states that have traditional jurisdictional links (territoriality and nationality), as a violation of the principle of sovereign equality and non-interference. Thus, a thorough examination of the relationship between a value claim and the legal structure of jurisdiction seems necessary in order to disentangle the curious situation regarding the debate over universal jurisdiction and to arrange it into a workable framework.

2.

Given the ideas examined above, the present study seeks to find a workable framework of jurisdiction by which a claim of universal jurisdiction can be assessed, by (re)examining the international rules governing jurisdiction and the relationship between universal jurisdiction and the emerging value claims, which have been gaining prominence in the debate. Before proceeding with the actual analysis, some points need to be clarified in order to properly frame the scope and focus of the study.

First of all, it is necessary to determine the scope of laws that international rules governing jurisdiction covers. It has traditionally been argued that the function of international law in prescribing the limits of jurisdiction is only relevant to the field of public law, as the courts of one state will generally not apply the public laws of another, whereas they will apply the

private law of another if it is regarded as the ‘proper’ law in dealing with the case.⁵ ‘Public laws’ means laws regulating conduct for implementing public policy and for the common good of the society in the court’s country. Examples of these laws include criminal law and tax law, which can be contrasted with private laws that set the ground rules for the creation of rights and duties between individuals, such as contract or property law.

However, the distinction between public law and private law is not absolute. For instance, tort law, which is usually classified as private law, may in some respects be regarded public, as it ‘prescribes rules of conduct for society’.⁶ Indeed, an English court refused to give effect to the letters rogatory issued by a US court during civil proceedings initiated by an American corporation under a provision of US antitrust law to recover damages for injury allegedly caused by a cartel formed by non-US companies. The court’s refusal was based on the grounds that the evidence had been sought as a matter of US government policy.⁷ As Bowett suggests, ‘where the civil jurisdiction of the State is an instrument of State policy, used as a means of exercising control over activities or resources in the interests of the State, then in principle such jurisdiction ought to be subject to the same governing rules of international law’.⁸

On the other hand, it must be borne in mind that criminal law, the subject of the present study, has its own peculiarities. In criminal matters, an accused is physically to be found in one place, and it is the state in whose custody the accused is found that is actually able to enforce the law. This dilemma underpins the vital role of mechanisms of international cooperation such as extradition that renders obtaining custody of the accused practicable. This stands in contrast to other fields that regulate corporative activities or activities

⁵ Jennings (1962), 210-211.

⁶ Lowe and Staker (2010), 335.

⁷ *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* [1978] AC 547.

⁸ Bowett (1982), 4.

relating to civil matters, for artificial persons can exist in many different jurisdictions, and for the purposes of civil jurisdiction over the individual, jurisdiction may be found even by the location of his/her assets.

Additionally, the ways in which each field of law has developed should be taken into consideration. Of particular note here is the difference between criminal law and economic law. In fact, these two had been the main battlefields for jurisdictional conflicts. On the one hand, the jurisdictional rules of criminal law had already been established within the first half of the twentieth century. On the other hand, it was not until after World War II that the jurisdictional issues in economic law (especially with regard to anti-trust law) began to emerge, as this period marked the start of a massive increase in transnational economic activity. Indeed, the ways the question of universal jurisdiction has developed in these two fields after WWII reveals some interesting differences. For example, in the field of economic law, the focus has been on the limits of the territorial scope of a state law; in particular, the validity and breadth of the ‘effects doctrine’ established in the US anti-trust cases. On the other hand, the jurisdictional issues in criminal law have been debated in relation to the extraterritorial scope of criminal jurisdiction of a state.

Accordingly, while the governing rules of international law can generally be applicable to the exercise of jurisdiction used as a means of exerting control over activities or resources in the public interests of the state, the present study also bears in mind the peculiarities of criminal law that may affect the conditions under which the general rules will or will not apply.

Second, the present study tries to locate the assertion of universal jurisdiction within the legal system of jurisdiction. In this regard, it should be noted that there is a trend in doctrines to deal with universal jurisdiction as a special category, assuming that the lack of any jurisdictional nexus renders universal jurisdiction quite distinct from other

jurisdictional grounds.⁹ In fact, doctrines have tended to view universal jurisdiction as a logical consequence of *jus cogens* norms,¹⁰ which allegedly override the normal framework of jurisdiction.

However, the present study is not premised on this assumption. Admittedly, it is hard to deny that the recent developments of the principle of universal jurisdiction have been affected by the concept of *jus cogens*. On the other hand, it is the very assumption—which rather simplistically classifies universal jurisdiction as a logical consequence of *jus cogens* norms—that seems to have provoked the current controversies. While proponents of a broad exercise of universal jurisdiction tend to emphasise that every state is entitled to assert jurisdiction over acts that violate *jus cogens* norms,¹¹ such an apparently unlimited assertion of universal jurisdiction has given rise to concerns that it would be incompatible with the established rules of international law.¹² In fact, it is not clear whether the *jus cogens* norm may justify the validity of any claims based upon it over any contrary norms. Thus, if indeed the basic jurisdictional rules of criminal law had been established in the first half of the twentieth century as suggested above, it is the relation between those rules and the *jus cogens* norms that should be reassessed. That is, it is how those jurisdictional rules have been affected, if not overridden, by the emergence of *jus cogens* norms that should be reviewed.

⁹ Colangelo (2006-2007), 161.

¹⁰ Orakhelashvili (2006), 288; Addis (2009), 142-144.

¹¹ It suffices to note at this stage that recourse is always made to the Furundžija judgment, in which the Trial Chamber observed the nature of universal jurisdiction as follows:

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

Prosecutor v. Furundžija, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 156.

¹² See the comments of governments, UN Doc. A/63/PV.105 (18 September 2009).

Third, the present study focuses on the matter of jurisdiction and does not discuss the matter of immunity as such. Admittedly, immunity is a central impediment to the application of law and both fields are inextricably linked. However, as Judges Higgins, Kooijmans, and Buergenthal have observed:

While the notion of ‘immunity’ depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other.¹³

Thus, it is still possible to assess the matter of jurisdiction distinctly from that of immunity.

3.

Against this background, Part I revisits the framework of jurisdiction. Chapter 1 examines the argument concerning the general framework of jurisdiction. Chapter 2 then explores into the argument on universal jurisdiction in light of the framework established in chapter 1. Part II addresses the modalities of jurisdiction. Chapter 3 critically examines the existing framework. Building on the critical analysis established in this chapter, chapter 4 explores if and how the idea of subsidiarity can be a feasible framework for the exercise of universal jurisdiction.

¹³ *Arrest Warrant case*, Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans, ICJ Reports 2002, 64 (para. 4).

Part I: Legal System of Jurisdiction

Universal jurisdiction is usually distinguished from other jurisdictional claims due mainly to the fact 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, asserting jurisdiction by a foreigner against a foreigner, where that conduct poses no threat to the vital interest of the state; that is, the assertion of jurisdiction where none of the jurisdictional links, such as territory, nationality or interest of state exist at the time of the commission of the alleged offence. Premised on that those links are a manifestation of an entitlement attributed by international law, doctrines have sought to find an alternative ground for the universal jurisdiction in international law that may replace jurisdictional links.

However, those efforts do not seem to have yielded a fruitful result. 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 (genocide, crimes against humanity, and war crimes), on what ground and to what extent it is established is still a source of confrontation. It can be argued that this instability is not peculiar to universal jurisdiction. On the contrary, if one takes a closer look at apparently established grounds of jurisdiction underpinned by certain links, one may notice that those links do not necessarily determine a permissive scope of jurisdictional claims. Moreover, whether those links are really an attribution provided by international law depends on how the international legal system pertaining to jurisdiction is conceived—whether it is governed by permissive rules or prohibitive ones. This is still a source of controversy. Given that jurisdictional links have been regarded as an indicator that distinguishes universal jurisdiction from other jurisdictional claims, it is all the more crucial to address the question of the status of those jurisdictional links within international legal system, before proceeding into the issue of universal jurisdiction.

Against this background, chapter 1 examines the argument concerning the general framework of jurisdiction, with particular focus on the status of jurisdictional links within the realm of international law. Chapter 2 then explores the argument on universal jurisdiction in light of the framework established in chapter 1.

Chapter 1: General Framework

This Chapter addresses the question of if and how international rules are relevant in regulating certain assertion of jurisdiction and how jurisdictional links are related to that regulation.

Before proceeding into the main argument, it is necessary to clarify certain basic concepts relating to the categorization of jurisdiction. As jurisdiction is not a single concept but consists of several aspects,¹ it is useful to categorize those aspects from the analytical point of view. In fact, there are mainly two approaches for this purpose: the first is to divide jurisdiction into two categories (jurisdiction to prescribe and jurisdiction to enforce),² which refers to the substance of the powers exercised; and the second is to divide it into three categories (jurisdiction to prescribe, adjudicate, and enforce),³ which generally, if not exactly, corresponds to the three branches of state authority. Each is formulated for practical purposes and may vary depending on the areas of law that they aim at.

In the field of criminal law, which this study focuses on, the primary distinction is made between criminalization and actual implementation, which seems comparable to the two-pronged approach. At the same time, this study does not deny that jurisdiction to enforce is further divided into two subcategories: adjudicative jurisdiction and executive jurisdiction. This is mainly related to the controversy over whether jurisdiction to

¹ Oppenheim/Jennings/Watts (1992), 456.

² E.g., Restatement (Second) of the US Foreign Relations Law (1965) (hereinafter Restatement Second), 20. Mann (1964), 13-14.

³ E.g., Restatement (Third) of the US Foreign Relations Law (1987) (hereinafter Restatement Third), §401. See also, Council of Europe, Extraterritorial Criminal Jurisdiction, reproduced in 3 Criminal Law Forum (1992) 441, 456; Shaw (2008), 649-651.

adjudicate should be distinguished from jurisdiction to prescribe and to enforce. Some argue that the power of the court may be subsumed under either jurisdiction to prescribe or jurisdiction to enforce, and there is no need to refer jurisdiction to adjudicate separately.⁴ Others maintain that crucial distinction should be made between jurisdiction to prescribe and jurisdiction to adjudicate,⁵ and jurisdiction to enforce is rather peripheral in this regard. As there is consensus that what matters is the distinction between the criminalization and the actual implementation,⁶ the difference comes in how they locate the function of the *application* of criminal law. In this regard, the former approach relates it to the power of the court, and contends that the application of a state's criminal law by its courts is simply the exercise of actualization of prescription.⁷ In contrast, the latter approach sees it covering the entire criminal judicial proceedings in a given case; including criminal investigation, prosecution, trial, and conviction, whether exercised by the courts or other executive organs.⁸

Admittedly, the application of criminal law having been regarded as a manifestation of prerogative power, a state's court does not apply a foreign criminal law. The power of judicial authorities is thus usually treated as premised on, and incidental to, the ambit of substantive criminal law.⁹ However, there are cases wherein while a substantive criminal law of a state is conceptually applicable, it may not be applied by its court because the

⁴ O'Keefe (2004), 737. See also, Lowe and Staker (2010), 316-317.

⁵ Tomschat, AIDI, 2005-I, 219, x7. See also, Kreß (2006), 564; Geneuss (2009), 949-950.

⁶ As for the former approach, O'Keefe submits that 'jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, *inter alia*, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalized'. O'Keefe (2004), 736-737. As for the latter approach, Tomschat similarly argues that '[w]hat is in issue here is jurisdiction to prescribe, i.e. the authority to enact legal rules making certain conduct a punishable offence under domestic law, and jurisdiction to adjudicate, i.e., the authority to implement the applicable law in a given case'. Tomschat, AIDI, 2005-I, 219, x7.

⁷ O'Keefe (2004), 737. See also, Bowett (1982), 1.

⁸ This is closer to the procedural tradition of continental legal systems. See, Reydam (2003), 4, note 29; Kreß (2006), 576-577; Geneuss (2009), 949, note 14.

⁹ Hirst (2003), 9-10.

principle of immunity is applicable under international law. Moreover, the decision on the initiation and continuance of criminal proceedings, either made by judicial or executive organs, involves not only the confirmation of the basis of jurisdiction but also the consideration of several elements such as the availability of criminal proceedings within other competent jurisdiction (the consideration of subsidiarity),¹⁰ which goes beyond the actualization of prescription. It is also submitted that this consideration of subsidiarity is made possible by seeing criminal judicial proceedings in their entirety, as the latter approach does. In short, the latter approach seems more appropriate to evaluate the actual exercise of jurisdiction in a specific case.

Distinguishing adjudicative jurisdiction from prescriptive jurisdiction may appear to be incompatible with the two-pronged approach that the present study adopts. Yet this is due merely to a difference in terminology and not in approach. As such, adjudicative jurisdiction referring to the entire process of criminal judicial proceedings can be seen as constituting a subcategory of jurisdiction to enforce. In this regard, enforcement jurisdiction, as is referred to by those commentators, denotes the exercise of authority to enforce without entailing judicial proceedings, which may also be placed as a subcategory of jurisdiction to enforce (in order to avoid confusion, it should be referred to as executive jurisdiction).

Accordingly, this study mainly adopts the following categorization: on the one hand, jurisdiction to prescribe, or prescriptive jurisdiction, refers in the criminal context to the authority of a state to determine the scope of application of its laws;¹¹ on the other, jurisdiction to enforce, or enforcement jurisdiction, refers in the criminal context, to the ability of a state to apply its criminal law in a given case through the courts, and through

¹⁰ Admittedly, these restrictions might not be imposed as a positive obligation, yet they are still worth addressing as such in terms of the conditions for the exercise of jurisdiction.

¹¹ Cassese et al. (2013), 278. Prescription by judicial ruling may occur when the scope of a particular statute is not clear. In that case, the courts might determine the reach of the statute. O'Keefe (2004), 736, n.3.

executive, or police action, which involves both adjudicative jurisdiction and executive jurisdiction.¹²

¹² Cassese et al. (2013), 278. Higgins prefers the division between jurisdiction to *prescribe* and jurisdiction to *apply*, instead of jurisdiction to *legislate* (prescribe) and jurisdiction to *enforce*, because the topic of immunity concerns whether there are exceptions to the authority to *apply* law within one's own territory. See, Higgins (1994), 78; see also Higgins (1984), 4. The present study basically agrees with this division, but follows the more commonly-used terminology.

1.1 International Rules Governing the Exercise of Jurisdiction

It is widely accepted today that territory is the primary basis of jurisdiction.¹³ However, as the transnational movement of people and goods increases and interdependence between states or any other societies deepens, 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.

Those phenomena are apparently ‘international’ in the sense that there is a concurrence or conflict of claims between states. In fact, it has been asserted that the main purpose of international rules with regard to jurisdiction is to determine ‘the permissible limits of a state’s jurisdiction’ or to provide ‘legal parameters against which the lawfulness of jurisdictional claims can be assessed’.¹⁴ However, there is no consensus on how and to what extent international rules can do that task. This is mainly because the assertion of jurisdiction is regulated not only by international law, but also by domestic law or other considerations,¹⁵ and doctrines of international law are divided over—or somewhat confused about—what sort of law or considerations are relevant in regulating assertions of jurisdiction.

¹³ Shaw (2006), 652-653; Bassiouni (2007), 352; Lowe and Staker (2010), 320; Cassese et al. (2013), 274.

¹⁴ Mann (1964), 15; Simma and Müller (2011), 136.

¹⁵ Blakesley (1984), 686-687.

Bearing this in mind, the following sections assess the relevance of international law in regulating over jurisdiction. In order to proceed with the analysis, it is useful to distinguish between two dimensions of the assertion of jurisdiction in light of the straightforwardness of the regulation of international rules: the exercise of jurisdiction to enforce within a territory of another state and the exercise of jurisdiction to prescribe over the conduct occurred within a territory of another state.

1.1.1 International Law Governing the Exercise of Enforcement Jurisdiction within the Territory of Another State

With regard to the international regulation over the exercise of jurisdiction, it has been firmly established that a state is not allowed to exercise its power within the territory of another state, as the PCIJ provided in the *Lotus* case:

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence 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.¹⁶

This is a corollary of the fact that a state monopolizes prerogative powers within its borders. Thus, not only coercive acts, such as compulsory investigation or arrest,¹⁷ but also non-coercive acts, such as seeking information upon the consent of individuals, are

¹⁶ *The Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment, 7 September 1927, [hereinafter *Lotus case*], 1927 PCIJ Series A, No. 10, 18. See also, Brownlie/Crawford (2012), 477.

¹⁷ The salient example is the abduction of Adolf Eichmann by Israeli agents from the territory of Argentina without the latter's consent. See, Mann (1964), 130. See the Security Council Resolution 138 (23 June 1960), declaring that such acts 'affect the sovereignty of a Member State,' and requesting the Government of Israel to 'make appropriate reparation'. The Supreme Court of Israel was more straightforward in admitting that the acts constituted the violation of the sovereignty of Argentina. Inferring from the fact that Argentina and Israel agreed to treat the incident as 'settled', it concluded: 'Argentina has condoned violation of her sovereignty and has waived her claims, including that for the return of the Appellant'.

prohibited in the territory of another state, in so far as it is related to the exercise of prerogative powers in light of its nature or purpose.¹⁸

1.1.2 International Law Governing the Exercise of Prescriptive Jurisdiction over Conduct Perpetrated within the Territory of Another State

1.1.2.1 Title of Jurisdiction

In contrast, whether it is also prohibited for a state to apply its domestic law to the events that occurred within a territory of another state, and also to exercise adjudicative jurisdiction in applying that law within its own territory, is not very clear. This is a question about the source of prescriptive jurisdiction, and the fact that both domestic and international aspects are involved, makes the relevance of international rules much less straightforward than the one concerning the exercise of enforcement jurisdiction within a territory of another state.

In order to address this question, it should first be pointed out that in the field of criminal law, it is an observable fact that many states apply their domestic law to conduct that has some link with their public order. Those links that are commonly adopted among states (territory, nationality of offenders or victims, states' fundamental interests) have been referred to as jurisdictional 'principles' and have also been regarded as the 'grounds' of jurisdiction in international law. However, as commentators suggest,¹⁹ this is originally

¹⁸ Akehurst (1972-1973), 146-147; Shaw (2008), 651.

Regarding non-coercive acts, activities of a diplomatic mission or a consular post within a territory of the receiving state are of note. For instance, the ICJ stated in the *Asylum Case* that a decision to grant diplomatic asylum was regarded prohibited, as 'it withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State'. *Asylum Case (Colombia / Peru)*, Judgment, 20 November 1950, ICJ Reports 1950, 274-275. Likewise, Tokyo High Court decided that granting interdiction by a consul to its nationals within a territory of the receiving state was not allowed without the latter's consent, because it amounted to 'an act of restricting one's legal capacity by a state organ, which constituted the exercise of prerogative power, in particular, the exercise of judicial power in the broad sense'. Tokyo High Court, Judgment, 22 February 1994, 862 *Hanrei Times* 295.

¹⁹ D'Aspremont (2010), 313.

the product of scholarly projects—the 1935 Harvard Research project being one of the earliest and the most influential ones²⁰—which aimed at classifying common denominators of domestic laws mainly for the purpose of providing a guideline for domestic judges. Those ‘principles’ are not necessarily international rules themselves, though they are often assumed to be. In fact, doctrines of international law are divided over the status of those ‘principles’ within the realm of international law depending on how one looks at the structure of the international legal system—whether it is a system of permissive rules or that of prohibitive rules.

The famous passage from the *Lotus* case in the Permanent Court of International Justice has been the centre of the debate in this regard. The case concerned a collision on the high seas between a French steamer, the *Lotus*, and a Turkish steamer, *Boz-Kourt*, which resulted in the death of eight people on board the latter. The Court was faced with the question whether the prosecution by the Turkish authority of M. Demons, the officer on watch on board the *Lotus*, was ‘in conflict with the principles of international law’. Turkey maintained that title to jurisdiction derives from sovereignty, hence a state may exercise jurisdiction unless it is prohibited by international rules. France submitted that the title to jurisdiction depends on international law, hence a state is not allowed to exercise jurisdiction unless it is authorized by international rules. After confirming that a state could not exercise its jurisdiction in the territory of another state, it continued:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which related to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the

²⁰ Harvard Research, ‘Jurisdiction with Respect to Crime’, 29 *AJIL, Supplement* (1935), 437.

application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that State 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 (*liberté*) which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free (*reste libre*) to adopt the principles which it regards as best and most suitable.²¹

Grounded on this opinion, some argue that the title of jurisdiction derives from sovereignty, and a state can adopt whatever principles it chooses in the application of its domestic law in so far as it is not prohibited by international rules (the present study refers to this as ‘the immanent theory’).²² For this approach, the jurisdictional principles are nothing more than domestic criteria, and universal jurisdiction is not an exception. Accordingly, a state may apply its domestic law to the offence committed abroad by a non-national against a non-national even when such an exercise is not anchored in any conventional regime or underpinned by customary rules.²³

In contrast, another approach submits that jurisdiction is an entitlement or right attributed by international law, with jurisdictional ‘principles’ forming part of those attribution rules

²¹ *Lotus case*, PCIJ Series A, No.10, 19.

²² Ryngaert (2010), 168. Interestingly, this is the view that criminal law scholarship believes to be a prevailing view of international law scholarship. For instance, Guyora Binder observes that ‘[i]nternational lawyers see jurisdiction, generally, and criminal jurisdiction, in particular, as essential attributes of states sovereignty. Thus, the criminal jurisdiction of a sovereign state is presumptively legitimate and raises a problem of international law only when it conflicts with the sovereignty of another state’. Binder (2013), 278-279.

²³ D’Aspremont (2010), 313.

(the present study refers to this as ‘the attribution theory’).²⁴ Premised on this understanding, commentators submit that the assertion of universal jurisdiction which lacks a link embodied in the jurisdictional principles should be grounded on treaty or customary rules. The so-called suppression treaties, such as the Convention for the Suppression of Unlawful Seizure of Aircraft in 1970 which includes the obligation to prosecute or extradite (*aut dedere aut judicare*), are typical examples of such treaties.²⁵ The immanent theory has been much criticized. The first criticism is that the theory depends on the *Lotus* dictum, which many commentators construe as indicating that what is not expressly prohibited is permitted. They thus argue that it reflects the vision of ‘extreme positivist school’²⁶ or a ‘high water mark of laissez-faire in international relations’²⁷ resting upon the principle of sovereignty and consent, and maintain that it has not survived the substantive changes that international society has achieved since then.²⁸

²⁴ Mann (1964), 11; Simma and Müller (2011), 137.

²⁵ *Arrest Warrant case*, Opinion individuelle de M. Guillaume, ICJ Reports 2002, 39-40 (para. 9); Boister (2012), 137.

²⁶ Brierly (1928), 155. See also, *Lotus case*, Opinion dissidente de M. Loder, PCIJ Series A, No.10, 34.

The Advisory Opinion on Kosovo seems to have refloated the argument over the *Lotus* presumption. In addressing the request from the General Assembly on whether the unilateral declaration of independence by Provisional Institutions of Self-Government of Kosovo was *in accordance with* international law, the Court ‘adjusted’ it into the question if there was any applicable rules *prohibiting* it. This was criticized by Judge Simma as an ‘anachronistic, extremely consensualist vision of international law’, equating ‘the absence of a prohibition’ with ‘the existence of a permissive rule’. See, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, 425-426 (para. 56); Declaration of Judge Simma, *ibid.*, 478-479 (para. 3).

It would be possible to deduce from the assessment of the Court a ‘lawfulness’ of the declaration of independence (it was in fact taken in that way by the international public opinion, whatever the Court may have intended), partly because of the Court’s rather nuanced wording. On the other hand, it would also be possible to see that this adjustment is premised on the fact that there is no applicable rule whether it is permissible or prohibitive—in other words, there is no rule that regulates this subject. In this case, it would not make much difference whether it is assessed in light of permissive rules or prohibitive rules. Accordingly, to declare that it is not prohibited does not necessarily mean that it is ‘lawful’.

²⁷ *Arrest Warrant case*, Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans, ICJ Reports 2002, 78 (para. 51). See also, Dissenting Opinion of Judge ad hoc van den Wyngaert, *ibid.*, 169 (para. 51).

²⁸ *Legality of the Threat or Use of Nuclear Weapons*, Declaration de president Bedjaoui, ICJ Reports 1996, 270-271 (para. 13); Dissenting Opinion of Judge Shahabuddeen, *ibid.*, 394-396.

While the dictum has in fact often been invoked as a formal residual closing rule,²⁹ it should be pointed out that the Court did not indicate in the above passage that states were *entitled* to do whatever they wanted when there was no prohibitive rule. Rather, the absence of prohibitive rules may only result in a *freedom* (liberté), not a *right*.³⁰ Moreover, this freedom shall not be considered unlimited. In fact, the Court itself refers to the limitation of international law placed upon the jurisdiction as:

This discretion (liberté) left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States. ... In these circumstances, 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.³¹

In other words, a freedom resulting from the absence of prohibitive rules should not be regarded as established but merely presumed, and this presumption is overridden when the limitation of international law enters in.³² Thus, although it uses the term ‘sovereignty’, the *Lotus* dictum should not be conflated with radical voluntarism and unbridled sovereignty as far as it is concerned with jurisdiction.³³

²⁹ For instance, some states supported that view during the proceedings of the Nuclear Weapons Advisory Opinion. See, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 238-239 (para. 21). See also, *R. v. Gul* (Appellant) [2013] UKSC 64, para. 57.

³⁰ The distinction of a freedom (or Hohfeldian privilege) and a right shall be crucial here. To hold that someone has a right entails that someone else has a duty to ensure the state of affairs envisaged by that right to be brought about. On the other hand, to hold that someone has a freedom or a privilege to do something does not impose any contrary duty on others. See, Hohfeld (1913), 32-44; Scobbie (1997), 295.

³¹ *Lotus case*, PCIJ Series A, No.10, 19.

³² Reydam (2003), 15.

³³ D’Aspremont (2010), 312.

Advocates of the attribution theory further argue that, in any event, the immanent theory is not underpinned by state practice. This is a more practical version of this theory, which relies on state attitude in an actual dispute and tries to derive from it the background approach. If one takes the immanent theory, freedom to act is presumed on the side of the state exercising jurisdiction, and the burden of proof is placed on the challenging state to show that there is a rule of international law that limits the freedom in question. On the other hand, if one takes the attribution theory, the burden of proof is placed on the state asserting jurisdiction to show that its conduct is compatible with a jurisdictional ground recognized by international law.³⁴ In fact, many commentators render other states' objections to apparently novel claims of jurisdiction a refuting effect if made in a timely manner.³⁵ While this can be seen as an ordinary technique to assess the validity of a claim in a decentralized legal system, it can be noted that in the field of jurisdiction, comments seem premised on the fact that the claim is presumptively prohibited in giving the final say to the opposing states, thus endorsing the attribution theory.

With regard to this view, the US' protest against Mexico's exercise of jurisdiction in the *Cutting* case³⁶ has been referred to as a 'perfect example of a protest against an excessive jurisdictional claim', in that 'the United States assumed that the burden lay upon Mexico to prove its entitlement to exercise jurisdiction in this way; no attempt was made by the United States to establish a "prohibitive rule" of the kind that is sometimes said to be required by the *Lotus* case'.³⁷ In fact, France referred to the *Cutting* case as a reflection of

³⁴ Lowe and Staker (2010), 346; Schachter (1991), 251-222. According to Schachter, the difference between the two positions may be critical in 'these cases where the law is still uncertain or fragmentary'.

³⁵ Ryngaert (2008a), 36-37. For instance, the validity of passive personality principle was assessed in light of the fact that this assertion of jurisdiction 'today meets with relatively little opposition, at least so far as a particular category of offences is concerned'. *Arrest Warrant case*, Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans, ICJ Reports 2002, 76-77 (para. 47).

³⁶ For details of the *Cutting* case, see, Report on Extraterritorial Crime and the Cutting Case, *Foreign Relations of the United States* [hereinafter *FRUS*] (1887), 757-867.

³⁷ Lowe and Staker (2010), 346. See also, Dumas (1931), 190. Dumas regarded the Mexican penal code itself as being in conflict with a rule of international law.

the attribution theory at the proceedings in the *Lotus* case,³⁸ and although this is a case in the nineteenth century, this view seems to have remained the US' position for almost one hundred years.³⁹

That being said, a closer look at the *Cutting* case may provide a different picture. First, it can be pointed out that the United States accused Mexico's assertion of jurisdiction of *being intrusive on its right*. According to the US government, '[t]o say ... that the penal laws of a country can bind foreigners and regulate their conduct, is to assert a jurisdiction over such countries and to impair their independence'. Thus, 'any assertion of it must rest, as an exception to the rule, either upon the general concurrence of nations or upon express conventions'.⁴⁰ Second, the US argued that asserting passive personality jurisdiction is *unfair to the possible defendant*, as it would be to 'assert that foreigners coming to the United States bring hither the penal laws of that country from which they come, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility'.⁴¹

As to the first point, it apparently fits in the rationale of the attribution theory that states are not allowed to extend criminal jurisdiction beyond their frontiers, except for permissive rules. However, this view merely contends that asserting jurisdiction over the event that occurred in the territory of another state is regarded as intrusive on its sovereign, and one might ask whether the case would be the same had the event occurred in a place not subject to any sovereignty. In this regard, state practice in the same period shows that, in the latter case, asserting jurisdiction was not regarded as prohibited. Indeed, France enacted a new legislation in 1900 providing that it would exercise jurisdiction on the islands of the Pacific

³⁸ Mémoire du Gouvernement de la République Française, PCIJ Series C, No.13-II, 193.

³⁹ Watson (1991), 7-13.

⁴⁰ Mr. Bayard to Mr. Connery, 1 November 1887, *FRUS* (1887), 754.

⁴¹ *Ibid.*, 755.

Ocean in order to protect its citizens on the ground that they were *terra nullius*.⁴² To put it differently, a state's assertion of jurisdiction beyond its frontiers was not prohibited as such, but it was limited with regard to the territory of another state because of its sovereignty.

Moreover, it should further be pointed out that what the US attacked was not the passive personality of jurisdiction itself, but the way the Mexican court applied it. Indeed, the State Department recognized that certain legislation in European states adopted the passive personality jurisdiction.⁴³ However, it maintained that Russia and Greece were the only countries whose claim of jurisdiction was as extensive and absolute as that of Mexico. On the other hand, some countries (Sweden and Norway) defer the decision of prosecution to the King's order⁴⁴ and others (Austria, Hungary, and Italy) made it subject to the condition that the offer of surrender of the accused had first been made to the state in which the crime was committed and had been refused by it.⁴⁵ Given this premise, the State Department observed that the Mexican court applied the principle laid down in Article 186 in all force without examining it, and the executive branch disclaimed any power to interfere with the execution of the law by the juridical tribunal, which according to the Department, made the Mexican claim absolute, compared to that made by Sweden and Norway.⁴⁶ In sum, the US accused the Mexican assertion of passive personality jurisdiction as lacking the procedure, because it was not able to consider each case in light of the friendly relations it has with other states or to respect the decision of the state where the offence was committed, instead of the assertion of jurisdiction itself.

⁴² Loi du juillet 1900, Art. 1: Le Président de la République est autorisé à prendre, par voie de décret, les mesures d'ordre administratif et judiciaire nécessaires pour assurer la protection et garantir l'état et les droits des citoyens français établis dans les îles et terres de l'Océan Pacifique, ne faisant pas partie du domaine colonial de la France et n'appartenant à aucune autre Puissance civilisée. A.C. Kiss, *Répertoire de la pratique française en matière de droit international public*, t.2 (1966), 269-270.

⁴³ Akehurst (1972-1973), 164-166.

⁴⁴ Report on Extraterritorial Crime and the Cutting Case, *FRUS* (1887), 785, 787-788.

⁴⁵ *Ibid.*, 783, 785-786.

⁴⁶ Mr. Bayard to Mr. Connery, November 1, 1887, *FRUS* (1887), 754. On the concept of judicial deference to executive authority in general, see Falk (1964), 9-11.

As to the second point, it was again the way Article 186 of the Mexican penal code was applied that was attacked by the US. In fact, Article 186 required that the accused should not have been definitively tried in the country where the offence was committed (the requirement of *ne bis in idem* in the broad sense) and that the offences included in the article must also be punishable in the place of their commission (the requirement of dual criminality), which would serve to prevent an individual from being exposed to an ‘indefinite criminal responsibility’. Probably with this in mind, the State Department attacked the way the Mexican judge interpreted the Texas penal code, which did not criminalize an act of publishing ‘statements of fact as to the qualification of any person for any occupation, profession, or trade’ of which Cutting was convicted in Mexican court. Furthermore, according to the US, it was the jury and not the judge that should have the authority to determine both law and relevant facts in the case of indictment of libel under the Texas code.⁴⁷ In other words, it was the difference in scope and procedure with regard to the offence of libel that drew a protest from the US, but one might ask whether this would have been the case had Cutting been accused of another offence where the scope and procedure were the same in Mexico and the US.

To sum up, the protest of the US in the *Cutting* case did not seem to reflect the attribution approach, as it did not claim that the assertion of jurisdiction beyond the territory of states is prohibited as such. Rather, the focus was on whether it would be intrusive on the rights of other states or individuals when it is actually applied.

Moreover, the attribution theory has its own problems. First, states apply jurisdictional principles in various ways, and it is hard to discern any uniform standard of application to which reference can be made.⁴⁸ Indeed, even a conception such as ‘territorial jurisdiction’ varies from one state to another. As Crawford pointed out, ‘the “principles” are in

⁴⁷ Mr. Bayard to Mr. Connery, November 1, 1887, *FRUS* (1887), 755.

⁴⁸ Bowett (1982), 15.

substance generalization of a mass of national provisions which by and large do not reflect categories of jurisdiction specifically recognized by international law'.⁴⁹ Accordingly, it may be that 'each individual principle is only evidence of the reasonableness of the exercise of jurisdiction', rather than the title of jurisdiction.

Second, and more importantly, it is argued that the proper application of domestic criminal law on the international plane may not be determined by merely demonstrating that a jurisdictional claim is compatible with a jurisdictional principle. Rather, one must consider whether it affects other states' rights and interests.⁵⁰ In other words, those jurisdictional principles in themselves cannot make an assertion of jurisdiction opposable to other states. Thus, they may not be seen as permissive rules or titles of jurisdiction.

1.1.2.2 Legality of the Exercise of Jurisdiction

Because jurisdictional 'principles' may not play a decisive role in attributing and delimiting the scope of prescriptive jurisdiction, commentators are inclined to assess whether the extraterritorial application of criminal law constitutes a violation of the rights of other states,⁵¹ in light of the principles of law that govern relations between states.⁵² In this regard, the main principle at issue is that of non-interference,⁵³ which can be

⁴⁹ Brownlie/Crawford (2012), 477; Ryngaert (2008a), Ch.5.

⁵⁰ Bowett (1982), 15.

⁵¹ It can be pointed out that if one takes this approach, the difference between immanent theory and attribution theory would become almost ignorable; the immanent theory does not preclude that a certain link is required as a domestic criteria, nor deny that the assertion of jurisdiction may ultimately be limited by the prohibitive rules of international law.

⁵² Bowett (1982), 15 (suggesting that rather than relying on the established principles or rules of jurisdiction, one has to go back to the basic principles of law which govern relations between states); Brownlie/Crawford (2012), 457 (stressing that the sufficiency of grounds for jurisdiction is normally considered relative to the rights of other states).

⁵³ Mann (1964), 47 (arguing that the reference to the paramountcy of international law implies what one may call the requirement of non-interference in the affairs of foreign states); Gaeta (2009), 70-71.

summarized as ‘the right of every sovereign State to conduct its affairs without outside interference’.⁵⁴

While the principle of non-interference itself has been firmly established as ‘part and parcel of customary international law’,⁵⁵ whether it is applicable to the assertion of jurisdiction requires a distinct inquiry. On the one hand, Jennings and Watts argue that for interference to constitute an illegal intervention, it must be ‘forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question’.⁵⁶

In this regard, the acts of a state that touch the affairs of another state do not constitute intervention if the element of coercion is lacking. If one takes this view, the assertion of prescriptive jurisdiction can hardly fall within the scope of prohibited intervention. Simply put, it is difficult to see how prescription could be coercive, since a state’s law ordinarily prescribes acts of individuals, not of states, and its application does not compel a state to do or not do certain acts. Moreover, it could be argued that a mere prescriptive statement may not compel individuals in another country to alter their behaviour, given the inability of the foreign state to immediately enforce its laws in a foreign jurisdiction. That can hardly constitute even indirect coercion.

On the other hand, there is a more lenient view that may accommodate the assertion of prescriptive jurisdiction. This view argues that while prescription does not directly prescribe conduct for foreign states, it may still affect the right of those states by

⁵⁴ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment (Merits), 27 June 1986, ICJ Reports 1986, 106 (para. 202) [hereinafter *Nicaragua case*].

⁵⁵ Ibid. See also, Oppenheim/Jennings/Watts (1992), 428; Jamnejad and Wood (2009), 348. ICJ also seems to regard a prohibited intervention as involving the ‘methods of coercion’. *Nicaragua case*, ibid., 108 (para. 205).

⁵⁶ Oppenheim/Jennings/Watts (1992), 432.

controlling the conduct of individuals. Gerber maintains that by attaching legal consequences to conduct in another state, a state exercises control over that conduct, which may constitute an interference with the sovereign rights of that foreign state, when such control affects the latter's essential interest.⁵⁷ As for the power of prescriptive statement to compel individual's behaviour, Ryngaert argues—albeit not in the context of the principle of non-interference—that a state may use ‘indirect territorial means to induce the conduct it desires’. According to him:

If a person outside the territory does not abide by the norm prescribed extraterritorially, he could be sued in the territory of the enacting State. If he does not pay the fine, his assets in the territory could be seized. Similarly, he could be precluded from entering the territory or registering with a government agency. Thus, territorial enforcement jurisdiction could compel persons to comply with norms prescribed extraterritorially.⁵⁸

At this stage, it is not necessary to precisely establish what constitutes an illegal intervention, but state practice seems to reflect the lenient view.⁵⁹

In fact, this view seems perfectly fitting in the field of economic law. For instance, the extraterritorial application of anti-trust legislation by courts in the United States, based on the so-called effects doctrine, or law that makes American export control legislation, as part of economic sanctions, applicable to transactions in foreign countries by non-American companies. The extra-territorial reach of American laws has been

⁵⁷ Gerber (1984-1985), 212.

⁵⁸ Ryngaert (2008a), 24-25.

⁵⁹ It should be noted here that while such a protest is ordinarily raised at the stage of the enforcement of law by an asserting state through trial or other executive measures, it is mainly the illegality of prescription that is at stake.

condemned by other states as a violation of the principle of non-interference or sovereignty and has sometimes led to the enactment of a so-called ‘blocking statute’. In such cases, not only were the laws being ‘blocked’ aimed at pursuing a certain public policy peculiar to the United States, but the United States could also actually exercise control over the activities of non-American companies outside of the United States through enforcement against the assets or subsidiaries of those companies located within the United States. In other words, territorial enforcement jurisdiction could have the power to compel companies to comply with norms that reflect American economic policies, which is considered, by the home countries of those private persons, as constituting a ‘threat’ to their own public order.⁶⁰

However, things may not be the same in the field of criminal law. Unlike the field of economic law, in which the substance of law may vary from one state to another due to a divergence of economic policy among states, there is consistency in criminalization among states, especially with regard to crimes related to the infringement of life and body. As a result, the application of the criminal law of one state to conduct within the territory of another state, may not lead to an act in violation of the public order of that territorial state. Moreover, even if the substance of law differs among states, a prescriptive statement in itself would not affect individuals’ behaviour, in so far as they remain within the territorial bounds of another state. This is mainly due to the fact that in the field of criminal law, it is only the state that holds the alleged perpetrator in custody that can effectively enforce its law. Admittedly, the possibility that individuals may be subject to territorial enforcement after they enter into the proscribing state, may induce compliance with that law, or deter them from traveling to that state. In the former case, their behaviour could be regarded as a violation of their home country’s law. If it is an isolated case, which is very likely in the case of criminal law, it would hardly constitute a threat to that local state. In the latter case, the possibility of territorial enforcement may be perceived as a restraint on their freedom to

⁶⁰ European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., 21 *ILM* (1982), 891-904.

move (not a right, as individuals do not have a right to enter foreign territories in general). However, it would not be a matter of international law, unless the individual in question enjoys immunity as a state official, which is not an instance that involves the principle of non-interference. For instance, in the *Arrest Warrant* case, the ICJ held that Belgium's international circulation of the arrest warrant might have affected Yerodia's capacity to undertake travel in the performance of his duties as an incumbent foreign minister, thereby constituting a violation of an obligation of Belgium towards the Congo. However, it was the infringement of the immunity of the incumbent foreign minister from criminal jurisdiction and the inviolability enjoyed by him under international law and not the principle of non-intervention that was at stake.⁶¹

1.2 International Restraint on the Exercise of Jurisdiction

As was discussed above, regulation of international law over the assertion of prescriptive jurisdiction is still undeveloped, not only at the level of entitlement but also that of legality. States have a large discretion in determining the ambit of their criminal law, on which international law imposes little limitation other than prohibiting the exercise of enforcement jurisdiction within the territory of another state.⁶²

Nevertheless, the fact that international law is still undeveloped with regard to the assertion of prescriptive jurisdiction does not necessarily mean that each state may apply its domestic laws without any restraint. While the application of criminal law to conduct that occurred in the territory of another state does not constitute a violation of the principle of non-interference, territorial jurisdiction still functions as a *de facto* restraint upon other states' assertion of jurisdiction. Moreover, the rights of the accused individuals also constitute a restraint on states' application of criminal law. It is in light of those restraints

⁶¹ *Arrest Warrant case*, ICJ Reports 2002, 30 (para. 71).

⁶² D'Aspremont (2010), 315.

that the place and function of jurisdictional links and conventional regimes should be assessed.

1.2.1 Restraint within the Context of Interstate Relations

1.2.1.1 *De facto* Primacy of Territoriality

Restraint on the Necessity of Extraterritorial Proscription

As was demonstrated in the previous section, international law does not prohibit a state from applying its criminal law to events that occurred within a territory of another state.⁶³ However, territorial jurisdiction still takes primacy over other jurisdictional claims (*de facto* primacy of territoriality).⁶⁴ In fact, it 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.⁶⁵ 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.⁶⁶ 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.

⁶³ This is compatible with the understanding that international law does not prohibit the concurrence of jurisdiction.

⁶⁴ Council of Europe, European Committee on Crime Problems, 'Extraterritorial Criminal Jurisdiction', reproduced in 3 *Criminal Law Forum* (1992), 458-459; The AU-EU Expert Report on the Principle of Universal Jurisdiction (2009), 8672/1/09 REV1, Recommendation 9.

⁶⁵ Shaw (2008), 653.

⁶⁶ Cassese et al. (2013), 275.

Second, because of its ability to fully exercise its jurisdiction, a territorial state is presumed to be willing to do so. In fact, it is usually the public order of a territorial state that is directly affected by the conduct perpetrated in its territory. It follows that the territorial state is usually the most interested in the suppression of the offence and would therefore be willing to ‘invest the necessary resources to investigate the matter’.⁶⁷

This ability and willingness of territorial states normally leads to the regular enforcement of criminal law within its borders. It should be noted here that regular enforcement is crucial in view of the rule of law in the first place. Since criminal law is an integral part of a rule of law that suppresses private vengeance and gives a state a monopoly of coercive force, it must be enforced regularly in order to claim legitimacy over its population.⁶⁸ At the same time, regular enforcement by territorial states has an external impact—if not a legal one—in the sense that it would induce other states to refrain from extending the ambit of their criminal law.

First of all, if a territorial state regularly enforces its law within its borders, there would be no need on the part of other states to resort to their own power. After all, the exercise of extraterritorial jurisdiction involves costly and complex procedures, and not many states are willing to invest their own resources unless there is an actual need. Second, asserting jurisdiction over conduct perpetrated in a territory of another state may be taken by the latter as a distrust of its ability or willingness to pursue criminal proceedings. This could undermine friendly relations between the two, which often makes the asserting state—especially its executive branch—feel reluctant about asserting extraterritorial jurisdiction. It is in this diplomatic consideration that the decision to initiate criminal proceedings is often deferred exclusively to a state’s executive branch even if it has established a basis of extraterritorial jurisdiction in its domestic law, on the ground that it is

⁶⁷ Mullan (1997), 17.

⁶⁸ Binder (2013), 289-291. See also, Chehtman (2010), 36-43.

in a better position than the judicial branch to consider relationships with other states. In short, as far as a territorial state enforces its law regularly, it can claim primacy over other states, which constitutes the (relative) *legitimacy* of territorial jurisdiction.

That said, it should be noted that regulation of crimes by territorial states may not always be expected. Thus, the degree of restraint on the other states' necessity to act may vary accordingly. As for the ability to regulate, as the transnational movement of people and goods increases, and cross border activities grows, it will enhance the dispersed presence of the accused and evidence. This has a correlative effect of decreasing the effectiveness of investigations and arrest by territorial states. As for the willingness to regulate, territorial states are not always interested in the regulation of every single event that occurs within their borders. Moreover, in some cases, a major obstacle to the regulation of crimes by a territorial state arises when state officials are involved in the commission of those crimes.⁶⁹

In fact, the decision of a state to extend the ambit of its criminal law has been accompanied by a sense of necessity to invest its own resources in view of the lack or deficiency of territorial jurisdiction. It should be pointed out here that such an 'extension' usually becomes an issue on the international plane when a state applies its law beyond its borders for the purpose of protecting certain *interests*. In this regard, the extra-territorial application of criminal law based on the nationality of the offender (active personality jurisdiction) has rarely been an international issue, mainly because active personality jurisdiction presupposes certain *control* over the subject, through allegiance in history and entitlements attached to nationality that are vulnerable to forfeiture in modern times,⁷⁰ and has been regarded as being a part of a state's prerogative.

⁶⁹ This is particularly the case with international crimes that will be examined in detail in Chapter 2.

⁷⁰ Binder (2013), 291.

As for the ‘extension’ for the purpose of protecting interests, the most notable example is provided by the exercise of jurisdiction over conduct that threatens states’ essential interests (protective jurisdiction). Many states have enacted legislation that empowers their domestic courts to prosecute the crimes of counterfeiting their currency or treason even if committed abroad. It derives from the fact that the counterfeiting of currency of foreign states or treason against foreign states would not affect the public order of the state where they were committed; hence, the latter would not be interested in exercising its criminal jurisdiction to suppress such conduct.

By the same token, it may not be surprising that the practice of the extension of jurisdiction on the basis of the nationality of the victims (passive personality jurisdiction) had initially emerged in the field of the suppression of terrorism. In this regard, it can be pointed out that acts of terrorism are committed in the circumstances where the notion of territoriality may not function as such, or the effective regulation of territorial states can hardly be expected. For instance, if an aircraft registered in state A was hijacked in the airspace of state B, and later landed in state C, it would not be easy to confirm exactly where the crime was committed. Nor would it be appropriate to designate only one state as having ‘territorial jurisdiction’. Furthermore, terrorist organizations are often based in a state whose infrastructure is totally destroyed as a consequence of international or civil conflicts, or at times even sponsored by the state where they are based. In those cases, it would be difficult to expect that the territorial state is able and willing to invest its resources to regulate the activities of those organizations.

In addition to this dysfunction of the notion of territoriality, acts of terrorism either target nationals of a particular state or—conversely—attack people almost indiscriminately, which makes states feel all the more necessity to take some measures to protect its nationals in the case of terrorism. In the age of globalization, their nationals can be targeted specifically or indiscriminately all over the world. Therefore, it came as no surprise when

the United States, which had once been a strenuous objector to passive personality jurisdiction, enacted legislation to establish a passive personality basis of jurisdiction after the *Achille Lauro* incident where a US citizen became the victim of a seajack in 1985. Likewise, France adopted passive personality jurisdiction after the 1974 *Hague* incident in which French nationals were taken hostage by terrorists.⁷¹

The variant of the deficiency of territorial jurisdiction can be conceived in respect of the flag state jurisdiction. For instance, Japan's reintroduction of passive personality jurisdiction in the 2003 amendment of its Penal Code⁷² was triggered by the so-called *Tajima* incident, in which a Japanese national was killed by two Philippine nationals on board a vessel of Panamanian registry on the high seas. Because the Penal Code of the Philippines did not include a basis of jurisdiction to prosecute crimes of its own nationals committed abroad, it was only Panama that was available to conduct criminal proceedings, and, as a flag of convenience state, it was not willing to do so at first. In these circumstances, the need to adopt a basis for extraterritorial jurisdiction to prosecute crimes in which nationals would be victims was brought into stark relief.⁷³

To sum up, the degree of restraint on the other states' necessity to act in order to protect its own interest by the application of criminal law may vary according to the possibility of regular enforcement by territorial jurisdiction.

⁷¹ Cafritz and Tene (2003), 594.

⁷² The Article 3(2) of Japanese Penal Code of 1907 had adopted the passive personality basis of jurisdiction with regard to certain crimes, but it was deleted in the 1947 amendment of the Code on the ground that it would not be appropriate in light of 'the spirit of international cooperation' which was enshrined in the new Constitution of 1945. The explanation on the deletion given in the Diet was reproduced in, Takeuchi (2011), 422.

⁷³ Ibid., 420, 426-427.

Restraint on the Effectiveness of Enforcement Jurisdiction

As was observed, states have extended the ambit of their criminal law out of necessity for protecting their own interests, due to the lack or deficiency of territorial jurisdiction. However, pursuing prosecution and trial is not always possible. In the case of extraterritorial jurisdiction, alleged perpetrators or evidence are normally found in the territory of a foreign state—not necessarily the state where the conduct was perpetrated. Because of the territorial prerogative of that state, the asserting state is prevented from conducting an investigation and arrest on its own, and needs to ask for judicial cooperation from the states where the alleged perpetrators or evidence are found. Moreover, because this interstate cooperation is still governed by the reciprocity requirements—in this regard, it is still horizontal in nature⁷⁴—whether the requesting state can gain cooperation from the requested state depends largely on the legal system of the latter, even if there is an international agreement between the states. Put differently, in the context of judicial cooperation in extraterritorial criminal jurisdiction, the asserting states must double-count other states' preference for their own legal system. This constitutes a considerable restraint on the effectiveness of enforcement jurisdiction.

In this regard, the principle of 'double criminality' in the context of extradition is of particular note. This principle generally requires that the underlying act or omission is criminalized in both the requesting and requested states (substantive aspect of double criminality).⁷⁵ In the context of the assertion of extraterritorial criminal jurisdiction, it is further required that the relevant act is made punishable on the same jurisdictional ground in both the requesting and requested states (jurisdictional/procedural aspect of double criminality).⁷⁶ Both aspects of double criminality are regarded as a well-established

⁷⁴ Cryer et al. (2010), 88.

⁷⁵ This could entail not only a comparison of the definition of the crime (*in abstracto*), but also applicable grounds for excluding criminal responsibility in the case at hand (*in concreto*).

⁷⁶ Cryer et al. (2010), 89; Warbrick (1999), 960.

principle,⁷⁷ having been adopted in domestic laws⁷⁸ and many treaties,⁷⁹ including the United Nations Model Treaty on Extradition.⁸⁰ It can be noted that the European arrest warrant does not require double criminality verification for a certain class of offences; for example, transnational crimes such as terrorism or organized crimes, or some serious crimes, such as murder and grievous bodily injury, as far as the substantive aspect of double criminality is concerned.⁸¹ However, the jurisdictional aspect of double criminality may still be invoked as grounds for non-execution, where the European arrest warrant relates to extraterritorial offences.⁸²

It is important to note that it is the requested state—the state that holds custody of the alleged perpetrator—that plays a crucial role for the assessment of double criminality. For instance, in the *Abu Daoud* incident, Israel requested France to extradite Daoud on charges involving the 1972 Munich Olympics massacre. France had to deny the request because it did not adhere to the passive personality basis of jurisdiction at the time the massacre occurred. It was only in 1975 that France enacted a law that adopted the basis of passive personality jurisdiction, after its own nationals had been taken hostage in the 1974 Hague incident. Therefore, the court found that the dual criminality requirement could not be satisfied, and Daoud was released.⁸³ In *Questions Relating to the Obligation to Extradite*

⁷⁷ Bassiouni (2007), 497.

⁷⁸ See e.g., Section 2(1)(b), (2) and (3) of the UK Extradition Act 1989.

⁷⁹ Articles 2(1) and 7(2) of the European Convention on Extradition (1957), European Treaty Series, No.24; Article 4(1) and (3) of the Agreement on Extradition between the European Union and the United States of America (2003), Official Journal of the European Union, No. L 181, 19.07.2003, at 27; Articles 2 and 6 of the Treaty on Extradition between Japan and the United States of America (1978); Articles 2 and 7 of the Treaty on Extradition between Japan and the Republic of Korea (2002).

⁸⁰ Articles 2 and 4 of the UN Model Treaty on Extradition (1990), GA Res. 45/116 of 14 December 1990, 29 *ILM* (1991), 1407.

⁸¹ Article 2(2) of the EU Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002), Official Journal of the European Communities, No. L 190, 18.07.2002, 1.

⁸² Article 4 of the EU Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002).

⁸³ Hafen (1992), 223.

or *Prosecute*,⁸⁴ it was suggested by Judge *ad hoc* Sur that Belgium's request for extradition of Habré to Senegal would not have been granted. He noted that while Belgium's jurisdiction was based on the nationality of the victims, who became Belgian citizens years after the events in issue, Senegal only recognized passive personality jurisdiction in its domestic law based on the nationality of victims at the time of the relevant facts.⁸⁵ In the former case, while Israel clearly felt a need to protect its nationals abroad through the application of its criminal law, such a necessity was not acknowledged by France before 1974. In the latter case, where three years' residence was enough for Belgium to render a nationality link, it was not so for Senegal. In both cases, the enforcement by the requesting states was, or would have been, blocked.

As the above cases demonstrate, the effectiveness of enforcement jurisdiction depends on whether the state that holds the alleged perpetrator in custody has the same perception about the link (the relevant interest) and the necessity for the assertion of jurisdiction. Given that individuals increasingly move across borders, the degree of such effectiveness depends on how commonly such a perception is shared among states.

1.2.1.2 The Place of Link and Conventional Regimes

As was demonstrated in the previous section, territorial prerogative serves not only to affect other states' decisions to extend the ambit of their domestic criminal law but also to restrain enforcement in a specific context. In order to secure effective enforcement for a state asserting extraterritorial jurisdiction, there should be common acknowledgment among states that the interest in issues deserves protection by criminal law and that it is necessary for states other than the territorial state to exert authority as well.

⁸⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports 2012, 422 [hereinafter, *the Obligation to Extradite or Prosecute*].

⁸⁵ *Obligation to Extradite or Prosecute*, Opinion dissidente de M. le juge *ad hoc* Sur, ICJ Reports 2012, 611 (para. 21).

It is within this framework that one can understand the place and function of jurisdictional links and conventional regimes. As for jurisdictional links, a state adopts whatever link it thinks necessary in its domestic law, so long as it is not prohibited by international rules. However, it remains a unilateral claim in itself. For it to be enforced effectively, it must be underpinned by the sense of necessity (the lack or deficiency of territorial jurisdiction) commonly acknowledged among states. To expand on this, it is submitted that a *legitimacy* of certain jurisdictional claims on the international plane would be secured by the common awareness embodied in the link and the need for such a jurisdiction. This legitimacy is a necessary condition for its effective enforcement. In other words, legitimacy of a claim is a source of effectiveness in the case of extraterritorial jurisdiction.

As for conventional regimes, they can be seen as mechanisms to ensure the effectiveness of the regulation over the conduct for which states have common interest and also acknowledge the need for suppression. In order to achieve this purpose, those regimes will provide a framework under which both substantive and procedural requirements of double criminality can be met. The Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (The Hague Convention) is a typical example of suppression convention. It designates conduct regarded as an offence under the convention (Article 1) and requires state parties to criminalize that conduct with severe penalties in their domestic law (Article 2). By doing so, not only will the punishment of such offences be enabled in each state party, but the reciprocity of substantive laws that constitutes a precondition for international cooperation will also be secured. This will allow the substantive aspect of double criminality to be met in general.⁸⁶

At the same time, these suppression conventions attempt to harmonize the procedural laws, which is also a necessary condition for international cooperation. The Hague Convention

⁸⁶ Boister (2012), 14.

requires state parties to take measures necessary to establish jurisdiction in cases where they have some link with the convention offence (Article 5(1)). This is also the case when an alleged perpetrator is found in their territory and they do not extradite the perpetrator to the other state parties that have established jurisdiction under the convention (Article 5(2)). By forming such a jurisdictional network, it establishes a mechanism that ensures that offenders will be punished wherever they flee. It also contributes to harmonizing the procedural laws among states' parties by requiring them to establish certain kinds of jurisdictions that are necessary for the effective suppression of treaty offences.⁸⁷

It can be argued that by obligating state parties to establish jurisdiction, these conventional regimes do not confer them a right/entitlement vis-à-vis other state parties. Rather, they impose obligations upon state parties to mobilize their jurisdictions, by restricting the discretion/freedom of action (or inaction) that a state usually enjoys where there is no prohibition. By doing so, it secures the effectiveness of the suppression of treaty offences. At the same time, these regimes recognize the necessity of such a jurisdiction, thereby endorsing its legitimacy on the international plane.

1.2.2 Restraint with Regard to Individuals

1.2.2.1 Requirement of Foreseeability

Along with the restraint with regard to other states, the rights of individuals can also be a restraint on the exercise of extraterritorial jurisdiction, especially with regard to the foreseeability of law under the principle of legality. In fact, the lack of foreseeability is a substantive restraint on the authority of a state to impose punishment upon individuals, at least within the context of domestic law, and can be conceived as such in terms of the scope of prescriptive jurisdiction in an international context. Nevertheless, the restraint on the exercise of jurisdiction has traditionally been discussed as a matter of inter-state

⁸⁷ *Ibid.*, 16.

relations in international law doctrine and until recently the rights of individuals had not been taken seriously. However, as international cooperation develops, the restraint with regard to other states decreases, and as the principle of legality has been enshrined in international rules, the consideration of the rights of individuals has increasingly come to the fore; and in fact has become seen as a substantial restraint on the extraterritorial application of criminal law.

On the one hand, in the case of the extraterritorial application of criminal law, the accused are not subject to the public authority of the asserting state unless they are a national of that state, and are hence not expected to have knowledge about the criminal law in the forum. This is apparently incompatible with the requirement of the specificity of criminal rules under the principle of legality, which aims at ensuring that those who may fall under the prohibition of the law know in advance which specific conduct is allowed or proscribed, and thereby foresee the consequences of their actions and freely choose either to comply with or instead breach legal standards of conduct (foreseeability of the law) (Article 15 of the International Covenant on Civil and Political Rights [ICCPR], Article 7 of the European Convention on Human Rights [ECHR]).

At the same time, the principle of legality not only requires that the accused be aware that their act amounts to a criminal offence, but also that they know the range of penalties attached to it. Because sentencing policy and legislation vary from one state to another, this aspect of the principle of legality requires that the accused must be aware in advance of which criminal jurisdiction they will be subject to (foreseeability of the forum). This requirement falls under due process clauses in the constitutions of several states as a notice test, but also is related to the right to liberty and security in human rights conventions (Article 9(1) of the ICCPR, Article 5(1) of the ECHR). In the *Medvedyev* case,⁸⁸ the

⁸⁸ *Medvedyev and others v. France* [GC], App. No.3394/03, Judgment, 29 March 2010.

European Court of Human Rights [Court] had to rule on the legality of the detention by the French authorities of the crew of the *Winner*, who were suspected of engaging in drug trafficking on board that ship, while it was being escorted to France. In this case, the French authorities seized the *Winner* flying the Cambodian flag on the high seas with the consent of the Cambodian Government; hence, there was no restraint with regard to other states. After reiterating the established case-law that the general principle of legal certainty requires that the conditions for deprivation of liberty under domestic and/or international law be clearly defined, and that the law itself be foreseeable in its application,⁸⁹ the Court concluded that the intervention of the French authorities on the basis of an ad hoc agreement with the Cambodian Government could not reasonably be said to have been ‘foreseeable’ within the meaning of the Court’s case-law.⁹⁰ It is important to note that the Court distinguished between the foreseeability of prosecution (foreseeability of forum in this study) from the foreseeability of the law,⁹¹ both of which should be subject to the principle of legal certainty.

1.2.2.2 Conditions to Secure Foreseeability

While the requirement for the foreseeability of law and forum constitute a considerable impediment in the application of criminal law in the case of extraterritorial jurisdiction, it is not always insurmountable. In fact, a number of states have developed specific conditions in their domestic law which mandate that the application of its criminal law meets the requirement of foreseeability. There are two key approaches that have been undertaken by states for this purpose.

⁸⁹ Ibid., para. 80.

⁹⁰ Ibid., para.100.

⁹¹ Ibid. The Court observes: ‘In any event, the Court considers that the foreseeability, for an offender, of prosecution for drug trafficking should not be confused with the foreseeability of the law pleaded as the basis for the intervention. Otherwise any activity considered criminal under domestic law would release the States from their obligation to pass laws having the requisite qualities, particularly with regard to Article 5 §1 of the Convention and, in so doing, deprive that provision of its substance’.

In the first approach, some legislation explicitly defers in the application of their state's own criminal law to the criminal law of the state where the conduct was perpetrated. This is typically premised on the idea that the accused is generally aware of the law of the territorial state whose authority he/she is subject to. This approach allows the requirement of the foreseeability of law to be met. At the same time, it may avert the question of the foreseeability of forum by—in a somewhat fictitious manner—designating the asserting state as a 'vicarious' or 'representational' jurisdiction.⁹² For instance, some legislation requires a double criminality, in which the application of criminal law would be subject to the condition that the conduct in question is criminalised in the state where it was perpetrated.⁹³ Other legislation applies a requirement of lesser penalty, in which a penalty of the criminal law of the territorial state is applied only if it stipulates a lesser penalty for the crimes in question than those of the forum state.⁹⁴

In the second approach, the application of criminal law is subject to the accused having 'intended' to injure the order of the forum state. In this approach, the accused is conceived as having acted at his/her peril, which makes them subject to the forum. In the United States, a ruling concerning the interpretation of the Fifth Amendment due process clause that was handed down by the Ninth and Second Circuits⁹⁵ established a leading test that requires that, in order for a federal criminal statute to be applied in congruence with the due process clause, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.⁹⁶ In

⁹² On vicarious or representational jurisdiction, see Ryngaert (2008a), 102-104.

⁹³ Article 7(1) of the German Penal Code.

⁹⁴ Article 65(2) of the Austrian Penal Code.

⁹⁵ There is a difference in circuits' approaches and the Supreme Court has yet to address this issue. See in general, Colangelo (2011), 1103. See also, Lichter (2009), 1929.

⁹⁶ *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987); *United States v. Davis*, 905 F.2d 245, 248-249 (9th Cir. 1990). See in general, Brilmayer and Norchi (1992), at 1217.

applying this nexus test, there is generally a requirement that an attempted transaction is aimed at causing criminal acts within the United States.⁹⁷

In addition, it can be argued that jurisdictional links and conventional regimes may also contribute to meet the requirement of foreseeability. As to the former, if a state enacts legislation to establish passive personality basis for acts of murder, its nationals are expected to know the types of jurisdiction to be exercised by other states; hence, they would not be able to raise an issue of foreseeability when they are prosecuted on that basis of jurisdiction in a foreign court. As to the latter, suppression conventions usually require states' parties both to make the conventional offence punishable in its domestic law and to establish several types of extraterritorial jurisdiction in order to secure the effective suppression of the conventional offence; nationals of the states' parties are thus put on notice that their conduct will be prosecuted by any state parties. In this regard, it deserves some mention that the courts of the United States apply a statute implementing suppression conventions to the nationals of non-state parties without raising an issue of due process.⁹⁸ It depends on whether and in what sense it can be argued that the adoption of such conventions may put nationals of non-state parties on notice.

⁹⁷ *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987); *United States v. Yousef*, 327 F.3d 56, 112 (2nd Cir. 2003). In *Yousef*, the defendant bombed a Philippines flight en route from the Philippines to Japan, killing a Japanese citizen and injuring other passengers, but no US citizens were on board or were targeted by the bombing. The Second Circuit found that the attack on the Philippine Airlines was a 'test run' in furtherance of the conspiracy to attack the United States and its citizens, and that this 'substantial intended effect' was sufficient to relate the defendants' conduct to American interests as to render their prosecution in the United States not arbitrary or fundamentally unfair. It thereby concluded that prosecuting the defendants in the United States did not violate the Due Process Clause.

⁹⁸ The Ninth Circuit found in *United States v. Lei Shi* that due process does not require a nexus in the case of violators of a statute implementing suppression conventions or that of piracy. The court argued that such statute expressly provided that the conduct of foreign offenders would be prosecuted by any state signatory. As for the case of piracy, it found that 'universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found'. *United States v. Lei Shi*, 525 F.3d 709, 723 (9th Cir. 2008).

1.3 New Taxonomy

As the discussion in the preceding sections demonstrated, the exercise of jurisdiction should be examined from the perspective of whether and to what extent it may secure the effectiveness of enforcement, the legitimacy of claim, and the foreseeability of law and forum in relation to the accused, rather than whether it is established under international law. Building on this analysis, this section tries to put forward a new taxonomy. Given that jurisdictional links and conventional regimes affect the above three variables, jurisdictional claims are divided into three categories: (a) jurisdiction with a specific/individual link; (b) jurisdiction anchored in a conventional regime; and (c) jurisdiction without specific links.

(a) Jurisdiction with a Specific/Individual Link

Jurisdictions falling within this category are divided further into two groups according to whether or not it may secure the effectiveness of enforcement.

(i) Jurisdiction with Effectiveness (Territoriality, Active Nationality)

Territorial Jurisdiction

In the case of territorial jurisdiction, the *effectiveness* of enforcement is usually secured due largely to the fact that a territorial state monopolizes a prerogative power within its borders, which allows that state to enforce its law without any restraint. Such effectiveness of enforcement is also a source of *legitimacy* of territorial jurisdiction, in the sense that a territorial state is given *de facto* primacy over other states in so far as it regularly enforces its law.

Because an individual is regarded as being subject to the public authority of the state where they are, the *foreseeability* of law and forum is normally met in the case of territorial jurisdiction.

Active Nationality Jurisdiction

The national state of the offender may also secure the *effectiveness* of enforcement, due mainly to the fact that it exercise certain control over the subject, through entitlement attached to nationality that is vulnerable to forfeiture. Such a tie is regarded as a source of *legitimacy*.

The *foreseeability* of law and forum is normally met in the case of active nationality jurisdiction, because individuals are usually subject to the public authority of their national state.

(ii) Jurisdiction without Effectiveness (Protective, Passive Personality)

Protective Jurisdiction

In the case of protective jurisdiction, the *effectiveness* of enforcement is usually lacking because of the non-presence of the offender and evidences. In contrast, the *legitimacy* of the claim based on protective jurisdiction has been widely recognized especially with regard to the crimes of counterfeiting of currency or treason. This is mainly due to the fact that while this category of crime is commonly conceived as threatening states' essential interests, it rarely affects the public order of the state where they are perpetrated because it aims at threatening the public order of foreign states; hence, territorial states are usually not interested in suppression, which had amounted to the sense of necessity shared by many states to act by themselves to protect their own interests.

The recognition of *legitimacy* has been underpinned by the fact that a vast majority of states had adopted protective jurisdiction with regard to certain categories of crime in

their domestic law as early as early twentieth century (congruence in interest). At the same time, the diversity of legislation and the disposition of certain governments to regard the offense as political in character had still been a major obstacle for extradition around that time⁹⁹; it led states to adopt the Convention for the Suppression of Counterfeiting Currency in 1929. It defined the offences of counterfeiting that should be made punishable under the domestic law of states' parties, and second, it restricted the freedom of states to dispose those offences as political offenses, by imposing an obligation to punish them as ordinary crimes.¹⁰⁰

The requirement of *foreseeability* in the case of protective jurisdiction is usually met by the fact that the accused usually intended to injure the public order of the state exercising jurisdiction.

Passive Personality Jurisdiction

The lack of *effectiveness* of enforcement also applies to the case of passive personality jurisdiction. The recognition of *legitimacy* has been underpinned by the awareness of states that territorial states are not always able or willing to protect the interests of foreign nationals, which particularly applies to the case of terrorism.

The *foreseeability* of law is usually secured by adopting double criminality requirement.

⁹⁹ Garner (1930), 136.

¹⁰⁰ Garner (1930), 138; García-Mora (1962), 143. It has been suggested that since then, the rules embodied in the Conventions have substantially become part of the law of very many countries, and thus formalized the broad principles of modern public international law on this point. See, Mann (1992), 481.

b. Jurisdiction Anchored in Conventional Regime

In the case of jurisdiction anchored in conventional regime, *effectiveness* of enforcement can be secured through the duty to cooperate established under the regime. The *legitimacy* of certain jurisdictions is also secured by the fact that such basis of jurisdiction has been mobilized as a necessary basis of jurisdiction for the purpose of suppression of convention offenses.

The *foreseeability* of law is usually secured by the implementing statute of state parties.

c. Jurisdiction without Specific Links – Universal Jurisdiction *strict sensu*

In the case of jurisdiction without specific links, such as the assertion of universal jurisdiction over genocide or crimes against humanity, there is ostensibly no effectiveness of enforcement. Moreover, it is not clear how legitimacy of claims and *foreseeability* are secured. This will be a focus of the next chapter.

Chapter 2: Specific Framework- Universal Jurisdiction

As was demonstrated in chapter 1, jurisdictional links cannot be regarded as exemplifying a right or entitlement attributed by international law. Rather, they basically represent the interests that the asserting state thinks necessary to be protected in order to maintain its public order. As such, they remain a unilateral claim; for it to be effectively exercised, they should be underpinned by the common awareness that the interests in question are really interests that deserve protection by criminal law and also that the assertion of jurisdiction other than the territorial state is necessary. Also, the authority to impose punishment upon individuals should be established. This re-capturing of jurisdictional links implies the need to reconsider the existing scholarship's proposition about universal jurisdiction, which emphasizes the difference between universal jurisdiction and other assertions of jurisdiction in that the former lacks the links that the latter has (territory, nationality of the perpetrator and the victim, states' vital interest), and has sought to find an alternative justification for the former which may replace jurisdictional links.

On the other hand, the crimes that are allegedly subject to the assertion of universal jurisdiction *strict sensu* seem distinguished from those targeted by others, in terms of their gravity or the nature of the affected interests. In this regard, it should be noted that universal jurisdiction has in fact increasingly been asserted with regard to crimes of genocide, crimes against humanity and war crimes, i.e., the core crimes or the most serious crimes falling within the jurisdiction of the International Criminal Court, and also are often labelled as a breach of *jus cogens* norms. In fact, there seems at least a growing support that as far as those core crimes (and perhaps crimes of torture) are concerned, even a state that has no link with the crime may have a right or interest to prosecute the perpetrators, which seems to warrant a separate examination of universal jurisdiction with respect to core crimes from other jurisdictional claims.

Against this background, section 1 examines the existing literature that has captured universal jurisdiction as a distinct category of jurisdiction and has sought its special jurisdictional ground. The candidate encompasses both the deductive approach and inductive approach. The former 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. On the other hand, the latter is more in line with traditional scholarship and seeks to establish a customary rule which provides a ground for universal jurisdiction, while applying less strict conditions in one way or another in confirming customary rules than required in the traditional view. After critically analysing both approaches, section 2 examines whether the assertion of universal jurisdiction can be fit within the general framework of jurisdiction established in chapter 1, and if so, how it is captured in light of the factors that compose jurisdictional claims.

2.1 Universal Jurisdiction as a Special Regime of Jurisdiction?

The assertion of universal jurisdiction began manifesting as a trend in the 1990s with regard to serious international crimes and grave violations of human rights. Behind this was a zeitgeist¹ that could be observed in the spirit of cooperation generated among great powers at the end of the Cold War, the phenomenon of globalization in various fields, and the re-emerged interventionism. This changing legal climate also led the international society to direct its attention towards the project of international criminal justice. Galvanised by the mass atrocities in Yugoslavia and Rwanda, the project evolved into a global fight against impunity,² which resulted in the establishment of international criminal tribunals, including the International Criminal Court, the first permanent criminal court in history.³ Along with international criminal tribunals, universal jurisdiction has been perceived as one of the central apparatuses for promoting this ongoing project.

This trend has also found supporters among states, with Belgium and Spain as the most notable forerunners. In 1993, Belgium enacted a law implementing the four 1949 Geneva Conventions and Additional Protocols (the Geneva Conventions),⁴ in which a list of 20 acts constituting grave breaches of the Conventions and Protocols were designated as ‘crimes under international law (crimes de droit international)’ and made punishable in accordance with the Act. The Act was later amended in 1999⁵ (the amending legislation is hereinafter referred to as the Act of 1993/1999) to include genocide and crimes against

¹ See, Reydamas (2011), 338.

² This campaign was led mainly by NGOs. In this regard, Amnesty International and Human Rights Watch are of particular importance. See, Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (2001); *Ending impunity: Developing and implementing a global action plan using universal jurisdiction* (2009); *Universal Jurisdiction: Strengthening this Essential Tool of International Justice* (2012). Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (2006).

³ Cassese et al. (2013), 258.

⁴ Loi du 16 Juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1988, additionnelles à ces conventions, Moniteur belge, 5 août 1993, 17751.

⁵ Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire, Moniteur belge, 23 mars 1999, 9286.

humanity in the list. Described by some legal scholars as ‘the most progressive of its kind’,⁶ the Act of 1993/1999 not only established universal jurisdiction over the listed crimes, not all of which were subject to the principle of *aut dedere aut judicare* provided in the relevant treaties;⁷ it also contained several rules that derogated from the general principles of criminal law, such as the inapplicability of any statute of limitations or amnesties and the rejection of immunity attached to an official capacity of a person. In addition, the Belgian criminal justice system adopted the mechanism of *constitution de partie civile*, by which a victim may trigger the opening of a preliminary investigation and commence criminal proceedings in certain circumstances.⁸ Many such complaints were brought under the Act of 1993/1999 before its amendment by the Act of 2003.⁹ These acts were made against former as well as incumbent foreign heads of states, heads of governments, and other high officials.¹⁰ One complaint actually resulted in the issuance of an arrest warrant to the incumbent foreign minister of the Democratic Republic of the Congo, Mr Abdulaye Yerodia Ndombasi.

⁶ Smis and Van der Borgh (1999), 920.

⁷ The most notable was the fact that the ‘grave breaches’ to which the Act was applicable not only covered the crimes under the four Geneva Conventions of 1949 and their Additional Protocol I, but also the Additional Protocol II. This meant that the scope of crimes subject to universal jurisdiction was extended to include violations of humanitarian law in non-international armed conflicts, which was not assumed in the regime of Geneva Conventions. In fact, pursuant to Articles I/49, II/50, III/129 and IV/146 of the Geneva Conventions and Article 85 §1 of Additional Protocol I, the term ‘grave breaches’ is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts (Additional Protocol II) do not fall within the ambit of the undertaking referred to in the above mentioned articles.

⁸ Victims may, by making him/herself a civil party, seize an investigating judge (*juge d’instruction*), if the public prosecutor in the exercise of his discretion decides not to prosecute or is still considering his/her position.

⁹ Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l’article 144ter du Code judiciaire, 23 avril 2003, Moniteur belge, 7 août 2003, 40506.

¹⁰ They include: the Cuban President Fidel Castro, the Ivory Coast President Laurent Gbagbo, the Iraqi President Saddam Hussein, the Rwandan President Paul Kagame, the Mauritanian President Maaouya Iuld Sid’Ahmed Taya and the Israeli Prime Minister Ariel Sharon. See, Smis and Van der Borgh (2003), at 743. Complaints were also made against former U.S. President George H. W. Bush, Vice President (and former Secretary of Defense) Dick Cheney, Secretary of State (and former chairman of the joint chiefs of staff) Colin Powell, and retired general Norman Schwarzkopf for allegedly committing war crimes during the 1991 Gulf war. See, Ratner (2003), 889-891.

In 1985, Spain enacted the Organic Law of the Judicial Power (Ley Orgánica del Poder Judicial /LOPJ). Article 23(4) of this law empowered Spanish authorities to investigate, prosecute, and adjudicate certain crimes including genocide¹¹, even if these crimes had no connection with Spain. The only statutory limitation was that prosecution should not be pursued if the criminal has been acquitted, convicted, or pardoned abroad (Article 23(2)(c)). Spanish universal jurisdiction received considerable international attention in October 1998, when a Spanish investigative judge issued an arrest warrant for Chile's former President, Augusto Pinochet, who was at the time visiting the United Kingdom. Following this high-profile case, Spanish tribunals dealt with a significant number of allegations concerning international crimes in the exercise of universal jurisdiction¹² before retreating from the frontline after the amendment of Article 23(4) by the law of 4 November 2009.¹³

At the same time, the promotion of universal jurisdiction required a theoretical innovation, especially in the period of its genesis. This assertion of jurisdiction not only lacked the jurisdictional links that traditional assertion of jurisdiction had, it also lacked grounding in the conventional regimes in that it was not underpinned by customary law. On the one hand, some of the crimes subject to the assertion of universal jurisdiction had no

¹¹ Those crimes are: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offences in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking, (g) any other offence which Spain is obliged to prosecute under an international treaty or convention.

¹² See Rojo (2011), 722-728.

¹³ The law, while adding crimes against humanity, illegal traffic or clandestine immigration of persons, and crimes related to female genital mutilation to the catalogue of crimes covered by the principle of universality, made the exercise of jurisdiction subject to the following conditions: that the alleged perpetrators are present in Spain, that the victims are of Spanish nationality, or that there is some demonstrated relevant link to Spanish interests. In any case, the Spanish courts have no jurisdiction when other competent courts or international tribunals have begun proceedings that constitute an effective investigation and prosecution of these punishable acts. For an overview of the development toward the amendment, see, de la Rasilla del Moral (2009), 802-805. See also, Rojo (2011), 713.

Most recently, it was reported that the arrest warrants were issued on 19 November 2013 against Former Chinese president Jiang Zemin and ex-Prime Minister Li Peng, for their alleged commission of genocide in Tibet. The case was brought by two Tibetan support groups and a monk with Spanish nationality, which allowed suspects to be tried under the Spanish law based on the victim's nationality. See, 'Chinese leaders face Spain arrest warrant over Tibet', <http://www.reuters.com/article/2013/11/19/us-china-tibet-spain-idUSBRE9AI0XA20131119>

corresponding conventional regime as such (crimes against humanity), or were not covered by the jurisdictional grounds provided by relevant conventional regimes (genocide¹⁴ and a part of violation of humanitarian law¹⁵). On the other hand, state practices were either scarce or inconsistent, which would not be sufficient for a customary rule to be confirmed. Thus, proponents of universal jurisdiction have tended to seek its justification within the nature of crimes; i.e., 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.

Before proceeding further into the argument, it is necessary to clarify the role of universal jurisdiction *in absentia*, the first instance of which was triggered by Belgium's issuance and international circulation of an arrest warrant against an incumbent foreign minister of the Democratic Republic of the Congo. It is referred to as jurisdiction '*in absentia*' because the criminal proceeding is initiated while the alleged perpetrator is absent from the territory of the asserting state. The question here is whether this is a distinct category of jurisdiction to be distinguished from universal jurisdiction in general, as both opponents and proponents of universal jurisdiction *in absentia* seem to accept.

Opponents of universal jurisdiction maintain that universal jurisdiction *in absentia* should be grounded in *permissive rules*. They observe that there is no multilateral convention that permits the exercise of universal jurisdiction *in absentia*. For them, typical conventions that provide grounds for universal jurisdiction as such are those requiring a state party to establish jurisdiction over an offence in the case where the alleged offender is present in its territory and it does not extradite him/her (the formula of *aut dedere aut judicare* / the ADAJ formula). However, as the International Court of Justice (ICJ) has noted, 'none of these texts has contemplated establishing jurisdiction over offences committed abroad by

¹⁴ Article VI of the Genocide Convention refers only to a competent tribunal of territorial state and international penal tribunals as a venue for the trial of genocide.

¹⁵ See footnote 7 for the Belgian Act 1993/1999's dealing with the violation of humanitarian law in non-international armed conflicts.

foreigners against foreigners when the perpetrator is not present in the territory of the State in question',¹⁶ because the obligation of this kind is premised on the presence of the accused perpetrator.

In contrast, the proponents of universal jurisdiction *in absentia* submit that the exercise of jurisdiction of this kind is at least *not prohibited* by existing rules. Judges Higgins, Kooijmans, and Buergenthal of the ICJ argue that the treaties that lay down the obligation of *aut dedere aut judicare* assume the presence of the accused because '[t]here cannot be an obligation to extradite someone you choose not to try unless that person is within your reach'.¹⁷ However, as the judges point out, the treaties cannot be interpreted 'so as to exclude a voluntary exercise of a universal jurisdiction', in light of the underlying purpose of designating certain acts as international crimes which, in their view, is to authorize a wide jurisdiction to be asserted over persons committing them. Accordingly, as the judges have observed, 'there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a state wishing to exercise jurisdiction'.¹⁸ Similarly, Judge *ad hoc* van den Wyngaert of the ICJ submits that there is no rule of conventional international law to the effect that universal jurisdiction *in absentia* is prohibited. In stating this, the judge gave particular attention to the provisions of the Geneva Conventions that embody the principle of *primo prosecute, secundo dedere*, whose textual interpretation of this does not logically presuppose the presence of the offender.¹⁹

¹⁶ *Arrest Warrant case*, Opinion individuelle de M. Guillaume, président, ICJ Reports 2002, 39-40 (para. 9).

¹⁷ *Arrest Warrant case*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *ibid.*, 80 (para. 57).

¹⁸ *Ibid.*, 80 (para. 58).

¹⁹ *Arrest Warrant case*, Dissenting Opinion of van den Wyngaert, *ibid.*, 170 (para. 54).

Despite the contrasting views, there is no need to distinguish universal jurisdiction *in absentia* from general universal jurisdiction at the prescriptive level. In this regard, it is useful to note that the so-called universal jurisdiction *in absentia* consists of a series of measures taken by a state to obtain custody of the alleged perpetrator who is outside of the territory of that state in relation to and as a precondition for his/her arrest and prosecution. These measures may include investigation, issuance, and international circulation of an arrest warrant, and a request for extradition.²⁰ As such, they fall squarely within the scope of jurisdiction to enforce—a means to enforce the law in question provided that the jurisdiction to prescribe is established.²¹

Admittedly, some conventions and legislations require the alleged perpetrator's presence at the initiation of criminal proceedings.²² Moreover, even if legislation does not expressly require the presence of the accused party in the territory, it might be interpreted as so.²³ However, these practices may not be taken as endorsing the idea that the assertion of universal jurisdiction *in absentia* should be regarded as a distinct category of prescriptive jurisdiction, and should be permitted by specific rules. The reasoning for this is because if one assumes the presence of the alleged perpetrator as a condition for the assertion of universal prescriptive jurisdiction, it would mean that the crime would only be prescribed

²⁰ Trial *in absentia* is not included therein, although it theoretically is, as it may constitute a violation of perpetrator's right to a fair trial. See, Vandermeersch (2002), 606.

²¹ To say that jurisdiction to prescribe is 'established' does not necessarily mean that it is grounded on international law.

²² E.g., Art. 689-I of the Code of Criminal Procedure of France.

²³ The Dutch legislation implementing the 1984 Convention against Torture does not include a specific provision requiring the presence of the accused. This raised a question of universal jurisdiction *in absentia* in *Wijngaarde et al. v. Bouterse*. The Netherlands' Supreme Court noted that the legislation implementing the Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch court's jurisdiction in respect of offences committed abroad when 'the accused was found in the Netherlands', and the same applied in the case of the legislation implementing the Convention against Torture. Thus, it held that prosecution in the Netherlands for acts of torture committed abroad was possible only 'if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example ... if the accused was on Dutch territory at the time of his arrest'. Supreme Court of the Netherlands, 3 *YbIHL*(2000), para. 8.5. See also, *Arrest Warrant case*, Opinion individuelle de M. Guillaume, président, ICJ Reports 2002, 41 (para. 11).

at the time of the alleged perpetrator's entry into the territory of the state asserting jurisdiction. This would have an unreasonable consequence from a theoretical point of view, as it would violate the principle of legality, which requires the prohibition of a certain conduct to exist at the time of the conduct. Accordingly, these practices should be seen as restricting the exercise of enforcement jurisdiction, which does not affect the validity or legitimacy of universal prescriptive jurisdiction.

In summary, the types of conduct associated with universal jurisdiction *in absentia* are in fact the manifestation of universal prescriptive jurisdiction at the enforcement stage, which suggests that they do not constitute a distinct category of jurisdiction at the prescriptive level.²⁴

2.1.1 The Deductive Approach

2.1.1.1 Piracy as an Analogy

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.²⁵

However, it seems inadequate to infer the nature of crime from the term *hostis humani generis*. The view that refers to pirates as *hostis humani generis* dates back to ancient

²⁴ O'Keefe (2004), 750.

²⁵ Marcedo (2003), 4. See also, Mann (1964), 95; *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

Rome, a time when the term ‘pirates’ was used primarily in reference to political communities in the Eastern Mediterranean.²⁶ Although these pirates attacked other vessels without any Roman-style declaration of war, they were still regarded as an agent of ‘war’ for which the law of war was applicable. They were referred to as *hostis*, which made them distinct from criminals under Roman law.²⁷ Additionally, these communities were in an enduring state of war against neighbouring 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.²⁸

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. Additionally, 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 commission’.²⁹ In other words, the grounds

²⁶ Rubin (1997), 16.

²⁷ *Ibid.*, 16-19.

²⁸ In fact, in *In re Piracy Jure Gentium* [1934] AC 586 which has often been cited as a precedent denouncing acts of piracy as ‘*hostis humani generis*’, the Privy Council did not use that label to mean that an act of piracy was of particularly heinous nature. Actually, the act in question was merely a robbery, and according to the Privy Council, recognition of the pirates as constituting crimes was left to the municipal law of each country. It was rather submitted that the criminal jurisdiction of municipal law would be extended to piracy committed on the high seas by any national on any ship, ‘because a person guilty of such piracy has placed himself beyond the protection of any State’.

²⁹ Hall (1924), 310-311. See also, Beckett (1924), 45.

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.³⁰ 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.³¹

Given the points set out above, 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.³² The structure of such an exercise of jurisdiction was later adopted in the provisions for the repression of piracy under the Convention on the High Seas and the United Nations Convention on the Law of the Sea (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.³³ This by no means denies that the interest protected by the repression of

³⁰ 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), 681.

³¹ Hall (1924), 317. Actually the remedy was obtained from the state, which issued a letter of marque when the privateer acted beyond the extent of permission.

³² Kontorovich (2004), 183. See also, Addis (2009), 129.

³³ Since a vessel engaging in an act of piracy does not automatically lose its nationality (Article 18 of the Convention on the High Seas, Article 104 of UNCLOS), it is not appropriate to equate a pirate ship with a ship without nationality (Cf. Schwarzenberger (1950), 269.) Rather, it should be submitted that the certain kind of act for which the flag state would not be willing to claim its exclusive jurisdiction had been historically

piracy—namely, the security of maritime transportation—is an interest common to all nations. In fact, the common interest of nations became more clearly acknowledged³⁴ with regard to the repression of piracy after the demise of privateers and their authorised attacks on the merchant vessels of other nations,³⁵ which consequently nullified the need to distinguish between permissible private depredations and acts of piracy. However, it should be recognized that even under modern international law in which such common interest is acknowledged, the structure of the exercise of jurisdiction remains unchanged; i.e., the exercise of universal jurisdiction is accepted when there is no concurrence with another state's claim.

2.1.1.2 The *Jus Cogens* Nature of Crimes

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.³⁶ The *jus cogens* norm is regarded as embodying such collective value interest,³⁷ and accordingly, it is alleged that all states as members of the international community are entitled to punish conduct that violates *jus cogens* norms.³⁸

At the outset, it is necessary to clarify the concept of *jus cogens* and its role and context in the existing international legal system. While the literature of the pre-WWII era made

established as an act of 'piracy' which is subjected to the universal jurisdiction and was later adopted in the international agreements.

³⁴ Harvard Research, 'Jurisdiction with Respect to Crime', 29 *AJIL, Supplement* (1935), 566.

³⁵ The Declaration on the Abolishment of Privateers was adopted in 1856, and it was observed that the practice of privateers became obsolete by the early twentieth century. Hannikainen (1988), 71.

³⁶ Simma (1994), 286-293; Hannikainen (1988), 4.

³⁷ Rozakis (1976), 2; Hannikainen (1988), 2.

³⁸ Bassiouni, (2001), 107; A. Orakhelashvili (2006), 288; Addis, (2009), 142-144.

references to the concept,³⁹ it was the Vienna Convention on the Law of Treaties (VCLT) that introduced the concept of *jus cogens* to the realm of positive international law. Article 53 of the Convention defines *jus cogens* as ‘a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted’ and ‘a treaty is void if it conflicts with a peremptory norm’.

The significance of the concept of *jus cogens* thus formulated should not be underestimated. Its power to *invalidate* an agreement is premised on—and indeed cannot be explained without—the existence of a certain public order. This can be well understood by comparing the proposition of Fitzmaurice and that of Waldock, both of whom were serving as special rapporteurs in the International Law Commission (ILC) for the work on the codification of the law of treaties. Fitzmaurice postulated that the mutual consent of the parties was an essential condition for the validity of any treaty. Thus, while observing the nature of *jus cogens* as ‘absolute and imperative’, he submitted that a treaty which was in conflict with *jus cogens* norms could only become unenforceable *between parties*, as there was no flaw with respect to their mutual consent.⁴⁰ In contrast, Waldock postulated a certain legal order—imperfect though it might be in Waldock’s own words—from which states could not at their own free will contract out.⁴¹ A *jus cogens* norm is regarded as embodying such an order, and as such it makes a treaty *void* when the latter is in conflict with it. Note that Waldock’s view was reflected in the provisions of the VCLT.

Conceptualized in this manner, the notion of *jus cogens* has been regarded as embodying a certain public order that cannot be reduced to the will of individual states, thus going beyond the scope of application of treaty law. Accordingly, *jus cogens* has been understood as having a function that *prohibits* acts that infringe on the values which it

³⁹ Shelton (2006), 297-299.

⁴⁰ Fitzmaurice, Third Report of the Law of Treaties, YbILC, 1958 Vol. II, 25, 27-28, 40.

⁴¹ Waldock, Second Report of the Law of Treaties, YbILC, 1963 Vol. II, 39, 52.

intends to protect.⁴² Based on this assumption, doctrines have sought to identify the special effect of violations of *jus cogens* norms and how *jus cogens* are to be situated in the international legal system, premised on that violation of such rules that serve for the maintenance of the public order must be dealt with differently from that of ordinary rules.⁴³

In the field of international criminal law, this special effect is succinctly illustrated by the oft-cited passage of the *Furundžija* case in the International Criminal Court for the former Yugoslavia (ICTY). After observing that the prohibition of torture is a norm of *jus cogens* that enjoys ‘a higher rank in the international hierarchy’,⁴⁴ the Trial Chamber added:

Furthermore, at the individual level, that is, that of criminal liability it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction. 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.⁴⁵

⁴² Hannikainen (1988), 9; The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries (2002) [hereinafter, *Articles on State Responsibility*], Article 40, Commentary (3), 246.

⁴³ No doubt the distinction between international crimes and ordinary international wrongs in the field of state responsibility that had been introduced by the ILC is the most discussed issue in this regard. YbILC 1976, Vol. II, Part 2. While the notion of ‘international crime’ was not included as such in the Article on State Responsibility finally adopted, the distinction between the *jus cogens* (peremptory) norms and any other rules was retained, the serious violation of the former being attached special consequences.

⁴⁴ *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 153.

⁴⁵ *Ibid.*, para. 156.

However, it is not clear from this statement how the power of *jus cogens* to restrict ‘the treaty-making power of sovereign states’, in which an addressee seems to be a state⁴⁶, may also serve to authorize the exercise of criminal jurisdiction by other states over an individual who acted in violation of the norm. To put it another way, there are two distinct questions relevant here: whether—and how—an individual can be an addressee of *jus cogens* norms; and, if so, whether this will entail every state’s entitlement to punish. These questions are addressed in order below.

Can an Individual be an Addressee of Jus Cogens Norms?

In order to address the first question, it is necessary to begin by asking whether an individual can be an addressee of the rules of international law, the scope of which include *jus cogens* norms. If so, how is the basis for an individual addressee of *jus cogens* to be established? In this regard, it should be recalled that under the classical doctrine, it was assumed that only a state could be held liable at international law and responsibility of individuals remained a matter of domestic law.⁴⁷ This principle, taken on its own, appears to negate the very capability of an individual to be an addressee of international duties. However, the post-WWII prosecution of war leaders at the International Military Tribunals (IMTs) set a precedent that international law could impose duties on individuals directly, with regard to crimes against peace, crimes against humanity, and war crimes. It also suggested that these individuals would not be immune from their responsibility due to the

⁴⁶ Admittedly, the Trial Chamber in *Furundžija* seems to assume that it is individuals that are the addressees of *jus cogens* prohibition. However, it requires further clarification, since as far as the restriction of treaty-making power of states is concerned, an addressee of ‘no derogation’ from *jus cogens* is states.

⁴⁷ Bianchi (2009), 17.

fact that they were acting on behalf of the states they belonged to.⁴⁸ These propositions were later confirmed by the Formulation of Nurnberg Principles prepared by the ILC.⁴⁹

It is important to note that before these prosecutions by the IMTs, the three categories of crimes had had only an ambiguous or even non-existent status on the international plane. As for war crimes, while states had customarily punished nationals of belligerent states for acts committed before capture, there was no consensus among commentators on whether it was done in direct application of international customary law, or domestic laws of a state of the prisoner, or a custodial state. The Formulation of Nurnberg Principles had the effect of endorsing their status as crimes under international law. As for crimes against humanity, elements of crimes constituting them (murder, extermination, enslavement, deportation, and other inhuman acts) had already been criminalised in many municipal legal systems, but they were unknown to international law as such. Thus, the Formulation served to legitimise the concept within the realm of international law.⁵⁰ In contrast, crimes against peace as a crime for individuals had been unknown both to international and domestic law before World War II (WWII). Commentators thus observed that the Charters of the IMTs were the application of *ex post facto* law.⁵¹ While the implication of the confirmation of status of these crimes thus varies from one category to another depending on the place that they had held before, the significance of the precedent laid down by the IMTs and the Formulation lies in the fact that it elevated these three categories of crimes to the international level by labelling them ‘crimes under international law’, for which individuals could be held responsible directly under international law.

⁴⁸ The oft-cited statement of the International Military Tribunals succinctly but eloquently illustrated the rational: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced’. Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947, 223.

⁴⁹ YbILC, 1950, Vol. II, 374.

⁵⁰ Cryer (2008), 120.

⁵¹ Röling and Cassese (1993), 3-5; Gallant (2008), 115-116.

However, this precedent did not necessarily mean that ‘crimes under international law’ became firmly established within the realm of positive international law. For such a concept to be entrenched, not only must substantive norms have direct binding force on individuals in the absence of intermediate provisions of municipal law being established on the international plane, but the corresponding procedure must also be available in the form of an international criminal court, or if before a municipal court, in accordance with the principle of universal jurisdiction.⁵² Moreover, those regimes establishing individual liability would have to be binding on the great majority of states, for ‘only then would the international status of the relevant penal provision be assured’.⁵³ In light of this, the precedent of the IMTs and the Formulation could be seen as validating the existence of those substantive norms,⁵⁴ yet those norms remained to be complemented by the corresponding procedure, because the character of those tribunals as truly international courts was highly questionable.⁵⁵ As the discussion below will show, the practice during the Cold War era demonstrated that the international society had not been united enough to provide the procedure and judicial entities for this purpose. The question of the *capability* of individuals to be addressees of international duties, therefore, had remained unresolved during that era.

The most notable example of this lack of resolution can be observed in the procedure in practice for the punishment of crimes of genocide. The Convention on the Prevention and Punishment of the Crimes of Genocide [Genocide Convention] (1948) declares genocide

⁵² Jescheck (1985), 333. See also Gaeta (2009), 63 (arguing that certain conduct is criminalized not only if that conduct is prohibited by law, but also if the threat of a criminal sanction is attached to it in case of transgression).

⁵³ Jescheck (1985), 333.

⁵⁴ Parlett (2011), 258, 274-277 (arguing that the Nuremberg Principles were a strong indication that individuals could be held responsible directly under international law for certain violations of international law, while admitting that jurisdiction to enforce was absent around that time).

⁵⁵ Both judges and prosecutors were appointed by each of the victor Powers, the latter even being acted under the instruction of each appointing state. Therefore, it is argued that ‘the two military Tribunals were not independent international courts proper, but judicial bodies acting as organs common to the appointing states’. Cassese et al. (2013), 257-258.

as a crime under international law (Article I), and also designates an international penal tribunal along with a tribunal of territorial state as a venue for it to be tried (Article VI), which is observed by commentators as reflecting ‘the truly international legal character of the crime.’⁵⁶ However, the Convention does not expressly refer to individual obligations but rather imposes obligations on states to give effect to the prohibition in domestic law. More importantly, an attempt to establish an international criminal court soon became stymied,⁵⁷ and indeed the prosecution of crimes of genocide at the international level did not take place until the 1990s. As for universal jurisdiction, it was not included in the Convention: an Iranian proposal to introduce universal jurisdiction⁵⁸ met with strenuous objection especially from major powers⁵⁹ and was eventually rejected.⁶⁰ While the chief reason for the objection was not that the exercise of universal jurisdiction would be in breach of international law,⁶¹ this example succinctly illustrates the lack of will among states around the time to establish a procedure that would adequately match the status of crimes of genocide as ‘crimes under international law’.

The procedure used in the context of war crimes requires a distinct examination, because the Geneva Conventions adopted in the same era mandate the High Contracting Parties to

⁵⁶ Simma & Alston (1999), 308.

⁵⁷ The ILC was referred to work on the prospect of establishing an international criminal court in 1948, and it produced the Draft Statutes in 1951 and 1953 (Report of the Committee on International Criminal Jurisdiction, UN Doc. A/2136 and Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc. A/2638). However, work was deferred pending the adoption of a definition of aggression and was only referred back to the ILC in 1989 (GA/Res/44/39, 4 December 1989). It was only in 1994 that the Draft Statute was finally adopted.

⁵⁸ U.N. GAOR, 6th Comm., 3d Sess. (1948), A/C.6/218, Annexes, 20. It was proposed that a custodial state would be conferred a right, hence not a duty, to try an alleged perpetrator, provided no request had been made.

⁵⁹ Ibid., A/C.6/SR.100 (USA), 398-399 (arguing that at that stage of development of international law, it was dangerous to extend the jurisdiction of national courts to include the punishment of offences committed on the territory of others); *ibid.*, A/C.6/SR.100 (USSR), 403 (arguing that the territorial state where documents and witnesses are found ‘would not consent to surrender its penal jurisdiction to another State’, being ‘jealous of its sovereignty’).

⁶⁰ Ibid., A/C.6/SR.100, 406.

⁶¹ Rather, concern was made over the lack of impartiality of the national courts of a state in trying other states’ leaders. See A/C.6/SR.100 (Afghanistan), 397; A/C.6/SR.100 (Egypt), 398; A/C.6/SR.100 (Uruguay), 398.

establish and exercise universal jurisdiction over ‘grave breaches’ of the Conventions.⁶² While there is little doubt that it is ‘the first treaty-based embodiment of an unconditional universal jurisdiction applicable to all states parties’,⁶³ the question here is whether those grave breaches were meant to be ‘crimes under international law’, which would directly bind individual perpetrators to international norms. Regarding this, it is useful to analyse the relevant provisions in light of the *travaux préparatoire*.

The International Committee of the Red Cross’ (ICRC) proposals submitted to the Diplomatic Conference endorsed a relationship between the international character of crimes and the universality of jurisdiction. The proposal stated that ‘grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognised by them’.⁶⁴ It argued that the principle of the universality of jurisdiction was adopted for the purpose of repressing such acts,⁶⁵ the immunity of which would lead to ‘the degradation of human personality and a diminished sense of human worth’.⁶⁶

⁶² Article 49 of the First Geneva Convention, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth oblige the High Contracting Parties ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of [the] Convention defined in the following Article’. Each Article goes on commonly to provide: ‘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.’

⁶³ O’Keefe (2009), 811. In this regard, although only the nationality of the offender is mentioned as being irrelevant for the exercise of jurisdiction, it is implied that other jurisdictional grounds are also irrelevant. In fact, when the Italian Delegate proposed to limit the obligation of searching for alleged perpetrators and bringing them to justice to the Parties to the conflict, the Netherlands Delegate answered that each Contracting Party should be under this obligation, even if neutral in a conflict; hence, the principle of universality applied here. The Italian proposal was finally withdrawn. See, Final Record of the Diplomatic Conference of Geneva, Vol. 2-B (1949), 116.

⁶⁴ ICRC, Remarks and Proposals (1949), 18.

⁶⁵ *Ibid.*, 21.

⁶⁶ *Ibid.*, 20.

Nevertheless, these proposals faced strong objections from the commencement of the Diplomatic Conference, and the Netherlands Delegation, which had first tried to give the proposals the chance of being discussed, but who decided to submit a new text made in collaboration with the delegations that had raised objections.⁶⁷ In this new text, which would become the basis of the provisions finally adopted at the Conference, the term ‘crimes against the law of nations’ that had originally characterised the concept of ‘grave breaches’ was dropped. In addition, there was no longer any reference to international jurisdiction.⁶⁸

The intention not to vest the term ‘grave breaches’ with the status of crime under international law was further illustrated by the explanation of the Netherlands Delegate in their answer to the USSR Delegate who proposed replacing the word ‘breaches’ with ‘crimes’:

...The Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted in the national penal laws.⁶⁹

According to the Netherland Delegate, the inclusion of grave breaches would guarantee a certain amount of uniformity in the national laws, which was desirable, as tribunals were also dealing with accused parties who were of other nationalities.⁷⁰ Given all this,

⁶⁷ Final Record of the Diplomatic Conference of Geneva, Vol. 2-B (1949), 115. These delegations were Australia, Belgium, Brazil, France, Italy, Norway, the United Kingdom, the United States of America, and Switzerland.

⁶⁸ Final Record of the Diplomatic Conference of Geneva, Vol. 3 (1949), 42-43.

⁶⁹ Final Record of the Diplomatic Conference of Geneva, Vol. 2-B (1949), 116. The USSR’s proposal was rejected.

⁷⁰ Ibid., 115.

although the laws and customs of war embodied in the Conventions had been established as the rules to be observed, ‘grave breaches’ of the Conventions were not regarded as directly imposing obligations on individuals.

In short, the Genocide Convention and the Geneva Conventions that were adopted immediately after the WWII failed to consolidate ‘crime under international law’ within the realm of positive international law, thereby rendering ambiguous the issue of whether an individual could be an addressee of international norms, not to mention *jus cogens* prohibitions. In fact, before the 1990s, most of the treaty practice in terms of international criminal law had taken place within the field of transnational criminal law, of which the suppression treaties are the typical examples. These treaties (and customary rules, if any) imposed obligations on states to criminalize certain conducts and enforce transgressions within their own legal orders.⁷¹ It is important to note that the main feature of transnational criminal law is that international legal obligations are imposed on states, rather than individuals. As Cryer states, ‘the essence of these offences is that the locus of the criminal prohibition on individuals is not the international legal order, but the municipal law of the State that prosecutes’.⁷² In light of this, many of the alleged ‘crimes under international law’ could in fact be categorized as crimes in the transnational criminal law, at least within the context they were dealt with during the Cold War era⁷³: genocide and apartheid⁷⁴, without the establishment of international criminal tribunals, may fit into this category; grave breaches of the Geneva Conventions in light of the drafters’ intention mentioned above demonstrates a feature of transnational criminal law; and as for crimes of

⁷¹ Boister (2003), 963.

⁷² Cryer (2008), 109.

⁷³ Gaeta (2009), 64.

⁷⁴ Article V of the Convention on the Suppression and Punishment of the Crime of Apartheid provides: ‘Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States’ Parties which shall have accepted its jurisdiction’.

torture, the Convention Against Torture remains faithful to the formula of suppression treaties.

Things had started changing at the conclusion of the Cold War. Faced with the human atrocities in the conflicts that had erupted in the former Yugoslavia and Rwanda, the UN Security Council set up two *ad hoc* International Criminal Tribunals that became the first truly international tribunals; one tribunal was established for the former Yugoslavia in 1993 and another for Rwanda in 1994. The creation of these tribunals provided a vital starting point for the subsequent establishment of the International Criminal Court in 1998, and it also paved the way for the establishment of a group of ‘hybrid’ tribunals founded after 2000. It is important to note that the subject-matter jurisdiction of these tribunals generally includes crimes of genocide, crimes against humanity, and war crimes. These are crimes for which individual perpetrators are to be prosecuted and punished. The significance of their creation, therefore, was to provide a means of enforcing those criminal prohibitions at the international level, thereby *consolidating* the notion of ‘crime under international law’ for which individuals could be held responsible directly.⁷⁵

In sum, there is little doubt today that there are international norms that directly impose obligations upon individuals, of which genocide, crimes against humanity, and war crimes are the clearly accepted and recognized examples. It should be noted that the concept of ‘crimes under international law’ does not connote that they are vested with the character of *jus cogens*.⁷⁶ Nevertheless, various tribunals, especially international or quasi-international

⁷⁵ Parlett (2011), 277 (arguing that individual responsibility for international crimes has been affirmed by international prosecutions, while submitting that individual criminal responsibility exists absent jurisdiction to enforce).

⁷⁶ Its underlying rationale is, or at least originally was, not the nature of the interest to be protected, but the reality that it is individuals, not abstract entities, that committed a crime and ‘only by punishing individuals who commit such crimes can the provision of international law be enforced’. Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947, 223.

criminal tribunals, have started affirming the peremptory nature of those crimes,⁷⁷ thereby contributing not only to the identification of *jus cogens* norms, but also to confirming that individuals could certainly be addressees of those norms (*individualization* of *jus cogens*⁷⁸).

Can the Entitlement of Universal Jurisdiction be Deduced from Jus Cogens Norms?

Having confirmed that individuals can be addressees of *jus cogens* norms, the focus of the discussion now turns to the second question: whether the entitlement to universal jurisdiction can be deduced from the violation of those norms.

At the outset, it is necessary to make a brief observation on the distinction between substantive rules and procedural rules in the sphere of international law.⁷⁹ Despite the strenuous objection from some commentators,⁸⁰ this distinction has been retained in the proceedings before various courts, and is of particular importance in assessing the relation between the violation of *jus cogens* norms and the consequences it may entail. Basically, substantive rules are the rules that determine whether conduct is lawful or unlawful.⁸¹ Those rules prescribe rights, obligations, and standards of conduct; determine legal status, title, and conditions; and provide legal definitions. On the other hand, procedural rules, or rules that in the ICJ's words are 'procedural in nature',⁸² are defined as the rules that

⁷⁷ *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 153 (torture); *Prosecutor v. Kupreškić et al.* IT-95-16, Trial Chamber II, Judgment, 14 January 2000, para. 520 (genocide, crimes against humanity and war crimes).

⁷⁸ Mogami (2009), 23.

⁷⁹ On the substantive-procedural distinction, Talmon (2012), 981-982.

⁸⁰ Orakhelashvili (2007), 968; Orakhelashvili (2013), 94. See also, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervention)* [hereinafter *Jurisdictional Immunities case*], Dissenting Opinion of Judge Cançado Trindade, ICJ Reports 2012, 285-286 (paras. 294-297).

⁸¹ *Jurisdictional Immunities case*, Judgment, 3 February 2012, ICJ Reports 2012, 124, 140 (paras. 58, 93).

⁸² *Ibid.*, 124 (para. 58).

govern the means to effectuate the contents of substantive rules. As such, they are made up of rules governing the jurisdiction of courts and tribunals, including rules on the immunity from jurisdiction in both criminal and civil proceedings, and rules on the admissibility of a claim or application.

In light of this distinction, the assertion that the entitlement of universal jurisdiction derived from the peremptory nature of the violated norms can be understood to imply that substantive *jus cogens* norms necessarily entail corresponding procedures that can effectuate the special nature of those norms.

In this regard, it can be observed that generally, and not confined to the field of international criminal law, prohibition of genocide, crimes against humanity, war crimes, and torture have been affirmed as having a peremptory character in a number of recent cases in both international⁸³ and domestic courts.⁸⁴ Despite this, whether such substantial rules entail corresponding procedures is not self-evident. In fact, those very courts that recognized that the norms at issue were peremptory also refused to recognise specific effects that were alleged to be attached to the peremptory nature of those norms. For instance, in the *Armed Activities on the Territory of the Congo*, the ICJ recognized that the prohibition of genocide was assuredly of peremptory nature, but went on to state that the fact that a dispute related to the non-compliance with that norm could not of itself provide a basis for the jurisdiction of the Court to entertain that dispute. According to the court,

⁸³ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006, 31-32 (para. 64) (genocide); *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, 457 (para. 99) (torture); *Al-Adsani v. The United Kingdom*, App. No. 35763/97, Judgment, 21 November 2001, para. 61 (torture) [hereinafter *Al-Adsani*].

⁸⁴ *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (genocide, enslavement, and other inhuman acts); *Re Pinochet*, Court of First Instance of Brussels, 6 November 1998, 119 *ILR* 346, 356 (crimes against humanity); *Ferrini v. Germany*, Italian Court of Cassation (Plenary session), No. 5044 of 11 March 2004, 128 *ILR* 658 (international humanitarian law).

‘jurisdiction is always based on the consent of the parties’ under the Statute of the Court.⁸⁵ In other words, the fact that the violation of peremptory norms is at issue does not confer itself the jurisdiction to entertain the dispute that it would not otherwise have had. In the *Al-Adsani*, the European Court of Human Rights observed that despite the special *jus cogens* nature of the prohibition of torture, there was a rule of international law that stated a state could not enjoy immunity from civil suit in the courts of another state where acts of torture were alleged.⁸⁶ The Court thereby rejected the argument that the peremptory nature of the prohibition of torture would affect the principle pertaining to immunity established under customary international law. This rationale was echoed in the *Jurisdictional Immunity of the State* case with a more detailed argument. In this case, the ICJ observed that there is no conflict between a rule of *jus cogens* and the rules on state immunity, because they address different matters. The rules on state immunity, as a rule that is procedural in nature, are neutral to the question of whether or not the conduct in respect of which the proceedings are brought is lawful or unlawful⁸⁷; rather, they concern the conditions for proceedings to be brought, and hence necessarily precede the determination of the lawfulness of the conduct in question.⁸⁸ If there is no conflict, there is no prospect of a *jus cogens* rule affecting a rule on immunity with its alleged ‘overriding’ or ‘non-derogable’ power.

⁸⁵ *Armed Activities on the Territory of the Congo (New Application: 2002)*, ICJ Reports 2006, 31-32, 52, (paras. 64, 125). Similarly, the Court had already declared in *East Timor* that the right of self-determination’s *erga omnes* character, which is also related to the idea of the protection of the interest of international community, does not affect the rule of consent to jurisdiction. It provides: ‘The Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*’. *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports 1995, 102 (para. 29).

⁸⁶ *Al-Adsani*, para. 66. See also, Report of the Study Group of the ILC (Finalized by Martti Koskenniemi), Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), 187-188, para. 373.

⁸⁷ *Jurisdictional Immunities case*, ICJ Reports 2012, 140 (para.93).

⁸⁸ *Ibid.*, 136, 140-141 (paras. 82, 94).

This brief overview suggests that the peremptory nature of norms does not always achieve the virtually unlimited special effects that they are alleged to have, by ‘overriding’ or ‘trumping’ all other rules or regimes of international law.⁸⁹ However deplorable the act in question might be, *jus cogens* norms do not function as a panacea to remedy all situations of alleged injustice. It follows that the mere identification of some rules as having peremptory nature is not sufficient to determine what the legal consequences are that they may entail.⁹⁰ Moreover, this may lead to the negation of the validity of the deductive approach as such, because drawing practical conclusions directly from the *jus cogens* concept without any need for state practice and *opinio juris* can be seen as a manifestation of the interpreter’s own approach.⁹¹

That said, there is still considerable support for the proposition that an entitlement of universal jurisdiction over perpetrators of international crimes is a logical consequence of the peremptory nature of those crimes. This view seems to have gained support not only from doctrinal comments, but also from practices of various courts. While some commentators might argue that this is merely an achievement of the ordinary customary law-making process,⁹² a further assessment on this point is still warranted, as this proposition seems to have been retained for quite some time, irrespective of the fact that state practices did not seem to be matured enough to confirm customary international law.

In this regard, the earliest and most important case is the *Eichmann* case.⁹³ This case has been heavily relied on as an authoritative precedent supporting the proposition that

⁸⁹ Talmon (2012), 987-994; Vidmar (2013), 22.

⁹⁰ Focarelli (2008), 444.

⁹¹ *Ibid.*, 446.

⁹² *Ibid.*, 450. See also, Zimmermann (2006), 339.

⁹³ The *Eichmann* case, the Supreme Court of Israel, Judgment of 29 May 1962, 36 *ILR* 277 [hereinafter *Eichmann*].

universal jurisdiction can be inferred from the peremptory nature of the prohibitions. Nonetheless, the Supreme Court of Israel did not refer to *jus cogens* norms as such, but instead to the interest of the international community or fundamental values that *jus cogens* norms embody. In *Eichmann*, the Supreme Court observed, by drawing upon an analogy of piracy and war crimes, that it had been established as a principle of international law that an individual who committed crimes that ‘damage vital international interest,’ ‘impair the foundations and security of the international community,’ or ‘violate the universal moral values and humanitarian principles,’ must account for his or her own conduct.⁹⁴ It was thus confirmed that an individual could be held accountable on the international plane.⁹⁵ The court then submitted that the harmful and murderous effects of these crimes were ‘so embracing and widespread as to shake the international community to its very foundation’ and that every state, including Israel, that had not existed at the time of the commission of the crimes, was entitled to try the offender. In such a case, the state trying the offender would be regarded as acting ‘in the capacity of a guardian of international law and an agent for its enforcement.’⁹⁶ The entitlement of Israel to act on this basis was later confirmed by the U.S. Court of Appeals for the Sixth Circuit in the *Demjanjuk* case. According to the court, on the point of exercising universal jurisdiction, ‘neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offences against the law of nations or against humanity and the prosecuting nation is acting for all nations’.⁹⁷

It should be pointed out here that the Supreme Court of Israel in *Eichmann* admitted that there was no procedure for criminalisation and allocation of powers in the decentralised

⁹⁴ Ibid., 291-93.

⁹⁵ Admittedly, the proposition that the nature of crimes was the sole basis for confirming the individual criminal responsibility is problematic.

⁹⁶ *Eichmann*, 304.

⁹⁷ *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (USCA 6th Circuit 1985); cert. den. 475 US 1016 (1986), 628 F. Supp. 1370; 784 F. 2d 1254 (1986).

system of international law.⁹⁸ Rather, the court suggested, it was the very lack of a constitutionalized system that was alleged to authorize states to exercise its jurisdiction on behalf of the international community. The court suggested that strictly speaking, therefore, it was not from the norms of fundamental nature, but the (deficient) state of international legal system, that the entitlement of universal jurisdiction was inferred. In addition, the emphasis was equally on the fact that the great majority of the witnesses and the greater part of the evidence were concentrated in Israel⁹⁹ or that Israel, as a Jewish state, could be regarded as a state of victims¹⁰⁰—hence Israel’s special link with the crime. This renders the significance of *Eichmann* as a precedent of universal jurisdiction rather limited. Nevertheless, the substance of its jurisprudence—that is, the community interest or fundamental value having an impact of *transcending* sovereignty, making the scope of jurisdiction of one state reach an individual who is otherwise subject only to the territorial jurisdiction or the jurisdiction of his or her own state—has been followed by the ‘case law’ that was gradually accumulated in the 1990s, which would become the driving force behind the evolution of universal jurisdiction.

The Court of First Instance of Brussels took full advantage of this transcending effect in *Re Pinochet*. Faced with the question of whether it had jurisdiction to try a crime against humanity, which had not been explicitly included in its domestic law at the time in 1998,¹⁰¹ the court distinguished *jus cogens* crimes, which have an unspeakable and unacceptable nature from ‘any others’. According to the court, the former is subject to the exercise of universal jurisdiction even in the absence of any treaty requirement, because ‘all States in the world can be considered as having a legal interest in ensuring that such crimes are

⁹⁸ The court provides: ‘It is true that international law does not prescribe explicit and scaled criminal sanctions; that there still does not exist either an International Criminal Court or even international penal machinery.’ *Eichmann*, 291-292. On the lack of criminalizing powers in the international society, see, Cryer (2008), 119.

⁹⁹ *Eichmann*, 302.

¹⁰⁰ Bassiouni (2004), 52. But see, Orentlicher (2008), 137.

¹⁰¹ The crime against humanity was added to the list of ‘crimes under international law’ that is subjected to the assertion of universal jurisdiction only in the amendment of the Act in 1999.

punished'. On the other hand, the latter '[does] not transcend national boundaries and [its] punishment is to be left to the discretion of each State'.¹⁰² According to the court, crimes against humanity belong to the former category; in light of this view, the jurisdiction of the Belgian courts can be confirmed to encompass universal jurisdiction. It is important to note here that the court made these findings without further elaboration, declaring it almost as an immutable principle.

Interestingly, the transcending effect of *jus cogens* or community interest has also been invoked by the international criminal tribunals. Admittedly, those tribunals did not need to invoke the peremptory nature of crimes in order to confirm the ground of their jurisdiction, because their jurisdiction is given under the Security Council's resolutions or other international instruments. In any event, the scope of their jurisdiction is temporarily or geographically limited, and thus not universal. However, it is still useful to assess the statements made by those tribunals, because they are regarded as highly influential in 'interpreting and clarifying international criminal law'.¹⁰³

The ICTY seems the most proactive in this respect. In the *Prosecutor v. Furundžija*, 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 and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad [emphasis added]'.¹⁰⁴ Put differently, the entitlement of universal jurisdiction can be viewed as a logical consequence of the peremptory nature of the prohibition of torture. In the *Prosecutor v. Tadić*, 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

¹⁰² *Re Pinochet*, Court of First Instance of Brussels, 6 November 1998, 119 *ILR* 346, 356.

¹⁰³ Cryer (2008), 119.

¹⁰⁴ *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 156.

committed on the territory of another state without any justification by a treaty or customary international law.¹⁰⁵ 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 mentioned above. According to the court, the primacy of the international tribunal over domestic courts can be confirmed with regard to the crime, which was ‘universal in nature, well recognized in international law as serious breaches of international humanitarian law, and *transcending* the interest of any one state [emphasis added]’.¹⁰⁶

Similarly, the Special Court for Sierra Leone was faced with the challenge to its jurisdiction in the *Prosecutor v. Kallon & Kamara*, in light of the amnesty granted in the Lomé agreement. In rejecting this allegation, the court, while admitting that ‘the grant of amnesty or pardon is undoubtedly an exercise of sovereign power,’¹⁰⁷ nevertheless concluded that the grant of amnesty would not amount to depriving another state of its jurisdiction where it is universal. Whether the crimes are crimes susceptible to universal jurisdiction depends on the nature of the crimes. Thus, ‘[o]ne consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes’.¹⁰⁸

Given all this, there seems to be at least a strong indication in the ‘case law’ that international crimes that amount to the violation of *jus cogens* norms may be subject to the

¹⁰⁵ *Prosecutor v. Tadić*, IT-94-1-AR 74, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 55.

¹⁰⁶ *Ibid.*, para. 59.

¹⁰⁷ *Prosecutor v. Kallon*, SCSL-2004-15-AR 72 (E) (March 13, 2004), and *Prosecutor v. Kamara*, SCSL-2004-16-AR 72 (E) (March 13, 2004), para. 67.

¹⁰⁸ *Ibid.*, para. 70.

assertion of universal jurisdiction. In fact, when Lord Brown-Wilkinson stated in *Pinochet* (No. 3) 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'¹⁰⁹ he did not feel obliged to make detailed arguments but merely referred to *Furundžija* and *Demjanjuk*.

Nevertheless, one may still argue whether this is truly a logical consequence of the peremptory nature of these types of crimes. Regarding this, it should be noted at the outset that if one takes that view, then the assertion of universal jurisdiction should be *mandatory*, rather than merely *permissive*. In fact, this view is premised on the postulation that since those offences, by their very nature, undermine the foundations of the international community, individual perpetrators—an addressee of the prohibition of *jus cogens* norms—must not go unpunished; hence, it has a strong overtone of retributive justice.¹¹⁰ Based on this proposition, it argues that offences that undermine the international order are the concern of all states; in order for the absolute nature of the prohibition to be effectuated, all states *must* cooperate in bringing those perpetrators into justice. Such cooperation requires states to either prosecute or extradite perpetrators if they are found in their territory; this can be seen as a requirement of mandatory universal jurisdiction in the sense that states are obliged to exercise their jurisdiction when they do not extradite the alleged offender *even if the offense does not have any link with the forum state other than the presence of that person*. In fact, proponents of the deductive approach express support for

¹⁰⁹ *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97 (H.L.)

¹¹⁰ On the assertion that universal jurisdiction over international crimes should be understood as a manifestation of retributive justice, rather than deterrent, see, e.g., ILA, *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences* (2000), 3-4.

Dissenting Opinion of Judge Van den Wyngaert in *Arrest Warrant* mirrors this idea: 'the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its *raison d'être* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries'. *Arrest Warrant case*, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, ICJ Reports 2002, 166-167 (para. 46).

the idea of mandatory universal jurisdiction. For example, Stevens impassionedly argues that:

the only way the prohibition of genocide can have any concrete meaning as a *jus cogens* norm—that is, as a rule of paramount importance to the maintenance of the international order and from which no derogation is allowed—is if this norm is supported by a *jus cogens* duty to extradite or prosecute. The absolute prohibition of genocide has no meaning unless all states have an absolute obligation to bring offenders to justice'.¹¹¹

Orakhelashvili, applying the all-embracing superiority of *jus cogens* norms, concludes that '[i]f *jus cogens* crimes are peremptorily outlawed as crimes, then the duty to prosecute or extradite their perpetrators must be viewed as peremptory'.¹¹² Judge Ferrari Bravo, in his dissenting opinion in *Al-Adsani*, albeit not in the criminal law context, insists that the *jus cogens* nature of the prohibition of torture entails that 'every State has a duty to contribute to the punishment of torture'.¹¹³

The proponents of mandatory universal jurisdiction thus infer the duty to prosecute or extradite from the peremptory nature of the prohibition of crimes in question. As observed above, there is a growing consensus today that certain crimes are established as *jus cogens* crimes. However, the addressee of the peremptory prohibition is individuals, not states. If one argues that the effect of such a prohibition stretches to states, it would amount to situate individuals and states in the same sphere, and argue that states would act in

¹¹¹ Stevens (1998-1999), 447-448.

¹¹² Orakhelashvili (2006), 306.

¹¹³ *Al-Adsani*, Dissenting Opinion of Judge Ferrari Bravo.

complicity with those individual perpetrators by not punishing them. Yet it does not seem to match the current legal system of international law.

Admittedly, states may assume an obligation *in relation to* the acts of individuals, but it does not derive from the complicity of states with individuals. On the one hand, a state may be held responsible for an act of genocide committed by individuals if their conduct is attributable to it. However, this is because *states themselves are bound not to commit genocide*, through the actions of individuals or certain entities whose acts are attributable to them.¹¹⁴ On the other hand, a state is held responsible for the violation of the obligation to prevent or punish certain conduct committed by individuals under certain circumstances. However, this obligation derives from norms that address and regulate states' acts and omissions, which are conceptualized distinctly from the conduct of individuals.¹¹⁵ In any event, while there is growing support among doctrines that territorial states and national states of the offender assume an obligation to investigate and prosecute as far as international crimes or serious human rights violations are concerned,¹¹⁶ it does not automatically apply to third states.

Hence, 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

¹¹⁴ See, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, 114 (para. 167).

¹¹⁵ While the theory of complicity was prevailing in nineteenth century's doctrines and practices, it was criticized by some modern theorists, such as Anzilotti, as situating a private person and a state in the same sphere. According to them, a state is internationally responsible solely for its conduct, and not for that of private persons. See, Anzilotti (1906), 13. This was adopted by the General Claims Commission in *Janes v. Mexico*, where the Commission found that '[t]he international delinquency in this case [the failure to investigate and prosecute] is one of its own specific type, separate from the private delinquency of the culprit'. See, *Janes v. Mexico*, General Claims Commission, Opinion and Decision of 16 November 1926, 26 *AJIL* (1927), 362-371. The distinction between state responsibility and individual liability established in this opinion marked the turning point in the sense that it conceptualized the duty to prosecute, which has been adopted by doctrines and practices since then.

¹¹⁶ This argument will be addressed in chapter 4.

practice shows a strong indication in favour of the permissive nature of universal jurisdiction. Above all, those statements made in the case law highlighted above typically spoke of ‘entitlement’ or ‘interest’ of the assertion of universal jurisdiction, and in doing so, hints at the permissive nature of universal jurisdiction. In the same vein, many instruments adopted by the association of experts employ permissive terms when they define the concept of universal jurisdiction.¹¹⁷ Doctrinal statements also conform to this trend.¹¹⁸

In conclusion, the approach that infers the basis of universal jurisdiction directly from the peremptory nature of the crimes does not appear to provide a feasible explanation for the current state of practice. It is true that certain crimes are recognized as *jus cogens* crimes that directly impose obligations upon individuals. It is also true that there is a growing support for the idea that those crimes are subject to the assertion of universal jurisdiction. Nevertheless, the latter proposition cannot be seen as an automatic consequence of the former. If one infers the foundation for universal jurisdiction from the peremptory nature of the crimes, it suggests that one begins from the absolute nature of individual criminal responsibility, which would inevitably lead to the argument that individuals must be held accountable wherever they are *and* states must act to hold individuals accountable. No considerable support for such an absolute duty of states can be found in the current developments with respect to the assertion of universal jurisdiction.

¹¹⁷ Principle 1-2 of the Princeton Principle on Universal Jurisdiction (2001) provides: ‘Universal jurisdiction *may* be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body [emphasis added]’.

Resolution 3(a) of the Institute adopted in the Krakow Session (2005) provides: ‘Universal jurisdiction *may* be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict [emphasis added]’.

AU-EU Expert Report (2009) provides: ‘...States by and large accept that customary international law *permits* the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy [emphasis added]’. AU-EU Expert Report (2009), para. 9.

¹¹⁸ Sunga (1992), 104; Bottini (2004), 515; Cryer (2005), 93.

2.1.2 The Inductive Approach

As opposed to the deductive approach, the inductive approach, that is, inducing the basis for universal jurisdiction by confirming ordinary customary rules, seems to have gained support. This is by no means without reason. While the retreat of Belgium and Spain from their spearheading course on universal jurisdiction led some commentators to declare the ‘fall’¹¹⁹ or even the ‘death’¹²⁰ of universal jurisdiction, there has been a number of developments which seem to have provided ample evidence for assessing the operation universal of jurisdiction in the context of customary international law.

For instance, a growing number of states have adopted legislation that empowers their courts to exercise universal jurisdiction over core crimes. According to Amnesty International’s survey of national legislation published in 2012, 147 (approximately 76.2%) out of 193 UN member states have made provisions for universal jurisdiction over one or more ‘crimes under international law’ (war crimes, crimes against humanity, genocide, and torture), and 16 (approximately 8.29%) out of 193 states can exercise universal jurisdiction over conduct that amounts to a crime under international law, albeit only as an ordinary crime. The survey concludes that a total of 163 states (approximately 84.46%) can exercise universal jurisdiction over one or more crimes under international law.¹²¹ It is important to note that the list includes many African states, which have been known for their critical attitude towards the assertion of universal jurisdiction. Moreover, criminal proceedings have been actually conducted in some states, such as Canada, Denmark, Germany, and South Africa.

¹¹⁹ Reydams (2011), 337.

¹²⁰ Ratner (2003), 888.

¹²¹ Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update* (2012), 2.

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 on the agenda of the General Assembly's Sixth Committee debate 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 law¹²² and/or is an important tool for the fight against impunity, while concerns have been constantly raised as to the possibility of its abuse; for example, through politically motivated use.

However, a closer look at those practices leads one to question: to what extent and in what sense it can be said that universal jurisdiction has been established. With regard to national legislation, the same 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.¹²³ 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. While the ICJ mentioned in the *North Sea Continental Shelf* case¹²⁴ the possibility that 'a very widespread and representative participation in the convention' might transform a conventional rule into a rule of customary international law,¹²⁵ this fact makes it difficult to characterise the enactment of these national statutes as a practice that in and of itself creates customary international law, because enactment is

¹²² Australia (A/C.6/66/SR.12, paras.6-8)(on behalf of CANZ); Canada, (A/C.6/65/SR.10, paras. 63-67) (on behalf of CANZ).

¹²³ Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update* (2012), 12-13.

¹²⁴ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark/ The Netherlands)*, Judgment, 20 February 1969, ICJ Reports 1969, 3.

¹²⁵ *Ibid.*, 43 (para. 73).

generally regarded as an implementation of treaty obligation rather than an acting out of *opinio juris sive necessitatis*. In any event, these figures merely reveal a deplorable fact of non-compliance. Hence, enactment can be considered as far from being capable of generating customary international law in the first place, particularly when one recalls that the number of contracting state parties amounts to 195 for the Geneva Conventions and 154 for the Convention Against Torture (both as of January 2014).

The same applies to judicial practices. Apart from the fact that the number of proceedings is still limited compared to that of legislation, many proceedings have been conducted to carry out treaty obligations, as observed in the trial of Hissène Habré in Senegal.¹²⁶

With regard to state declarations, while considerable support has been given to the idea of universal jurisdiction as an ‘important tool’,¹²⁷ ‘effective instrument’, or ‘[essential] mechanism’¹²⁸ for the fight against impunity, emphasis has often been made as to the absence of a common understanding with regard to the scope, definition, and condition for the application of universal jurisdiction.¹²⁹ Moreover, describing universal jurisdiction as a ‘tool’, ‘instrument’ or ‘mechanism’ in itself renders its legal status rather ambiguous.

On balance, it can be concluded that uncertainty remains as to the scope, application, and conditions for the exercise of universal jurisdiction as far as its customary law status is

¹²⁶ Actually, it can be seen not only as a performance of treaty obligation but also partly as a response to the judgment of the ICJ that required Senegal to submit the case, without further delay, to its competent authority for prosecution as a remedy to its breach of the obligation under the Convention. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, 463 (operative paragraph (6)).

¹²⁷ Czech Republic (A/C.6/65/SR.11, paras.16-17), Netherlands (A/C.6/66/SR.13, paras. 46-47).

¹²⁸ Democratic Republic of the Congo, (A/C.6/65/SR.11, paras. 29-31).

¹²⁹ Thailand (A/C.6/65/SR.11, paras. 11-12); UK (A/C.6/66/SR.13, paras. 24-26) (arguing that universal jurisdiction is clearly established only for piracy, war crimes, there being no consensus on genocide and crime against humanity).

concerned, despite the fact that there is growing support for the idea of universal jurisdiction as a tool for the fight against impunity. For the purpose of this study, there is no need to determine at this stage whether and to what extent universal jurisdiction is established in customary international law, and it may be sufficient to observe how commentators evaluate the current state of affairs.

Some commentators have taken a strict approach in which only a considerable amount of state practice and *opinio juris* can be counted as factors generating customary international law. These commentators suggest that only national legislation and judicial practices, and/or state declarations made as official statements, may be relevant. They suggest that the practice of international criminal courts may not be counted, on the grounds that that their development was precisely in order to provide a remedy for the deficiencies of national courts.¹³⁰ Those commentators tend to deny the customary status of universal jurisdiction, observing that ‘the evidence of state practice on this matter is not yet substantial so as to afford the finding of a customary international law rule in its favour’,¹³¹ or that ‘[such category of jurisdiction] is unknown to international law’.¹³²

Other commentators have taken a more lenient approach, which in many cases results in the affirmation of a right of universal jurisdiction under customary international law. There seem to be mainly two distinct strands for this perspective.

The first strand argues that a smaller amount of practice is sufficient to establish a *right* to exercise universal jurisdiction, as distinguished from a *duty* to do so. This has the effect of

¹³⁰ Cf. *Arrest Warrant case*, Opinion individuelle de M. Guillaume, président, ICJ Reports 2002, 40 (para. 11).

¹³¹ Yee (2011), 529-530.

¹³² *Arrest Warrant case*, Opinion individuelle de M. Guillaume, président, ICJ Reports 2002, 44 (para. 12). This statement was made with regard to universal jurisdiction *in absentia*, though. See also, Reydam's (2003), 224.

mitigating the requirement for the establishment of customary law. Premised on this view, Cryer concludes that ‘increasing support’ for the assertion of universal jurisdiction by states is sufficient to suggest that the customary case for universal jurisdiction over core crimes may be made, and, with some caution, the same conclusion can be made with regard to universal jurisdiction *in absentia*.¹³³ In this regard, reference can also be made to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, in the *Arrest Warrant* case, which Cryer explicitly relies on. While admitting an apparent lack of evidence to support the status of universal jurisdiction *in absentia*, the judges concluded that ‘there is no rule of international law ... which makes illegal co-operative acts designed to secure the presence within a State wishing exercise jurisdiction [in this case, co-operative acts denote a request of extradition in the application of the universal principle, which is seen as the exercise of universal jurisdiction *in absentia*]’.¹³⁴ While this statement in itself can be criticized as being premised on an erroneous distinction between universal jurisdiction in general and universal jurisdiction *in absentia*, it is still worth noting because it appears to apply a less strict condition—the absence of prohibition which could be confirmed more easily than the establishment of right—in affirming universal jurisdiction *in absentia*.

While being in line with the mainstream argument that universal jurisdiction over core crimes is permissive and not mandatory, this view cannot be entirely free from criticism. First of all, it raises the question of why an establishment of right can be treated differently from duty: a right entails that someone else has a duty to ensure the state of affairs envisaged by that right to be brought about.¹³⁵ In other words, the creation of a right entails the creation of a corresponding duty. It follows that, normally, the conditions for the establishment of right should be as strict as that of duty. Moreover, this view seems

¹³³ Cryer (2005), 89-94.

¹³⁴ *Arrest Warrant case*, Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans, ICJ Reports 2002, 80 (para. 58).

¹³⁵ Hohfeld (1913), 32-44.

self-contradictory: on the one hand, it is premised on that the ground of jurisdiction must be established under international law, thereby rejecting (and somewhat misreading, in the present study's understanding) the *Lotus* presumption; on the other, it infers, at least presumptively, the existence of right from the absence of prohibition, thereby implicitly endorsing the *Lotus* presumption.

In contrast, the second strand of reasoning broadens the scope of 'practice' to be considered, thereby making it easier to affirm the customary status of universal jurisdiction without a large amount of state practice *lato sensu*. Conveying a strong overtone of 'modern positivism',¹³⁶ this view attaches significant weight to 'verbal' state practice, along with 'hard' state practice, and deduces detailed rules from general principles.¹³⁷ In his influential article, Kreß draws attention to the Preamble of the ICC Statute in which states solemnly declare that such crimes 'must not go unpunished' and that 'their effective prosecution must be ensured by taking measures at the national level'.¹³⁸ States have thus expressed 'their wish to see international criminal law regularly enforced', with regard to crime under international law.¹³⁹ Postulating this necessity for the routine enforcement of international criminal law as a goal of the emerging system of international criminal justice for which universal jurisdiction plays a part, he concludes:

...the categorization by states of conduct as a crime under international law must, for reasons of principles and consistency, be seen as a strong indication in

¹³⁶ Simma and Paulus (1999), 306-308.

¹³⁷ On the deduction of concrete rules from general principles, see, Simma and Alston (1992), 102-106.

¹³⁸ All citations are from the fourth preambular paragraph of the Statute of the ICC.

¹³⁹ Kreß (2006), 574.

The attachment of a weight to states' wish made in the preamble can also be found in *Obligation to Prosecute or Extradite*, although it was made within the context of treaty interpretation, and not necessarily related to the establishment of customary international law. See, *Obligation to Prosecute or Extradite*, ICJ Reports 2012, 449 (para. 68).

favour of a customary state competence to exercise universal jurisdiction. Accordingly, the same amount of precise and ‘hard’ state practice demanded by the *Continental Shelf* test may not be necessary to affirm the existence of a permissive international legal rule in this case.¹⁴⁰

The merits of this view lie in that it may offer a way for integrating various ‘verbal’ state practices that are generally made in relation to concluding treaties (conclusion of treaties, voting records, and expression of states’ wish in the preamble) or other proclamations made in international fora on customary international law, thereby capturing or catching up the trend that is changing rapidly today. This method seems to be particularly promising for the field of international criminal law, because international criminalization takes place at the international level, which, as shown above, has been taking a different path from an ordinary customary law creation.¹⁴¹

However, this approach nevertheless raises some problems. If states truly wish to see the regular enforcement of international criminal law, in the sense that individual perpetrators are held accountable wherever they are, the exercise of universal jurisdiction must be mandatory, not merely permissive. In fact, the Preamble of the ICC Statute speaks of ‘the *duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes [emphasis added]’,¹⁴² although ‘jurisdiction’ here does not necessarily mean universal jurisdiction. However, universal jurisdiction has been constantly conceived as permissive, as far as its customary status is concerned. Moreover, as Amnesty International’s figures (cited above) demonstrate, not all states are willing to provide universal jurisdiction over all crimes under international law, and verbal state practice is contradicted by material state practice. It may be argued that the modern positivist

¹⁴⁰ Kreß (2006), 575.

¹⁴¹ Simma and Alston (1999), 308-316. See also, Kreß (2006), 571-572.

¹⁴² Citation is from the sixth preambular paragraph of the Statute of the ICC.

approach perfectly functions at the level of international criminalization, but not at the level of its national enforcement.¹⁴³ In this regard, the application of modern positivism to universal jurisdiction seems to share the same problems with the deduction of universal jurisdiction from *jus cogens* prohibition. Whether relying on the *jus cogens* prohibition or verbal state practice, there is little doubt today that individual criminal responsibility is established over war crimes, crimes against humanity, and genocide. However, this fact, or the method that is applied to establish individual criminal responsibility, does not necessarily apply to or affect the national enforcement of those prohibitions.

2.1.3 Interim Conclusion

Overall, the deductive approach and the inductive approach each have their own significance and problems. It can be noted that both of approaches agree that individuals are held responsible directly under international law with regard to ‘crimes under international law’, and there should be no impunity for the individual perpetrators of those crimes, for which universal jurisdiction may play a part. Simultaneously, state practices that provide universal jurisdiction over those crimes are apparently not sufficient or coherent enough to establish customary rules in light of the strict conditions demanded by the *Continental Shelf* test.

Against this backdrop, doctrines have sought to overcome this apparent deficiency in one way or another, thereby establishing the ground of universal jurisdiction in order to meet the need of the fight against impunity. On the one hand, the deductive approach (especially in the context of the *jus cogens* doctrine) puts emphasis on the absolute nature of

¹⁴³ Admittedly, Kreß is explicitly aware of this distinction, when he argues: ‘It is not necessarily inconsistent for states, on the one hand, to pronounce themselves in favour of the international criminalization of certain conduct because such conduct is of ‘concern to the international community as a whole’, and on the other hand, to deny a state’s competence to exercise universal jurisdiction over such a crime [citation omitted]’. Perhaps the problem lies in the fact that the modern positivist approach is applied to the case of national enforcement in order to confirm a *right* of universal jurisdiction.

individual responsibility from which the ground of universal jurisdiction can be deduced, thereby eliminating the need to rely on state practice or *opinio juris*. While this view may capture the reality of those crimes being increasingly condemned as the violation of *jus cogens* rules, it has its own drawbacks. In order for this approach to retain a logical coherency, universal jurisdiction must be structured as a duty, not a right. However, this is not observed in the current context. On the other hand, the inductive approach tries to mitigate the strict conditions for the establishment of customary international law, thereby confirming the ground of universal jurisdiction. This approach may provide a description of *how* those conditions are mitigated, but does not seem to provide a persuasive explanation for the question of *why* these conditions can be mitigated in those cases (for example, with respect to the establishment of a right or national enforcement of international criminalization).

Somewhat paradoxically, it can be argued that the problem lies not necessarily in methodology, but in the conception of jurisdiction. Both approaches seem to be, at least implicitly, premised on that the basis for universal jurisdiction must be provided by permissive rules of international law, because jurisdictional claims without linkage to a crime are excessive claims that constitute interference with the domestic matters of the territorial or national state of the offender. That is why the deductive approach makes recourse to the peremptory nature of crimes, which allegedly bestows a power to *transcend* sovereignty. That is also the reason the inductive approach seeks to mitigate the conditions for the establishment of customary international law, based on the understanding that the ground of universal jurisdiction must be established in international law that governs relations between states.

However, it can be argued that that very premise should be questioned. As was discussed in Chapter 1, the idea that international law attributes and distributes jurisdiction (the attribution theory) does not stand in the current legal system pertaining to jurisdiction. To

expand on this, the ground of jurisdiction does not need to be established in international law at the prescriptive level as far as relations with other states are concerned, whereas the primacy of territoriality may restrain the effective exercise of extraterritorial jurisdiction at the enforcement level. In this regard, there is no need to deal with the matter of universal jurisdiction over crimes under international law in a distinct manner from other types of jurisdiction. Admittedly, universal jurisdiction over core crimes can be distinguished from other types of jurisdiction in terms of the fact that it is asserted in the pursuit of holding individuals accountable for crimes under international law, whereas ordinary jurisdiction holds individuals accountable for domestic crimes. In other words, the peculiarity of universal jurisdiction over core crimes lies in the fact that criminalisation takes place at the international level, in the sense that ‘the locus of the criminal prohibition is not the domestic, but the international legal order’.¹⁴⁴ However, its enforcement materialises through the national enforcement mechanism that is still governed by those restraints applicable to the assertion of other types of jurisdiction.

Premised on this, the next section examines if and how the framework established in Chapter 1 is applicable to the assertion of universal jurisdiction over crimes under international law.

2.2 Applying New Framework to Universal Jurisdiction

As was demonstrated in chapter 1, international law does not directly govern prescriptive jurisdiction as far as the field of criminal law is concerned. Prescription is basically related to the relations between a state asserting jurisdiction and individuals subject to the exercise of jurisdiction, and does not need to be established as a right under international law in relation to other states. At the same time, within the context of the decentralized system of international law, the assertion of extraterritorial jurisdiction needs to be underpinned by a

¹⁴⁴ Cryer (2008), 108.

common awareness that the alleged interest deserves protection by criminal law and also that jurisdiction other than territorial or national jurisdiction is necessary to compensate the latter's deficiency, in order for it to be effectively enforced. Actually, those factors (interest, and necessity for extraterritorial jurisdiction) constitute a justifying ground for extraterritorial jurisdiction vis-à-vis other states in the sense that it can be conceived as a claim to be taken seriously. In addition, because jurisdiction is basically personal, the authority to impose punishment upon individuals should be established vis-à-vis those individuals, which is usually discussed as a matter of foreseeability in the context of extraterritorial jurisdiction.

In order to assess the assertion of universal jurisdiction within this framework, it should first be pointed out that, albeit there is a lack of consensus over its precise scope (even among core crimes) and condition for its exercise, there has been growing support among states that universal jurisdiction can be an important tool for the fight against impunity over certain serious crimes. This trend seems to indicate that there is at least a common awareness that there is a need for the jurisdiction of this kind in order to protect certain interests that are infringed. Against this backdrop, the following part will assess if and how this trend can be captured by those factors that constitute justifying grounds of jurisdiction.

2.2.1 Rationale behind the Fight against Impunity

As a first step, it is useful to clarify the background of the fight against impunity.¹⁴⁵ This idea basically maintains that the perpetrators of serious human rights abuses should be

¹⁴⁵ According to the report prepared by Mr. Joinet submitted to the Sub-Commission under the United Nations Commission on Human Rights, impunity is defined as follows:

'Impunity' means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

brought to justice, which does not necessarily mean that they should be held *criminally* accountable. However, it has been increasingly conceptualized as intolerance for perpetrators being left unpunished, and also as an issue for the international community as a whole. The trend reached its peak with the adoption of the Rome Statute of the International Criminal Court in 1998¹⁴⁶ and after a judgment of the UK House of Lords on the Pinochet case in 1999.¹⁴⁷

It can be argued that such conceptualization of the fight against impunity has been underpinned by two distinct, but interrelated, normative developments of international law.

First, it may be argued that the development of human rights law has humanized humanitarian law,¹⁴⁸ thereby contributing to modify the nature of those interests protected under humanitarian law. Indeed, this field had originally focused on the individual criminal responsibility, and there was nothing new in the idea in itself of bringing perpetrators into criminal justice. At the same time, those interests to be protected have not always been a matter of ‘international concern’. The notion of ‘crimes under international law’ adopted in the Nuremberg Charter and recognized in the Formulation of Nuremberg Principles did not originally connote the nature of the interest to be protected, but rather focused on the conceptualization of individual criminal responsibility.¹⁴⁹ The determination of the interests to be protected was based on each of the crimes subject to the jurisdiction of the Tribunal. In this regard, it should be pointed out that crimes against humanity at

Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997).

¹⁴⁶ Rome Statute of the International Criminal Court (1998), 2187 UNTS 3.

¹⁴⁷ *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97 (HL).

¹⁴⁸ On the humanization of humanitarian law, Meron (2000), 239-278.

¹⁴⁹ See, Section 1.1.2.

Nuremberg required a connection to other crimes under the Charter,¹⁵⁰ which meant that they were only applicable in times of war, and not in times of peace. They were not ‘international criminal provisions of universal application’, but subsidiary or traditional types of war crimes.¹⁵¹ It also meant that the only criminal activities that were punished were those that ‘directly affected the interests of other states’.¹⁵²

It is thus the later development that has infused the notion of crime under international law with the idea of universality or common interest. It can be pointed out that the development of human rights has made a major contribution in this regard. An international ‘bills of rights’ and other instruments developed under the auspices of the United Nations¹⁵³ demonstrate that a government’s treatment of its citizens in peacetime is appropriate for general international regulation. In particular, the Genocide Convention articulates that genocide is a crime under international law whether committed in times of peace or in times of war, thereby clearly dropping the nexus between the crime and war (Article I). Moreover, the nature of the interest enshrined in this convention was summarized by the ICJ in its Advisory Opinion as early as 1951:

In such a convention the Contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the

¹⁵⁰ Article 6(c) of the Nuremberg Charter (1945) 82 UNTS 279. It provides: ‘Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’

¹⁵¹ Schwelb (1946), 207.

¹⁵² Ibid.

¹⁵³ Those include: the Universal Declaration of Human Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child.

accomplishment of those high purposes which are the *raison d'être* of the convention.¹⁵⁴

Later development gradually led to the abandonment of the link between crimes against humanity and those of war.¹⁵⁵ The 1968 Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity dropped the link,¹⁵⁶ while the definition 'whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal' does not definitively break the connection to war crimes. The Statute of the ICTY still maintains the link,¹⁵⁷ yet the ICTY Appeals Chamber stated in the dictum that it was 'a settled rule of customary international law' that crimes against humanity did not require a connection to international armed conflict.¹⁵⁸ In the case of the ICTR, there was no mention of the link at all. Likewise, the ICC Statute lacks any requirement of a nexus to armed conflict. It may be pointed out that such a separation from war has provided crimes against humanity with the context in which they are perceived as human rights abuses.

In summary, such humanization of humanitarian law has brought into relief that the interest to be protected in humanitarian law is that of persons or population under the jurisdiction of a state, and not that of particular states. This development has further been

¹⁵⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 1951, 23.

¹⁵⁵ See in general, Ratner et al. (2009), 52-59.

¹⁵⁶ Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) 40, UN Doc. A/7218 (1968).

It is also noted that the preamble of the Convention emphasizes the effective punishment of war crimes and crimes against humanity is 'an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security (...)'.¹⁵⁷

¹⁵⁷ Article 5 of the ICTY Statute.

¹⁵⁸ *Prosecutor v. Tadić*, IT-94-1-AR 74, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141.

endorsed by the international movement¹⁵⁹ and jurisprudence of the International Court of Justice¹⁶⁰ that maintain that the protection of human rights law does not cease in times of war.

Along with humanization of humanitarian law, there is a strand of ‘criminalization of human rights law,’ which places criminal prosecution as a necessary means for the protection of human rights. In this regard, it should be pointed out that there are not many human rights treaties that explicitly provide the obligation to prosecute violators of rights protected under the treaty. In addition to humanized humanitarian conventions, such as the Genocide Convention and the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁶¹ only the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture provide such an obligation to prosecute. On the other hand, the most comprehensive human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and its regional equivalents (the European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights (IACHR)), do not explicitly stipulate an obligation to prosecute the violation of the rights they are enjoined to protect. In fact, human rights treaties generally grant state parties substantial leeway to determine how they will implement the treaty obligation and to fashion an appropriate remedy when found in breach of their treaty obligations.

At the same time, authoritative interpretation of these comprehensive treaties has made clear that the obligation to protect substantive rights, read in conjunction with the general

¹⁵⁹ Human Rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights. Teheran, 12 May 1968. Final Act of the International Conference on Human Rights (Tehran), UN Doc. A/CONF.32/41 (1968), 18.

¹⁶⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 (I), 240 (para. 25).

¹⁶¹ G. A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1974), 1015 UNTS 243.

duty to ensure human rights protection (Art.2(1) of the ICCPR, Art.1(1) of the IACHR, Art.1 of the ECHR), requires that a state party both investigate the violation and seek to punish those who are responsible for rights violations, at least with regard to rights of fundamental importance such as the right to life and the prohibition of torture.

For instance, since the beginning of its practice, the Human Rights Committee of the ICCPR has held repeatedly that state parties are under an obligation to bring perpetrators of human rights violations to justice. The scope of this obligation has been discerned from the practice of the Committee, and it is now established that states are regarded in breach of the Convention if they fail to institute criminal proceedings involving those serious abuses such as torture and similarly cruel, inhumane, and degrading treatment (article 7); summary and arbitrary killing (article 6); and enforced disappearance (articles 7 and 9 and, frequently, 6).¹⁶² Likewise, in European Court of Human Rights case law, it has been established that the state not only refrain from the intentional and unlawful taking of life, but also take appropriate steps to safeguard the lives of those within its jurisdiction.¹⁶³ Since the case of *Osman v. The United Kingdom*, this has been understood to involve, ‘a primary duty of the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up

¹⁶² General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), paras. 15, 18. See also, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), Adopted at the Forty-fourth Session of the Human Rights Committee (10 March 1992), UN Doc. HRI/GEN/1/Rev.1, 30 (1994).

This view is also stated in *Arellana v. Colombia* which provides:

‘The Committee...considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations [emphasis added]’.

Arellana v. Colombia, UN Doc. CCPR/C/55/D/563/1993 (13 November 1995), para. 8.6. See also, *Arhuacos v. Colombia*, UN Doc. CCPR/C/60/D/612/1995 (19 August 1997), para. 8.8.

¹⁶³ *L. C. B. v. the United Kingdom*, App. No. 23413/94, Judgment, 9 June 1998, para. 36.

by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.’¹⁶⁴

On the other hand, the most elaborate jurisprudence for the obligation to prosecute has been generated under the American Human Rights Convention. In the case of *Velásquez-Rodríguez v. Honduras*,¹⁶⁵ the Court found that there was a practice of enforced disappearance carried out or tolerated by Honduran officials, within whose framework the disappearance of Velásquez occurred. The Court also found that the Government of Honduras failed to guarantee the human rights affected by that practice (the right to personal liberty, the right to the integrity of the person, the right to life, etc.).¹⁶⁶ It held that the obligation to ensure the free and full exercise of the rights recognized by the Convention implied the duty of the state, ‘to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.’¹⁶⁷ As a consequence:

...the States must prevent, investigate, and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.¹⁶⁸

¹⁶⁴ *Osman v. The United Kingdom*, App. No. 87/1997/871/1083, Judgment, 28 October 1998, para. 115. See also *Mahmut Kaya v. Turkey*, App. No. 22535/93, Judgment, 28 March 2000, para. 85; *Kilic v. Turkey*, App. No. 22492/93, Judgment, 28 March 2000, para. 62.

¹⁶⁵ *Velásquez-Rodríguez v. Honduras*, Judgment on Merits, 29 July 1988, IACtHR (Ser. C), No. 4.

¹⁶⁶ *Ibid.*, paras. 155-157.

¹⁶⁷ *Ibid.*, para. 166.

¹⁶⁸ *Ibid.*

More concretely, the state has ‘a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation’.¹⁶⁹

This pronouncement has been regarded as establishing the obligation to prosecute. However, some commentators warn not to read too much into it, particularly because the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance of Velásquez. Indeed, although the Court said that, ‘[s]tates must prevent, investigate and punish any violation of the rights recognized by the Convention,’ it did not specifically refer to criminal prosecution as opposed to other forms of disciplinary action or punishment.¹⁷⁰ However, practices of the Court based on this precedent have matured and have gradually determined that states owe a duty to ensure judicial remedy. Measures short of prosecution are not sufficient for this purpose, at least for the violation of non-derogable rights recognized by the Convention, such as torture, enforced disappearance, or summary execution.¹⁷¹

In light of the above, it can be argued that the development of human rights law has contributed to generating the awareness that certain human rights abuses should be addressed by criminal prosecution, whether on the international or domestic plane.

¹⁶⁹ Ibid., para. 174.

¹⁷⁰ Scharf (1996), 50-51. Actually, Scharf observed that measures short of prosecution—such as establishment of an investigative commission that specifically identifies perpetrators and victims, noncriminal sanctions against responsible officials and military personnel, and judicial redress for victims—would be adequate to discharge the duty to ensure human rights. Ibid., 61.

¹⁷¹ *Castillo-Páez v. Peru*, Judgment on Reparations and Costs, 27 November 1998. IACtHR (Ser. C) No. 43, para. 107; *Barrios Altos (Chumbipuma Aguirre et al. v. Peru)*, Judgment on Merits, 14 March 2001, IACtHR (Ser. C) No. 75, para. 42; *Almonacid Arellano et al v. Chile*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, IACtHR (Ser. C) No.154, para. 110.

In addition, the development of human rights law has also contributed to the coming into relief of an underlying rationale of criminal prosecution: the protection of the collective interest of individuals in society. Indeed, the fact that the obligation to investigate and prosecute is given rise under the general duty to *ensure* human rights protection and also that such obligation requires states to mobilise their governmental apparatus indicates that the purpose of that obligation is not to impose sanction upon individual perpetrators as such, but rather to put a regular enforcement mechanism in place. For instance, the Human Rights Committee has maintained that that impunity for perpetrators of human rights may contribute to ‘the recurrence of the violations’¹⁷² which weakens respect for human rights.¹⁷³ It thereby demonstrated that the purpose of the obligation to prosecute is related to the preventive and, accordingly, future aspect of punishment. Likewise, the European Court articulated that punishment is required due to its preventive effect,¹⁷⁴ which is related to the necessity to protect all people in society. In other occasions, the Court has emphasized that a prompt response by the authorities to a violation is vital for ‘maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.’¹⁷⁵ Inter-American Court of Human Rights has also conceptualized the duty to prosecute under the general duty to ensure the free and full exercise of the rights recognized by the Convention provided in Article 1(1), thereby endorsing that the purpose of the obligation can be seen to protect the interest of all persons under the jurisdiction of the state.¹⁷⁶

¹⁷² General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 18.

¹⁷³ Human Rights Committee, Concluding Observation on Argentina, UN Doc. CCPR/C/79/Add.46 (1995), para. 10.

¹⁷⁴ *X. and Y. v. The Netherlands*, App. No. 8978/80, Judgment, 26 March 1985, para. 27. The Court found that the protection afforded by the civil law was insufficient in the case where fundamental values and essential aspects of private life were at stake. According to the Court, ‘[e]ffective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions’.

¹⁷⁵ *Varnava and Others v. Turkey* [GC], App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, Judgment, 18 September 2009, para. 191.

¹⁷⁶ Indeed, the Court in *Velásquez-Rodríguez* suggested that this obligation involved organizing, ‘the governmental apparatus and...all the structures through which public power is exercised’, which indicates that

This also implies that impunity of such crimes gives rise a concern for the relevant society as a whole rather than that for individual victims. However, it does not necessarily mean that serious human rights abuses deserving criminal prosecution should automatically be elevated to a matter of *international* concern. Indeed, while a murder is a conduct that injures an interest of serious nature (right to life), and deserves criminal prosecution, it would rarely become an international issue in so far as it is perpetrated in an isolated incident. In contrast, murder can be elevated into a matter of international concern as a crime against humanity when it is committed against a civilian population. Likewise, while torture may be in short of a deprivation of life, it has consistently been a matter of international concern. It follows that a serious or important nature of interest to be protected is not in itself sufficient to make its violation an international issue. In this regard, commentators suggest that the factors that distinguish crimes of international concern from ordinary crimes are systematic nature or involvement of state organs. This can be seen as a necessary condition for a crime to be an international matter; yet it still begs the question why such nature makes them as a matter of international concern. In this regard, it can be argued that the fact that those crimes have been repeatedly condemned as a violation of *jus cogens* norms has contributed to identifying them as violations of a fundamental value of the international community, which can be an issue for the international community as a whole.

2.2.2 Need to Compensate Territoriality – The Paradox of Territorial Jurisdiction

Having pointed out that certain systematic and serious human rights abuses can be seen as an issue for the international community as a whole, the focus is now on the second aspect: the necessity for other states to act in order to compensate the dysfunction of territorial jurisdiction. In this regard, the fact that a crime has such an international aspect does not

this obligation is related to the protection of all people within those structures. *Velásquez-Rodríguez v. Honduras*, Judgment on Merits, 29 July 1988, IACtHR (Ser. C) No. 4, para. 166.

necessarily explain why it is necessary for the international community to respond to its impunity by way of offering prosecution in place of territorial jurisdiction. Indeed, the idea of the protection of human rights through criminal law inherently relies on the effective functioning of territorial jurisdiction or other entities close to stakeholder in some cases. First, the purpose of international human rights law is to oblige each state to ensure the respect for human rights of individuals *under its jurisdiction*. In other words, each state is allocated an obligation to protect human rights while the right itself can be regarded as universal, and the non-performance of its obligation entails the responsibility of that very state, which is redressed by the measures of treaty bodies or international litigation. Second, the modern criminal justice system is basically territorial. It is mainly because territorial jurisdiction has many advantages in obtaining evidence and safeguarding the rights of the accused to fair trial.

However, this very emphasis on territorial jurisdiction for the purpose of prosecuting perpetrators of serious human rights abuses reveals the paradox of relying on territorial jurisdiction. It is in the awareness of this paradox that the fight against impunity recalls the involvement of the international community.

In fact, while it is either the territorial state or the national state of the offender that is usually expected to conduct the investigation and prosecution, it is usually the case that they are not able or willing to do so, particularly with regard to the cases of serious human rights abuses. On the one hand, genocide or crimes against humanity of such large-scale and organization are often planned and conducted by state agents or their equivalent through a certain state apparatus, which can be conceived as ‘system criminality’.¹⁷⁷ Hence, it is highly unlikely, if not unthinkable, for these offenders to subject themselves to prosecution in their own states. For instance, offenders of serious human rights abuses

¹⁷⁷ Nollekaemper (2009), 1.

under dictatorship regimes of many Latin American States had been left unaccountable because of the amnesties set up by the regime itself (self-amnesty), which had not been immediately repealed during the transitional period toward democracy. On the other hand, serious human rights abuses tend to occur during civil wars or large-scale insurgencies where there is no functioning government that can exercise effective control over its territory, and it is almost impossible to expect those states to conduct prosecution and punishment during and immediately after such conflict due to the lack of necessary infrastructure.¹⁷⁸

International conventions or international criminal tribunals that deal with serious human rights abuses can be seen as measures to tackle those ‘dysfunctions’ of territorial states. They do so by trying to implement an awareness that impunity would lead to continuance and recurrence of the similar grave violations which would shake the fundamental principles of international law, such as the maintenance of international peace and order or respect for human rights.

In summary, it can be pointed out the rationale behind the fight against impunity was common acknowledgment about the interest to be protected and the need to compensate the deficiency of a territorial or national state.

Having said that, it does not necessarily mean that the exercise of jurisdiction by states other than territorial or national states are required (except for war crimes and torture for which relevant treaties impose obligation to exercise universal jurisdiction upon state parties), nor does it explain why an increasing number of states have established universal

¹⁷⁸ See, Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786 (10 August 2000), which provides: ‘With regard to the magnitude and extent of the crimes committed, Sierra Leone does not have the resources or expertise to conduct trials for such crimes. This is one of the consequences of the civil conflict, which has destroyed the infrastructure, including the legal and judicial infrastructure, of this country.’

jurisdiction while they are not obliged to do so, especially with regard to genocide and crimes against humanity.

Regarding this, it can be argued that states have increasingly found themselves interested in prosecuting those crimes themselves. In fact, there has been a growing necessity among states to establish universal jurisdiction over serious human rights abuses, in terms of the maintenance of their own internal order or retention of a good reputation of not making their own territory a safe haven. This has been brought about by the increase of refugees and asylum seekers fleeing from civil war or armed conflict, among whom both perpetrators and victims of genocide and crimes against humanity tend to be included. It is no coincidence that most of the successful prosecutions based on universal jurisdiction have been those against Rwandans who sought asylum in the forum state. In those cases, extradition of alleged perpetrators to their home countries has not always been possible in light of the principle of non-refoulement. This was in fact a major impetus behind Belgium's establishment of broad universal jurisdiction. After an armed conflict in Rwanda in 1994, many Rwandans fled their country and sought refuge in Belgium; among them were victims but also alleged perpetrators of genocide who managed to escape after the final victory of the rebel force. This created a situation in which both victims and perpetrators lived face-to-face in a small community in Belgium, which caused an intolerable situation for the victims.¹⁷⁹ In fact, when an extension of the scope of the Act 1993 was proposed in 1998, the major concern was that Belgium could become a place of refuge for the perpetrators of the Rwandan genocide if it did not enact legislation that allowed a court to exercise jurisdiction over non-nationals.¹⁸⁰

There are both international/descending and domestic/ascending momentums in states' exercise of jurisdiction over serious human rights abuses, and they seem to become

¹⁷⁹ Winants (2003), 503.

¹⁸⁰ Justice Committee of the Senate, Doc. parl., senate, S.O. 1-749/3, 2-3.

harmonizing with each other under the rubric of fight against impunity. The African Union Model National Law on Universal Jurisdiction Over International Crimes¹⁸¹ seems to provide a symbolic example in this regard; its first preamble recognizes that certain crimes are of such heinous character and of most serious concern to the international community that they must not go unpunished; Article 4 provides that the court shall have universal jurisdiction over certain crimes (genocide, crimes against humanity, war crimes, piracy, trafficking in narcotics, and terrorism).

In sum, it can be argued that the interaction between international strategy and domestic necessity has generated the legitimacy of third states' interest in repressing systematic and serious human rights abuses.

2.3 Classifying Assertions of Universal Jurisdiction in a New Taxonomy

Having clarified the legitimacy of universal jurisdiction, the following part tries to classify several assertion of universal jurisdiction in a new taxonomy.

2.3.1 Universal Jurisdiction Anchored in Conventional Regime

In the case of jurisdiction anchored in conventional regime, *effectiveness* of enforcement can be secured through the duty to cooperate, established under the regime.

The *legitimacy* of universal jurisdiction is also recognized by the fact that such basis of jurisdiction has been mobilized as a necessary basis of jurisdiction for the purpose of suppression of convention offenses.

¹⁸¹ African Union Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI. This was adopted during the 19th summit of the African Union in May 2012 and later approved by the Executive Council in July 2012, and can be seen as one of the examples of the African countries' support for universal jurisdiction.

The *foreseeability* of law and forum is usually secured by the implementing statute of state parties.

2.3.2 Universal Jurisdiction without Specific Link

The *legitimacy* of universal jurisdiction can be secured by the common awareness of the importance of the interest to be protected and also the necessity to compensate the dysfunction of territorial jurisdiction.

As to the *effectiveness*, the presence of the alleged perpetrator ostensibly secures some effectiveness of enforcement; yet the custodial state still need to ask for judicial cooperation from the territorial states in order to secure effective enforcement. It is all the more crucial how the state exercising universal jurisdiction can claim its legitimacy to territorial states that ostensibly have *effectiveness* of enforcement.

The *foreseeability* of law can be secured by the fact that those crimes such as genocide or crimes against humanity are criminalized at the international level. In contrast, the foreseeability of forum is a difficult matter; one solution could be to refer to the sentencing policies of international tribunals. In relation to this, it can be argued that the voluntary presence of the accused is relevant; it provides that they expect what sort of procedure they should be subject to.¹⁸²

¹⁸² Cassese et al. (2013), 279.

Interim Conclusion for Part I

In Part I, it was submitted that the exercise of jurisdiction should be examined from the perspective of whether and to what extent it may secure effectiveness, legitimacy, and foreseeability. In this regard, it was pointed out that, as far as crimes under international law (war crimes, crimes against humanity, genocide) and other *jus cogens* crimes (especially torture) that have the character of systematic and serious human rights abuses are concerned, the exercise of universal jurisdiction has been gaining legitimacy. It is principally because states have been less interested in condoning or tolerating impunity for these types of crimes. Additionally, there has been growing awareness of the necessity for the exercise of jurisdiction by states other than territorial and national states, in order to compensate for the latter's failures in the suppression of these crimes.

The fact that the legitimacy of universal jurisdiction is recognised implies that it can be taken seriously as a jurisdictional claim on the international plane. In fact, it is the abusive and politically motivated use of universal jurisdiction, and not its *raison d'être* as such, that has been the dominant source of concern today.¹⁸³ At the same time, recognition of the legitimacy of universal jurisdiction inevitably brings about concurrent claims from other jurisdictions. It is only a potential concurrence at the stage of states' asserting prescriptive jurisdiction, but it then becomes a real conflict when a state exercises adjudicative jurisdiction in a specific case. In fact, an actual exercise of universal jurisdiction has provoked protests from territorial or national states that allege that the exercise would violate the principle of sovereign equality. Yet it is not clear on the face of it why this conflict occurs, as states ostensibly share the same interest in prosecuting such crimes under the rubric of the fight against impunity. Thus, the question is why this conflict does occur, and if and how it could be resolved, which is the main issue in Part II.

¹⁸³ Russian Federation, A/C.6/67/SR.13, para. 8 (2012).

Part II: Modalities of the Exercise of Jurisdiction

Building on the analysis established in Part I, Part II seeks a feasible framework within which the conflict of jurisdictional claims triggered by the exercise of universal jurisdiction can be properly reconciled.

As a first step, it should be recalled that the exercise of extraterritorial jurisdiction rarely provokes conflict between states. In the field of criminal law, the subject of a criminal proceeding is usually a natural person, and it is the state in which the subject is found that can actually exert a power over that person. In practice, these custodial states usually prefer extradition to the '*forum conveniens*' states that have closer links to the crime. In addition, even if the custodial state does decide to exercise jurisdiction over the alleged crime, other states will not find it necessary to protest in so far as their interest in suppression of the crime is satisfied by the prosecution in the custodial state—which it usually is, especially with regard to ordinary crimes.

The same premises, however, do not always apply to the exercise of universal jurisdiction over systematic and serious human rights abuses. On the one hand, territorial states have particularly strong interests and concerns in the suppression of crimes in this category, as they are usually the national states for both the offenders and the victims. In fact, with regard to these types of crimes, the implementation of any accountability mechanisms has been closely related to post-atrocity justice policies aimed at achieving national reconstruction and reconciliation after civil conflict or during a transitional process toward the realisation of democracy.¹ The latter could even be regarded as a matter of self-determination.² On the other hand, the assertion of universal jurisdiction originated

¹ Scharf and Rodley (2002), 89-90; Seibert-Fohr (2009).

² Orentlicher (2004). Laplante (2009) also conceived this requirement as *truth* in contrast to *justice*.

from the concern that territorial states do not often exercise their jurisdiction, which results in the alleged offender not being held accountable. Indeed, universal jurisdiction has in part been developed on the basis that systematic and serious human rights violations do at times go unpunished. Thus, if the decision of the territorial state (including a decision not to exercise jurisdiction) is always given primacy, it would not only decrease the effectiveness of universal jurisdiction but also undermine its *raison d'être*.

In reality, any such cases of conflict have typically been provoked by the exercise of jurisdiction by third states without deferring primacy to territorial jurisdiction. This is then interpreted by territorial states as an intrusion into their own administration of criminal justice, and hence treated as an abusive exercise of jurisdiction. In other words, this is a conflict of interests between the necessity of holding individual perpetrators accountable and the autonomy of territorial states in their administration of criminal justice.

In this context, and given that an increasing number of states have adopted universal jurisdiction over many, if not all, of these crimes in their domestic law, it is all the more vital to establish clear and feasible guiding principles for the exercise of jurisdiction. In fact, during the debate at the Sixth Committee, it was reiterated that it is the establishment of the scope of *ratione materiae* of universal jurisdiction and of the modalities for its exercise that would prevent its abuse and politicisation.³ Admittedly, there is yet to be a complete consensus on the scope of crimes that are subject to universal jurisdiction. In fact, some states are still sceptical as to whether universal jurisdiction has been 'established' over genocide or crimes against humanity that are not anchored in conventional regimes, as opposed to war crimes and crimes of torture. At the same time, given that grounds of jurisdiction need not be 'established' in international law and the issue of scope fundamentally rests on the authority of states to impose punishment upon

³ Algeria, A/C.6/67/SR.12, para. 43 (2012); Nigeria, A/C.6/67/SR.12, para. 68 (2012); China, A/C.6/67/SR.13, para. 11 (2012); Botswana, A/C.6/67/SR.13, para. 13 (2012).

individuals—which can be addressed distinctively from the modalities of the exercise of jurisdiction—the following analysis focuses on the latter aspect of the exercise of universal jurisdiction.

Against this background, the following chapters will examine whether existing as well as suggested approaches can yield a feasible framework for resolving conflicts relating to jurisdictional claims where they result from claims of universal jurisdiction over systematic and serious human rights abuses. Chapter 3 critically examines the existing framework (the self-restraint approach, the inter-state balancing approach, and the community interest approach). Building on the critical analysis outlined in this chapter, chapter 4 addresses the idea of subsidiarity, which has been drawing interest as a potentially workable framework for resolving conflict among jurisdictions.

Before proceeding into the main analysis, some clarification of the analytical framework is required. First, it should be pointed out that assertion of jurisdiction is inherently a unilateral act—it is solely the asserting state that is competent to undertake the enactment, adjudication, and enforcement of its domestic law.⁴ From another perspective, this is nothing more than an act of auto-interpretation; it is not a decision, and it does not bind other states in itself.⁵ Thus, if other states protest against the assertion of jurisdiction, it means that there is an on-going international dispute, which shall be settled on the basis of the sovereign equality of states.⁶ Hence, the crucial issue is what legitimises this act of auto-interpretation in the context of concurrent claims by territorial and national states and in the context of a decentralised legal discourse.

⁴ Cf. *Fisheries Case (United Kingdom v. Norway)*, Judgment, 16 December 1951, ICJ Reports 1951, 132.

⁵ Gross (1953), 77.

⁶ Principle 2 of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (24 October 1970).

Second, and in relation to the first point, the fact that it is mainly the state organs that make the decisions in the exercise of jurisdiction suggests that any criteria that is to be used for the exercise of jurisdiction must be articulated in terms that these state organs can use or at least make reference to. Therefore, it is all the more crucial to clarify the framework within which the conflict of jurisdictions can be reconciled and to show how it could be reflected in the conditions for the exercise of universal jurisdiction.

Chapter 3: Existing Principles

This chapter examines the existing frameworks that address the conflict of jurisdictional claims. There are generally three approaches for this purpose. The first is a self-restraint approach (a comity approach and a balancing interest approach), which is related to techniques of self-restraint employed by relevant state organs in the exercise of jurisdiction. The second one can be seen as an inter-state balancing approach, which suggests applying the doctrine of abuse of rights to the exercise of jurisdiction. In contrast, the third one, a community interest approach, asserts that there is no conflict among jurisdictions as such, as far as the protection of community interest is concerned. Therefore, this approach focuses on the convenience of forums and whether due process is guaranteed.

3.1 Self-Restraint Approach

3.1.1 Comity Approach

One of the existing approaches to handle a conflict of jurisdiction is comity consideration. Based on reciprocity and mutual respect—hence, not as a matter of absolute obligation⁷—comity requires states to accord due regard to the interests of other affected jurisdictions. In fact, in the field of criminal law, certain measures have been developed for respecting other states' interests. For instance, states tend not to pursue prosecution when a final and binding decision has been rendered by a foreign judiciary, including a grant of amnesty (a prohibition of double jeopardy or the principle of *ne bis in idem*),⁸ while there is no such an obligation established in the international context. In addition, the 'rule of non-inquiry' in common law jurisdiction in the context of extradition has often discouraged courts from inquiring into the fairness of proceedings of a requesting state.⁹ Although the measures to give due regard to other jurisdictions may in some cases protect the interests of individuals,¹⁰ they nevertheless can provide for good relations with foreign states by respecting the latter's policy choice without inquiring into its substance.¹¹ These considerations indeed play an important role in providing a good atmosphere for judicial cooperation in the still decentralized system of criminal jurisdiction, where there is no general obligation to comply with a request for cooperation without special agreement.

⁷ See, Maier (1996), 70 (referring to comity as a 'pragmatic principle of reciprocal expectations'); Pearce (1994), 528-529 (defining comity as 'a jurisprudential doctrine parallel and related to international law, yet also distinct and worth distinguishing from it.').

⁸ Wyngaert and Stessens (1999), 784. It should, however, be noted that many states do not always apply the principle of *ne bis in idem* in the exercise of jurisdiction on the basis of the protective principle, based on the consideration that the offences covered by the protective principle infringe on the basic values of the state itself and that such offences are not usually be punishable in other states. See, Cameron (1994), 86.

⁹ Parry (2010). Cryer et al. (2010), 94. This tradition has been considerably circumscribed since the *Soering* decision in the ECHR.

¹⁰ Plachta (1989), 107; Naqvi (2010), 287.

¹¹ Feagle (1996), 301.

Because the exercise of universal enforcement jurisdiction often induces protests from other states, comity tends to require self-restraint to avoiding international conflicts. In this regard, it has been suggested that prosecution for crimes under universal jurisdiction should require the consent of a public prosecutorial authority in order to avoid its ‘abusive’ use.¹²

To defer such a decision to the executive branch is in itself quite normal. In fact, under the doctrine of separation of powers, the enforcement of criminal law and the initiation of criminal proceedings are basically executive functions.¹³ However, the problem lies in the circumstances in which decisions of the executive branch are situated. For instance, Belgium amended the Act of 1993/1999 in April 2003 to the effect that the decision to initiate proceedings was deferred to federal prosecutors if the violation had no link with Belgium, which meant that the mechanism of *constitution de partie civile* would not be applied.¹⁴ This amendment was brought about after US Secretary of State Colin Powell warned that Belgium risked losing its status as the host state of NATO,¹⁵ in response to complaints filed in March 2003 against former President George H. W. Bush and several of his advisers for allegedly committing war crimes during the 1991 Gulf war. Similarly, the UK made changes to the law in the Police Reform and Social Responsibility Act, requiring the consent of the Director of Public Prosecution before an arrest warrant could be issued in universal jurisdiction cases brought by individuals.¹⁶ This came about after an embarrassment was caused for the UK government when an attempt was made to obtain an

¹² Israel, A/C.6/67/SR.13, para. 37 (2012).

¹³ Nsereko (2005), 126.

¹⁴ Loi modifiant la loi du 16 jin 1993 relative à la répresttion des violations graves du droit international humanitaire et l’article 144^{ter} du Code judiciaire, Apr. 23, 2003.

¹⁵ Murphy (2003), 985.

¹⁶ UK Police Reform and Social Responsibility Act 2011 c.13

arrest warrant for Tzipi Livni, former Foreign Minister and then leader of the Opposition in Israel, while he was visiting the UK.¹⁷

In relation to this, it is noted that the principles governing the exercise of a prosecutor's discretion are sometimes difficult to ascertain, which may amount to a lack of transparency in their decisions. It has been suggested that a lack of transparency may make it difficult to discern if and to what extent foreign relations consideration was given weight.¹⁸

Admittedly, the judicial or administrative review of the exercise of prosecutorial discretion may serve to increase its transparency, which is worth a distinct assessment.¹⁹ Yet, for the purpose of the present study, suffice it to point out that the necessity for judicial review only highlights the fact that the comity approach does not, in itself, provide a solution. It merely suggests that the interests of other states should be taken into consideration, but does not suggest how those interests should be considered, let alone how they could be weighed against other interests.²⁰

3.1.2 Balancing Interest Approach

Perhaps partly in response to the lack of predictability and concreteness of the comity approach, certain efforts have been made to identify the relevant interests and factors to be considered. It is asserted that consideration of all relevant factors makes a decision reasonable and legitimate, which is in itself a requirement of international law.²¹ The most

¹⁷ See, Press Release of UK Ministry of Justice, available at <https://www.gov.uk/government/news/universal-jurisdiction>

¹⁸ Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (2006), 31.

¹⁹ Lafontaine (2010), 44-45.

²⁰ Gerber (1984-1985), 206.

²¹ Randall (1987), 786.

notable example is the US Restatement on the Foreign Relations Law (Third). Premised on the postulation that the role of international law is to ‘deal with the propriety of the exercise of jurisdiction by a state, and the resolution of conflicts of jurisdiction between states’,²² it introduces the concept of ‘reasonableness’ as a limitation on jurisdiction. According to its Section 403, all the relevant factors must be evaluated in order to determine whether an exercise of jurisdiction is reasonable. It goes on to provide a non-exhaustive list of such factors.

While the Restatement does not explicitly make universal jurisdiction subject to the principle of reasonableness,²³ the Princeton Principles on Universal Jurisdiction (2001) can be seen as an attempt to apply reasonableness and a balancing interest approach to the matter of universal jurisdiction. Principle 8 provides:

Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organ shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

- (a) multilateral or bilateral treaty obligation;
- (b) the place of commission of the crime;
- (c) the nationality connection of the alleged perpetrator to the requesting state;
- (d) the nationality connection of the victim to the requesting state;

²² Restatement (Third), § 401 comment, b.

²³ In fact, while jurisdictions enumerated in Section 402 (territoriality, nationality, and protective jurisdiction) are made subject to the principle of reasonableness stipulated in Section 403, universal jurisdiction is dealt with separately in Section 404, which does not refer to the consideration in Section 403.

- (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim
- (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- (g) the fairness and impartiality of the proceedings in the requesting state;
- (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
- (i) the interests of justice

Identifying relevant factors may contribute to increasing the concreteness of decisions, and if it is regularly applied, it will lead to the formation of a precedent to guide future decisions. In fact, the Introduction to the Principles made clear that these Principles were intended to be a useful guide for practitioners and actors involved in the process of the exercise of universal jurisdiction (i.e., legislators, judges, government officials, nongovernmental organizations, members of civil society, and citizens).²⁴

However, reasonableness or the interest balancing approach does not seem to provide a satisfactory solution. First, identifying relevant factors in itself does not provide how they are to be evaluated.²⁵ For instance, factors such as the nationality connection of the alleged perpetrator to the requesting state (Principle 8(c)) and the likelihood, good faith, and

²⁴ Introduction to the Principles provides: '[The Principles] are intended to be useful to *legislators* seeking to ensure that national laws conform to international law, to *judges* called upon to interpret and apply international law and to consider whether national law conforms to their state's international legal obligations, to *government officials* of all kinds exercising their powers under both national and international law, to *nongovernmental organizations and members of civil society* active in the promotion of international criminal justice and human rights, and to *citizens* who wish to better understand what international law is and what the international legal order might become [emphasis added]'. Princeton Principle of Universal Jurisdiction (2001), 26.

²⁵ Gerber (1984-1985), 208.

effectiveness of the prosecution in the requesting state (Principle 8(f)) may be in conflict, where the alleged perpetrator is a state official of the requesting state—which is very likely in the case of serious human rights abuses. However, the Principle merely suggests that a decision should be made on an ‘aggregated balance’, and does not provide criteria for how those factors may be weighed against each other. Simply, it lacks a conceptual framework within which those factors are evaluated.

Second, it can be pointed out that reasonableness or the interest balancing approach is intrinsically linked to US judicial tradition, where vast discretionary power is left with the judges. In other words, it is in light of the judges’ rationale that those relevant factors are evaluated and made into a ‘reasonable’ solution. Yet, due exactly to this premise, it may not be able to claim its universal validity. Indeed, it has often been suggested that this approach would not appeal to European jurists, where courts are not expected to engage in balancing interests, but to apply mechanical and ‘certain’ jurisdictional rules under the principle of legal certainty.²⁶

3.2 Interstate Balancing Approach—The Doctrine of Abuse of Rights

While the approaches addressed above are related to techniques of self-restraint employed by relevant state organs in exercising their discretion, the doctrine of abuse of rights is alleged to provide criteria for reconciling competing interests in interstate relationships.

Abuse of rights has been well established in civil law countries and has also been suggested as being an underlying principle for nuisance, duress, and breach of good faith in common law countries. Due largely to its widespread acceptance in domestic legal systems, many states as well as international law doctrines have regarded the doctrine of abuse of

²⁶ Gerber (1984-1985), 208; Pearce (1994), 567; Bianchi (1996), 85; Ryngaert (2008), 169.

rights to be part of international law, ‘whether as a general principle of law or as part of customary international law’.²⁷ According to Kiss, one of the best authorities of this concept, the doctrine of abuse of rights in the international law context implies that a state may not exercise a right ‘either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another state’.²⁸ Similarly, Oppenheim’s textbook, edited by Lauterpacht, a well-known proponent of this doctrine, defines abuse of rights as occurring ‘when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage’.²⁹ A number of states have invoked the doctrine of abuse of rights in international litigation and arbitration.³⁰ Some treaties contain provisions that expressly refer to abuse of rights.³¹ Abuse of rights has also appeared in the case law of international courts and tribunals.³²

²⁷ Byers (2007), 397.

²⁸ Kiss (2012).

²⁹ Oppenheim/Lauterpacht (1955), 345.

³⁰ E.g., the United Kingdom in the *Fisheries Jurisdiction Cases (United Kingdom v. Iceland)*, Memorial of the Merits of the Dispute Submitted by the Government of the United Kingdom, 12 April 1972, ICJ Pleadings 1975, Vol.1, paras 153-154; Lichtenstein in the *Nottebohm Case (Lichtenstein v. Guatemala)*, Memorial Submitted by the Government of the Principality of Liechtenstein, 26 January 1952, ICJ Pleadings 1955, para.51; Belgium in the *Barcelona Traction Case, Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*(Second Phase), ICJ Reports 1970, 17. Most recently, it was invoked by Australia in the *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Memorial of Australia, Vol.I, 9 May 2011, paras. 4.57-4.63, 5.135-5.136.

³¹ Article 300 of the United Nations Convention on the Law of the Sea provides:

State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.

³² *Case concerning Certain German Interests in Polish Upper Silesia (Merits) (Germany v. Poland)*, Judgment, 25 May 1926, PCIJ Series A, No.7, 30; *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Judgment, 7 June 1932, PCIJ Series A/B, No.46, 167; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WTO Doc. WT/DS58/AB/R, paras.147-160.

That said, it does not necessarily mean that abuse of rights is a legal rule in the sense that it should be underpinned by state practice accompanied by *opinio juris*. Rather, it is a concept or an ‘interstitial norm’ as Lowe argues:

The effect of interstitial norms is to set the tone of the approach of international law to contemporary problems, bringing subtlety and depth to the relatively crude, black-and-white quality of primary norms. I have used one example; but I expect there to be many others in the coming decades, during a phase in the development of international law analogous to the development equity in English law. ... The concept of *abus de droit*, already established in the approach of civil lawyers to international law, is likely to achieve much greater prominence as a check upon exercises of legal power by States. Through the influence of these principles, the whole character of international law and its relation to the most pressing problems of fairness and justice can be materially altered.³³

As such, it functions to regulate the exercise of rights by considering the impact that it would have on the rights of other parties in the society; it thereby mediates between the rights that are equally legitimate as such. Its role is thus flexible and context-dependent.

Because of its role in regulating the assertion of power that does not in itself violate a specific rule of international law, commentators suggest that abuse of rights is particularly useful as a guiding principle for the exercise of jurisdiction. As early as the 1970s, Akehurst promoted the applicability of the concept in the field of jurisdiction. According to him, even when the content of legislation does not infringe a specific rule of international law, it may nevertheless be contrary to international law if it constitutes an abuse of rights:

³³ Lowe (2000), 218.

(i) if the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating state; or (ii) if legislation is aimed at advancing the interests of the legislating state illegitimately at the expense of other states.³⁴ Three decades later, Ryngaert emphasized its usefulness as a doctrine of mediating between various state claims and interests in an interdependent world in which the discretionary exercise of rights is increasingly undesirable.³⁵

Indeed, the doctrine of abuse of rights seems particularly applicable to the current controversy over the exercise of universal jurisdiction, in which the exercise of universal jurisdiction is condemned by other parties as an abusive use of power. The question is, however, whether this doctrine functions in the context of decentralized discourse. It should be noted here that an abuse cannot be presumed,³⁶ because it is alleged with regard to the exercise of power that does not in itself infringe on a specific rule of international law; hence, the burden of proof must be on a party alleging its abusive use.

Bearing this in mind, it can be argued that the application of the doctrine of abuse of rights in the current argument over universal jurisdiction may end up with an apparently irreconcilable conflict between equally legitimate claims. On the one hand, it would be very difficult to prove whether the legislation adopting universal jurisdiction aimed to advance the interests of the legislating state at the expense of other states, because the ‘intent’ of legislators is hardly discernible by other states; in any event, it is apparently legitimate in so far as it is designed to bring perpetrators of serious human rights abuses into justice, which is usually the case. On the other hand, if the abusive intent is inferred from the actual exercise of jurisdiction, universal jurisdiction would usually be perceived

³⁴ Akehurst (1974-1975), 189-190.

³⁵ Ryngaert (2008a), 150-151.

³⁶ *Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, PCIJ Series A/B, No. 46, 167.

as abusive by other parties because it infringes upon their autonomy in the administration of criminal justice.³⁷

Thus, the problem lies in the fact that the relevant rights and interests are presumed to be equally legitimate and could hardly be reconciled in the discourse between parties. In this regard, it is important to note that commentators emphasize the role of international courts or arbitrators in the application of this doctrine. For instance, Lowe seems to rely on a role of tribunals in applying interstitial norms, as he argues that ‘[i]f the tribunal chooses to adopt the concept, the very idea of sustainable development [one of the interstitial norms along with abuse of right] is enough to point the tribunal towards a coherent approach to a decision in cases where development and environment conflict’.³⁸ Lauterpacht also presupposes the ability of judges to develop the law in the application of abuse of rights, while calling for studied restraint on the discretion of judges in applying such an ambiguous concept.³⁹ Moreover, what Freedman observed in relation to the expropriation of foreign owned property in the 1960s seems still applicable to the current argument:

In the present greatly diversified family of nations—which comprises states of starkly differing stages of economic development, as well as of conflicting political and social ideologies—the notions, for example, of “equity,” “reasonableness” or “abuse of rights” ... do and are bound to, differ widely. What to the one party is an abuse is to the other the reassertion of a long

³⁷ On this point, see Paul Kagame’s address at the General Assembly:

‘It is important that those who consider themselves powerful nations do not misuse that tool of international justice to extend their laws and jurisdiction over those they perceive to be weaker countries. If unchecked, one can only imagine the legal chaos that would ensue should any judge in any country decide to apply local laws to other sovereign States. The United Nations has a duty to ensure that universal jurisdiction serves its original goals of delivering international justice and fairness, as opposed to abuse.’

UN Doc. A/63/PV.6, 6 (23 September 2008).

³⁸ Lowe (2000), 217

³⁹ Lauterpacht (1958), 164.

withheld “natural” right. *It is therefore in the individualizing application of such guideposts by impartial arbiters to concrete and unique situations that such principles as equity or abuse of rights can contribute to the evolution of a new balance of rights and duties in many fields of international law.*⁴⁰
[emphasis added]

In sum, because of its flexibility, the doctrine of abuse of rights may serve to mediate between the rights that are equally legitimate as such, if it is combined with the exercise of discretion of ‘impartial arbiters’. However, in the context of a decentralised legal discourse, it in turn brings into relief an apparently irreconcilable conflict between equally legitimate claims.

3.3 Community Interest Approach

This approach emphasises the nature of crimes and the necessity of protecting fundamental interests of international community; hence, it does not give any primacy to territorial or national states. The Resolution (2009) of Association International de Droit Pénal,⁴¹ which sets ensuring the protection of the fundamental interests of the international community and preventing impunity as the aim of universal jurisdiction,⁴² provides that the most appropriate state for prosecution should be determined with a preference to either the custodial state or the state where most of the evidence can be found.⁴³

⁴⁰ Friedmann (1963), 289-290.

⁴¹ International Association of Penal Law (AIDP), XVIII Congress in 2009, Resolution on Universal Jurisdiction [hereinafter Resolution of AIDP], available at

http://www.penal.org/?page=mainaidp&id_rubrique=24&id_article=95

⁴² Resolution I-1 of the AIDP.

⁴³ Resolution III-2 of the AIDP provides:

In cases of conflicts of jurisdiction amongst states to exercise universal jurisdiction, in accord with the Resolution of the XVIIth International Congress of Penal Law, the most appropriate state should be determined with a preference to either the custodial state or the state where most of the evidence can be found, taking into

In this approach, the goal is to achieve a result of punishment of perpetrators—thus it inclines more on retribution than prevention—and it does not really matter where the prosecution is conducted in so far as a due process can be guaranteed. To reflect this view in the conditions for exercise of universal jurisdiction, what is crucial in initiating the criminal proceedings is whether prosecution and punishment has actually been conducted in another state; if not, every state is given an equal opportunity to exercise its jurisdiction.

The Spanish Constitutional Court's decision (2005) in *Guatemalan Genocide* case⁴⁴ provides an example for this approach. The Court observed that the principle of universal jurisdiction which was reflected in Article 23.4 LOPJ originated from the nature of the crimes. In light of this, it suggested that the mere indication of inactivity of the territorial jurisdiction is sufficient for a state asserting universal jurisdiction to commence the criminal proceeding. In light of this, it suggested that the mere indication of inactivity of the territorial jurisdiction is sufficient for a state asserting universal jurisdiction to commence the criminal proceeding, instead of the legal impossibility or prolonged judicial inactivity that the lower courts required in the application of the subsidiarity approach. It then concluded that the lower courts' restrictive approach violated the right to access of jurisdiction recognized in Article 24.1 of the Constitution. Thus, although the assessment of the Court is centred on the interpretation of domestic law, not necessarily on that of

account criteria such as the ability of each state to ensure a fair trial and to guarantee the maximum respect for human rights and the potential (un)willingness or (in)ability of such states to conduct the proceedings.

On this Resolution, see, Vajda (2010), 325-344.

⁴⁴ Constitutional Court, Decision, 26 September 2005, English translation is available at: http://cja.org/downloads/Guatemala_Court_Decision_Accepting_Jurisdiction_English.pdf. See also, 'Correspondents Report: Spain,' 8 *YbIHL* (2005), 508.

This is a series of proceedings in a suit filed in Spain in 1999 by Ms. Rigoberta Menchú Tum who won the Nobel Peace Prize in 1992 and a group of Spanish and Guatemalan NGOs against eight senior Guatemalan government officials, charging them with terrorism, genocide, and systematic torture that were committed during that country's long civil war.

international law,⁴⁵ its jurisprudence can be seen as a reflecting community interest approach.

It is true that there has been an increasing number of states that adopted universal jurisdiction, regarding the infringement on community interest (violation of *jus cogens* norms) as one also infringing on their own national interests. On the other hand, as has also been suggested, the violation of *jus cogens* norms does not in itself confer third states a new *right* to punish offenders; hence, it does not change the existing structure of jurisdiction. This seems to suggest that the recourse to the nature of crimes is not sufficient in itself to justify the denial of the primacy of territorial jurisdiction that would otherwise be recognized. It merely raises the conflict between the assertions of equivalent rights that cannot be easily reconciled in a decentralized discourse, as the territorial/national states are equally entitled to the prosecution of crime in question. Indeed, the assertion of universal jurisdiction supporting this view has raised strenuous opposition by territorial/national states, alleging that it would violate the principle of sovereign equality.

The fact that the conflict of equal rights tends not to be reconciled provides several problems. First, it will impair the effectiveness of the exercise of universal jurisdiction, due to the lack of cooperation. In many cases, with regard to the exercise of jurisdiction over an extraterritorial event, the cooperation of territorial or national states is crucial, especially in terms of collecting evidence or obtaining custody of the accused. This being the case, the refusal of cooperation by these states can effectively block the exercise of jurisdiction. If the alleged perpetrator stays in the territory of his or her own national state, the refusal of these states to extradite the individual gives a crucial blow to the exercise of universal jurisdiction, because trial *in absentia* is not allowed in most of the countries.⁴⁶

⁴⁵ Cf. Ascensio (2006).

⁴⁶ Vandermeersch (2002), 606.

Moreover, even if the state exercising universal jurisdiction succeeds in obtaining custody of the perpetrator, the refusal of cooperation from territorial or national states would still hamper the following proceedings, especially in terms of evidence and witnesses who are, in most cases, located in territorial states. For instance, although France succeeded in obtaining custody of Rose Kabuye on November 9, 2008, one of the nine Rwandan officials, along with Mr. Kagame, accused by a French judge in connection with the fatal April 1994 attack on President Juvenal Habyarimana's plane, she was released in April 2009, as no proof had been found to determine her guilt. It is not difficult to imagine that French authorities could not receive any judicial cooperation from Rwanda to bring forward evidence against her because of the break of diplomatic ties caused by the issuance of the arrest warrant. Ironically, the French inquiry team was allowed to visit the scene of the attack after the two countries recovered their diplomatic relations, and they eventually concluded that it was not Mr. Kagame and his allies but Hutu extremists that had killed Mr. Habyarimana.⁴⁷

Second, there is also a danger that the discourse would derail into power politics, because it lacks the ground for legal dialogue. One of the most salient examples seems to be provided by the U.S. reaction to Belgium in protest of the several criminal complaints filed against U.S. officials under the law of 1993/1999.

In response to the complaints filed in March 2003 against former U.S. President George H. W. Bush and several of his advisers for allegedly committing war crimes during the 1991 Gulf war, Secretary of State Colin Powell warned that Belgium risked losing its status as the host state of the North Atlantic Treaty Organization (NATO) by allowing investigations of those who might travel to Belgium.⁴⁸ Belgium reacted immediately by

⁴⁷ BBC News, "Rwanda genocide: Kagame cleared of Habyarimana crash," available at <http://www.bbc.co.uk/news/world-africa-16472013>.

⁴⁸ Murphy (2003), 985.

amending the law (effective May 7, 2003)⁴⁹ to the effect that the decision to initiate proceedings was deferred to federal prosecutors if the violation had no link with Belgium.⁵⁰ Moreover, the prosecutor may refuse to proceed if the matter should be brought either before international tribunals or before a tribunal of states that have links with the offense, as long as this tribunal is competent, independent, impartial, and fair. However, this amendment did not prevent another complaint from being filed against a U.S. General for alleged war crimes during the invasion of Iraq in March 2003. On June 12, 2003, Secretary of Defense Donald Rumsfeld announced that the United States would oppose any further spending for construction of a new NATO headquarters unless Belgium repealed its law, stating that “Belgium appears not to respect the sovereignty of other countries.”⁵¹ Belgium again reacted through parliamentary legislation, this time by renouncing the basis of universal jurisdiction.⁵²

⁴⁹ Loi modifiant la loi du 16 jîn 1993 relative à la répresttion des violations graves du droit international humanitaire et l’article 144^{ter} du Code judiciaire, Apr. 23, 2003.

⁵⁰ Ratner (2003), 891.

⁵¹ News Transcript: Secretary of Defense Rumsfeld at NATO Headquarters, cited by Ratner (2003), 891.

⁵² As for the substantive aspect, the loi 5 Août 2003 limits the scope of the jurisdiction of Belgian courts to the case that the perpetrator is a Belgian national, or the person has a principal residence in Belgium, or the victim is a Belgian national or a person who has resided in Belgium for at least three years. In addition, the new amendment recognizes immunity on the basis of international law or binding treaty law and for persons staying in Belgium on the invitation either of Belgian authorities or of an international organization established in Belgium and with which Belgium has concluded a headquarters agreement (Art 13). As for the procedural aspect, the new amendment stipulates that the prosecution may only be undertaken at the request of the federal prosecutor (procureur fédéral), which means that the mechanism of constitution de partie civile will not be applied. Moreover, this decision of the federal prosecutor may not be appealed.

Chapter 4: New Principle—Subsidiarity

In contrast to the existing framework, there has been a growing support for the idea of subsidiarity as a guiding principle for the exercise of universal jurisdiction or as a modality in the exercise of universal jurisdiction.

In the context of universal jurisdiction, 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. Because this idea ostensibly respects the primacy of territorial or nationality states and indicates when other states may intervene, it seems to provide a feasible mechanism for overcoming the deficiencies observed in existing frameworks. In fact, there is a growing support not only from legal doctrine,¹ but also from instruments prepared by experts² and, above all, statements made by states.³ This increasing support has led some commentators to conclude that the idea of subsidiarity has already attained the status of customary international law. However, 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 to render the exercise of universal jurisdiction feasible and more workable. It may be argued that it is exactly because of 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 consideration has come to the fore. At the same time, because of subsidiarity's arguable status and function as a policy consideration,

¹ Lafontaine (2012), 1286.

² Cassese (2003), 593; Kreß (2006), 580.

³ See e.g., NZ (on behalf of the Canada, Australia, and NZ [CANZ]), A/C.6/67/SR.12, para. 15 (2012); Chile, A/C.6/67/SR.12, para. 36 (2012); Norway, A/C.6/67/SR.12, para. 61 (2012); Argentina, A/C.6/67/SR.12, para. 65 (2012); South Africa, A/C.6/67/SR.13, para. 3 (2012); Sri Lanka, A/C.6/67/SR.13, para. 20 (2012); Brazil, A/C.6/67/SR.13, para. 33 (2012); Azerbaijan, A/C.6/67/SR.13, para. 40 (2012); Malaysia, A/C.6/67/SR.13, para. 43 (2012).

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. Against this backdrop, this chapter examines the possible function of subsidiarity as a policy consideration, rather than its purported status as a customary rule.

4.1 Concept and Its Place in International Law

While the origins of subsidiarity may be traced back to Aristotle, it is the Catholic socialism that modernized its rationale. In the teaching of Catholic socialism, subsidiarity aims to mediate the individual and social aspects of human person; it postulates the human person as inherently social in the sense that the fulfilment of individuals cannot be realized without being in association with others; at the same time, human flourishing inherently requires freedom; therefore, subsidiarity respects autonomy of individuals in the pursuit of their fulfilment 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.⁴

Because of its applicability to all social relationships,⁵ 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. 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 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. The role of subsidiarity is thus flexible.⁶

The idea of subsidiarity has also been gaining support as a guiding principle for the exercise of universal jurisdiction. 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

⁴ Encyclical of Pope Pius XI on Reconstruction of the Social Order (15 May 1931), in 3 *The Papal Encyclicals 1903-1939*, 428, paras. 79-80. See also, Carozza (2003), 42-46.

⁵ Chaplin (1997), 118.

⁶ Feichtner (2012); Tsagourias (2011), 548.

had been perpetrated because it enjoyed readier access to the evidence, was closer to the aggrieved parties, and would benefit most from the transparency of a trial and the accountability of a verdict. At the same time, they 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.⁷

As to the conditions for the exercise of subsidiarity 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 Institute de droit international (2005),⁸ 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.⁹ Similarly, the AU-EU Report (2009) sets forth slightly more detailed and nuanced conditions, albeit as a matter of policy.¹⁰ Its

⁷ NZ (on behalf of the Canada, Australia, and NZ [CANZ]), A/C.6/67/SR.12, para. 15 (2012); Chile, A/C.6/67/SR.12, para. 36 (2012); Norway, A/C.6/67/SR.12, para. 61 (2012); Argentina, A/C.6/67/SR.12, para. 65 (2012); South Africa, A/C.6/67/SR.13, para. 3 (2012); Sri Lanka, A/C.6/67/SR.13, para. 20 (2012); Brazil, A/C.6/67/SR.13, para. 33 (2012); Azerbaijan, A/C.6/67/SR.13, para. 40 (2012); Malaysia, A/C.6/67/SR.13, para. 43 (2012).

⁸ The Resolution of Institute de droit international on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity, and war crimes (2005), available at: <http://www.idi-iil.org/index.html>.

⁹ Art 3 provides:

‘Unless otherwise lawfully agreed, the exercise of universal jurisdiction shall be subject to the following provisions:

...

c) Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.’

¹⁰ 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 of the

Recommendation 10 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 suspect's and victims' national states are manifestly unwilling or unable to prosecute the suspect. Note that when the suspect is a foreign state official, the initiation of criminal proceedings begins with a summons to appear, rather than an arrest warrant.

Moreover, Article 4(2) of the African Union Model National Law on Universal Jurisdiction over International Crimes (2012)¹¹ 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 19th 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'.¹² 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.

fact that it is the territorial states that would be mostly affected by crimes that should be subjected to universal jurisdiction. See, Recommendation 9.

¹¹ African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI.

¹² Decision on the African Union Model National Law on Universal Jurisdiction over International Crimes, EX.CL/Dec.731(XXI)c.

While there is a difference in the scope and tone of these statements and instruments, they share the same fundamental assumption: that territorial states¹³ are to be given primacy. At the same time, they allow other entities to step in where the territorial state is not able or willing to exercise its jurisdiction, without the need to obtain consent from the state. On the face of it, it seems reasonable because while territorial states have been regarded as entities that are closer to the relevant 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.

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.¹⁴ From a different perspective, subsidiarity is a principle that a society has chosen as a ‘best-fit’ mechanism for efficiently realising the common good of the society, in a less intrusive manner, given the difference in the ability and willingness of the entities involved. In other words, 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 indeed 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.

¹³ In this regard, it should be pointed out that while the resolution of the Institute recognizes territorial and national states as the ‘primary responsible’ state, the AU-EU Report adds national states of victims to be considered. In contrast, the African Union Model National Law on Universal Jurisdiction gives primacy only to territorial states.

¹⁴ Tsagourias (2011), 548.

Before proceeding into a main analysis, it seems useful to examine the so-called *aut dedere aut judicare* formula that is adopted in various suppression conventions. This formula deserves detailed examination, not only because it reflects the idea of subsidiarity¹⁵ and has already been adopted in the Convention against Torture as a mechanism for the fight against impunity, but also because it provides insight on the ability and willingness of territorial states to take on such a challenge.

Suppression conventions adopting the *aut dedere aut judicare* formula usually distinguish states that have links with the offence in question from those that have no link other than the presence of the offender in their territory. Premised on this distinction, they usually impose differentiated obligations on each type of state: the obligation to prosecute (establish its jurisdiction over the offences) for the former group, and the obligation to prosecute if not extradite for states that fall under the latter category (*aut dedere aut judicare* provision). This formula had in actuality been chosen as a compromise between the view that every state has the same rights and duties for combating universal crimes (the universal approach) and the perspective that only the states that have an individualized linkage should undertake an obligation to establish jurisdiction (the strict approach), which seems to reflect the same considerations underpinning the idea of subsidiarity.

This point can be brought into relief by comparing the drafting processes of the Convention for the Suppression of Unlawful Seizure of Aircraft (the ‘Hague Convention’) and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (the ‘New York Convention’). Both adopted the same system of differentiated obligation mentioned above, but through different courses.

¹⁵ Cassese (2003), 593-594.

On the one hand, the drafting process of the Hague Convention started from the strict approach before moving closer toward the universal approach. At first, the draft texts of the Convention prepared by the Legal Committee of the International Civil Aviation Organisation (ICAO) adopted the strict approach in which only a state of registration and a state of landing were required to establish jurisdiction over the offence.¹⁶ At the diplomatic conference, a new paragraph was adopted and became, with minor drafting changes, Article 4 (2) of the Convention. The proposal was put forward by Spain and established an obligation for the state where an offender was present to prosecute the offender if it refused to grant extradition. According to Spain, that proposal was made in an attempt to address the case where the offender was in the territory of a state that had no jurisdiction over the offence and that state refused to grant extradition for political reasons or on any other grounds.¹⁷ Put differently, this paragraph was aimed at closing the ‘loophole’ between the fact of there being no general obligation to extradite and the necessity of preventing impunity in light of the gravity of the offence.¹⁸ It should also be noted that, at this stage, a proposal was adopted in which the state of the operator (or lessee) of the aircraft was added in Paragraph 1, along with those of registration and of landing, as states assuming an obligation to establish jurisdiction over the offence.¹⁹

¹⁶ ICAO, International Conference on Air Law, the Hague, December 1970, Vol. II, 16 [hereinafter, ICAO Conf. Doc.].

¹⁷ ICAO, Conf. Doc. Vol. II, 117-118.

¹⁸ This was succinctly reflected in the comment made by the delegation of the United Kingdom:

...normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however of the gravity of the offence and the loophole pointed out by the delegates of Austria and Spain, he was prepared to support either or both proposals [made by these States]...

ICAO, Conf. Doc. Vol. II, 75, para. 18. See also, comments by Costa Rica (*ibid.*, 75, para. 20); US (*ibid.*, 77, para. 35); Italy (*ibid.*, 78, para. 41).

¹⁹ ICAO, Conf. Doc. Vol. II, 99. It was explained by Barbados, one of the proposers, that in the case of leased aircraft, the state of the operator had the greatest interest in bringing an offender to justice, for in many cases, its nationals would be involved. Moreover, it would be in the best position to ensure conviction because the principal witness to the offence would be readily available. ICAO, Conf. Doc., Vol. I, 83, para. 20. See also the comment of the Netherlands, ICAO, Conf. Doc., Vol. I, 82, paras. 14-15.

On the other hand, the drafting process of the New York Convention followed this trajectory in reverse. In the beginning, the text of the International Law Commission had adopted the universal approach. Article 2 provides that the crimes set forth therein shall be made by each State Party crimes under its internal law ‘whether the commission of the crimes occurs within or outside of its territory’ and that each State Party shall ‘take such measures as may be necessary to establish its jurisdiction over these crimes’.²⁰ Indeed, the Commission stated in its commentary for the text that the important aspect of Article 2 was that ‘paragraph 1 incorporates the principle of universality as the basis for the jurisdiction’, which follows the example of ‘those conventions which provide for co-operation in the prevention and suppression of offences which are *of concern to the international community as a whole*, such as the slave trade and traffic in narcotics’ [emphasis added].²¹ However, the majority of delegates in the Sixth Committee favoured the jurisdictional system of the Hague and Montreal Conventions, and a new article was adopted by a substantial majority.²²

This differentiated system of obligation was adopted by the Convention against Torture, which became the first human rights convention to recognise an obligation on the part of state parties to establish jurisdiction where an alleged offender is present in its territory.²³ It seems that the usefulness of the *aut dedere aut judicare* formula as a tool for combatting impunity had already been acknowledged in the field of human rights, as the Swedish draft

²⁰ YbILC, 1972-II, 315.

²¹ YbILC, 1972-II, 316, para. 10. It should, however, be noted that article 36, paragraph 1 of the 1961 Single Convention on Narcotic Drugs which was mentioned by the Commission as an example of universal jurisdiction clause makes an obligation to establish jurisdiction to ‘[the state’s] constitutional limitation’, which may narrow down the significance of this document as setting out universal jurisdiction in an international sense.

²² Wood (1974), 807.

²³ Nowak and McArthur (2008), 254. This formula was taken over by the International Convention for the Protection of All Persons from Enforced Disappearance (2006) (UN Doc. A/RES/61/177), with slightly modification of terms: the Article 9 of this convention chooses the terms ‘to establish its competence to exercise its jurisdiction’ instead of ‘to establish its jurisdiction’.

that adopted this formula had received widespread support throughout the drafting process,²⁴ with a limited number of states objecting to its content.²⁵

The discussion above succinctly illustrates that the view that an offence considered to be ‘of concern to the international community as a whole’ should result in the entitlement of every state to prosecute on the same standing has yet to gain sufficient support from states. However, it has also been recognized that imposing the obligation to establish jurisdiction merely on states with direct interest or links is insufficient for the purpose of avoiding impunity. In light of this, the *aut dedere aut judicare* formula has been considered to have the best fit in the context of the current legal system.

As demonstrated above, suppression conventions adopting the *aut dedere aut judicare* formula aim at eliminating safe havens for the perpetrators by mobilising not only forum convenience (usually territorial or national states of the offender) and states that have interest in suppression (states such as national states of victims), but also states where the alleged perpetrators are found. Under this formula, those states are allocated differentiated obligations in accordance with their varying characteristics relating to the availability of resources and interests. Furthermore, those obligations are integrated in order to serve the common multilateral interest of combating impunity. This is apparently comparable to the concept of subsidiarity that this study examines.

However, it should be noted that in ordinary suppression treaties, potential safe havens are usually the states where the offenders are found and have no direct link with the offences.

²⁴ Although the draft of International Association of Penal Law which adopted the universal approach was submitted to the informal working group, along with the Swedish draft, only the Swedish draft was sent to the Governments of Member States for comments (UN Doc. E/CN.4/1292 (1978), 30).

²⁵ Brazil had expressed concern over abusive use of universal jurisdiction. Argentina and Uruguay have denied the validity of universal jurisdiction entirely. They all, however, retracted their objections at the later stage. See, Burgers and Danelius (1988), 78-79, 85, 94.

This is mainly due to the absence of a general obligation to extradite; in other words, those states that do have direct links are presumed to be able and willing to exercise jurisdiction. Moreover, those conventions are usually aimed at combating offences that have transnational elements and do not cover the offences that are consummated within a territory of one state.²⁶ The common interests enshrined in those conventions are of a concrete nature such as international transportation or actual or potential threat to states' national interests; therefore, incidents that are consummated within a territory of one state are usually construed to be domestic affairs of that state.

In contrast, in the case of serious human rights abuses, it is not only the states that have no link with the offence but also the territorial or national states that could be potential safe havens for offenders. In this case, impunity could be brought about by sham trials or even corruption in the administration of criminal justice; in other words, territorial states are not always presumed to be able or willing to exercise jurisdiction. Moreover, the offences in question include those that are consummated within a territory of one state; in fact, it is mainly those situations in which the offence is committed within a territory of one state against its own population with the involvement of state officials that the exercise of universal jurisdiction is chiefly aimed at. 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.

²⁶ For instance, Article 3 of the International Convention for the Suppression of Terrorist Bombings (1997) provides:

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1 or paragraph 2, of this Convention to exercise jurisdiction except that the provisions of article 10 to 15 shall, as appropriate, apply in those cases.

4.2 Applying Subsidiarity in the Case of Universal Jurisdiction

4.2.1 Criteria of Inability and Unwillingness

In order to clarify the criteria of inability and unwillingness, it is first useful to draw a comparison with the complementarity mechanism of the ICC, in which the ICC may not seize a case unless a state which has jurisdiction is ‘unwilling or unable genuinely’ to carry out the investigation or prosecution. On the one hand, there is a similarity between the notions of subsidiarity and complementarity, in that both regard the unwillingness and inability as a threshold for other entities to enter in. Moreover, although the complementarity of the ICC deals with the relations between an international organization and a state, hence being somewhat vertical, it should be pointed out that the relation between the ICC and state parties was cautiously designed to be close to the one between equal sovereigns. In fact, the term ‘genuinely’ was chosen instead of ‘effectively’ in order not to make the ICC an appellate body to review decisions of domestic courts, since the former was considered more objective.²⁷ On the other hand, there is a critical difference: while the objectivity of judgment on inability and unwillingness of states can be secured in the ICC through some procedural mechanism for challenging to the admissibility of a case,²⁸ there is no equivalence in the subsidiarity between states.²⁹ Thus, it is all the more crucial in the horizontal subsidiarity mechanism between states to secure the objectivity of the assessment.

Bearing the above clarification in mind, it can be pointed out that there are state practices that apparently reflect the idea of subsidiarity, which will also serve to demonstrate the

²⁷ Holmes (2002), 673. In addition, the chapeau of Article 17 (2) which obliges the Court in making its determination to have ‘regard to the principle of due process recognized by international law’ was added at the Rome Conference, based on the consideration that the Court must use objective criteria in assessing national procedures. See, Holmes (1999), 53-54.

²⁸ Article 19 of the Rome Statute.

²⁹ On the comparison between the horizontal and vertical complementarity, see, Ryngaert (2008b), 157-160.

condition for exercise of jurisdiction based on subsidiarity. Regarding this, it is useful to examine the notions of inability and unwillingness separately.

The Case of Inability

As for the notion of inability, it is not difficult to identify the practices which reflect it, as this can be based on a judgement of fact: a *de facto* dysfunction of the judicial system. For example, in *Public Prosecutor v. Cvjetkovic* (1994), there was no functioning judicial system in Bosnia due to the ongoing war, nor was an international tribunal available because the International Criminal Tribunal for the former Yugoslavia was in its ‘start-up phase’.³⁰ This factual background underpinned the 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

³⁰ Reydam (2003), 99. The Bosnian authority did not respond to the Austrian notification, and the ICTY did not take over the proceedings. Cf. The first Annual Report of the ICTY, UN Doc. A/49/342 (29 August 1994).

not functioning and the international criminal court is not in place or its jurisdiction has not been accepted by the State concerned.³¹

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.

The Case of Unwillingness

As for the notion of unwillingness, in contrast, it requires some more cautiousness to identify the practices which reflect it. The identification of unwillingness involves an interpretative act; hence, it is somewhat subjective in contrast to that of inability, it is all the more crucial to specify its contents as a prerequisite to proceed to legal analysis.

In this regard, the decision of the German General Federal Prosecutor on *CCR v. Rumsfeld* (2005)³² is worth examining in order to set up a general analytical framework. In this case, the General Federal Prosecutor expressly relied on the principle of subsidiarity build in §153(f) StPO [Code of Criminal Procedure], in considering whether there was room for the

³¹ Oberste Gerichtshof, decision on jurisdiction, 13 July 1994. Original German text is available at: <http://www.haguejusticeportal.net/eCache/DEF/8/283.html>. English translation for this part can be found in Reydam (2003), 100. The accused was later acquitted by jury.

³² 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 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.

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.³³

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’. In this case, 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.³⁴ 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 serious intent to prosecute,’ it can

³³ Ibid., 120.

³⁴ Ibid., 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’. Ambos (2007), 52. See also Ryngaert (2008b), 177.

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.

In order to explore further into the substance of the notion of unwillingness, a series of decisions of Spanish courts in connection to the amnesty laws in Latin American states deserves detailed examination. This seems exactly the case of the primary jurisdictions being 'unwilling' to conduct the proceedings, as enacting amnesty laws means that a certain extent of crimes or people is intended to be categorically precluded from the prosecution. This is also crucial especially for this study, as there is an apparent conflict between the interest of primary jurisdiction in not conducting criminal proceedings and that of other states in doing so for the purpose of combating impunity.

The decision of the Criminal Chamber of Audiencia Nacional on the *Pinochet* case (1998)³⁵ seems one of the earliest and important decisions in this regard. 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 LOPJ, than those it stipulates, while suggesting that the former jurisdictions is made subsidiary to the latter.³⁶ Thus 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*), pursuant to Decree-law 2,191 of 1978 of the Government Junta, which extended amnesty to persons responsible for criminal acts perpetrated during the state of siege from 11 September 1973 until 10 March 1978. At this stage, the Chamber had to address whether the above fact

³⁵ Audiencia Nacional, Criminal Chamber, Order, 5 November 1998. Original Spanish text is available at: <http://www.derechos.org/nizkor/chile/juicio/audi.html>. English translation is reproduced in, Brody and Ratner (2000), 95-107.

³⁶ 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'.

would amount to the Spanish court's lacking of jurisdiction for failure to meet the requirement of Article 23(2)(c) of LOPJ, 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.³⁷ [emphasis added]

Accordingly, the relevant provision of Chilean Decree-law 2,191 of 1978 was regarded as 'a provision decriminalizing certain conduct for reasons of political convenience,' and a decision based on its application was not interpreted as a product of proper administration of criminal justice.

³⁷ Ibid., 105-106.

Similarly, the Criminal Chamber of the Audiencia Nacional's decision (2000) in the *Guatemala Genocide* case,³⁸ relying expressly on the above mentioned Audiencia Nacional's decision in the *Pinochet*, confirmed a subsidiary character of universal jurisdiction drawn from the interpretation of Article VI of the Genocide Convention. It then proceeded to address whether the territorial jurisdiction had been 'inactive'. As a first step, the Chamber set forth the criteria to assess 'lack of activity', with regard to legislative and adjudicative functions, respectively. According to the Chamber, the lack of activity of legislative branch can be detected from the fact that:

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, such as through amnesty or 'forgetting' laws [leyes de amnistía o de olvido], (...) ³⁹

In applying these criteria to the present case, the Chamber held that there was no 'reason' or 'feasibility' to conclude that the Guatemalan system had been inactive. In this regard the Chamber paid attention to article 8 of the Law of National Reconciliation of 18.12.96, which specifically ruled out extinguishment of criminal liability for crimes such as genocide, torture, and forced disappearance, as well as any offences not barred by statute of limitations or for which domestic law or international treaties ratified by Guatemala did not allow criminal liability to be extinguished. In other words, the Guatemalan law was considered 'active,' because it did not 'shield the accused from prosecution' as was typically the case with amnesty laws.

³⁸ Audiencia Nacional, Criminal Chamber, Plenary Session, Decision, 13 December 2000. English translation is reproduced in, 3 *YbIHL* (2000), 691-697. This is one of the lower courts' decisions, which was repealed later by the Constitutional Court's decision.

³⁹ *Ibid.*, 695-696.

In the *Cavallo* case, Argentine amnesty laws played a key role both in initiating and withdrawing Spanish jurisdiction. In the early stages, the Audiencia Nacional confirmed the ‘lack of activity’ due to the existence of the Ley de Punto Final (*Full Stop Law*) and the Ley de Obediencia Debida (*Due Obedience Law*), which had been major obstacles in Argentina to conduct criminal proceedings against offenses committed during its ‘dirty war’ periods.⁴⁰ Having thus confirmed its basis of jurisdiction in light of the principle of subsidiarity, the Spanish authority then issued an arrest warrant for Cavallo and circulated it internationally, eventually obtaining extradition from Mexico in 2003 where he had been found.⁴¹

When the Spanish authority reached the stage of deciding whether to initiate public prosecution in 2005, however, the Supreme Court of Argentina declared those two amnesty laws to be null and void in the *Simón* case.⁴² In response, the Audiencia Nacional reviewed its proceedings and rendered a decision in 2006, in which it suggested that Argentine jurisdiction should be preferred. According to the court:

There is no doubt that Argentinean jurisdiction, under the leadership of the Public Prosecutor once the obstacle of the Ley de Punto Final (*Full Stop Law*) and the Ley de Obediencia Debida (*Due Obedience Law*) had been removed (they were declared to be null and void by the resolution of 14 June 2005 of the Supreme Court of Argentinean Justice), has been *acting effectively* in judging the acts that took place in the ESMA, thus responding

⁴⁰ Wilson (2000), 26.

⁴¹ Cf. Supreme Court of Mexico, Decision, 10 June 2003. English translation is reproduced in 42 *ILM* (2003), 888.

⁴² *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, Suprema Corte [Supreme Court], 14 June 2005. Original Spanish text is available at <http://www.derechos.org/nizkor/arg/doc/nulidad.html>.

the expectation of the International Community and, in particular of their victims.⁴³ [emphasis added]

Despite the Spanish Supreme Court's later repeal of the above decision,⁴⁴ the Spanish government later decided on Cavallo's extradition to Argentina, which was implemented on 31 March 2008.

While amnesty law is primarily concerned with an activity of the legislative branch, the assessment of unwillingness has also involved activities of the judicial branch. In *Guatemala Genocide*⁴⁵ mentioned above, Audiencia Nacional illustrated the lack of activity of the judicial branch as follows:

because although it may be legally possible for proceedings to be opened, the domestic courts are subjected to pressures from the governing or de fact authorities which are such that it can be reasonably concluded that it is not feasible, in such a climate of governmental hounding or fear, for the judiciary to carry out their duties with the calmness and impartiality which they need to be able to reach a judgment.⁴⁶

In applying this criterion, the Chamber, while expressing some concern about the judiciary being subject to intimidation, nevertheless observed that there was no evidence that the

⁴³ *Cavallo* case, Audiencia Nacional, Criminal Chamber, 20 December 2006. English Translation is reproduced in 'Correspondent's Reports: Spain', 9 *YbIHL* (2006), 556-557.

⁴⁴ *Cavallo* case, Supreme Court of Spain, Decision, 18 July 2007. English translation is reproduced in 10 *YbIHL* (2007), 430-431.

⁴⁵ *Guatemala Genocide* case, Audiencia Nacional, Criminal Chamber, Plenary Session, Decision, 13 December 2000. English translation is reproduced in, 3 *YbIHL* (2000), 691-697.

⁴⁶ *Ibid.*, 696.

complaint and supplementary lawsuits submitted to the First Central Magistrates' Court had been rejected. It should be noted that a comparison was drawn particularly with the cases of Chile and Argentina, where there had been no judicial action for a long period since the military dictatorships had ended, which made it 'feasible' to conclude that it constituted a 'lack of activity' of the judicial system.⁴⁷ In contrast, the Chamber found it impossible to put forward the same argument in this case, because it was only about a year since the initial complaint had been submitted to the Guatemalan courts. The Chamber also mentioned that such complaints had not been dismissed by any Guatemalan court up to that point.

Likewise, the modalities of the investigation may be included in the assessment of 'unwillingness'. In the *Shehadeh* case, regarding the target killing operation by the Israeli Defence Forces in Gaza in 2002, which killed a suspected Hamas militant and 14 civilians,⁴⁸ the Audiencia Nacional granted leave to proceed with the investigation on 29 January 2009.⁴⁹ 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 2009⁵⁰; this time it went further into the assessment of the modalities of the investigation that had actually taken place in Israel.⁵¹ According to the court, the Israeli authorities who had conducted the investigation and concluded that there was no need to initiate a criminal investigation were not

⁴⁷ On the case of Chile, see Audiencia Nacional's decision on *Pinochet* (see above). A similar decision was rendered by the Audiencia on the case of Argentina a day before the decision on *Pinochet*. See, Wilson (2000), 26.

⁴⁸ On an analysis of the *Shehadeh* case, Weill (2009), 617.

⁴⁹ Audiencia Nacional, Preliminary Report no.157/2.008-G.A., 29 January 2009. Unofficial English translation by FIDH is available at http://www.fidh.org/IMG/pdf/admission_order_propery_translated-1.pdf.

⁵⁰ Audiencia Nacional, Preliminary Proceedings, No.157/2.008, 4 May 2009. Original Spanish text is available at <http://www.nodo50.org/csca/agenda09/palestina/pdf/auto040509.pdf>.

⁵¹ On the investigation in Israel, I. Rosenzweig and Y. Shany, 'Universal Jurisdiction: Spanish Court Initiates an Inquiry of the Target Killing of Salah Shehadeh', available at

http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/3d%20Newsletter/1/SpanishCourtInquirySalahShehadeh.aspx.

independent or impartial, none of their decisions made a legal assessment of the event, and actually there had been no criminal investigation since 2002.⁵² In response, Israel informed the Spanish authorities that the case was subject to the proceedings in Israel. After another challenge by the public prosecutor, the investigations in the case were halted on 30 June 2009 according to a decision of a panel of judges of the Audiencia Nacional by a 14-4 vote,⁵³ referring to the Israeli investigation.

The most difficult case may arise where the alleged perpetrators have already been subjected to criminal proceedings in other states. On the one hand, it is largely recognised 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. However, there is no such principle in an international context. The absence of the principle of *ne bis in idem* at the international level was confirmed 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, paragraph 7 of the International Covenant on Civil and Political Rights, 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.⁵⁴

⁵² It should be noted that the court assessed the independency and impartiality of Israeli authorities in light of its own Constitution.

⁵³ La Audiencia Nacional cierra la causa contra Israel por la matanza de 14 civiles, available at http://elpais.com/diario/2009/07/01/espana/1246399206_850215.html. See also, Stigen (2010), 139.

This decision was made just days after the lower house of the Spanish Parliament voted to limit the scope of a 1985 law that allowed judges to investigate crimes against humanity that had no link with Spain.

⁵⁴ *A.P. v. Italy*, Communication No.204/1986, UN Doc. CCPR/C/OP/2 (2 November 1987), 67 (para. 7.3).

The absence of the principle of *ne bis in idem* at the international level means that there is no need to give primacy to territorial states in this regard; put differently, other states may proceed whether territorial states are willing to conduct proceedings themselves or not. This seems to be exactly the case in a decision of the French Cour de cassation (2008)⁵⁵ in the case of *disparus du Beach*.⁵⁶ In assessing the repeal (annulation) of proceedings provided by la chambre de l'instruction de la cour d'appel de Paris in 2004, the Cour suggested that *chose jugée* of foreign judgment would not prevent the initiation of *action publique* with regard to crimes that are subject to universal jurisdiction. At the same time, it strictly interpreted the condition of 'presence of accused' as denoting the defendant's presence in person at the launch of the proceedings, finding the mere existence of the address or residence of the accused insufficient to initiate proceedings. In this case, the criminal proceedings had concurrently been conducted in the Republic of Congo, in which all the defendants had been acquitted on 17 August 2005. Thus, the above decision amounts to a refusal to take into consideration a decision of a court of a foreign state.

On the other hand, some legislation seems to apply the principle of *ne bis in idem* in the international context with regard to international crimes. For instance, Spanish Ley Orgánica del Poder Judicial provides that prosecution should not be pursued if the defendant has been acquitted, convicted, or pardoned abroad (Article 23(2)(c)). In fact, it was the interpretation and application of this provision that led the Audiencia Nacional to conclude in the *Pinochet* case that the amnesty granted under Chilean amnesty laws would not amount to a true pardon pursuant to Spanish law. Regarding this, Canada's Crimes Against Humanity and War Crimes Act⁵⁷ deserves special mention, because it not only

⁵⁵ Arrêt, la Cour de cassation, chambre criminelle, 9 avril 2008, available at http://www.fidh.org/IMG/pdf/ArretCCBeach9avril08_exp.pdf.

⁵⁶ This is a series of proceedings in a suit filed in France by Fédération Internationales des ligues des droits de l'homme (FIDH) against senior officials of the Republic of Congo, charging them with their commitment in the disappearance of refugees who were in the process of returning from the Democratic Republic of Congo to the Republic of Congo. On the development of the proceedings, see a report of FIDH: *Affaires des "disparus de Beach": Récapitulatif des procédures (décembre 2001- novembre 2007)*, available at <http://www.fidh.org/>.

⁵⁷ Canadian Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

seems to apply the prohibition of double jeopardy in the international context, but also sets forth detailed criteria for its application. Its Article 12(1) introduces the principle of double jeopardy in an international context and provides that a person would be able to plead *autrefois acquit*, *autrefois convict*, or pardon, if they had been tried and dealt with outside Canada in respect of the offence under the Act. At the same time, Article 12(2) makes exceptions to this and provides that a person may not *plead autrefois acquit*, *autrefois convict* or pardon if the person was tried in a court of a foreign state or territory and the proceedings in that court were for the purpose of shielding the person from criminal responsibility or were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.

4.2.2 Assessment

As was demonstrated above, the assessment of unwillingness covers many cases and at times can involve intrusive inquiry into the domestic proceedings of territorial states. At the same time, it can be observed that those cases generally appear to be comparable to the criteria for unwillingness established under the complementarity mechanism of the Rome Statute. For instance, granting amnesty (as in the *Pinochet* case and the *Cavallo* case) or bringing to trial and subsequently acquitting the accused can be equated to a means of shielding the accused from criminal responsibility; a potential course of action by unwilling states that is addressed by in Article 17(2)(a) of the Rome Statute. Likewise, an unjustified delay in the proceedings as described in Article 17(2)(b) of the Statute seems to have been at issue in the *Guatemala Genocide* case. Moreover, the requirement for the independence and impartially on the part of the authorities conducting the investigation that was applied in the *Shehadeh* case may be viewed as corresponding to the requirement under Article 17(2)(c) of the Statute, which is concerned with unwillingness in the context of proceedings that are not being conducted independently or impartially. In addition, it should be pointed out that the criteria for the non-application of *autrefois acquit*, *autrefois*

convict put forward in Canada's Crimes Against Humanity and War Crimes Act mirrors the wording of Article 17(2)(a) and (c) of the Statute.

That said, one should not be quick to conclude that the criteria for the assessment of unwillingness that is integral to the complementarity mechanism of the ICC can be translated into the subsidiarity principle that is applied in inter-state relationships. While the complementarity mechanism of the Rome Statute contains a procedure for challenging the admissibility of a case, there is no such procedure available in the decentralised inter-state discourse. In this sense, the assessment of subsidiarity in the exercise of universal jurisdiction remains a unilateral effort, and as such, if territorial states object to it and refuse to cooperate, it would be unlikely that the asserting state could secure any level of effective enforcement.

It should be recalled here 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 behind the growing support that subsidiarity has been attracting from states, including the African states that have been critical of the potential abuse of the principle of universal jurisdiction. It follows that in the assessment of unwillingness, it is all the more necessary for a state exercising universal jurisdiction to present any elements that restrain the exercise of discretion on the part of territorial states and to present these elements in a way that could be acknowledged by those states.

To put it in a broader context, if a matter is left to someone's discretionary power, another party may not pass judgement on the validity of the former party's decision on that matter unless the former acts *manifestly* beyond its discretion. In the field of international law, the best illustration of this proposition can be found in the argument surrounding

Kompetenz-Kompetenz/la compétence de la compétence of international tribunals. While it has been consistently accepted by international law that ‘an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction’,⁵⁸ this right is not unconditional or exempt from limitation. This was confirmed by the International Court of Justice (ICJ) in the *Arbitral Award* case where Guinea-Bissau challenged the validity of the arbitral award. The award was delivered by an arbitration tribunal that had been established pursuant to an arbitration agreement between Guinea-Bissau and Senegal. The ICJ, while admitting that the tribunal had had the power to determine its own jurisdiction and to interpret the agreement for that purpose, did not deny its own authority to rule on the central issue. That is, the issue of whether ‘by rendering the disputed Award the Tribunal acted in *manifest* breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction’ (emphasis added).⁵⁹ It is of particular note here that the Court insisted it would not act as an appellate body in relation to the arbitration tribunal, but would only treat the request as a *recours en nullité*. Put differently, since it was the tribunal that had the power to determine its own jurisdiction, the other body, which was not acting in the role of an appeal court, could review the former’s exercise of jurisdiction only if it was manifestly (manifestement) in excess of its competence. Thus, it is the *manifest* nature of breach or excess of power that would vest another body’s judgement with some objectivity, and accordingly make it opposable to the primary competent body.⁶⁰ This objectivity of judgment is all the more crucial in the

⁵⁸ *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objection, 18 November 1953, ICJ Reports 1953, 119.

⁵⁹ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, ICJ Reports 1991, 69 (para. 47).

⁶⁰ Castberg (1931), 443; Berlia (1955), 130.

In fact, Article 52 (1)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

...

(b) that the Tribunal has *manifestly* exceeded its powers; [emphasis added]

relation between sovereign states, and one should recall that the Resolution of the Institute requires *manifest* unwillingness and inability as a ground for triggering subsidiary jurisdiction.⁶¹

In addition, the application of objective criteria in the judgement of unwillingness is also essential for the practicable exercise of universal jurisdiction. As some commentators suggest, subsidiarity may be used by states—especially by their executive branches—that are reluctant to interfere in other states’ affairs as an excuse for not exercising jurisdiction even when it is actually required.⁶² In cases where the assessment of unwillingness is based on ambiguous criteria, proceeds on an *ad hoc* basis, or is subject to the free discretion or whims of prosecutors, such assessments could not be described as being subject to judicial review even if there were specific procedures in place for this purpose.

In summary, the question arises as to how the objectivity of a judgement on unwillingness can be secured. Are there any grounds in the decentralised system of jurisdiction that establishes a basis for the auto-interpretation of any objectively framed criteria in this context?⁶³

4.3 Normative Framework for Subsidiarity Discourse

4.3.1 Manifestness of Unwillingness

In considering the question of manifest nature of unwillingness, it seems, as a first step, useful to address the *Ould Dah* case⁶⁴ in the European Court of Human Rights. In this case,

⁶¹ Article 3 (c) of the Resolution of the Institute de droit international.

⁶² Stigen (2010), 141.

⁶³ In this regard, it should be noted that in the *Arbitral Award* case, the manifest nature of the breach was regarded resulting from ‘the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its competence’ (ICJ Reports 1991, 69 (para. 49)).

⁶⁴ *Ould Dah c. France*, décision sur la recevabilité, 14 mar 2009, de la requête no.13113/03.

a Mauritanian applicant complained that his conviction for torture in application of French law was in breach of the principle of legality under Art. 7 of the European Convention of Human Rights, as the 1993 Act of Mauritania amnestied any acts of armed groups from 1989 to 1992, and its validity should not be denied by the application of French law. Thus, the court was faced with the question of the validity of amnesty law of the territorial state vis-à-vis the assertion of universal jurisdiction.

It is important to note here that the court could not invoke the European Convention or the Convention against Torture to justify the exercise of universal jurisdiction initiated in 1999 by French authorities vis-à-vis Mauritania, as the latter was not party to the European Convention nor had been to the Convention against Torture before 2004. Nevertheless, the court proceeded into the question of the relation between amnesty laws and the assertion of universal jurisdiction. First, it noted that the prohibitions of torture have been established as *jus cogens* norms and observed that amnesty laws are generally incompatible with the duty to investigate acts such as torture. It then continued:

It is certain that, in general, one could not exclude the possibility of a conflict between, on the one hand, the necessity to prosecute the crimes committed, and, on the other hand, the need to reconcile the social structure of the country. In any case, no process of reconciliation of this kind was put in place in Mauritania. However, as the court has already pointed out, the prohibition of torture holds a core place in all international instruments relevant to the protection of human rights and is one of the core values of democratic societies. One could not therefore question the obligation to prosecute such actions by allowing impunity to the perpetrator through adoption of an amnesty law, susceptible of being abusive with regard to international law.

And it further noted:

...[international law] does not exclude the conviction of a person granted amnesty in his state of origin prior to being tried by another state, which derives for example from Article 17 of the Statute of the International Criminal Court, whose list that enumerates inadmissible cases does not include this type of situation.

This ruling has a great implication in the present analysis. The Court indicated that the *jus cogens* nature of crimes limited a discretion left to territorial states in the administration of criminal justice, including granting of amnesty; in other words, the adoption of an amnesty law would be incompatible with the obligation to prosecute, and amount to being an abusive use of power. Moreover, it was suggested that such a state of abusive use of power would generate a certain relation between a territorial state and a state exercising universal jurisdiction in the sense that the former would not be able to exclude the latter's exercise of power, even if there is no direct right-duty relationship between them under treaty regimes. These points are of particular importance here, because it implies that the assessment of unwillingness would be opposable to the territorial states if it amounts to be an abusive use of power—the non-performance of the obligation to prosecute.

Regarding this, it can be pointed out that, in the *Simón* case mentioned above, which triggered subsidiarity consideration in the Spanish Audientia Nacional, it was exactly the acknowledgement that the enactment of two amnesty laws, *Ley de Punto Final* (*Full Stop Law*) and the *Ley de Obediencia Debida* (*Due Obedience Law*), constituted a violation of the obligation to prosecute that underpinned the acceptance of the subsidiarity universal

jurisdiction by the judges.⁶⁵ In this case, judges constituting the majority opinion admitted that Argentina's failure to act had resulted in other states' exercise of universal jurisdiction over Argentine nationals. In particular, Judge Zaffaroni observes that jurisdiction is an attribute of sovereignty which emanates from people, and accordingly, the universal jurisdiction becomes operational when a state has not exercised its sovereign power.⁶⁶ Behind this acknowledgment was a judgment of the Inter-American Court of Human Rights, that declared that those two amnesty laws were null and void as a violation of the duty to prosecute under the American Convention. Article 75.22 of the Argentine Constitution of 1994 provides the primacy of international rule over domestic law, in which the American Convention on Human Rights explicitly stipulated as an example of those international rules. Domestic courts have actually applied the jurisprudence of the American Courts of Human Rights as an authoritative interpretation of the Convention.⁶⁷ In short, the state of being contrary to the obligation to prosecute was conceived by the judges as being *inactive* in that it leads to other states' taking action.

Of course, one should not be quick to infer any conclusion from those rather isolated cases. Above all, it is not entirely clear how the obligation to prosecute that is assumed by states and the exercise of universal jurisdiction that is a means to incur the responsibility of individuals are related. At the same time, those practices hint at the possible function of the obligation to prosecute as a ground for discourse between territorial states and the states

⁶⁵ *Simón*, supra note 42, Voto del Señor Ministro Doctor Don Ricardo Luis Lorenzetti, para. 29; *ibid.*, Voto del Señor Ministro Doctor Don E. Raúl Zaffaroni, paras. 32-33

⁶⁶ Original text states: 'Es claro que la jurisdicción es un atributo de la soberanía y que ésta, en nuestro sistema, emana del pueblo. En consecuencia, el principio universal deviene operativo cuando un Estado no ha ejercido su soberanía y, por ello, los restantes estados de la comunidad internacional quedan habilitados para hacerlo. Un Estado que no ejerce la jurisdicción en estos delitos queda en falta frente a toda la comunidad internacional.'

On the other hand, he maintained, now that the amnesty laws had been declared null and void, there would be no room for other States to step in. See, Zaffaroni, *ibid.*, para. 37. Some commentators, however, expressed concerns about whether the annulment of amnesty laws would result in the actual exercise of jurisdiction. Bakker (2005).

⁶⁷ Bakker (2005), 1111.

exercising universal jurisdiction, which deserves further inquiry for the purpose of the present study. The following section thus addresses the relevance of the obligation to prosecute to the exercise of universal jurisdiction.

4.3.2 Relevance of the Obligation to Prosecute with the Exercise of Universal Jurisdiction

With regard to the relevance of the obligation to prosecute to the exercise of universal jurisdiction, there seems to be mainly two approaches. The first one is rather straightforward. It sees the obligation to prosecute as a secondary obligation, derived from a wrongful act of individuals that is attributable to a state. Put differently, it sees the obligation to prosecute individual perpetrators as a form of responsibility to ‘re-establish the situation which would, in all probability, have existed if that act had not been committed’ and to provide a guarantee against repetition of the criminal acts.⁶⁸ In this regard, the exercise of universal jurisdiction—the act of incurring the responsibility of individuals, on its face—can actually be seen as an invocation of responsibility of the state of which the individual perpetrator is an organ.⁶⁹

The second one is more nuanced. It regards the obligation to prosecute as a primary obligation, and designates the exercise of universal jurisdiction as a means to ‘redress’ the state of non-performance of the obligation to prosecute. Premised on that such obligation is owed to the international community as a whole (obligation *erga omnes*), Van der Wilt argues that the exercise of universal jurisdiction is ‘a correlative right of the international

⁶⁸ De Hoogh (1996), 165.

⁶⁹ De Hoogh argues that ‘the punishment of culprits by the author State is necessary to have it perform its obligation’ and that because of the fundamental importance of the obligations concerned, this gives rise to a rule endowing each and every state with universal jurisdiction. *Ibid.*, 165.

community' for the failure of those states that assume a responsibility to bring perpetrators of international crimes to justice.⁷⁰ He concludes:

...if the state most responsible for suppressing international crimes flouts its obligations, other states, as trustees of the international community, are at least allowed to redress the situation. In this way, the claim of universal jurisdiction gains legitimacy, because it is directly tagged to, and originates from, original sovereign rights that have been turned into obligations and contribute to a watertight system of international criminal law enforcement.⁷¹

As for the first approach, it should first be noted that the question of individual responsibility is in principle distinguished from that of state responsibility,⁷² which has been endorsed by the works of the ILC⁷³ and also is reflected in Article 25 (4) of the Rome Statute for the International Criminal Court.

Moreover, this approach is problematic because it designates the prosecution of individual perpetrators by an 'author' state as a form of satisfaction. First, while some commentators argue that the prosecution of criminal conduct is sought by way of satisfaction,⁷⁴

⁷⁰ Wilt (2011), 1050.

⁷¹ Ibid., 1051.

⁷² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, 116 (para. 173); *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 142. See also, Seibert-Fohr (2009), 370.

⁷³ Commentary on Article 58, para. 3, *Articles on State Responsibility* (2002), 312. In fact, the ILC had already submitted in its first reading of the draft articles of state responsibility that the obligation to punish individuals who are organs of the state and are guilty of certain international crimes does not constitute a form of international responsibility of the state. ILC, commentary to Article 19.

⁷⁴ This view is further divided into two groups. On the one hand, some commentators hold the view that *a state is generally obliged to prosecute its officials that acted on its behalf* as a means of satisfaction. See, Bothe (1996), 301; Wyler and Papaux (2010), 631. On the other hand, Crawford suggests that it is consistent with

punishment has not always been considered as a form of satisfaction.⁷⁵ Indeed, the ICJ has often considered that its declaration of a violation of international law was, ‘in itself appropriate satisfaction’. In the judgment of the *Application of Genocide Convention on the Prevention and Punishment of the Crime of Genocide*,⁷⁶ the ICJ followed this trend. While finding that Serbia and Montenegro was in breach of the obligation to cooperate with the ICTY under the obligation to punish in Article VI of the Genocide Convention,⁷⁷ the Court held that a declaration of a violation of that obligation would constitute appropriate satisfaction.⁷⁸

Second, and more importantly, the practice relating to the obligation to prosecute has shown that it is not regarded as a consequence of the previously established responsibility of the state. In fact, even in the traditional field of the protection of aliens, punishment had been required not as a consequence of the delinquency of the culprit, but as an execution of obligation of the state itself.⁷⁹ This notion of the obligation to prosecute had been brought about by the distinction between the responsibility of individuals and that of states, and has been followed by the subsequent practices. The ICJ observed in the *Application of the*

established conceptions of satisfaction to include this category at least in *serious cases*. J. Crawford, Third Report on State Responsibility, YbILC, 2000, Vol.II, Part 1, 56, para. 192.

In addition, while the punishment of perpetrators was not explicitly listed as a form of satisfaction in Article 37 of the Articles on State Responsibility, its commentary mentioned the possibility that disciplinary or penal action against the individuals whose conduct caused the wrongful act constitutes a form of satisfaction. Commentary on Article 37, para. 5, *Articles on State Responsibility* (2002), 233. However, it stands a noted contrast with the corresponding article in its First Reading Draft Articles, which explicitly listed disciplinary action or punishment as a form of satisfaction. See, Article 45 of the First reading Draft Articles, *ibid.*, 360.

⁷⁵ Dominicé (1984), at 106.

⁷⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, 43.

⁷⁷ *Ibid.*, 229 (para. 449).

⁷⁸ *Ibid.*, 235 (para. 465). It should be noted that the Court made this finding despite the fact that Bosnia had asked the Court to order a concrete measure as a form of reparation such that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide or any other acts prohibited by the Genocide Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal and to fully cooperate with this Tribunal.

⁷⁹ Dominicé (1984), 106.

Convention on the Prevention and Punishment of the Crime of Genocide, that the obligation to punish acts of genocide did not simply constitute a consequence of a state organ having previously committed genocide. According to the Court:

It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.⁸⁰

Similarly, the Inter-American Court has held that the violation of the rights protected in the Convention can be established even if the identity of the individual perpetrator is unknown. The Court found that ‘[w]hat is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.’⁸¹

Confirming that the obligation to prosecute is a primary obligation, the focus of the discussion now turns to the second approach. This approach is more plausible than the first one, from the perspective of the present study, because it seems to accommodate the idea of subsidiarity by designating the exercise of universal jurisdiction as a means to ‘redress’ the situation where the territorial state does not perform its obligation to prosecute.

⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, 201 (para. 383). See also, Zimmermann and Teichmann (2009), 304-305.

⁸¹ *Velásquez-Rodríguez v. Honduras*, Judgment on Merits, 29 July 1988, IACtHR (Ser. C) No. 4, para. 173.

However, it begs a question as to whether such obligation to prosecute can be seen as an obligation *erga omnes* owed toward the international community as a whole in the first place. Indeed, it can be said that acts of genocide or torture constitute a violation of an obligation arising under peremptory norm, for which every state can be held to have an interest; yet it is an individual perpetrator that violated such an obligation⁸²; it is thus not entirely clear whether obligation to prosecute such an act can automatically be vested with an *erga omnes* character.

In this regard, one may still argue that the obligation to prosecute that derives from the obligation to ensure the protection of human rights can be seen as an obligation *erga omnes*, not necessarily because it concerns prosecution of violators of peremptory norms, but rather because it concerns the rules governing fundamental human rights, as the Human Rights Committee has observed:

While article 2 is couched in terms of the obligations of State Parties towards individuals as the rights-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.⁸³

⁸² In this regard, Ryngaert seems to bear in mind that the addressees of a prohibition are individuals and not states when he illustrates the exercise of universal jurisdiction as follows:

These are obligations [obligations arising under a peremptory norm of general international law] in which every state has an interest, which it could (although not necessarily *should*) vindicate by conferring on its prosecutors and courts *the power to investigate and prosecute violations of those obligations* [emphasis added].

Ryngaert (2010), 168.

⁸³ General Comment No. 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 2.

If one takes this view, the question still arises as to the scope of measures that the third states may take as the exercise of a ‘correlative right of the international community’,⁸⁴ because as the above observation of the Human Rights Committee explicitly admits, it is individuals under the jurisdiction of a state, and not other states, that are direct stakeholders of that international obligation.⁸⁵ In other words, while states other than injured states or entities have a legal interest in seeing obligations respected, these states do not hold the same standing with states directly injured by the wrongful act,⁸⁶ and the responsibility generated thereby stands independently from the injury to the subjective right of another state or individual stakeholders.

Premised on this understanding, one may refer to the elaborated regime of invocation of responsibility pertaining to the breach of the obligation *erga omnes* provided in the ILC’s Article on Responsibility of States. Article 48 (2) provides that interested states may claim cessation of the internationally wrongful act and assurances and guarantees of non-repetition,⁸⁷ whereas they may claim reparation only in the interest of the injured state or of the beneficiaries. The former category intends to ensure the maintenance, restoration, and the guarantee of respect of international legality,⁸⁸ thus purely related to ‘*un contrôle de la légalité*’⁸⁹. In contrast, the latter aims to obtain reparation for the injured parties. While it is obvious that the exercise of universal jurisdiction cannot be regarded as a means to obtain reparation for the injured parties, it may apparently fall into the former category, given the function of criminal prosecution being the deterrence of future crimes and the assurance of the respect for the rule of law.

⁸⁴ Wilt (2011), 1050.

⁸⁵ See also, Crawford (2006), 470.

⁸⁶ Sicilianos (2002), 1132.

⁸⁷ Some commentators argue that this category may still be in the state of progressive development though. Cf. Barbier (2010), 561.

⁸⁸ Dupuy (1991), 295; Corten (2010), 548.

⁸⁹ Stern (1973), 33.

Having said that, it is still problematic to designate the exercise of universal jurisdiction as a means of invoking responsibility of the territorial state. As has been reiterated in this study, the exercise of criminal jurisdiction is a means to hold individual perpetrators accountable, and should not be conceived as a means to invoke responsibility of other states. At the same time, if the exercise of subsidiarity universal jurisdiction is conditioned on the unwillingness and inability of the responsible states, it inevitably involves the assessment of the administration of criminal justice of those states. In this sense, it cannot entirely be separated from the system of state responsibility. Thus, the question still arises as to how one could situate such an assessment in relation to the system of state responsibility.

In order to explore this point, it is useful to draw a comparison with the case law under human rights conventions on the consideration of possible human rights violations that may occur as a result of extradition⁹⁰. Indeed, in the field of extradition, there has been an established jurisprudence that it would be a violation of human rights for a state to surrender a fugitive under its custody to a state where he or she would be in danger of being subjected to treatment that is in violation of human rights.⁹¹ It is important to note that it is the liability of a sending state, and not a receiving state, that is at stake in this context, whereas, at the same time, the decision concerning it apparently involves an assessment of the administration of justice in the receiving state. Nevertheless, it has been regarded that it would raise ‘no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise.’⁹² In fact, an assessment of this kind could be seen as an

⁹⁰ Vajda (2010), 343.

⁹¹ *Soering v. the United Kingdom*, App. No. 14038/88, Judgment, 7 July 1989, para. 91. See also, *Saadi v. Italy*, App. No. 37201/06, Judgment, 28 February 2008, para. 138; *Kaboulov v. Ukraine*, App. No. 41015/04, Judgment, 19 November 2009, para. 107. See also, Dugard and Van den Wyngaert (1998), 187; Wilt (1995), 53.

⁹² *Al-Saadoon and Mfudhi v. the United Kingdom*, App. No. 61498/08, Judgment, 2 March 2010, para. 124. See also, *Drozd and Janousek v. France and Spain*, App. No. 12747/87, Judgment, 26 June 1992, para. 110.

assessment of factual situation in order to determine the liability of the sending state and should not be seen as a binding decision on the receiving state nor as a means of invoking the latter's responsibility.

The distinction between the assessment of fact and invocation of responsibility can be analogically applied to the exercise of universal jurisdiction. In fact, while the assessment of unwillingness by the state exercising jurisdiction entails indicating the fact that the territorial state does not administer its own apparatus properly to implement the obligation to investigate and prosecute, it does not amount to the invocation of responsibility of the latter. For a claim to be an invocation of responsibility, it should also have some formality, as the ILC's commentary to Article 42 suggests:

...invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for the observance of the obligation, or even reserves its rights or protests.⁹³ For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of

⁹³ Commentary on Article 42, para. 2, *Article on State Responsibility* (2002), 256.

an application before a competent international tribunal, or even the taking of countermeasures.

In light of this, the assessment of unwillingness is no more than an informal diplomatic contact mentioned here. Indeed, it does not amount to a claim for compensation, nor an application before a competent international tribunal or taking of countermeasures.

More importantly, it can be argued that the exercise of universal jurisdiction should not be seen as any type of claim toward the territorial states. While the notion of the obligation to prosecute can be seen as a yardstick against which the assessment of unwillingness is made, the exercise of universal jurisdiction triggered by such an assessment may not be accommodated within the system of state responsibility. In fact, it does not claim anything from territorial states. Rather, it complements the dysfunction of territorial states on its behalf. It should be noted here that while states cannot enact legislation for other states or exercise police power in the territory of another state, they can exercise criminal jurisdiction over conduct perpetrated within the territory of other states. In other words, criminal jurisdiction is a very unique function of a state that can be exercised on behalf of other states. In this sense, it can be argued that the mechanism of universal jurisdiction complements the system of state responsibility, rather than being part of it or being accommodated in it.

Admittedly, the territorial or national states may still find such an assessment ‘intrusive’, and even raise a protest by accusing it as an infringement of its own sovereignty; yet this protest on its part likewise constitutes a diplomatic contact short of being an invocation of responsibility. Moreover, this discourse may lead to a dialogue between relevant parties, due exactly to the fact that it does not involve a final decision and leaves some room for a territorial state to recover its primacy by showing its own ability and willingness to prosecute.

In summary, it can be argued that the notion of the obligation to prosecute deriving from the duty of a state to ensure the protection of the right of people under its jurisdiction may serve to provide the assessment of the unwillingness with some objectivity.

4.3.3 Practical Implication of the Notion of Obligation to Prosecute on the Assessment of Unwillingness

Having observed that the notion of obligation to prosecute may serve to provide a ground of discourse between territorial states and states exercising universal jurisdiction, the focus is now on its practical implication on the actual assessment of unwillingness. Because judges or prosecutors of one state cannot invoke the responsibility of the territorial state, the notion of obligation to prosecute should be translated into terms that these state organs can make reference to. It can be pointed out that there are two distinct but interrelated factors that can be employed in the assessment of unwillingness: nature of crimes and systematic and consistent nature of inactivity. It will also be suggested that the development of jurisprudence may serve to establish a criteria for international standards of *res judicata*.

Nature of Crimes

As the assessment in chapter 2 demonstrated, the human rights treaty bodies have developed a jurisprudence that the obligation to protect substantive rights, read in conjunction with the general duty to ensure human rights protection (Art. 2(1) of the ICCPR, Art.1(1) of the IACHR, Art.1 of the ECHR), requires that a state party both investigate the violation and seek to punish those who are responsible for violations, at least with regard to rights of fundamental importance, such as the right to life and the prohibition of torture. Those developments had already contributed to narrow a range of discretion of the state, in the sense that measures in short of criminal proceedings is not sufficient; it stands in stark contrast to cases of other human rights violations where states wield considerable discretion with regard to measures taken to protect rights of individuals

under its jurisdiction. At the same time, it was not entirely clear to what extent the obligation to prosecute retains its power to limit such discretion. In fact, granting amnesties has at times been even encouraged in order to achieve national reconstruction and reconciliation after civil conflict or during a transitional process toward the realization of democracy. This in turn means that, in such cases, the decision of a territorial state not to exercise its jurisdiction may fall exactly within its discretionary power.

In this regard, it can be pointed out that the development of human rights bodies or other international institutions has also generated a jurisprudence that the particular nature of crimes (violation of non-derogable right, violation of *jus cogens*) serves to limit the discretion of territorial states, even in the cases of national reconstruction and reconciliation.

The *Barrios Altos* case in the Inter-American Court of Human Rights provides a good starting point. In this case, Peru's self-amnesty laws (Laws No.26479 and No.26492) had prevented criminal proceedings from being initiated. The Court, in line with the established jurisprudence of the Convention which links the general obligation to protect human rights with the substantive rights which had been affected by the offence, observed:

The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate

impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.⁹⁴

In the view of the Court, however, it is not only self-amnesty laws whose object and purpose should be criticized as inadmissible in the first place, but amnesty provisions in general that are inadmissible under the Convention:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violated non-derogable rights recognized by international human rights law.⁹⁵

Accordingly, the Court found that the amnesty laws were incompatible with the Convention, and consequently, ‘lack legal effect’.⁹⁶ Of particular importance here is that the judgment articulated that the non-derogable nature of the violated rights would make all amnesty provisions—whether they are self-amnesty or not—inadmissible. As Judge Ramírez observed in his concurring opinion, such forgive and forget provisions ‘cannot be permitted to cover up the most severe human rights violations, violations that constitute an

⁹⁴ *Barrios Altos (Chumbipuma Aguirre et al. v. Peru)*, Judgment on Merits, 14 March 2001, IACtHR (Ser. C) No. 75, para. 43 [hereinafter *Barrios Altos*].

⁹⁵ *Ibid.*, para. 41.

⁹⁶ *Ibid.*, operative paragraph 4. The interpretation of this judgment issued by the Court confirmed that the effects of operative paragraph 4 of the judgment were general in nature, given the nature of the violation that amnesty laws No. 26479 and No. 26492 constituted. Accordingly, these amnesty laws were not only considered illegal in so far as applied to the Barrios Altos case, but were denied their effect in general. *Barrios Altos*, Interpretation of the Judgment on the Merits, 3 September 2001, IACtHR (Ser. C) No. 83, para. 18.

utter disregard for the dignity of the human being and are repugnant to the conscience of humanity'.⁹⁷

Thus, the significance of the *Barrios Altos* judgment made clear that the discretionary power of the primary responsible states to grant amnesty should be limited with regard to the violation of non-derogable rights, regardless of what the object and purpose of that amnesty may be. This point has gained support in later case law of the Court. In the *Almonacid-Arellano* case, the Court confirmed that the prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.⁹⁸ It also observed that crimes against humanity were crimes which cannot be susceptible to amnesty.⁹⁹ According to the Court:

Amnesty laws with the characteristics as those described above (supra para.116) leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State. Consequently, given its nature, *Decree Law No. 2.191 does not have any legal effects* and cannot remain as an obstacle for the investigation of the

⁹⁷ *Barrios Altos*, Concurring Opinion of Judge Ramírez, para. 11. This part was in fact the extract of his former concurring opinion in the Castillo Páez case. *Castillo Páez v. Peru*, Judgment on Reparations and Costs, 27 November 1998, IACtHR (Ser. C) No. 43, Concurring Opinion of Judge Ramírez, para. 7.

⁹⁸ *Almonacid Arellano et al v. Chile*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, IACtHR (Ser. C) No.154, para. 99.

⁹⁹ *Ibid.*, para. 114.

facts inherent to the instant case, or for the identification and punishment of those responsible therefor. (...) ¹⁰⁰ [emphasis added]

As a consequence, the Court decided that the states must ensure that Decree Law No.2.191 did not continue to hinder the investigation, prosecution, and if applicable, punishment of those responsible.¹⁰¹ While the *Almonacid-Arellano* differs from the *Barrios Altos* in referring to a prohibitive norm (*jus cogens* norm) and not an individual's right (non-derogable right), both share a common ground in relying on the nature of rules from which states cannot deviate on their own free will. As a result, the discretion of states to choose no prosecution was denied in both cases.

In the Concluding Remarks on Colombia in 2004, the Human Rights Committee, having taken note of the efforts by the state party to encourage members of illegal armed groups to lay down their arms and rejoin civil society, recommended that the state party should ensure that the proposed legislation on alternative penalties to imprisonment would not grant impunity to persons who have committed war crimes or crimes against humanity.¹⁰² Similarly, in the Concluding Remarks on Guatemala in 2001, the Committee expressed its disturbance on the absence of a state policy intended to combat impunity which had prevented the identification, trial, and punishment of those responsible. The Committee recommended strictly applying the National Reconciliation Act, which expressly excluded crimes against humanity from amnesty.¹⁰³ Similarly, it was confirmed in the SG Report in 2004 that United Nations-endorsed peace agreements could never promise amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights.¹⁰⁴

¹⁰⁰ Ibid., para. 119.

¹⁰¹ Ibid., para. 145, and operative paragraphs 5 and 6.

¹⁰² UN Doc. CCPR/CO/80/COL (2004), para. 8.

¹⁰³ UN Doc. CCPR/CO/72/GTM (2001), para. 12

¹⁰⁴ SG Report on The Rule of Law and Transitional Justice in conflict and post-conflict societies, UN Doc. S/2004/616 (August 3, 2004), para. 10.

These practices demonstrate that impunity is no longer to be tolerated with regard to war crimes or crimes against humanity, which constitute *jus cogens* crimes, even in a situation where it is necessary to encourage ‘civic harmony through amnesty laws that contribute to re-establishing peace and opening new constructive stages in the life of a nation’.¹⁰⁵

In summary, if there is no possibility for a criminal prosecution for conduct that constitutes *jus cogens* crimes or violations of non-derogable rights, it may be argued that there is a strong case for the unwillingness of territorial states.

Systematic and Consistent Nature of Inactivity

At the same time, it may be argued that the nature of crime in itself is not sufficient to ensure the manifestness of the judgment on unwillingness. It is submitted that the inactivity should also be a consequence of a dysfunction of governmental apparatus, as the jurisprudence concerning the obligation to prosecute has confirmed. In other words, the judgment on inactivity in the administration of criminal justice should entail a systemic and consistent nature, rather than a mere inexistence of investigation and prosecution in a specific case.¹⁰⁶ The legislation of amnesty law has been a typical case because it categorically precludes the prospect of investigation and prosecution.¹⁰⁷ The lack of state policies that can lead to generating the atmosphere of impunity can also be conceived as a state of inactivity.

¹⁰⁵ *Barrios Altos*, Concurring Opinion of Judge Ramírez, para. 11.

¹⁰⁶ Regarding this, see the so-called *Rawagede* case. *Stichting Komitee Utang Kehormatan Belanda v. Netherland*, Rechtbank ‘s-Gravenhage (Court of First Instance), trial judgment, LJN: BS8793, 14 September 2011. In its finding that it was unreasonable for the Dutch state to invoke statutory limitations as a bar to civil liability for the executions committed by its officials in an Indonesian village in 1947, the Court emphasized not only the gravity of the offences, but also the state’s inaction over decades despite the fact that it had known the commission of wrongful acts immediately after the event. See also, Herik (2012), 696.

¹⁰⁷ Concluding Observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.67 (25 July 1996), para. 358.

This element is indeed compatible with the rationale of subsidiarity. While states cannot enact legislation for other states or exercise police power in the territory of another state, they can exercise criminal jurisdiction over conduct perpetrated within the territory of other states. In other words, criminal jurisdiction is the very unique function of a state that can be exercised on behalf of other states. It follows that exercising universal jurisdiction when the governmental apparatus involving criminal jurisdiction is prevented from functioning, can be seen exactly as the application of the rationale of subsidiarity which encourages other entities to get involved when entities closer to the stakeholders cannot achieve their ends by themselves. At the same time, it is for this end that the exercise of universal jurisdiction should be limited to the cases of such systematic and consistent dysfunction, and should not be extended to the sporadic cases of delay in judicial proceedings.

Towards International Standard of res judicata?

While there is no well-established principle of *ne bis in idem* in the international context, jurisprudence in the Inter-American Court of Human Rights has developed some criteria of possible standards for the principle of *ne bis in idem* that deserves special mention for the purpose of the present study.

In the case of *Carpio-Nicolle et al. v. Guatemala*, the proceedings to determine the liability of the perpetrators of the attack against Jorge Carpio Nicolle and his delegation began in July 1993 and ended in August 1999, with the acquittal of all the accused. However, the Court found that the courts of justice had acted ‘without independence and impartiality, applying legal norms and provisions that are contrary to due process or failing to apply the appropriate ones’.¹⁰⁸ According to the Court, the development of international legislation and case law has led to the examination of the so-called ‘fraudulent *res judicata*’ resulting

¹⁰⁸ *Carpio-Nicolle et al. v. Guatemala*, Judgment on Reparations and Costs, 22 November 2004, IACtHR (Ser. C) No. 117, para. 76 (34).

from a trial in which the rules of due process have not been respected, or when judges have not acted with independence and impartiality, which would prevent the state from invoking the judgment delivered thereby.¹⁰⁹ While the principle of *ne bis in idem* is enshrined in Article 8(4) of the Convention, it is not an absolute right, and is not applicable in a case of fraudulent *res judicata*. Similar findings were made in subsequent cases.¹¹⁰

It is important to note here that these standards for ‘fraudulent *res judicata*’ (application of the rule of due process, impartiality, and independence of judges) have been formulated not only in reference to the principle of *ne bis in idem* enshrined in the statutes of various international criminal tribunals,¹¹¹ but also in application of the obligation to investigate and prosecute that have been developed in the jurisprudence of the Court itself.¹¹² For the purpose of the present study, the latter aspect is of particular note, mainly because the state of the non-performance of the obligation to prosecute could be acknowledged by the territorial state as a state of inactivity that may constitute a situation of unwillingness. In fact, the Constitutional Court of Colombia found in its 2003 judgment,¹¹³ that where a human rights supervisory organ has found that Colombia breached its treaty obligations by

¹⁰⁹ Ibid., paras. 131-132.

¹¹⁰ *Almonacid-Arellano et al v. Chile*, Judgment, 26 September 2006, IACtHR (ser. C), No.154, para. 154 (arguing that the case of acquittal resulting from a trial that does not meet such standards as ‘apparent’ or ‘fraudulent’ *res judicata* case); *La Cantuta v. Peru*, Judgment on Merits, Reparation and Costs, 29 November 2006, IACtHR (Ser. C), No. 162, para. 153 (using a phrase of ‘fictitious’ or ‘fraudulent’ grounds for double jeopardy to describe similar circumstances).

¹¹¹ Article 20 of the Rome Statute of the International Criminal Courts, UN Doc. A/CONF. 183/9 (17 July 1998); Article 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia, SC Res. 827 (25 May 1993); Article 9 of the Statute of the International Criminal Tribunal for Rwanda, SC Res. 955 (8 November 1994). .

¹¹² In *La Cantuta v. Peru*, the Court provides: ‘The State has resorted to the figure of *res judicata* to avoid punishing some of the alleged intellectual perpetrators. This constitutes an infringement of the American Convention, inasmuch as States cannot apply domestic laws or provisions to escape the duty to investigate and punish those responsible for violations of the Convention.’

La Cantuta v. Peru, Judgment on Merits, Reparation and Costs, 29 November 2006, IACtHR (Ser. C), No. 162, para.130.

¹¹³ Judgement C-004/03 (20 January 2003), cited in the Note by the Secretary-General on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/2004/88 (27 February 2004), 14, para. 37.

failing to carry out an effective investigation, a case resulting in a judgment of acquittal can be reopened without violating the principles of *res judicata* and *non bis in idem*.

It remains to be seen whether this jurisprudence in the regional human rights body will attain a status of ‘international standard’. Yet the significance of this development should not be ignored. It may not only provide the condition for the exercise of universal jurisdiction in the case of the accused individuals having already been acquitted or pardoned in a foreign country, but it may also serve to restrict an unlimited exercise of universal jurisdiction that derives from the absence of the principle of *ne bis in idem* in the international context.

Concluding Remarks

While so many arguments have been made over universal jurisdiction, there is still no consensus among international scholars even over the scope of crimes that are subject to universal jurisdiction, let alone the modalities of its exercise. Interestingly, it seems to be a premise shared by many international doctrines to see jurisdiction as a right or entitlement attributed by international law that has actually been a stumbling block. In reality, international regulation over the assertion of prescriptive jurisdiction is still undeveloped. At the same time, the exercise of jurisdiction is subjected to several restraints either in relation to other states or with regard to the rights of accused individuals. It is in light of those restraints that this study sought to establish a framework within which jurisdictional claims can be evaluated; it concluded that the exercise of jurisdiction should be examined from the perspective of whether and to what extent it may secure effectiveness of enforcement, legitimacy of claim, and foreseeability of law and forum.

Building on this analysis, this study further sought for a justifying ground of universal jurisdiction. It was pointed out that the existing legal doctrines have problems in capturing the reality of universal jurisdiction, primarily because they seek to find or establish a *right* of jurisdiction. In contrast, it was suggested that the assertion of universal jurisdiction has been gaining legitimacy with regard to crimes under international law (war crimes, crimes against humanity, and genocide) and other *jus cogens* crimes (especially torture), primarily because states have been less interested in tolerating impunity for those types of crimes, and also been more aware of the necessity for the exercise of jurisdiction in order to compensate for the failures of the territorial and national state of the offender in the suppression of these crimes.

With those insights, this study further sought to find a feasible framework for resolving conflicts relating to jurisdictional claims where they result from claims of universal

jurisdiction. It was pointed out that existing approaches have problems in attaining the purpose of resolving conflicts primarily because they try to reconcile or avoid the conflict between interests, but fail to establish a framework within which relevant interests are weighted against with each other. In contrast, the idea of subsidiarity has been gaining support, which designates universal jurisdiction as a default mechanism and should only be exercised if the territorial or national states are unable or unwilling to exercise jurisdiction, due to the fact that it ostensibly respects the primacy of territorial jurisdiction while being capable of meeting the necessity of compensating for the dysfunction of territorial jurisdiction. At the same time, the feasibility of subsidiarity depends on how to identify cases and situations of inability and unwillingness. Regarding this, this study put forward the notion of obligation to prosecute that derives from the duty of a state to ensure the protection of rights to all individuals under its jurisdiction as a key concept in the assessment of inability and unwillingness. It was argued that a state of non-performance of obligation to prosecute can be conceived as an abusive use of power on the part of territorial states, thus vesting the assessment of unwillingness with some objectivity. This would at least provide a ground for legal discourse between territorial states and states exercising universal jurisdiction.

It remains to be seen whether the idea of subsidiarity will be accepted as a guiding principle for the exercise of universal jurisdiction. In fact, it is still facing many challenges. First of all, there is still a difference in the understanding of the concept of fight against impunity as a common goal to be achieved. While this study suggested that the aim of fight against impunity is to put the regular enforcement of criminal law in place in order to reduce a safe havens for individual perpetrators, there is a strand that emphasises the absolute nature of individual criminal responsibility; the latter tends to maintain that it is the state where the alleged perpetrator is found that should be a *forum convenience*. Second, one may still argue whether criminal prosecution is always a solution for redressing serious human rights abuses. While there is a trend in international jurisprudence that does not tolerate granting amnesty in the case of *jus cogens* crimes, there might be a case that

people in the territorial state will choose to grant amnesty in order to achieve national reconciliation. This is a matter of autonomy of the people in the territorial state, and the challenge will be if and to what extent the notion of obligation to prosecute may accommodate such factors within it. Third, one may wonder whether certain types of international crimes, especially the crime of aggression, can be subject to the exercise of universal jurisdiction. It is true that increasing numbers of states have established a basis of universal jurisdiction over the crime of aggression in their domestic laws, after the adoption of the Resolution on the Amendment on the Crime of Aggression to the Rome Statute of the International Criminal Court. At the same time, this is one of the typical and the most extreme case of 'state crimes', and it is not entirely clear whether a domestic court of a state can be suitable for a trial of such crimes, even on a subsidiarity basis.

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