Universal Jurisdiction – Historical Roots and Modern Implications

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The purpose of this dissertation is to analyse the historical development of universal jurisdiction and examine how it affects the modern application. I will show that literature on the history of universal jurisdiction provides two alternative methods of examining its development. A look at the traditional historical model will reveal few sources of law to support the use of universal jurisdiction for many modern crimes, despite the common agreement on the existence of such jurisdiction. A lesser-employed historical approach reveals more solid foundations that can be used to defend a moderate version of universal jurisdiction today. I will argue that the second historical model for the development of universal jurisdiction is stronger and therefore better suited to transforming universal jurisdiction from woolly liberal rhetoric to solid a solid legal concept. A moderate, limited form of universal jurisdiction linked with 'aut dedere aut judicare' and predicated on the presence of the accused and the implementation of necessary legislation in the custodial state can reduce the interstate frictions and bring universal jurisdiction back into a more main stream position.

I. What is universal jurisdiction? - Introduction

"Jurisdiction is the means of making law functional." [1]

When a crime is committed, a state must be able to exercise some kind of jurisdiction in order to be able to take judicial action. States do so regularly on the principles of territoriality or nationality, and sometimes on passive personality (the victim's nationality) or the protective principle (where national interests are affected). [2] Occasionally, however, courts have prosecuted defendants without any of the traditional jurisdictional links being present. They have done so by using the universality principle. The principle of universality recognises that certain crimes are of such an atrocious and dangerous nature that all states have a responsibility or a legitimate interest to take

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[1] Christopher L. Blakesley, "Extraterritorial Jurisdiction" in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 2 (Ardsley, N.Y.: Transnational Publishers Inc, 1999) 36.

[2] See, for example, Antonio Cassese, *International Criminal Law*, (Oxford University Press, 2003) 244-285; Vaughan Lowe, "Jurisdiction" in Malcolm D. Evans, *International Law*, (Oxford University Press, 2003) 329347; Ian Brownlie, *Principles of Public International Law*, 300305.

action. [3] This is the principle of universality and the root of universal jurisdiction. Another way to phrase the definition is to say that "international law *permits* any state to apply its laws to certain offences even in the absence of territorial, nationality or other accepted contacts with the offender or the victim." [4] Such exercise is extremely controversial, however, because jurisdiction is a manifestation of state sovereignty [5] , and therefore any extraterritorial application can lead to international disputes between states. [6]

The purpose of this dissertation is to analyse the historical development of universal jurisdiction and examine how it affects the modern application. I will show that literature on the history of universal jurisdiction provides two alternative methods of examining its development. A look at the traditional historical model will reveal few sources of law to support the use of universal jurisdiction for many modern crimes, despite the common agreement on the existence of such jurisdiction. A lesser-employed historical approach reveals more solid foundations that can be used to defend a moderate version of universal jurisdiction today.

I will argue that the second historical model for the development of universal jurisdiction is stronger and therefore better suited to transforming universal jurisdiction from woolly liberal rhetoric to solid a solid legal concept A moderate, limited form of universal jurisdiction linked with *aut dedere aut judicare* and predicated on the presence of the accused and the implementation of necessary legislation in the custodial state can reduce the interstate frictions and bring universal jurisdiction back into a more main-stream position.

For the purposes of this paper, I will focus only on criminal universal jurisdiction except where civil lawsuits contribute directly to its development. Also, while it is interesting to trace the development of the definitions of the various international crimes as well as their more general development in conjunction with universal jurisdiction, this has been left out of this paper in order to limit its scope. Definitions have been noted in the footnotes where this has been deemed necessary or insightful, or else have been commented on if pertaining directly to the argument.

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[3] Thomas Buergenthal and Harold G. Maier (eds.), *Public International Law in a Nutshell* (St. Paul: West Group, 1990) 172; Lowe, n 2 above, 343; Ingrid Detter, *Laws of War* (Cambridge University Press, 2000) 425; Cassese, n 2 above, 284285; Michael P. Scharf "Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States" 35 New Eng. L. Rev. 363, 368 (2001); Monica Hans, "Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish This Goal?" 15 Transnat'l Law. 357, 360361 (2002).

[4] Theodor Meron, *War Crimes Law Comes of Age* (Oxford: Clarendon Press, 1998) 251, emphasis original. See also Luc Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (Oxford University Press, 2003) 5; M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" 42 Va. J. Int'l L. 81, 88 (2001).

[5] D.W. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources" 53 BYIL 1, 1 (1982).

[6] Bassiouni expresses the notion as universal jurisdiction transcending national sovereignty. Bassiouni, n 4 above, 8990, 96.

II. HISTORY

"Almost all nations observe almost all the principles of international law and almost all of their obligations almost all of the time." [7]

The majority of scholars writing on universal jurisdiction [8] have relied so much on one particular strand of historic development to explain the history of the principle of universality that it has become the standard model of explanation. It starts with piracy and skips directly to Nuremberg, in between occasionally making a brief reference to slavery. Nuremberg, usually acknowledged as the birth of the modern form of universal jurisdiction, is followed by a few references to events that have become milestones or precedents since World War II, such as the drafting of the Geneva Conventions, the development of multilateral human rights instruments, and the Eichmann Trial. This is the standard formula for explaining the extension of universal jurisdiction from piracy to its modern application to *jus cogens* crimes, and is based to a large degree on making the latter analogous to the former.

This historical explanation, given in fuller detail below, contains some problems that subject the modern use of universal jurisdiction to claims of illegitimacy that are only partially addressed by subsequent adoption in some of the human rights treaties negotiated in the post World War II decades. Furthermore, it doesn't actually reveal from where the principle of universality was derived, only where it has been applied. There are other historical explanations for the development of universal jurisdiction and other events that have been used by scholars [9] who have looked at universal jurisdiction through different lens than the majority. The difference can often be explained by the examination of the definition of universal jurisdiction itself, beyond the simple explanation included here in the introduction. The majority of literature on the subject of universal jurisdiction is concerned with its application to human rights, and this may explain why the standard historical explanation so prominently features events from Nuremberg and beyond. One of the most recent monographs on the subject [10] has refocused instead not on explaining universal jurisdiction through its application, but by focusing on the nature of jurisdiction itself. The author, Luc Reydams, begins with the *Lotus* case and from there examines various national practices involving jurisdiction over foreign nationals. His understanding of universality is firmly intertwined with extradition and the development of the *aut*

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[7] Louis Henkin, "How Nations Behave" quoted in William W. Burke-White, "A Community of Courts: Toward a System of International Criminal Law Enforcement" 24 Mich.J.Int'l.L. 1, 77, n 414 (2002).

[8] Cassese, n 2 above, 284285; Kenneth Randall, "Universal Jurisdiction Under International Law" 66 Tex. L. Rev. 785, 788789 (1988); James D. Fry, "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction" 7 UCLA J.Int'l L. & Foreign Aff. 169, 175176 (2002); Madeleine H. Morris, "Universal Jurisdiction in a Divided World: Conference Remarks" 35 New Eng. L. Rev. 337, 339350 (2001); Scharf, n 3 above, 368373; Hans, n 3 above, 365367; Henry J. Steiner, "Three Cheers for Universal Jurisdiction – Or Is It Only Two?" 5 Theoretical Inquiries L 199, 201 (2004).

[9] Michael Akehurst, "Jurisdiction in International Law" 46 BYIL 145, 163165 (19721973); Michael J. Kelly, "Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of *Aut Dedere Aut Judicare* Into Customary Law & Refusal to Extradite Based on the Death Penalty" 20 Ariz. J. Int'l & Comp. L. 491, 496499 (2003); Georges Abi-Saab, "The Proper Role of Universal Jurisdiction" 1 JICJ 596, 601(2003) and generally, Reydams, n 4 above.

[10] Reydams, n 4 above.

dedere aut judicare principle. Reydams hardly mentions piracy, the supposed origin of universal jurisdiction, at all.

It is important to understand the difference in these approaches because, in addition to simply providing a fuller, more accurate historical record, the different historical approaches lend different levels of credence to the doctrine of universal jurisdiction. A thorough analysis of legal sources below will show that despite the passionate support lent to universal jurisdiction by human rights advocates and organisations, the foundation for universal jurisdiction is not as sound as it appears, and to attempt to justify universal jurisdiction under customary international law is to "cross the line between *lex lata* and *de lege ferenda*." [11]

The following section will first examine the traditionally cited evolution of universal jurisdiction and the weaknesses that this has engendered in its practice, followed by the examination of the limited legal sources for universal jurisdiction for core international crimes and *jus cogens* violations. The second section below will examine an alternative historical basis for universal jurisdiction based on greater emphasis of *aut dedere aut judicare* and its medieval roots.

1. Traditional elements in the historical development of universal jurisdiction

A. Piracy

Historically, the oldest and singularly most accepted application of the universality principle has been the prosecution of piracy on the high seas. [12] Piracy was identified as a problem as early as the 10th century, [13] and states have exercised universal jurisdiction over pirates, regardless of their nationality or where their crimes were committed, for nearly 500 years. [14] The practice evolved from the importance placed upon naval trade and communication links between states, which were constantly and

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[11] Bassiouni, n 4 above, 95.

[12] Buergenthal and Maier, n 3 above, 172173; Detter, n 3 above, 425; Thomas H. Sponsler, "The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen" 15 Loy. L. Rev. 43, 44 (19681969); Akehurst, n 9 above, 160; Bowett, n 5 above, 11; Hans, n 3 above, 365; William J. Aceves "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System Of Transnational Law Litigation" 41 Harv. Int'l L.J. 129, 154 (2000); Bassiouni, n 4 above, 110111; David J. Scheffer, "The Future of Atrocity Law" 25 *Suffolk Trasnatn'l L.* Rev. 389, 409, 425 (2002); Frank Tuerkheimer, "Globalization of U.S. Law Enforcement: Does the Constitution Come Along?" 39 Hous.L.Rev. 307, 323 (1996); Malvina Halberstam, "Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?" 25 Cardozo L. Rev. 247, 253 (2003); Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" George Mason University School of Law, Law and Economics Working Paper Series, 9 (2003) available online at http://ssrn.com/abstract id=385900 last accessed 28 March 2004.

[13] "In 1179, the Third Lateran Council condemned piracy but, characteristically for the time, only if it was committed against Christians." Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers Publishing Co, 1988) 67, n 149.

[14] Amnesty International, "Chapter Two: The History of Universal Jurisdiction" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001) 3; Scharf, n 3 above, 369; Bassiouni, pins the development of early piracy law to the period between 1600s and 1800s. Bassiouni, n 4 above, 109110.

indiscriminately threatened by piracy. [15] Additionally, the ability of pirates to flee territorial waters or commit these serious crimes on the high seas made them notoriously difficult to capture and prosecute. Pirates were therefore universally reviled and recognised as *hostis humani generis*, "punishable in the tribunals of all nations." [16] As all states were affected by piracy they were all eager to prosecute the pirates, and universal jurisdiction was a neat compromise to settle "potentially innumerable ... conflicts of jurisdiction." [17] Any state that apprehended a pirate could try him in its courts. This has been recognised as customary international law and has furthermore been codified by subsequent conventions, including the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea. [18]

In the modern context, hijacking has been compared to piracy, [19] and the relevant provisions of the Law of the Sea Convention includes aircraft as well as ships on the high seas. Universal jurisdiction over hijacking is explicitly provided in Article 4 of 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, in the form of *aut dedere aut judicare*, the significance of which will be examined later. [20] The resemblance of hijacking to piracy, however, lead to some nations, like Japan, to claim universal jurisdiction of it even before Hague Convention. [21]

It must be noted here that, despite the universal acceptance of the practice of universal jurisdiction over piracy, there has always been debate among legal scholars about the nature of the crime and how it gave rise to this jurisdiction. [22] This debate is still very relevant to understanding the historical weaknesses of relying on piracy for justification of modern universal jurisdiction. Although innumerable scholars and judges have called piracy a crime against the law of nations [23] it seems this is actually a

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[15] Randall, n 8 above, 795; Hannikainen, n 13 above, 67.

[16] *United States* v *Smith*, 18 U.S. 153, 156 (1820). This is the case where the US Supreme Court upheld the exercise of universal jurisdiction by US courts over piracy, which was declared to be "an offence against the universal law of society." *Ibid* 161. The notion of pirates being *hostis humani generis* is often credited to Cicero. Bassiouni, n 4 above, 108.

[17] Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo* v *Belgium* Case" 13 EJIL 853, 857 (2002)

[18] 1958 Geneva Convention on the High Seas, Article 19 and 1982 United Nations Law of the Sea Convention, Article 105.

[19] Akehurst, n 9 above, 161162. Counterarguments to this analogy can be found in Bowett, n 5 above, 13.

[20] Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), done at the Hague on December 16, 1970. Article 4 reads "1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence... 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him..."

[21] Akehurst, n 9 above, 161-162.

[22] Sponsler, n 12 above, 45; See generally Harvard Research in International Law, "Draft Convention and Comment on Piracy" 26 Am. J. Int'l L. 739 (Supplement 1932) for in depth examination of piracy laws.

[23] See, for example, *S.S. Lotus*, Dissenting Opinion of Judge Moore – "Though statutes may provide for [piracy's] punishment, it is an offence against the law of nations." P.C.I.J. Series A No. 10, (1927) at 70, reprinted in *World Court Reports*, vol 2, (New York: Carnegie Endowment for International Peace, by Oceania Transnationals, 1969) 69.

misstatement that has come into usage from convenience and not legal accuracy. [24] Since the municipal law of most nations condemned piracy, this gave rise to the acceptance of universality and the notion that it is a crime against the law of nations. This is strikingly discordant with the rest of the body of traditional international law because "it would make the pirate a direct subject of international law." [25] Whereas nowadays human rights lawyers now accept the idea of direct individual responsibility for international crimes, in the heyday of piracy 'the law of nations' applied only to nations themselves. In depth analysis of piracy law and criminal jurisdiction came to a similar conclusion, and despite the large body of judicial writings employing the misstatement, it must be concluded that according to strict legal interpretation, piracy was never an international crime but strictly grounds for extraordinary jurisdiction. [26] This strange and notable departure from the conventional and conservative nature of international law in the judicial and scholarly rhetoric is important to keep in mind during the contemplation of later developments of universal jurisdiction.

B. Slavery

Great Britain began the movement in the international arena to abolish slavery and the slave trade on moral grounds. [27] The international prohibition on the slave trade came first because the slave trade between nations took place on the high seas and could be regulated by international law, whereas slavery fell primarily within a state's domestic sphere. In 1815, the Declaration of the Congress of Vienna declared slave trading to be the same as piracy. [28] By the end of the 19th century there was general international consensus that slave trade was illegal and its prohibition could arguably be elevated to a peremptory norm. [29] The normative prohibition of slavery as a peremptory norm was slower to be accepted, but there was sufficient state practice to call it so by the start of

[24] Kontorovich, n 12 above, 4; Bowett, for example, splits universal jurisdiction into two different categories than those presented here. He distinguishes between the category of crimes under international law "which may be deemed criminal not by reference to some municipal penal code, but simply by reference to international law" and the category of crimes "under municipal (not international law) for which all municipal legal systems make provision. With this category the underlying rationale for universal jurisdiction is that, being crimes which all nations recognise, there is a universal interest in punishing such crimes and upholding a community interest in the maintenance of law and order." Strangely, he puts piracy in the first category and not the second despite evidence to the contrary, including the lack of any significant international conventions on piracy and the subsequent implication that this would subject individuals to the law of nations. The second category, Bowett argues, makes for better arguments on use of extradition than universal jurisdiction. Bowett, n 5 above, 1013.

[25] Sponsler, n 12 above 45.

[26] *Ibid* 46; Bassiouni, n 4 above, 109. Unlike many scholars, Amnesty International correctly placed piracy, at least until the most recent Law of the Sea Conventions, in its second category of crimes subject to universal jurisdiction, which are crimes under national law of international concern, and not the first category of crimes under international law. Amnesty International, "Introduction" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001) 1, n 2.

[27] Hannikainen, n 13 above, 76.

[28] Bassiouni, n 4 above, 112113.

[29] Hannikainen, n 13 above, 8687.

World War Two. [30] However, states were reluctant to extend the use of universal jurisdiction to search vessels on the high seas suspected of engaging in slavery, [31] although jurisdiction for such purposes was established among parties to certain treaties.[32]

Some scholars have stuck to Bassiouni's distinction that universal condemnation does not imply universal jurisdiction, [33] and therefore argue that no separate universally recognised crime of slavery existed before World War Two. [34] Such an assertion is perhaps too far to the other extreme, as slavery was widely recognised as a crime by World War Two, although it is fair to argue that no sound basis of universal jurisdiction over the crime existed.

There are still no treaties specifically providing for universal jurisdiction in the suppression of slavery, [35] but the prohibition on engaging in the practice has reached the status of *jus cogens*, as has the "universality of the obligation to prohibit the slave trade." [36] There appear to be differences among scholars on how Article 110 of the 1982 Law of the Sea Convention can be interpreted. Although Article 99 allows only for flag state jurisdiction to prohibit and punish slavery, [37] Article 110 allows any warship to board a vessel suspected of slavery on the high seas. [38] Some scholars have accepted this as grounds for claiming universal jurisdiction to slavery. [39] Others argue that the number of treaties and conventions that have come into existence since Britain began the drive to eradicate slavery in the 19th century have resulted cumulatively "in slave trading [being]

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[30] *Ibid.* 138139.

[31] The refusal to acknowledge a right of boarding in cases of suspected engagement in the slave trade is supported in early 19th century British and American jurisprudence. Brownlie, n 2 above, 243. This has changed in the 20th century law of the sea treaties.

[32] Hannikainen, n 13 above, 8485; Kontorovich calls this at most 'delegated jurisdiction' but certainly not universal jurisdiction as it was treaty-based an limited to the treaty signatories. Kontorovich, n 12 above, 11. Most of the treaties establishing special courts or tribunals are no longer in force. Randall, n 8 above, 799, n 84; Bassiouni reveals that few of the 74 conventions relating slavery, slave-related practices, or trafficking contain specific universal jurisdiction provisions. Bassiouni, n 3 above, 112 113.

[33] Bassiouni, n 3 above, 94; Kontorovich, n 12 above, 11; Princeton Project "Princeton Principles on Universal Jurisdiction, Commentary" 4243 (2001). [Henceforth *Princeton Principles*] available online at http://www.princeton.edu/~lapa/unive_jur.pdf, last accessed 27 March 2004.

[34] Kontorovich, n 12 above, 11.

[35] Roger Clark, "Steven Spielberg's Amistad and Other Things I Have though About in the Past 40 Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery" 30 Rutgers L.J. 371, 390, n 55 (1999); Hannikainen, n 13 above, 446.

[36] Hannikainen, n 13 above, 446; Bassiouni, *International Criminal Law*, vol. 1, (Ardsley, N.Y.: Transnational Publishers Inc, 1999) 663, 669.

[37] 1958 Convention, Article 13 and 1982 Law of the Sea Convention, Article 99 both require that "every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free."

[38] 1958 Convention on the High Seas, Article 22 and 1982 Law of the Sea Convention, Article 110 reads "a warship which encounters on the high seas a foreign ship... is not justified in boarding unless there is reasonable ground for suspecting that... the ship is engaged in the slave trade."

[39] Randall, n 8 above, 798.

being recognised as an international crime falling within the universality theory." [40] Various states, such as Greece, New Zealand, Nicaragua, and Vanuatu, have claimed universal jurisdiction over slavery without apparent criticism from other states. [41] Even the US, notorious for denying any jurisdictional provisions that may affect its own nationals, supports this custom. [42] Collectively, these various interpretations of the human rights law regarding slavery have lead to the general assumption that international law allows universal jurisdiction for its the prosecution. [43]

Regrettably, there seems to be a disassociation between the traditionally recognised slavery of the previous centuries and modern day 'institutions and practices similar to slavery.' Possibly the near extinction of traditional form of slavery may be the reason why the application of universality is now uncontroversial whereas universal jurisdiction has been withheld from the modern forms of slavery. [44] These include debt bondage, serfdom, trafficking in human beings, and specifically in women and children for forced labour or prostitution. [45] Such practices have achieved a high level of universal condemnation through various international human rights instruments, but that is only a surface impression. Many of the treaties lack serious enforcement and reporting mechanisms, and even when ratified, states have often failed to implement relevant domestic legislation or have appended sweeping reservations. [46] Additionally, although legal scholars have argued in favour of extending extraterritorial and universal jurisdiction for these crimes there have been no serious movements to put this into practice. International cooperation between police forces to end such crimes is rising, but there appears to be little political will to extend jurisdiction for prosecution outside of the traditionally accepted principles of territoriality and nationality.

Most ironically, modern attempts at addressing the crime of trafficking in human beings seem to have developed oppositely from the historical counterpart. In the case of traditional slavery, the prohibition of slavery was slower to be accepted than the

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[40] Bassiouni, "Theories of Jurisdiction and Their Application in Extradition Law and Practice" 5 Cal. W. Int'l L. J. 1, 54 (1974), quoted in Randall, n 8 above, 798, n 78.

[41] Clark, n 35 above, 390, n 55.

[42] US Restatement (Third) of Foreign Relations Law, Section 404, Universal Jurisdiction to Define and Punish Certain Offences, reads "A state has jurisdiction to define and prescribe punishment for certain offences recognised by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in §402 [territoriality, nationality, protective principle] is present." [Henceforth "US Restatement"] Quoted in Louis Henkin, *International Law: Cases and Materials*, 3rd Ed. (St. Paul: West Group, 1993) 1049.

[43] Rosalyn Higgins, *Problems and Process, International Law and How We Use It* (Oxford University Press, 1994) 58.

[44] Bassiouni, n 4 above, 114; "The specific contents of [slavery], however, are not sufficiently defined to cover the expanding range of contemporary practice." Bassiouni, n 36 above, 670.

[45] Hannikainen, n 13 above, 447.

[46] For example, the 1948 Universal Declaration on Human Rights (UDHR) is not binding on states, although it has become the foundation for the definition of human rights. The 1981 Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) has a very weak implementation and enforcement procedure and its ratification is riddled with reservations. See Vanessa von Struensee, "Sex Trafficking: A Plea for Action" 6 European Law Journal 379, n 34 (2000). The 1949 UN Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others was not widely ratified and established no monitoring body. *Ibid* 395.

prohibition of the slave trade because it was easier to address the international component first under international law. In the modern context, however, it is the international trafficking that has been addressed more slowly and inadequately, whereas prostitution, the running of brothels or sweatshops or other activities which fuel the trafficking business are often already illegal within many of the countries of destination. [47] In fact, the international aspect has made it even harder to prosecute those engaged in trafficking, because the victims, when found, are most often deported to the country of origin before they can contribute testimony to assist in prosecution. [48]

On the positive side, it is possible that this human trafficking may get the most benefit from the newly created International Criminal Court (ICC) which, although it lacks real universal jurisdiction, does list "the exercise of any or all the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children" as a form of "enslavement" punishable under the category of crimes against humanity. [49] Since these crimes are ongoing prosecution will not suffer lack of temporal jurisdiction [50] and the prosecution is likely to be less controversial as these crimes are usually carried out by criminal gangs for private gain and are not related to state policy.

C. Nuremberg

> *"The Nuremberg Tribunals operated on the assumption that the actions of states cannot be controlled by law unless law can control the actions of the men who direct the policies of states. Nuremberg, then, lights the way for a growth of attempts to apply duly postulated norms of international law to the actions of men who bear the ultimate responsibility for state action."*[51]

The monumental turning point in the evolution of universal jurisdiction was the establishment of the International Military Tribunal (IMT) and other Nuremberg trials held immediately after the Second World War. [52] Advocates of universal jurisdiction firmly cite the principles that emerged from Nuremberg and were affirmed by the UN General Assembly [53] as the foundation of the present-day application of universal jurisdiction to crimes against humanity, war crimes, genocide, and others. However, more critical analyses of the use of universality in the Nuremberg trials cast doubt on the solidity of this legal foundation.

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[47] *Ibid.* 47, citing North America, Western Europe, and Japan as the most common points of destination for the trafficking business.

[48] *Ibid*. 6566.

[49] Article 7.2.b of the Rome Statute of the ICC.

[50] Under Article 11, "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute," which is July 2002.

[51] Sponsler, n 12 above, 67.

[52] Morris, n 8 above, 341.

[53] G.A. Resolution on Nuremberg Principles, G.A. Res. 95, 11 December 1946, in Randall, n 8 above, 835 and Nuremberg Principles (1950), UNGAOR, 5th Session, Supp. No.12, in Christine Van den Wyngaert (ed), *International Criminal Law, A Collection of International and European Instruments*, 2nd ed. (The Hague: Kluwer Law International, 2000) 203204.

There have been numerous attempts to equate the crimes for which the defendants were tried with piracy, the surest link to establish the validity of universal jurisdiction. [54] Some even say that "the piracy analogy underpins" universal jurisdiction. [55] There are two flaws that make this analogy imperfect, however, and therefore weaken the entire foundation of using universal jurisdiction for pursuing perpetrators of crimes against humanity, as discussed below. [56]

i. Piracy versus war crimes and crimes against humanity: magnitude of violence

The first flaw is more easily addressed and is often overlooked by scholars. Although piracy has been universally condemned and is usually uttered in the same breath as adjectives such as 'heinous' it can be argued that the act of piracy itself, although a serious crime, does not actually rise to the level of the grave crimes such as crimes against humanity, war crimes, and genocide. Piracy may be merely an unauthorised act of violence involving relatively minor use of force. [57] And while there is a land equivalent of piracy (brigandage) [58] murder and theft on land is hardly ever characterised as heinous. Prior to the codification of the definition of piracy by the 1958 Convention on the High Seas, scholars even argued that the evidence of numerous definitions of piracy under various municipal statutes (and conversely the lack of a single established international definition of the crime of piracy under international law) meant that piracy was not actually a crime under the law of nations, as it is often referred to, but simply a "special ground of state jurisdiction" which may or may not be exercised by the custodial state depending on its own municipal definition of piracy. [59] Piracy is not very different from the crimes of rape, murder, robbery, and arson (none of which are crimes liable to universal jurisdiction) except that it is committed on the high seas.

Vaughan Lowe explains that there are really two types of universal jurisdiction, one for truly heinous crimes such as genocide, war crimes, and crimes against humanity, and the other for serious crimes that would go unpunished if states were limited to more traditional claims of jurisdiction, like piracy. [60] It is therefore not very accurate to extend the principle of universality to crimes against humanity simply because it is as atrocious and heinous as piracy, although this has been done so often that it has been accepted by

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[54] Randall, n 8 above, 793, see also Willard B. Cowles "Universality of Jurisdiction over War Crimes", 33 Cal. L. Rev. 177, 194 (1945) and Sponsler, n 12 above, 4950.

[55] Kontorovich, n 12 above, 4.

[56] It should be noted that Kontorovich included the analogy of piracy to slavery along with the analogies to war crimes and crimes against humanity and so forth, all as examples of historical inaccuracy. I have chosen to leave slavery out of Kontorovich's basket of bad analogies because it shares more in common with piracy than the rest of the crimes claiming universal jurisdiction in that it is usually done for private gain, and its prohibition was traditionally enforced on the high seas as well. Consequently I have delayed explaining the weakness in the analogy until Nuremberg.

[57] Lowe, n 2 above, 343; "The essence of the offence constitutes nothing more than robbery at sea." Kontorovich, n 12 above, 8, 41.

[58] See Cowles, n 54 above, 189. In fact, according to Grotius, brigandage was considered illegal before piracy. *Ibid* 194.

[59] "Draft Convention and Comment on Piracy" n 22 above, 75960.

[60] Lowe, n 2 above, 343. See also Scharf, n 3 above, 368369.

judges and scholars [61] and is very often how the development of universal jurisdiction at Nuremberg is often described.

Justice Robert Jackson, serving as the US representative and Chief Counsel to the IMT, viewed both the Nazi war crimes and piracy as illegal forms of warfare. [62] Like piracy, the Nazi crimes were of international concern because "they threatened peace and security of other states or of the international community as a whole." [63] Such a comparison is also not without drawbacks, for piracy cannot truly be described as a form of warfare at sea any more than a serial killer can be said to engage in warfare by committing a string of murders. Piracy is also not limited to acts during war. However, his statement was still accurate insofar as both acts, piracy in its heyday and the Nazi crimes during World War Two, threatened peace and security of the entire international community. On a more general level, scholars have made the comparison that, like piracy, war crimes and crimes against humanity often happen in locations where they cannot be prevented or where their perpetrators cannot be easily punished. Ergo this should trigger a similar exception to exclusive territorial or national sovereignty as piracy does. [64] This was exactly the argument used by the US Military Commission in justifying jurisdiction based on universality in the *Hadamar* Trial in Wiesbaden in 1945. [65] Cowles made the comparison to the traditional law on brigands, also known as outlaws [66] or in more modern parlance, irregular soldiers. [67] They were treated the same way as pirates, considered not to belong to any state and be can be punished by any state. [68]

Piracy, however, occurs on the high seas where no state exercises exclusive jurisdiction, whereas the Nazi crimes were committee within the territory of states. Randall points out though, that a similar problem would normally be encountered on the high seas, as ships are normally subjected to the floating-territorial principle, falling under the jurisdiction of their flag. [69] It is only the act of piracy itself that creates an *exception* to this exclusive jurisdiction allowing any other state to capture and try the pirate. [70]

While this solution, a trigger for exceptional jurisdiction, does provide a way out of the difficulty in comparing the scale of the crime of piracy to that of crime against humanity, it nevertheless returns the argument to the initial point of comparison. Can a crime against humanity trigger this type of exceptional jurisdiction on land just like

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[61] Kontorovich, n 12 above, 4.

[62] Sponsler, n 12 above, 50.

[63] Quincy Wright, "War Criminals" 39 Am. J. Int'l L. 257, 280 (1945).

[64] "[T]here is often no well-organised police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity." Cowles, n 54 above, 194.

[65] *Hadamar* Trial, US Military Commission in Wiesbaden, 1945, reported in Randall, n 8 above, 809.

66 Cowles n 54 above, 185.

[67] *Ibid.* 181.

[68] *Ibid.* 191.

[69] Randall, n 8 above, 804; Bassiouni, traces this idea of floating territoriality back to Grotius. Bassiouni, n 4 above, 109.

[70] J. Brierly, *Law ofNations*, 6th ed. (Oxford: Clarendon Press, 1963) 307; Randall, n 8 above, 804.

piracy does on the high seas? [71] Instead of comparing the scale of the violence, this entails examining the nature of the crime itself.

ii. Piracy versus war crimes and crimes against humanity: private or state acts

This second flaw does not lend itself to a solution as easy as the first flaw. Although the definition of piracy has long been disputed[72] there have been some steady themes throughout the centuries. [73] The important one is the distinction between private and official acts. The definition of piracy, as eventually codified by the 1958 Convention on the High Seas and restated in the 1982 Convention on Law of the Sea, is that it must be an illegal act "of violence, detention or any act of depredation, committed for *private* ends by the crew or the passengers of a *private* ship or a *private* aircraft." [74] This was a vital distinction in the law of piracy for it served to limit interstate conflict and prevent the use of universal jurisdiction over piracy as a political tool[75] and is in fact the reason why universal jurisdiction over piracy remains the only uncontroversial application of the principle. [76] The history of naval warfare has innumerable instances of states authorising "privateers" to disrupt the naval commerce of enemies in wartime as well as warships themselves attacking merchant ships flying the enemy flag for similar purposes. [77] These actions were consistently and purposefully excluded from the definition of piracy, just as the privateers themselves were excluded from universal jurisdiction. [78] As late as the 17th century, piratical behaviour by Christian ships against those of Islamic nations often went unpunished. [79] Similarly, pirate vessels under the protection of the Barbary powers were often untouched by European navies as a result of negotiated treaties. [80] Relations with the Barbary pirates were considered alongside the diplomatic relations with the Sublime Porte even though their actions were not carried out on behalf of any specific recognised state. Neither did this distinction fade from use as the threat of piracy receded in the past

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[71] Randall, n 8 above, 804.

[72] "In studying the context of the article [setting out the definition of piracy], it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. *There is no authoritative definition*. Of the many definitions which have been proposed, most are inaccurate, both as to what they literally include and as to what they omit." "Draft Convention and Comment on Piracy" n 22 above, 769. Emphasis added.

[73] Kontorovich lays out three elements that are common in all definitions of piracy. It must occur on the high seas, it must involve stealing, and it must be undertaken without the permission of a sovereign state. Kontorovich, n 12 above, 8.

[74] 1958 Convention, article 15 and 1982 Convention, article 101, emphasis added. Henkin, n 42 above, 1302; "Draft Convention and Comment on Piracy" n 22 above, 798; Brierly, n 70 above, 313.

[75] Morris, n 8 above, 339340; Kontorovich, n 12 above, 4; Brownlie, n 2 above, 239.

[76] Reydams, n 4 above, 58.

[77] Hannikainen, n 13 above, 72.

[78] Kontorovich, n 12 above, 2835.

[79] Hannikainen, n 13 above, 67.

[80] The Barbary powers consisted of Algiers, Tripoli, Tunis, and Morocco, and had a highly organised system of licensing private ships to engage in piracy against Christian states as part of *jihad*, the constant state of warfare that existed between the Islamic and European societies from the 16th to the 19th century. European states often concluded bilateral treaties with the Barbary powers, in effect paying them'protection money', even though the Barbary powers were not considered a 'State'. The Barbary pirate bases were eventually destroyed early in the 19th century. Hannikainen, n 13 above, 71 72.

century. The negotiations over the 1958 Convention on the High Seas record the dispute between the Soviet Union and its allies against the Western powers, at the time in cooperation with China. This distinction came under fire from the Soviet Union, alleging that certain Chinese actions in the China Sea, aided by the US, were of a piratical nature. [81] State sovereignty prevailed in the end, and the 1982 Convention on Law of the Sea, accepted as customary international law even by nonparties, maintained an identical definition of piracy as a private act. [82]

The insistence on the private nature requirement makes it inappropriate to make the analogy between piracy and war crimes or crimes against humanity, and those who have attempted it have simply ignored the distinction. [83] Comparison to brigandage suffers from an identical problem as the nature of the crime means it is also done for private profit. The majority of crimes prosecuted at Nuremberg were undeniably of an official nature. Most of the defendants were soldiers acting on orders. The highest officials prosecuted by the IMT were carrying out official state policy. This brought the use of the universality principle into direct confrontation with state sovereignty. Those who established the Nuremberg framework and the judges that went on to prosecute the cases after it did not address the flaw in this analogy, or indeed even clarify how the universality principle came to be applied. Nevertheless after the 1946 codification of the Nuremberg principles by the UN General Assembly, whether rightly or wrongly, enshrined the use of universal jurisdiction for war crimes and crimes against humanity and Nuremberg became the ultimate precedent. [84]

iii. The weakness of the Nuremberg precedent

The establishment of Nuremberg as a precedent for the use of universal jurisdiction is ironic not only because of the inaccurate analogy that creates such an ambiguous foundation for its use, but also because there is actually no reference to universality in the Nuremberg Charter and very little reference in the IMT judgements, which often relied on other more traditional jurisdictional bases. [85] Universality was most

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[81] Morris, n 8 above, 340.

[82] Article 101 of the 1982 Law of the Sea Convention.

[83] Reydams, n 4 above, 58.

[84] Morris, n 8 above, 345; Fry, n 8 above, 176

[85] Hari M. Osofsky, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice" 107 *Yale L.J*. 191, 195 (1997); Randall, n 8 above, 806807; The justification for the institution of the Tribunal itself is most strongly defended as an exercise of sovereign legislative power of the Allies after Germany's unconditional surrender. Sponsler, n 12 above, 51; Bassiouni calls it an exercise of criminal jurisdiction through collective state action by a group of states exercising *de facto* sovereignty. In fact, he takes the precise clause that is often used as the Tribunal's expression of universal jurisdiction and reinterprets it strictly as a territorial prerogative:

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." (IMT Judgment, Sept. 30, 1946, available online at the Nizkor Project website http://nizkor.org/hweb/imt/tgmwc/judgment/j-law-charter-01.html, last accessed 30 March 2004)

Some scholars, like Randall, have cited this as a possible, though not conclusive, reference to the universality principle by emphasising the "any nation" clause. He referred to a UN memorandum of the Secretary General on the Nuremberg Tribunal stating the possibility that the IMT "considered the crimes

often attributed to the IMT in retrospect. [86] There are clearer references to universality in the trials conducted in Nuremberg by individual countries and within the different military zones. [87] In the cases where universality was listed as a basis for jurisdiction, the various defences of it either compared the war crimes and crimes against humanity to piracy [88] or else the tribunals claimed the committed crimes were recognised as universal in customary and treaty law. [89] In all instances, there is no reference to an explicit legal source for the assumption of such jurisdiction. [90] It seems universality was invoked when the interpretations of territorial or passive nationality were more questionable. [91] This somewhat dubious, if not illegitimate, birth of universal jurisdiction for war crimes and crimes against humanity has sustained the controversy to the present day. Further arguments that Nuremberg represented little more than victor's justice have further tarnished some of the credibility of the initial precedent in the eyes of some scholars and practitioners of international law. [92] The following sections will examine the development

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under the Charter to be, as international crimes, subject to the jurisdiction of every state... This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation." (Randall, n 8 above, 806, n 125) It is more likely, however, that the 'right belonging to any nation' implied the right of any nation to exercise its power as an *occupier* to establish a military tribunal following an international armed conflict, thus exercising territorial not universal jurisdiction. Each state could have done this singly, while the Allies chose to exercise it collectively. Bassiouni, n 4 above, 91.

[86] For example, "[I]t is generally agreed that the establishment of these tribunals [the International Military Tribunal and courts within the four occupation zones] and their proceedings were based on universal jurisdiction." *Demjanjuk* v *Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

[87] Randall, n 8 above, 807809, citing *In re List* (US Military Tribunal at Nuremberg, 1948), *Almelo* Trial (British Military Court in Almelo, 1945), *Zyklon B* Case (British Military Court in Hamburg, 1946), and the *Hadamar* Trial (US Military Commission in Weisbaden, 1945).

[88] *Almelo* Trial 1945, Randall, n 8 above, 808; *Hadamar* Trial, 1945, *Ibid* 809. The notes on the cases contain a similar justification for such trials as in the *Hadamar* case: "The general doctrine recently expounded and called 'universality of jurisdiction over war crimes' ... has the support of the United Nations War Crimes Commission and according to [it] every independent State, has, under International Law jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished." Cowles, n 54 above, 312313, n 13.

[89] *In re List*, in Randall, n 8 above, 808.

[90] International Law Association: Committee on International Human Rights Law and Practice, *London Conference Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000) 22. [Henceforth, *London Conference*] Available online at: http://www.ila-hq.org/pdf/Hman%20Rights%20Law/HumanRig.pdf last accessed 27 March 2004.

[91] The *Hadamar* trial is a good example, as recounted by Cowles in 1948. As some believed that "a state may punish war criminals for offences committed against its own armed forces during military operations, it may not punish an offender when the victim or a criminal act is not a member of its forces [and] the crime was committed in a place over which, at the time of the act, the punishing state did not have ... military occupation." Hadamar was an insane asylum where men, women and children from various German-occupied territories were put to death under pretext of being incurably ill. There was no US national among the victims and the asylum was operation when the territory was not under US control. Nevertheless, the Commission ruled it had jurisdiction through "the general doctrine recently expounded and called 'universality of jurisdiction over war crimes.'" Cowles, "Trials of War Criminals (Non-Nuremberg)" 42 Am. J. Int'l L. 299, 309313 (1948). See also Scharf, n 3 above, 367-368.

[92] Timothy L.H. McCormack and Gerry J. Simpson, (eds.) *The Law of War Crimes, National and International Approaches*, (The Hague: Kluwer Law International, 1997) 5.

of universal jurisdiction for each of the most commonly cited international crimes in turn. The search for the legal source of such jurisdiction for these crimes, in conjunction with the examination of the use of universality in Nuremberg above, reveals that Nuremberg is a better precedent for the application of international law to individuals, and its effect on the use of universality was more subsidiary. [93]

D. Expansion of universal jurisdiction from the Nuremberg precedent

"Universal jurisdiction is not a broadly adhered-to standard. Everyone talks about universal jurisdiction, but almost no one practices it. It has been a mostly rhetorical exercise since World War Two." [94]

Various scholarly opinions have it that since Nuremberg the scope of universal jurisdiction has expanded significantly from piracy and slavery to incorporate war crimes, crimes against humanity, genocide, torture, slavery, terrorism, narcotics, crimes against peace, apartheid, and others. [95] Not all scholars agree on all of these categories, [96] and some conservative interpreters of international law argue that universal jurisdiction hasn't expanded at all, with Nuremberg being an exercise of sovereign occupational power and not one of universal jurisdiction. The individual conclusions of scholars and practitioners of international law depend on which side of the rift they occupy in their observation of the development of customary international law and its application in domestic courts of law. The following analysis of the most cited crimes under universal jurisdiction will indeed show that there is precious little treaty basis for any exercise of universal jurisdiction, even under the universally recognised Geneva Conventions. Greater support is found within the development of customary international law and through it, the recognition of certain peremptory norms, or *jus cogens*. [97] The development has lead some

[93] Sponsler, n 12 above, 5253. See also Axel Marschik "The Politics of Prosecution: European National Approaches to War Crimes" in McCormack and Simpson, n 92 above, 70.

[94] David J. Scheffer "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Opening Address" 35 New Eng. L. Rev. 233, 233 (2001).

[95] See, for example, Kerry Creque O'Neill, "A New Customary Law of Head of State Immunity? Hirohito and Pinochet" 38 Stan. J. Int'l L. 289, 297 (2002) "In [Nuremberg's] wake, the scope of universal jurisdiction widened."

[96] Higgins, n 43 above, 61. Judge Koroma lists war crimes, crimes against humanity, slavery, and genocide. ICJ, *Arrest Warrant* (Congo *v* Belgium) 14 February 2002, Separate Opinion of Judge Koroma, 9. Nassar mentions only piracy and war crimes. Ahmad E. Nassar, "The International Criminal Court and the Applicability of Jurisdiction Under Islamic Law" 4 Chi. J. Int'l L. 587, 590 (2003). The Princeton Principles set out universal jurisdiction to apply to piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. *Princeton Principles*, n 33 above, 29. The Draft Cairo Principles do not enumerate all the crimes and simply state that "in addition to the crimes that are currently recognised under international law as being subject to universal jurisdiction, certain other crimes that have major adverse economic, social, or cultural consequences – such as serious environmental crimes and serious acts of self-enrichment – should also be granted this status" and also add gender crimes, including rape and other forms of sexual violence. Africa Legal Aid, "Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Violations of Human Rights Offences: An African Perspective" [henceforth *Cairo Principles*] available online at: http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm, (last accessed 27 March 2004).

[97] For a brief discussion on *jus cogens* see Brownlie, n 2 above, 512515.

scholars to claim that once a crime rises to the level of a violation of *jus cogens*, it is automatically subject to universal jurisdiction; states have an obligation *erga omnes* to prevent such a crime going unpunished. [98] As will be shown below, domestic courts, on the whole, have not accepted this argument, declining to use universal jurisdiction in the absence of specific legislature implementing international treaty obligations, and such legislation is not common even in the presence of wide treaty ratification.

The establishment of the ICC has furthered fuelled the debate, as it is the first international court whose jurisdiction is not limited to a particular conflict as the rest of the *ad hoc* tribunals are. It is the first such treaty to house jurisdiction over the most notable *jus cogens* crimes under one roof. It is, however, limited only to crimes committed after 2002 on the territory of member states or by their nationals, and most importantly, it does not actually exercise true universal jurisdiction as priority is given to the state where the crime was committed or the state of which the accused is a national. States that have ratified that statue have been forced to reexamine their criminal codes and make changes to bring themselves in line with the Rome Treaty. [99] This is an ongoing process has the potential fill the gaps made by missing legislation to enact domestically human rights treaties already in existence internationally.

i. War Crimes

Despite the dubious initial foundations universal jurisdiction for war crimes obtained during the Nuremberg trials, even with the UN affirmation of the principles, [100] it received a firmer boost in the subsequent Geneva Conventions of 1949. [101] The Geneva Conventions, codification of the laws of war, inaugurated the treaty obligation of *aut dedere aut punire* or *judicare*. [102] Signatory states were now obligated to extradite individuals accused of grave breaches of the Conventions or else try them in their own courts. [103] The principle of *aut dedere aut judicare*, though not original [104] became a standard judicial defence for those attempting to bring to justice perpetrators of war crimes all over the world. It has since been incorporated into several treaties on hijacking and certain specific forms of terrorism. [105] The incorporations of the Conventions into

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[98] Randall, n 8 above, 831; Mark R. Von Sternberg, "A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the 'Elementary Dictates of Humanity'" 22 Brook. J. Int'l L. 111, 150151(1996).

[99] Scheffer, n 94 above, 238.

[100] Nuremberg Principles, U.N.G.A.O.R. 5th Session, Supp.No.12, UN Doc.A/1316 (1950), in Van den

Wyngaert, n 53 above, 203204.

[101] Morris, n 8 above, 346.

[102] Articles 49, 50, 129, 146 of the First, Second, Third, and Fourth Geneva Conventions, respectively, read "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, [certain] grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned . . ."

[103] Cassese, n 2 above, 286; Detter, n 3 above, 425; Hans, n 3 above, 365.

[104] See section II.2.B below.

[105] Detter, n 3 above, 425; Scharf cites the 1970 Hijacking Convention, the 1971 Aircraft Sabotage Convention, the 1973 Internationally Protected Persons Convention, the 1979 Hostage Taking Convention,

domestic statutes of some countries have lead the courts of some states, such Austria, the Netherlands, Denmark, Germany, and Switzerland, to declare themselves competent to prosecute individuals accused of war crimes even though they were committed abroad by foreigners on foreigners. [106]

Since their drafting, the Geneva Conventions have become the cornerstone of the laws of war, international criminal law, and humanitarian law. [107] Their provisions have been so universally endorsed that judges all over the world, including those of the International Court of Justice (ICJ), have agreed they constitute customary international law. [108] The *aut dedere aut judicare* clauses have lead many to assume that universal jurisdiction is provided by the Conventions. [109] Nevertheless, this high status enjoyed by the Geneva Conventions does mask a more complicated and less pleasant truth that, despite the near universal ratification, nowhere near as many states have implemented the necessary domestic legislation in order to make prosecution possible. [110] French courts have ruled that the Geneva Conventions do not create a basis for the exercise of universal jurisdiction because no specific legislation has been enacted and the Conventions do not have direct effect in the national legal systems because "their provisions have too general a character to be able directly to create rules on extraterritorial jurisdiction in criminal

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the 1984 Torture Convention, the 1988 Airport Security Protocol, the 1988 Maritime Terrorism Convention, the 1994 Convention on the Safety of United Nations Peacekeepers, and the 1998 International Convention for the Suppression of Terrorist Bombings. Scharf, n 3 above, 363.

[106] For Austria, see Marschik, n 92 above, 77; In the Netherlands, see *Knesevic*, 1997, where the *Hoge Raad* ruled that the Dutch courts were not limited to offences committed during wars in which the Netherlands had been a party. *London Conference*, n 90 above, 27;. For Denmark, see *Saric*, 1994, where jurisdiction was based on the Third and Fourth Geneva Conventions. *Ibid* 25; Also see generally, Marianne Holdgaard Bukh, "Prosecution Before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law" 6 Eur.Rev.Pub.L. 339352 (1994); In Germany, see Marschik, n 92 above, 7477; In Switzerland, see *Niyonteze*, 1999. War crimes and violations of the Geneva Conventions are punishable under the CPM (Swiss Military Penal Code), though the defendant has to represent the party to the conflict in a *de jure* or *de facto* manner. This extends to civilians where effective administrative control can be demonstrated. Under the CMP, foreigners can also be tried for common crimes such as murder, but only if they can be subject ordinarily to military penal law. Luc Reydams, "International Decision: *Niyonteze* v *Public Prosecutor*, *Tribunal militaire de cassation* (Switzerland)" 96 Am. J. Int'l L. 231, 324 (2002); For individual descriptions of state practice at the national level with respect to war crimes, see Amnesty International, "Chapter Four A and B: War Crimes: State practice at the national level" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001).

[107] Bassiouni, n 4 above, 116.

[108] ICJ, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (1996) 79: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case, that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."

[109] Bassiouni, n 4 above, 117.

[110] See later discussion of the French *Javor* case, and ICJ, *Arrest Warrant* (*Congo* v *Belgium*), 14 February 2002, Separate Opinion of Judge Guillaume, below, section III.3.

matters." [111] In states where there is legislation criminalizing war crimes the jurisdiction is often limited to crimes occurring within specific conflicts. [112] The Australian War Crimes Act, for example, is limited to war crimes committed in Europe during the Second World War by Australian citizens or residents, and the failure to convict anyone under the legislation lead to the dissolution of the War Crimes Special Investigations Unit in 1992. [113]

There is additional controversy over the interpretation of the jurisdictional provision of the Geneva Conventions. Whereas some authors opine that that the Geneva Conventions do not provide for universal jurisdiction whatsoever and only provide for jurisdiction between belligerent states, [114] others go so far as to interpret that the obligation to search for perpetrators of war crimes "even when they are outside of the territories of states parties [sic]." [115] Since no war crimes convention specifically refers to universal jurisdiction, its recognition has been predominantly driven by academic debate. [116]

ii. Crimes against Humanity

Out of all the *jus cogens* crimes for which universal jurisdiction is most commonly claimed nowadays, war crimes, or grave breaches of the Geneva Conventions, are the only ones for which universal jurisdiction can be firmly claimed through treaty law, thanks to the status of the Geneva Conventions. The legal foundations of universal jurisdiction for other crimes are not as straightforward.

Crimes against humanity also obtained status in customary international law with the UN affirmation of the Nuremberg Principles. While General Assembly resolutions are not binding, they are sometimes, as in this case, considered reflective of what states believe to be *opinio juris* or custom. Nevertheless, despite the *jus cogens* status of crimes against humanity, there has not been a single international convention that dealt with prosecution of such crimes, and consequently no authoritative definition of the crime, until the drafting of the statutes for the *ad hoc* tribunals and the ICC. [117] Instead some

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[111] Brigitte Stern, "International Decision: *In re Javor* and *In re Munyeshyaka*" 93 Am. J. Int'l L. 525, 527 (1999). See II.1.D.iii for further discussion on the *Javor* case and French law. Judge Guillaume, n 110 above, 6, for a similar view on the Geneva Conventions.

[112] Amnesty International, "Chapter One: Definitions" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001) 17.

[113] *London Conference*, n 90 above, 23. Similarly, the British 1991 War Crimes Act allows proceedings brought against UK citizens or residents in the UK who committed certain war crimes in Germany or German-occupied territory during WWII. So far there has only been one conviction under this Act. *Ibid* 29. This is the situation in Australia, Canada, Israel and Britain.

[114] Bowett, n 5 above, 12.

[115] *London Conference*, n 90 above, 8.

[116] Bassiouni, n 4 above, 117.

[117] Guillaume, n 110 above, 17; see ICJ, Arrest Warrant (Congo v Belgium), 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, 51 [henceforth "Joint Separate Opinion"]; ICJ, Arrest Warrant (Congo v Belgium), 14 February 2002, Dissenting Opinion of *ad hoc* Judge Van den Wyngaert, 59; *London Conference*, n 90 above, 5; Bassiouni, n 4 above, 119.

ICTR Article 3 and ICTY Article 5 on crimes against humanity both read "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when

individual crimes often listed under the rubric of crimes against humanity, such as genocide and torture, have been addressed individually creating a piecemeal system of humanitarian law. And although there is an innumerable amount of scholarly literature on the topic claiming the existence of universal jurisdiction for crimes against humanity [118] , these writings, "important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm." [119]

One of the milestones in the prosecution of crimes against humanity is the famous *Eichmann* trial in Jerusalem in 1962, based on the principle of universality. [120] Significantly, no other country that also could have raised jurisdictional claims over Eichmann, such as Germany or Poland, protested to Israel's use of universal jurisdiction in his case. [121] Protest was limited only to Argentina over the matter of his abduction. For support, the *Eichmann* court used the postwar trials as precedents as well as making the similar analogy to piracy. [122]

While the establishment of the ICC seems to have corrected the deficiency in codification, domestic trials basing jurisdiction for crimes against humanity on the universality principle are still often stymied by lack of specific domestic legislature in conjunction with general judicial reticence to rely on universal jurisdiction. Few states [123] have implemented such legislation, and not all of them allow for jurisdiction based on universality. For example, practice has established that such jurisdiction for crimes against humanity does not exist in the French legal system. [124] Few countries have established universal jurisdiction laws such as Spain [125] and Belgium [126] and where such

committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts." The Rome Statue lists the same crimes in Article 7, but it expands the category of rape to include "any form of sexual violence of comparable gravity" adds gender as a viable collective group liable to prosecution, the crimes of "(i) Enforced disappearance of persons; (j) Crime of apartheid" and qualifies "other inhumane acts" as "with a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The Article furthermore provides more detailed, but not exclusive definitions of the listed crimes.

[118] For example, Douglass Cassel, "Empowering US Courts to Hear Crimes Within the Jurisdiction of the ICC" 35 New Eng.L.Rev. 421, 426 (2001); Hans, n 3 above, 366; Bassiouni, n 4 above, 119.

[119] Joint Separate Opinion, n 117, 44.

[120] Steiner, n 8 above, 213-214.

[121] Cassese, n 2 above, 293.

[122] *Attorney Gen. of Israel* v *Eichmann* (Isr. Sup. Ct. 1962), 36 I.L.R. 277, 29899.

[123] Belgium, Spain, France, and Israel. Human Rights Watch, "The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad" March 2000, Crimes against Humanity section [henceforth HRW Brochure] available online at http://www.hrw.org/campaigns/chile98/brochfnl.htms (last accessed 3 April 2003).

[124] Stern, n 111 above, 525529; Brigitte Stern, "International Decisions: French Tribunal de grande instance (Paris)" 93 Am. J. Int'l L. 696, 697 (1999), concerning complaints filed pursuant to the arrest of Pinochet in the UK; Bassiouni, n 4 above, 142.

[125] *Ley Orgánica del Poder Judicial* (LOPJ) or the Judicial Branch Act of 1985.

[126] The Belgium Act Concerning the Punishment of Grave Breaches of International Humanitarian Law of 1993, amended in February 1999 and April 2003, repealed in August 2003.

legislature exists it has proven to be a political nightmare, leading to the repeal of the law altogether from the Belgian legislature. [127]

iii. Genocide

Despite "the fact of genocide being as old as humanity" [128] genocide did not come into its own category as a crime until shortly after the Second World War. It was examined under the rubric of war crimes or crimes against humanity until the drafting of the 1948 Genocide Convention. [129] Despite naming genocide as a crime that "shocks the conscience of mankind" [130] several countries voiced opposition to adopting universal jurisdiction for genocide. [131] These included the United States, France, the Soviet Union, [132] the Netherlands, [133] and the United Kingdom. [134] The US argued that granting universal jurisdiction for the prosecution of genocide would create obligations on non-state parties and make the convention "a tool for interstate conflicts." [135] The vigorous opposition [136] resulted in the omission of universal jurisdiction for crimes of genocide, instead obligating the crime to be prosecuted where it was committed (*locus delicti*) or else by an international criminal tribunal which has obtained jurisdiction through the agreement of member states. [137] Despite a General Assembly invitation to the International Law Commission to investigate the possibility of establishing such an international tribunal almost immediately after the adoption of the Convention, a tribunal did not come into existence until the adoption of the Rome Statute on the ICC. [138]

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[127] For state practice at the national level with respect to crimes against humanity, see Amnesty International, "Chapter Six: Crimes against humanity: State practice at the national level" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001).

[128] Jean Paul Sartre, quoted in Michael J. Kelly, "Can Sovereigns Be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of Milosevic Trial" 76 St. John's L. Rev. 257, 264 (2002).

[129] Bassiouni, n 4 above, 120; Fry, n 8 above, 187; Reydams, n 4 above, 47. The Genocide Convention was the first human rights convention adopted by the United Nations, and the first convention to use the term "crime under international law." *Ibid* 52.

[130] Fry, n 8 above, 187.

[131] Sponsler, n 12 above, 54.

[132] Morris, n 8 above, 347; Reydams, n 4 above, 48, 51.

[133] *Ibid* 49.

[134] *Ibid* 51.

[135] Morris, n 8 above, 347.

[136] The American delegate called the universality principle "one of the most dangerous and unacceptable of principles". The Soviet Union argued that universal jurisdiction was acceptable only for crimes where the territorial nexus was hard to establish, like piracy or trafficking in women. Genocide, however, could only be committed within a state's territory. Other countries objected on the basis of municipal legal difficulties. See Reydams, n 4 above, 51.

[137] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 11: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

[138] Reydams, n 4 above, 52; William A. Schabas, "National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'" 1 JICJ 39, 43 (2003).

It is interesting to note that the Geneva Conventions, adopted less than a year after the Genocide Convention, were able to retain the universal jurisdiction that was struck from the earlier convention, and Luc Reydams puts forth a few hypotheses on why there should have been such a change of course. The most interesting of these mirrors the distinction made earlier between slavery and the slave trade. Whereas genocide is usually perpetrated by a state on its own citizens, grave breaches of the Geneva Conventions necessitated an international element, where the nationality of the victim and perpetrator were never the same, as the Conventions were applicable during international armed conflict. [139] The application of extraterritorial jurisdiction to internal conflicts remains controversial even half a century later, as evidenced the significantly lower acceptance of the additional Geneva Protocols of 1977. This domestic facet resulted in the general dereliction of the Genocide Convention for most of the Cold War and has even lead some scholars to call the Convention stillborn. [140] Maintenance of state sovereignty and stability of the bipolar arrangement were more important and often involved the West and the Soviet Bloc in propping up despotic regimes that indulged in frequent genocidal practices.[141]

This situation was transformed with the end of the Cold War and the events in Yugoslavia and Rwanda. The International Criminal Tribunal for Rwanda (ICTR), in *Prosecutor* v *Akayesu*, rendered the first ever modern genocide conviction for an individual. [142] The status of the crime of genocide in customary international law has become generally accepted as giving rise to universal jurisdiction despite the lack of an apparent legal source for such jurisdiction. [143] The most common rationale was the one first used in the *Eichmann* trial, where the court argued that the Convention's jurisdictional clause was permissive and not prohibitive. In other words, although territorial jurisdiction was prescribed in the treaty, it did not explicitly rule out universal jurisdiction. [144] The application of universal jurisdiction has been affirmed by the ICTR [145] and the International Criminal Tribunal for Yugoslavia (ICTY), [146] various

[139] Reydams, n 4 above, 56.

[140] Kelly, n 128 above, 289; Schabas, n 138 above, 4344.

[141] Kelly, n 128 above, 288289.

[142] *Ibid* 313; Burke-White, n 7 above, 11; ICTR, *Prosecutor* v *Jean-Paul Akayesu*, Case No. ICTR-96- 4T (Sept. 2, 1998), appeal rejected 1 June 2001, available online at http://www.ictr.org.

[143] Cassel, n 118 above, 426; Randall, n 8 above, 835837; US Restatement (Third), Sec 404, n 42 above; Bassiouni, n 4 above, 121; Theodor Meron, "International Criminalization of Internal Atrocities" 89 Am. J. Int'l L. 554, 569 (1995); Kelly, n 128 above, 312; Aceves, n 12 above, 155; Schabas, n 138 above, 4243.

[144] The district court, affirmed by the Israeli Supreme Court, ruled that the jurisdiction in the Genocide Convention was not exhaustive. Randall, n 8 above, 836; Schabas, n 138 above, 39, 60.

[145] ICTR, *Prosecutor* v *Ntuyahaga*, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999). Available at http://www.ictr.org.
The ICTR has chosen to exclusively pursue the prosecution of genocide and there have been several convictions since *Akayesu*. There has only been one acquittal of genocide charges in the ICTR, and in the *Ntuyahaga* case, the Prosecution decided to withdraw the charges when a judge struck the counts of genocide charges from the indictment. Schabas, n 138 above, 4445.

[146] ICTY, *Prosecutor* v *Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 62 (Oct. 2, 1995). Available at http://www.un.org/icty/. Despite this, Tadic was not indicted for genocide. The ICTY has had several acquittals of genocide charges and only one conviction. Schabas, n 138 above, 45, 5354.

national courts, [147] the ICJ [148] and even, ironically, the US. [149] This acceptance, however, has not been without controversy. [150] This was witnessed in France during the *Javor* and *Munyeshyaka* trials. [151] The cases concerned criminal complaints based on universal jurisdiction for certain crimes, including genocide and torture, in Bosnia and Rwanda respectively. The Genocide Convention was rejected as grounds for jurisdiction precisely because of its *locus delicti* requirement. The *Javor* case was eventually dismissed by the *Cour de Cassation* on the grounds that the Torture Convention required the presence of the accused in France (which was not the case here) and the Geneva Conventions were ruled as not incorporated into French law. Around the same time, the presence of Munysheyaka in France came to light. He was accused of participating in the Rwandan genocide and witnesses filed a complaint against him. Once again the Genocide Convention was rejected but since the accused was present, the case was allowed to proceed based on jurisdiction under the Torture Convention. The appellate court in Nîmes overturned the decision based on an inexplicable ruling that held jurisdiction could only be established based on the most serious offence, which in this case was genocide not torture. This strange decision was quickly overturned in the *Cour de Cassation* where the case is being considered. Since the initiation of both trials, new legislation has been implemented in France providing its courts with universal jurisdiction over crimes listed in the ICTY and ICTR statutes. The presence of the accused remains a requirement, but the incorporation of the ICTR crimes into French legislature has allowed the *Munysheyaka* case to be heard again in the appellate court under both the Genocide and Torture Conventions.

[147] In 1994, in the case of *Cvjetkivoc*, the Austrian Supreme Court ruled that Austrian courts had universal jurisdiction under the Genocide Convention as a subsidiary measure when extradition is not possible because the genocide was state-sponsored or the state in question lacks a functioning or stable judiciary. In this particular case, the ongoing armed conflict prevented communication with the Bosnian authorities, so the trial was allowed to proceed. This finding by the Supreme Court makes this a landmark Austrian case despite the subsequent acquittal of the defendant on lack of evidence. See Marschik, n 92 above, 79-81; Thousands of cases have been tried under the 1996 Rwandan law, which had to incorporate a special provision to circumvent the *nullum crimen sine poena* principle, as Rwanda had ratified the Genocide Convention in 1975 but never enacted the proper legislation. Schabas, n 138 above, 4546. Incorporation of the ICTR crimes into French legislature has allowed the charge of genocide to be reinstated in the *Munysheyaka* case. In Canada, the Appeal Division of Canada's Immigration and Refugee Board upheld the stripping of residency status from Léon Mugesera in 1998 and the second phase of the trial to strip him of refugee status for his role in spreading genocidal propaganda in now in progress. Rwanda has requested his extradition but Canada is unsure of what action it will take. The case is outside the temporal jurisdiction of the ICTR, but Canadian officials worry about complaints from human rights groups in relation to the kind of justice Mugesera may or may not receive in Rwanda. Schabas, "International Decision: *Mugesera* v *Minister of Citizenship and Immigration*" 93 Am. J. Int'l L. 529, 529533 (1999).

[148] ICJ, *Legality ofNuclear* W*eapons*, n 108 above, 81.

[149] See Restatement of Foreign Relations Law, Section 404.

[150] Rubin rejects the notion that universality was ever intended for the Genocide Convention. Alfred P. Rubin, "Is International Criminal Law 'Universal?'" 2001 U. Chi. Legal F. 351, 359 (2001)..

[151] The following description of both cases comes from Stern, and also includes a criticism of the French judiciary's reluctance to rely on penal procedural codes, especially Article 689, that allow French courts to prosecute extraterritorial crimes whenever granted jurisdiction by an international convention, such as the Geneva Conventions. Stern, n 111 above, 525529.

Although other courts have upheld the use of universal jurisdiction for prosecution of genocide, notably in the *Pinochet* case, [152] the French judicial experience reveals that the status of a crime as *jus cogens* is not always enough to establish a basis of jurisdiction in the absence of specific treaty provisions and victims have to rely on the legislative will of states to realign their municipal codes with the international tribunals that have come into existence since treaty ratifications. [153] For example, despite Switzerland being regarded as "the cradle of international humanitarian law" [154] genocide was not considered a crime under Swiss law until 2000. [155]

iv. Other crimes subjected to universal jurisdiction

The adoption of the Genocide and the Geneva Conventions inaugurated a period of intense multilateral treaty negotiation, especially in the field of human rights instruments but also pertaining to numerous aspects of international criminal law enforcement. Several of these conventions included references that could be interpreted as providing universal jurisdiction or else endorse the principle of *aut dedere aut judicare*. [156]

A review of these treaties shows that there was a progressive shift toward the acceptance of the universality principle by states [157] but this acceptance has most often gone hand in hand with the decreased political costs to state sovereignty. [158] The 1973 International Convention for the Suppression and Punishment of the Crime of Apartheid contained provisions that would extend universal jurisdiction even to nationals of non-party states, but it was only intended to ever apply to Rhodesia, Namibia, and South Africa, states that would not ratify the convention anyway at the time it was drafted. [159] The majority of the treaties, however, cover criminal activity, such as terrorism and narcotics, which affects directly the interests of the most powerful states. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft is considered a major turning point because it not only placed on states the obligation of prosecute or extradite a suspect if they had existing legislation in place to claim jurisdiction for such a prosecution, but obligated states to take measures to establish legislation creating such jurisdiction. [160] It was this kind of implementation of *aut dedere aut judicare* that was employed in the subsequent treaties, establishing a two-tier system of first obligating the

[152] María Del Carmen Márquez Carrasco and Joaquín Alcaide Fernández "*In re Pinochet*" 93 Am. J. Int'l L. 690, 692 (1999), see also cases in n 147 above.

[153] For state practice at the national level with respect to the crime of genocide, see Amnesty International, "Chapter Eight: Genocide: State practice at the national level" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001).

[154] Reydams, n 106 above, 231, n 4.

[155] *Ibid* 232, n 13.

[156] Reydams lists nearly 30 conventions, many of them covering terrorist acts, but also covering narcotics, nuclear materials, torture, mercenary activities, apartheid, maritime law, and cultural property, see Reydams, n 4 above, 5667.

[157] *Ibid* 68.

[158] Bassiouni, n 4 above, 134.

[159] Reydams, n 4 above, 59-60; Bassiouni, n 4 above, 122123.

[160] See n 20 above. See also Reydams, n 4 above, 6164.

creation of jurisdiction, and then the obligation to extradite or prosecute offenders found within a signatory's territory.

Some have argued, however, that the provisions of all of these treaties are not really grounds for "universal jurisdiction *stricto sensu*" because they apply only to the parties of the relevant conventions, and subsequently do not create jurisdiction through treaty where it can be claimed to have passed into international law. [161] Other treaties that can now claim universality run into similar problems to those of the Genocide Convention. Torture, for example, is now accepted as a crime subject to universal jurisdiction, despite the fact that its treaty provisions provide jurisdiction specifically on the basis of territoriality, nationality, and passive personality. [162]

The international ardour for multilateral conventions has cooled off somewhat in the most recent decades, but human rights lawyers and activists have continued to push the boundaries of universal jurisdiction by invoking state practice and customary international law even in the absence of concrete legal sources and solid *opinio juris*. Some of the most commonly cited additions to the list of crimes for which universal jurisdiction has been argued as available through treaty, case law, or customary international law, are crimes of apartheid, torture, rape, forced disappearances, hijacking, and other forms of international terrorism.

2. Other historical precedents with elements of universal jurisdiction

The previous section laid out the traditional explanation for universal jurisdiction. From it, one can conclude that apart from piracy, universal jurisdiction was really conceived immediately following World War II and cemented when *aut dedere aut judicare* became the preferred jurisdictional instrument in multilateral treaties.

While nothing in the above-mentioned historical account is inaccurate or overstates the significance of the individual events, the traditional approach to universality's history is in reality rather shallow because it misses many developments that not only add meat to the historical skeleton for those who like thoroughness, but that can also shed light on many of the modern debates that universal jurisdiction engenders.

A. The Lotus case

First of all, as the principle of universality is, above everything, a jurisdictional question, an alternative enquiry into its roots would not be misplaced in starting with the examination of the most controversial and most cited, as well as the only international decision on jurisdiction. In 1927 the Permanent Court of International Justice ruled on a jurisdictional dispute between France and Turkey resulting from a collision on the high seas. [163] The famous *Lotus* decision, only one of three in the history of the PCIJ and its

[161] Higgins, n 43 above, 6364. See also Randall, n 8 above, 820.

[162] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 5.1 lays out the jurisdictional bases. It must be noted that paragraph 2 of Article 5 does requiring prosecution in the absence of extradition, but just as in the case of the Geneva Conventions, the clause of sometimes considered as too general to be used in court in the absence of enacting legislation.

[163] *S.S. Lotus* (*France* v *Turkey*), PCIJ 1927.

successor to be decided by President's vote, [164] questioned whether the nature of international law was permissive or prohibitive. [165] When the French ship docked in Constantinople [166] Turkey instituted criminal proceedings against the French officer on watch-duty at the time of the collision that resulted in the death of 8 Turkish nationals and the sinking of the Turkish ship. France challenged Turkey's jurisdiction under international law, pursuant to Article 15 of the 1923 Convention of Lausanne. [167] "The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognised by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 [of the Convention] allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law." 168

The court, in upholding Turkish jurisdiction, held that

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.
>
> 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; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on 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

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[164] Scharf, n 3 above, 367. The tie-breaking vote, noted by Reydams, is a highly exceptional procedure, and it is telling that one of the other incidents of its use was when the same debate resurfaced in the *Legality of the Threat of Nuclear Weapons*, 1996. The third case was *South West Africa*, 1996. Reydams, n 4 above, 12, 14 and n 6.

[165] Reydams, n 4 above, 11; Cowles, n 54 above, 178179. The corollary of the debate is whether universal jurisdiction is permissive or mandatory. See Bartram S. Brown, "The Evolving Concept of Universal Jurisdiction" 35 New Eng. L. Rev. 383, 391395 (2001); Bruce Broomhall, "Toward the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law" 35 New Eng. L. Rev. 399, 401 (2001).

[166] Present-day Istanbul.

[167] According to Article 15 of the Convention, recognised as applicable by both parties, all questions of jurisdiction between Turkey and other contracting parties are to be decided in accordance with the principles of international law. *S.S. Lotus* Judgement, the Facts, reprinted in *World Court Reports*, vol.2 (19271932) 2930.

[168] The *S.S. Lotus* Judgement, The Law, n 167 above, 34.

> 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 States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.
>
> This discretion 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. [169]

The question since 1927 has been finding these limits. Despite various attempts over the century, [170] no general international convention on criminal jurisdiction has come into being. Instead states have opted to address criminal jurisdiction internationally on a crimeby-crime basis, as witnessed by the numerous conventions on crimes mentioned above. Some scholars have cited this as evidence of the desire of states to maintain freedom in their discretionary use of extraterritorial jurisdiction. In their 1990 report on extraterritorial criminal jurisdiction, the Council of Europe concluded on this evidence that "[p]ublic international law does not impose any limitations on the freedom of states to establish forms of extraterritorial criminal jurisdiction where they are based on international solidarity between states in the fight against crime." [171] Given this ambiguous setting, the question of whether the principle of universality "oversteps the limits which international law places on [a state's] jurisdiction" [172] comes down to state practice and customary international law. Meanwhile, states practicing extraterritorial and universal jurisdiction continue to cite the Lotus *dictum* for support. [173]

B. Medieval state practice

A greater dimension to this state practice can be found if one moves away from the popular human rights approach to look instead at universal jurisdiction as the link between extradition and prosecution, not in the context of modern multilateral treaties but

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[169] *Ibid.* 35; Reydams, n 4 above, 1213.

[170] See, for example, Harvard Research in International Law "Draft Convention with Respect to Crime" 29 Am. J. Int'l L. 439 (Supplement, 1935). "The International Law Commission at its first session in 1949 selected jurisdiction with regard to crimes committed outside national territory as a topic for codification, but has discontinued its work on the matter." Reydams, n 4 above, 16.

[171] European Committee on Crime Problems, Council of Europe "Extraterritorial Criminal Jurisdiction" reprinted in 3 Crim. L. F. 441, 465 (1992).

[172] *S.S. Lotus* Judgement, n 167 above.

[173] Higgins, n 43 above, 77.

within the legal classics usually overlooked by scholars who dwell predominantly in the practice of the past century. Scholars who have addressed the issue of universal jurisdiction from this angle have not confined themselves to events stemming from the Nuremberg Tribunal. First of all, even that tribunal, often labelled as unprecedented, has a medieval counterpart in 1474 that is often reported to be the first international war crimes tribunal. [174] But debate on the possible forms of multiple concurrent jurisdictions began even earlier. Some have found the principle of universality formulated as early as the 6 th century in the Justinian Code. [175] In the 16 th and 17 th centuries, various extremely influential scholars such as Covarruvias, de Vattel, and Grotius, often called the father of international law, argued that the presence of a foreign criminal on a state's soil enjoying protection is intolerable. [176] It is the classical works of these authors that first formulate the principle of *aut dedere aut judicare* and not the Geneva Conventions or the subsequent multilateral treaties. Medieval practice among Italian city-states supports this. [177]

These states relied primarily on the territorial (where the crime was committed) and nationality principles of criminal jurisdiction. [178] The nationality principle in the historical context meant the residence or domicile of the offender, since the concept of nationality had not yet developed. Certain individuals, however, were identified as *vagabundi*, or without a permanent domicile, and could therefore be only subject to the jurisdiction of the state where the crime was committed (*locus delicti*). To prevent a situation similar to that of piracy, where the offender could leave the territory of the crime to avoid prosecution, Italian states provided for exceptional jurisdiction in these cases to the courts of the state where the offender was apprehended (*judex loci*

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[174] A specially constituted panel of international judges was put together to try Peter von Hagenbach in Briesach, Austria for atrocities committed in that town while it was under his charge by appointment from Duke Charles of Burgundy (alternately known in history as Charles the Bold or Charles the Terrible). The judges came from Austria and its allies, and the tribunal convicted him of murder, rape, perjury, and "other crimes against the laws of God and man," stripped him of his knighthood, and sentenced him to death. While it is far from a perfect analogy to modern tribunals, it nevertheless does establish a valid historical precedent for Nuremberg. See McCormack and Simpson, n 92 above, 3739; See also Von Sternberg, n 98 above, 140.

[175] Henri Donnedieu de Vabres, Les Principles Modernes du Droit Pénal International (1928) "Tel qu'on vient de le définir, le système de l'universalité du droit de punir a sa modeste origine dans un texte du Code de Justinien, C. III, 15, Ubi de criminibus agi oportet, 1, qui, déterminant le ressort, en matière pénale, des gouverneurs de l'Empire, donne à la fois compétence au tribunal du lieu de commission du délit, et à celui du lieu d'arrestation du coupable (judex deprehensionis). L'interprétation tendancieuse des glossateurs substitua au judex deprehensionis le judex domicilli." quoted in Bassiouni, n 4 above, 100101; Thomas W. Donovan, "Jurisdictional Relationships Between Nations and Their Former Colonies" 1 Across Borders Int'l L. J. 5, Section III, available online at http://www.across-borders.com.

[176] Guillaume, n 110 above, 4; Reydams, n 4 above, 3536.

[177] Akehurst identifies the existence of the universality principle not only in medieval Italy, but also 16 th century Brittany, and 17 th and 18 th century France and Germany. Akehurst, n 9 above, 163. See also Amnesty International, "Chapter Two: The History of Universal Jurisdiction" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001) 12.

[178] The description of medieval Italian criminal code is from Reydams, n 4 above, 29. A greater analysis, cited by Reydams, is purportedly available from Gilbert Guillaume's "*La compétence universelle. Formes anciennes et nouvelles*" in *Mélanges offerts à Georges Levasseur*, (1992), however, at the time of writing, I was unable to obtain this source.

deprehensionis). This category was subsequently extended to murderers, exiles, and thieves on the pretext that the former two were like vagabonds, and the crime of the latter is a continuous offence so long as the item remains stolen.

Covarruvias, as Grotius, found this limited category arbitrary and argued that natural law provided the obligation for the *judex deprehensionis* to extradite or prosecute all dangerous criminals - *judex requisitus vel remittere tenetur, vel delinquentem ipsum pinure* – the early form of *aut dedere aut judicare*. Reydams calls this type of universal jurisdiction "the cooperative general universality principle" or a "form of bilateral co-operation in penal criminal matters." [179]

C. From Grotius to the 20 th century

Covarruvias was writing on criminal jurisdiction over common crimes, not international crimes, and this is the distinction Reydams makes between the abovementioned cooperative general universality principle and "the cooperative limited universality principle." [180] It is Grotius who elevates this to the subject of international law. In an oft-cited passage, he argues that "kings ... have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard of any persons whatsoever." [181] Acknowledging that a state cannot simply march its forces into the territory of another state for the purposes of apprehension, Grotius proposes that "the State in which he who has been found guilty dwells ought to do one of two things. When appealed to it should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal." [182] The solution Grotius proposes makes a distinction vital to the modern debate on universal jurisdiction because instead of advocating a "*positive right* to exercise universal jurisdiction" he lays out instead the "*negative obligation* not to shield a fugitive from prosecution by granting asylum." [183] This obligation to extradite or prosecute is not triggered until another state has made an appeal. [184]

Subsequent legal literature weaves back and forth on the matter. As Guillaume pointed out in his Separate Opinion, Grotius' and Covarruvias' school of thought on punishment was challenged in the 18th century by Montesquieu, Voltaire, and Rousseau and crystallised by Beccaria in 1764, writing that "judges are not the avengers of humankind in general... a crime is punishable only in the country where it was

[179] Reydams, n 4 above, 2829.
[180] *Ibid*. 35.
[181] Grotius, *De Jure Belli ac Pacis Libri Tres* (1625) Book II, Chapter XX, §XL, 1, cited in *Ibid* 35.
[182] Grotius, *De Jure Belli ac Pacis Libri Tres* (1625) Book II, Chapter XXI, §IV, 1, cited in *Ibid* 36.
[183] *Ibid* 3637, emphasis original
[184] Several states actually incorporate this into their legislation. For example, in Colombia and Denmark, an extradition request has to have been made and rejected before their courts can exercise universal jurisdiction over certain crimes. Amnesty International, "Chapter One: Definitions" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001) 16.

committed." [185] This is strikingly similar to the present-day argument coined by Kissinger, that universal jurisdiction runs the risk of "substituting the tyranny of judges for that of governments." [186] Despite the eventual rejection of natural law in favour of legal positivism, Reydams still manages to find significant support for both his general and limited forms of universality in various penal codes and treatises, almost always in conjunction with extradition as a subsidiary principle. [187] The link with extradition is important, and Reydams points out that the disassociation of extradition with universal jurisdiction occurred only after the 1930s in the writings of scholars like Mikliszanksi, Feller, and Oehler, arguing that there existed an independent right of the *judex loci deprehensionis* to prosecute international offences. [188] This marked the shift between Grotius' negative obligation to the positive right.

Reydam's examination of the final category of universal jurisdiction, the "unilateral limited universality principle" [189] is necessarily much shorter because evidentiary practice is virtually nonexistent. This is the type of universal jurisdiction that does not require any sort of link between the crime and the forum state, including even custody over the accused. This modern sort of universal jurisdiction in its human rights application is seemingly found among scholars only after Randall's influential article in 1988. [190] He joins together the concepts of *jus cogens* and obligation *erga omnes* to individual criminal responsibility. [191] The idea of *erga omnes* itself does not always sit comfortably

[185] Beccaria, *Traité des délits et des peines*, para. 21 (1764), cited in Guillaume, n 110 above, 4. His citation of the other abovementioned philosophers includes Montesquieu, *L'esprit des lois*, Book 26, Chaps. 16 and 21; Voltaire, *Dictionnaire philosophique*, heading *"Crimes et délits de temps et de lieu"*; and Rousseau, *Du contrat social*, Book II, Chap. 12, and Book III, Chap. 18. Bassiouni similarly cites another one of Beccaria's works from the same year, *Dei Delitti e Delle Pene*, "There are also those who think that an act of cruelty committed, for example, at Constantinople may be punished at Paris for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men." Quoted in Bassiouni, n 4 above, 98.

[186] Henry Kissinger, "The Pitfalls of Universal Jurisdiction" *Foreign Affairs*, July/August 2001, available online from the Global Policy Forum at http://www.globalpolicy.org/intljustice/general/2001/07kiss.htm (last accessed 27 March 2004).

[187] Some of the cited works include Von Bar, Brusa, Donnedieu de Vabres, Travers, Mikliszanksi, Feller, Oehler, as well as the resolution of the Munich Session of 1883 of the Institute of International Law, inspired by Austrian penal codes, 1927 Warsaw Conference for the Unification of Penal Law, 1931 Cambridge session of the Institute of International Law, 1932 Congress of Comparative Law, 1932 Hague International Congress of Comparative Law, and the 1935 Draft Convention on Jurisdiction with Respect To Crime by Harvard Research in International Law. See Reydams, n 4 above, 3038. Amnesty International also lists numerous states that had legislation providing for universal jurisdiction over common crimes immediately prior to World War Two. Amnesty International, "Chapter Two: The History of Universal Jurisdiction" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (2001, AI Index: IOR 53/002/2001) 2023.

[188] Reydams, n 4 above, 38, citing K. Mikliszanksi's "Le système de l'universalité du droit de punir et le droit penal subsidiaire" (1936) in *Revue de science criminelle et de droit penal compare*; S.Z. Feller's 'Jurisdiction over Offences with a Foreign Element' in MC Bassiouni and VP Nanda (eds) *A Treatise on International Criminal Law, II* (1973); and D. Oehler, *Interationales Strafrecht. Geltungsbereich des Strafrechts. Internationales Rechsthilferecht. Recht der Gemeinschaften, Völkerstrafrecht* (1983).

[189] *Ibid* 38.

[190] See generally, Randall, n 8 above.

[191] *Ibid* 831.

with legal positivism as the positivist doctrine eschews any kind of obligation on states that is not deliberately accepted by a state. The concept appeared in the 1970 *Barcelona Traction* case as "obligations of a State toward the international community as a whole... [They] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." [192]

The use of *Barcelona Traction* to make the pursuit of individual criminal responsibility for *jus cogens* crimes an obligation *erga omnes* has been highly criticised by many as inapplicable. [193] Furthermore, the *South West Africa* judgement, controversial though it was, held that "humanitarian considerations may constitute the inspiration basis for rules of law... Such considerations do not, however, in themselves amount to rules of law. All States are interested – have an interest – in such matters. But the existence of an 'interest' does not itself entail that this interest is specifically juridical in character." [194] Bassiouni concisely rephrased this as "conduct that is universally condemned [does not] necessarily imply that universal jurisdiction is applicable to such conduct." [195]

D. The link between extradition and universal jurisdiction

This alternative historical analysis is summed up by Reydams as a progression of different concepts of universality from the subsidiary jurisdiction of the custodial state over all serious offences (the cooperative general universality principle) to the jurisdiction of the custodial state over just international offences (the cooperative limited universality principle) to the right of any state to prosecute international offences regardless of the location of the accused (unilateral limited universality principle). It is not a clean progression though, as some of these concepts overlap or else coexist simultaneously in different doctrines. [196]

With the important exception of the final category of universal jurisdiction where the link between the accused and the state has been lost, this kind of historical background to universal jurisdiction and the *aut dedere aut judicare* principle can be grafted to the more traditional, abridged historical explanation given above for a fuller and more convincing case that universal jurisdiction is far from a recent invention and can be extended with much greater confidence to a wide range of crimes beyond piracy without being caught by the structural flaws discussed earlier or by the lack of specific treaties for certain crimes. The revival of the role of *judex deprehensionis* can even go some way toward legitimising the piracy analogy as it represents enforcement jurisdiction

[192] ICJ, *Barcelona Traction* Judgement (1970) 3334, printed in *Reports of Judgements, Advisory Opinions and Orders*, International Court of Justice, (1970).

[193] Most prominently by Higgins, n 43 above, 57; Alfred P. Rubin, "*Actio Popularis, Jus Cogens*, and Offences *Erga Omnes*" 35 New Eng. L. Rev. 265, 2778 (2001); Rubin, n 150 above, 363.

[194] ICJ, *South West Africa* (1966) 50, printed in *Reports of Judgements, Advisory Opinions and Orders*, International Court of Justice (1966).

[195] Bassiouni, n 4 above, 94.

[196] Reydams, n 4 above, 42.

of the forum state, even if it still does not address the issue of private/public acts. The recent uncoupling of the link between universal jurisdiction and extradition has created something akin to its application in a vacuum, and the need to bring the two back together will be necessary in order to harness universal jurisdiction and prevent its unbridled application that has so tarnished its reputation.

Ultimately, a return to the medieval understanding of extraterritorial jurisdiction can go a long way toward assisting in the normalisation of the principle of universality by putting it firmly in it' place in the jurisdictional arsenal. Universal jurisdiction should be a last resort in circumstances where nothing else has worked. To a certain degree, despite the notoriety the ICC has garnered since its inception, it has helped to place universality back to a secondary position legally by forcing member states to ratify municipal legislation to align their domestic legal codes with that of the ICC or else risk losing having the first shot at trying criminals whose crimes fall under the ICC under the territorial or nationality principles. While this is primarily intended to protect their own citizens from a foreign judicial entity to as great a degree as possible, it also leaves room for cases such as Mushenka, where refugees from atrocities find themselves sheltering in the same country as those who persecuted them. It is ironic that this reformulation of universal jurisdiction can make it more successful by transforming it into a more efficient secondary tool rather than attempting to force it to be a blunt, inaccurate primary method. As one scholar wrote about the ICC, if states take their obligation to extradite or prosecute seriously the ICC may be left with a lighter caseload and that would not be a bad thing in a world of competing national jurisdictions. [197]

[197] Louise Arbour, "Will the ICC Have an Impact on Universal Jurisdiction?" 1 JICJ 585, 588 (2003).

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