

**DOES UNIVERSAL JURISDICTION
IN THE SOUTH AFRICAN LEGISLATION IMPLEMENTING THE ROME
STATUTE PROVIDE SOME SOLUTION TO IMPUNITY
IN THE AFRICAN CONTEXT?**

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Submitted in fulfillment of the requirements for the degree

LLM

In the Faculty of Law,
University of Pretoria

2013, October

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1. INTRODUCTION

Everybody talks about it, but nobody does anything about it.

After the arrest of Augusto Pinochet more than a decade ago, universal jurisdiction was a political and legal reality and became a white hot subject of global controversy.¹ Universal jurisdiction was hailed as one of the magic bullets in the campaign against impunity.² Universal jurisdiction³ is the doctrine that allows any country to punish certain egregious crimes, regardless of wherever or by whomever they have been committed, even if it has no direct⁴ connection with the offense and there is an absence of the traditional grounds for jurisdiction. However Schabas rightly indicate that universal jurisdiction past is mysterious and its future uncertain. Some say there is decline of universal jurisdiction or even state that there is a demise⁵ of universal jurisdiction.⁶ Still some other commentators assert that universal jurisdiction simply does not exist.⁷ There are those who view the broadening of the scope of universal jurisdiction with extreme skepticism.⁸ The critics fear for the slippery slope which could lead to a radical and dangerous encroachment on the sovereignty of nations. Today there are those that see a “backlash” or “downtrend” in the movement for universal jurisdiction especially after the *Arrest Warrant*⁹ case. It is stated that the universal jurisdiction movement appears to be

¹ D F Orentlicher “*Universal Jurisdiction after Pinochet: Prospect and Perils*” Paper presented at UC Irvine on 21 Feb 2003 as part of Symposium Series “Prosecuting Perpetrators: International Accountability for War Crimes and Human Right abuses [hereinafter Orentlicher] 1.

² Schabas in Introduction of L Reydams *Universal jurisdiction: International and Municipal Legal Perspectives* [hereinafter Reydams] on x. See also M Inazumi *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* [hereinafter Inazumi] 210: “*At the extreme end of the scale, some people seem to blindly worship universal jurisdiction as an ultimate solution for ending impunity.*”

³ Orentlicher calls it “*an obscure legal concept with an ungainly name ...*” and further on 2 it is referred to as: “*extraordinary jurisdiction*”.

⁴ The argument is that indirectly all countries have an interest in combating international crimes. See G Abi-Saab “*Proper Role of Universal Jurisdiction*” 1 (2003) *Journal of International Criminal Justice* 596 - 602 [hereinafter Abi Saab] on 597 that refers to “*interest of society at large*” and state when it comes to acts that qualify as crimes under international law, the interests of society attain greater importance.

⁵ A Cassese “*Is the Bell Tolling For Universality? A Plea for a Sensible Notion of Universal Jurisdiction*” *JICJ* 1 (2003) 589 – 595 [hereinafter Cassese *JICJ*] on 589 opines: “*It would seem that the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes...*” See however later qualification on 595.

⁶ See IBA Manual “*International Criminal Law Manual*” [hereinafter IBA Manual] on 343 that puts it: “*In academic literature there is much talk of the decline of universal jurisdiction since the Arrest Warrant case before the ICJ and the subsequent alteration of the Belgian legislation.*” However it is stated on 345: “*Despite these developments, practice suggest that the view that universal jurisdiction is in a state of decline is greatly exaggerated. There are many examples of the assertion of universal jurisdiction with regard to offences committed in the former Yugoslavia and Rwanda and many NGO’s have widely reported on the increase in universal jurisdiction cases in Europe since 2001.*” See also footnote 1423 and compare Cassese *JICJ* on 589 and 595.

⁷ See for example A Rubin “*Actio Popularis, Jus Cogens and Offences Erga Omnes*” (2001) 35 *New Eng L Rev* 265 referred to in the IBA manual. Ultimately universal jurisdiction remains contested. The Congolese Judge ad hoc Bula- Bula in the *Arrest Warrant* case 2002 ICJ 121 who dubbed it: “*variable geometry jurisdiction*” and stated: “*the idea that a State could have the legal power to try offences committed abroad by foreigners against foreigners while the suspect himself is on foreign territory, runs counter to the very notion of international law.*” See par 74.

⁸ A J Batog “*Understanding Universal jurisdiction*” http://respondeo.wordpress.com/2009/12/02/_understanding-universal-jurisdiction/ [hereinafter Batog] accessed 1/11/2011.

⁹ 2002 ICJ 121. S Yee “*Universal Jurisdiction: Concept, Logic Reality*” *Chinese Journal of International Law* (2011) 503 – 530 [hereinafter Yee] 503: “*The movement for “pure universal jurisdiction” has been trending down” since the conspicuous silence on the legitimacy of universal jurisdiction in the Arrest Warrant case decided by the ICJ in 2002.*” Orentlicher talks of a “*backlash*”. Also referred to as “*setbacks*” by CK Hall “*Universal Jurisdiction: New uses for an old tool*” in M Lattimer and Philippe Sands (Eds) *Justice for crimes Against Humanity* [hereinafter Hall].

a moving train without its locomotive.¹⁰ Maybe it only lost some of its steam. On the other hand NGO's assert that there is no question of the growing practice of states in regard to universal jurisdiction and the principle is supposed to be uncontested. Over exaggerated statements expressing support for universal jurisdiction are often found.¹¹ Notwithstanding that Prof Schabas state that universal jurisdiction is an ideal subject for research; he has nevertheless opined that universal jurisdiction generates more heat than light.¹² Many of the reports describe universal jurisdiction as important component in the struggle against impunity. According to him it is, but a small component or as stated by Bottini: "*its application remains negligible.*"¹³ Schabas is of the opinion that international tribunals and truth commissions seem a better investment for scarce resources.¹⁴

There still remains a relative paucity of ordinary universal jurisdiction cases.¹⁵ There is in fact a stunning paucity of national practice in regard to the application of universal jurisdiction.¹⁶ It is stated by Rabinovitz: "... *it is due to the dearth and inconsistency of State adjudication on universal jurisdiction.*"¹⁷ Also many controversies¹⁸ still surrounds universal jurisdiction. For a start it cannot be denied that universal jurisdiction is the most controversial head of jurisdiction¹⁹ in general. O'Keefe describe universal jurisdiction as one of international law's more controversial topics.²⁰ Sienhou Yee rightly indicates that even the debates at the United Nations General Assembly since 2009 on universal jurisdiction reveal great confusion on the concept,

¹⁰ Yee 504.

¹¹ Yee 512.

¹² Prof William A Schabas PhD Studies in Human rights a weblog for students engaged in doctoral studies in the field of human rights. Accessed on 1/11/2011 [hereinafter Schabas PhD Studies].

¹³ G Bottini "Universal Jurisdiction after the creation of the International Criminal Court" *International Law and Politics* 36 503- 562 [hereinafter Bottini] 550.

¹⁴ Schabas PhD Studies. Bottini is of the same opinion: 550.

¹⁵ S Macedo "Universal Jurisdiction National Courts and the Prosecution of Serious Crimes under International Law" [hereinafter Macedo] 65.

¹⁶ He specifically refers to the United States of America that did not bring Pol Pot to book for crimes committed when he was the number one of the Khmer Rouge regime in Cambodia. See Foreword of Reydams.

¹⁷ R Rabinovitch "Universal Jurisdiction in Absentia" (2004) Vol 28.2 *Fordham International Law Journal*: (hereinafter Rabinovitz) states later on 507: "*The dearth and inconsistency of State practice on this issue prevent any definitive conclusions from being reached at this time.*"

¹⁸ Twice in J Dugard *International Law: A SA Perspective* (2011) (4th – Ed) [hereinafter Dugard] there is reference to the controversy. On 156: "*Universal Jurisdiction remains a controversial basis for the exercise of criminal jurisdiction.*" and on 155: "*Universal Jurisdiction has in recent times become an issue of controversy*" and footnote 55 referring to Kissinger on 86. Also see Orentlicher 5: "*Controversy over universal jurisdiction has only intensified in recent years...*"

¹⁹ IBA Manual 338. See also Cassese *JICJ* 590: "*One fact that cannot be denied: much confusion and uncertainty reigns over this intricate matter. Let us therefore see whether some clarification is possible by setting out a number of points on which a measure of agreement can be reached.*"

²⁰ R O'Keefe "Universal Jurisdiction Clarifying the Basic Concept" *Journal of International Criminal Justice* 2 (2004) 735 - 780 [hereinafter O'Keefe]. Also see H van der Wilt "Universal Jurisdiction under Attack: An Assessment of the African Misgivings of International Criminal Justice as Administered by Western States" 9 *Journal of International Criminal Justice* (2011) 1043 -1066 [hereinafter Van der Wilt]: "*Universal Jurisdiction is an essentially contested topic*" 1062 and footnote 87 referring to George Fletcher "Against Universal Jurisdiction" *Journal of International Criminal Justice* 1 (2003) 580 – 584. See also CC Jalloh "Universal jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" *Criminal Law Forum* (2010) 21 1 – 65 [hereinafter Jalloh] 6: "... *evidenced by the reality that almost everything about it is contested. Some of the controversy over universal jurisdiction continues today.*" The issue was briefly addressed by the two ad hoc judges in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide before the International Court of Justice*. See Reydams 52. Judge Kreca recalled that the Convention "*does not contain the principle of universal repression.*" He has opted for the territorial principle of the obligation of prevention. His colleague Judge Lauterpach took a diametrically opposed view. The purpose of article 1 of the Convention, which states that Genocide is a crime under International law, is "*to permit parties, within the domestic legislation they adopt, to assume universal jurisdiction over the crime of genocide.*" The same difference is found in domestic jurisdictions and domestic Courts also remain divided.

scope and application of universal jurisdiction.²¹ Even the erudite ICJ Judges in the *Arrest Warrant Case* that have analysed the treaties, have given conflicting assessments on this subject matter.²² The judges in this decision of the ICJ in 2002 were split on the question of universal jurisdiction. As stated by Orentlicher: “*What was striking was the wide range of views concerning universal jurisdiction expressed by these judges.*” It is stated by Jalloh:²³ “*these judicial and independent expert assessments accurately reflect the chaos that reigns in the world of universal jurisdiction legislation.*” This highlights the lack of contemporary consensus on the contours of universal jurisdiction, even among judges and the uncertain state of universal jurisdiction in international law.²⁴ Whereas universal jurisdiction holds out the promise of greater justice, even prominent proponents of universal jurisdiction concede: “*that this weapon against impunity is potentially beset by incoherence, confusion and at times uneven justice.*”²⁵ Luc Reydams has given the subject an exhaustive examination and Schabas correctly points out the stunning paucity of national practice in regard to the application of universal jurisdiction.²⁶ This reminded him of Mark Twain’s words about the weather: “*Everybody talks about it, but nobody does anything about it.*” He states: “*For some reason or another, States rarely undertake prosecutions of crimes in the absence of a territorial or personal nexus, or an explicit treaty obligation to prosecute or extradite, no matter how horrible the criminal acts may be.*”²⁷ Schabas states in virtually all the cases where something resembling universal jurisdiction has been exercised, we find some special interest of the prosecuting state. Indeed the cynic looking at the prosecutions of Rwandan genocidaires in Belgium or of Augusto Pinochet in Spain might argue provocatively that there is an additional category of jurisdiction in criminal law, to wit criminal prosecution of crimes committed on the territory of a States former colony.²⁸ He states that there are few examples of ostensibly disinterested prosecutions in countries such as Germany, and on closer examination these turn out to be the result of treaty obligations to prosecute or extradite (*aut dedere aut judicare*). To his knowledge essentially nobody is in jail as a result of the exercise of absolute²⁹ universal jurisdiction.³⁰ It appears from Bassioni’s work that as a matter of actual historical and current custom and practice there have been many fewer instances than one might expect of the ordinary cases of universal jurisdiction.³¹ In the end there remains a relative paucity of ordinary universal jurisdiction cases.³² Bassiouni calls it: “*the checkered nature of the recognition and application of the theory of universal jurisdiction in international law and national law.*” Thus it can be stated that notwithstanding that universal jurisdiction is one of the visible modern developments in international law;³³ it still is one of the most controversial with a paucity of national practice.

²¹ Yee 503.

²² It was also found by Judge Christine van den Wyngaert in the *Arrest Warrant* case (supra) that the states which have incorporated universal jurisdiction into their national laws have reflected a widely varied understanding of the concept: par 46 of judgement and Jalloh on 6.

²³ Jalloh 21.

²⁴ Yee 522.

²⁵ A Zemach “Reconciling Universal Jurisdiction with Equality before the Law” *Texas International Law Journal* Volume 47 Issue 1 on 145 and footnote 2 [hereinafter Zemach].

²⁶ Foreword Reydams ix.

²⁷ However see the SA case *S v Okah* (SS 94/2011) [2013] ZAGPJHC 6 (21 Jan 2013) [obtained at www.saflii.org.za] albeit to comply with a treaty obligation relating to terrorism and the *aut dedere aut judicare* principle but universal jurisdiction nevertheless.

²⁸ See also Jalloh 58. Schabas Foreword in Reydams at ix.

²⁹ As to the use of terms see infra in Chapter 2.

³⁰ He also state while the fabled alien tort claims in the United States lead to fabulous judgments, none of them is really enforceable.

³¹ Macedo 65. Reydams Introduction on x.

³² Macedo 65.

³³ Kontorovich E “Pirates to Pinochet (and Back): Universal Jurisdiction” Northwestern Law Course History <http://www.law.northwestern.edu/academics/coursecatalog/details.cfm?CourseID=1198> accessed 1/3/2012.

There was a plethora of attempts³⁴ where Ngo's used the principles of universal jurisdiction to prompt and prod the authorities in national jurisdictions to open cases. Some officials would describe it as a "veld- fire" and that the floodgates are open. I agree with Bassiouni: "*Universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of orderly legal processes. If that were to happen it would produce jurisdictional conflicts between states that could threaten world order, subject individuals to abuses of judicial processes and to politically motivated harassment.*"³⁵ Numerous Ngo's, Civil Society organisations (CSO's), nations and international courts had initiated cases against everyone from Rwandans genocidaires to United States defence secretaries and in SA, they even required the arrest of President Obama.³⁶ Today the same doctrine can be used in the campaign against the Somali Pirates, Zimbabwean Policemen and also for modern day atrocities like drone strikes, torture and the like. In addition the rapid development of international humanitarian law triggered by the atrocities in Yugoslavia and Rwanda in 1990s, has exerted a great impact on the practice and the conceptual notion of universal jurisdiction. However the rapid change involving universal jurisdiction has provoked some resistance from States, and recently we can observe more reluctance to its active exercise³⁷ also in South Africa.³⁸

As it stands now, universal jurisdiction is understood poorly and liable to being exercised haphazardly.³⁹ Rabinovitz states the exact parameters of the doctrine are ill defined. Some clarification is needed.⁴⁰ As indicated, even the debates at the United Nations General Assembly since 2009 on universal jurisdiction, reveal great confusion in regards to its concepts, scope and application.⁴¹ There is danger that even when well-meaning states, intent on justice, deploy universal jurisdiction based on idiosyncratic standards rather than common norms. Conflicting standards and competing jurisdictional claims could lead to real conflict.⁴² In cases where States assert extraterritorial jurisdiction like universal jurisdiction, sovereignties will overlap.⁴³ Different from private international law, within general international law there are currently no principles establishing a hierarchy of lawful jurisdictional claims.⁴⁴ Cherif Bassiouni treatment of universal jurisdiction in conventional international law certainly supports his conclusion that universal jurisdiction resembles a "*checkerboard*" and is replete with unevenness and inconsistency.⁴⁵ It reminds Stephen Oxman of the old Chinese proverb: "*We're in a muddy river that leads to a muddy lake.*"⁴⁶ With respect there is complexity and one has to

³⁴ Described as "Explosion of lawsuits" by D v Hoover on 2: "Universal Jurisdiction not so universal: A Time to Delegate to the International Criminal Court" Cornell Law School Inter- University Graduate Student Conference Papers Paper 52 on 2 [hereinafter Hoover].

³⁵ Bassiouni M Cherif the History of Universal Law in Macedo 63.

³⁶ News24 "SA Group fails in Obama arrest application" 2013-06 – 26 www: news 24.com accessed 08/07/2013.

³⁷ Inazumi 234.

³⁸ See discussion in final chapter on the evaluation and conclusion in this regard.

³⁹ R Pavlic, *Universal Jurisdiction: A Qualified success* Thesis presented Reed College May (2005) [hereinafter Pavlic] 84 states: "*As this thesis has demonstrated, the practice of universal jurisdiction is extremely irregular and haphazard, and states' understanding of it is mixed because there are no widely understood and agreed upon legal standards concerning it.*"

⁴⁰ See Rabinovitz 500 and 501. See also Inazumi 115: "*Notwithstanding the increased attention to and discussion on 'universal jurisdiction', there is deep confusion as to the real meaning of universal jurisdiction.*"

⁴¹ Yee 503.

⁴² Reydams Introduction.

⁴³ IBA 334.

⁴⁴ Ibid.

⁴⁵ Macedo Chapter 2 on 64 and footnote 1.

⁴⁶ Yee also refers on 518 to the messy treaty practice.

simplify the complexity.⁴⁷ The sharp division among the Judges in the *Arrest Warrant* case, and the scholarly comments on the judgment, is a vivid illustration of the reality of Beckett's words:

[T]he exercise of criminal jurisdiction over foreigners is a sphere in which judicial literature and speculation abound and are conflicting even in the matter of first principles, ... and at the same time international precedent is rare and indecisive.

Much of the academic literature and material published by Ngo's opines that universal jurisdiction is supposed to be uncontested and uncontroversial. Enormous material resources and personal efforts are devoted to building prosecutions and convincing national justice systems to proceed on this basis. On closer examination even the legal underpinning of the exercise of universal jurisdiction seems far less certain than many would claim.⁴⁸ One indication that universal jurisdiction is not as generally accepted is the fact that during the negotiations for the ICC, the push by Germany⁴⁹ (together with South Korea and the NGO Coalition) for "universal jurisdiction"⁵⁰ and that it should be delegated⁵¹ to an international body was not accepted.⁵² The final Act of the ICC stopped short of recognizing universal jurisdiction. Similarly the implementations by countries especially in Africa are slow and this relates also too promulgating implementing legislation with universal jurisdiction.⁵³ This is but one sign that the principle of universal jurisdiction has yet to be realised to its full potential and was perhaps not as uncritically accepted as had been purported.⁵⁴ But still it is a useful instrument⁵⁵ and necessary weapon in the arsenal that should be applied when needed. Universal jurisdiction can be described as an international legal concept that is expanding but in general we remain in relatively unclear territory for the moment. The substance of the concept is still being explored.

From its early beginnings, primarily as a means for maritime states to assert jurisdiction over acts of piracy, gradual developments have seen the expansion of the content of universal jurisdiction to encompass other egregious acts such as war crimes, genocide and torture. There were some drawbacks.⁵⁶ The application of this concept, with unavoidable implications for the sovereign equality of states, still continues to be debated. The exercise of universal jurisdiction by one State may infringe the sovereignty and sovereign equality of other States and can be abused.⁵⁷ The inherent conflict or underlying tensions remains. But the concepts are also not stagnant. In the present context of globalization and international cooperation there is increasingly a more limited conception of State sovereignty.⁵⁸ It is only reasonable to expect that the practical application of the concept - universal jurisdiction- be explored.⁵⁹ Universal jurisdiction encapsulates much of the promise and peril of international law: the possibility of

⁴⁷ Macedo Chapter 2 by Oxman, Stephen A Comment: the Quest of Clarity on 64.

⁴⁸ Schabas on x in Reydams. However see Batog Andrew J, Understanding Universal jurisdiction.

⁴⁹ Also see JD Van der Vyver, "Universal Jurisdiction in international criminal law" (1999) 24 *SAYIL* 107 [hereinafter Van der Vyver] 127.

⁵⁰ See discussion about difference between **international jurisdiction** and universal jurisdiction in Chapter 2.

⁵¹ See Hoover 23 - 30.

⁵² However the complimentary scheme of the ICC has resulted in just that, more universal jurisdiction.

⁵³ Hoover 9 - 13.

⁵⁴ Schabas asked if this was a sign that the African Union clearly recognize universal jurisdiction. For exceptional circumstances when higher values came to the fore and the whole humanity feel that something should be done. This is comparable to arrest by a civilian without a warrant. It is the exception to the general rule that Police are the institution that usually arrest people. See history by Luc Reydams's how big states change their tack.

⁵⁵ Jalloh 3 also indicates: "*increasingly useful, if not necessary tool in the modern fight against impunity.*"

⁵⁶ See the changing of legislation of Spain and Belgium in the period after the *Arrest Warrant* case.

⁵⁷ Yee 503.

⁵⁸ Rabinovitz 506. As to state sovereignty see Batog in Respondeat: Understanding Universal Jurisdiction.

⁵⁹ Statement by Ambassador H. E. Dr. Palitha TB Kohona Permanent Representative of Sri Lanka to the United Nations Sixth Committee 66 Session of the United Nations General Assembly Agenda Item 84: 12 October 2011. Also see the cases of *Butare Four* and *Demjanjuk cases*.

deterring human rights violations and at the same time the peril that it will become simply another tool of international politics.

1.1. Historical foundations

Universal jurisdiction in its current incarnation has well developed historical roots, so an examination of those roots may be a useful guide in our understanding of more current developments in this area.⁶⁰ One has to clarify the historical foundation and philosophical basis and theory of universal jurisdiction first. The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory.⁶¹ That territory is where evidence of the offence can most often be gathered and where the offence generally produces its effect. The territory is also where the punishment imposed, can most naturally serve as an example. National territorial sovereignty which is the historical basis for national criminal jurisdiction however is transcended by universal jurisdiction. Two theoretical bases exist for justifying universal jurisdiction. The first a **normative universalist** position which recognizes the existence of certain core values that are shared by the international community. These values are deemed important enough to justify the overriding the usual territorial limitations on the exercise of jurisdiction. The second position is a **pragmatic policy oriented one**, which recognizes that occasionally there exist certain shared international interests that require an enforcement mechanism not limited to national sovereignty and territory. There are some commonalities between them. They both require the existence of common values and interests shared by the international community. Second, there must be a need to collectively prosecute the more serious transgressions of these values.⁶² Universal jurisdiction is therefore not based solely on the nature of the crime; however that is important part of it.

The universalist normative position can be traced to the metaphysical and philosophical conceptions arising in different cultures and at different times.⁶³ Early modern Western jurist and philosophers developed the normative universalist position based partly on Christian concepts of natural law. The idea was that there exist a community of nations and they share common values. Hugo Grotius had argued from the same philosophical premise but relied on a **pragmatic policy oriented approach** of pursuing “enemies of the human race”⁶⁴ on the high seas. This doctrine became the foundation of the modern theory of universal jurisdiction for certain core crimes. Expanding on the classical understanding of universal law accessible by reason, in the Seventeenth century, Grotius laid the foundations for universal jurisdiction in modern international law promulgating in his *De Jure Pradae* (of captures) and later in *De Jure belli ac pacis* (of the law of War and peace) the Enlightenment view that there are universal principles of right and wrong. Because the right of freedom of navigation on the high seas was applicable universally, it followed that an infringement upon that right by pirates would be universally punished. This doctrine became the foundation of the modern theory of universal jurisdiction for certain international crimes. In regard to concurrent jurisdiction Grotius pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes, was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particular serious crime, not only in the state on whose territory the crime was committed, but also in the country they sought refuge.

I agree with Bassiouni that support the proposition that an independent theory of universal

⁶⁰ Rabinovitch 516.

⁶¹ Judge Giuillame in the *Arrest Warrant* case: on 2 par 1 fundamental principles.

⁶² Bassiouni refers to a third position on 42.

⁶³ Bassiouni 43.

⁶⁴ The concept of *hostes humani generis* enemies of the human race. However see Batog 2/8 and footnote 6.

jurisdiction exists with respect to serious international crimes. I also agree with Bassiouni that grounds for such a theory are both the normative universalist position and the pragmatic policy position mentioned above.⁶⁵ Considering how universal jurisdiction over piracy was formed, the two rationales - the gravity of the crime which signifies the common interest of the international community and the absence or uncertainty of effective jurisdiction - are equally important. In Inazumi's opinion these two rationales for universal jurisdiction are still relevant today in determining the role, the necessity and appropriateness of universal jurisdiction.⁶⁶ The rationales underlying international criminal law also support universal jurisdiction.⁶⁷ The serious crimes concerned deserve condemnation in themselves and are deemed to affect the moral and security interest of the entire international community. Second, other bases of jurisdiction are insufficient to see perpetrators brought to book. As a result of these normative and pragmatic rationales, universal jurisdiction does not arise with respect to any and all crimes. The pragmatic consideration is especially apparent with piracy on the high seas, slavery and terrorism, where the potential to evade justice through absconding and safe havens are great. The normative impulse is more apparent with crimes against humanity and war crimes, the prosecution of which reinforces the declared interest of all states. Nonetheless both pragmatism and normativity play a role with respect to all these crimes. Pirates were labeled enemies of mankind (*hostis humani generis*) emphasizing the moral aspect of condemnation while war crimes and crimes against humanity are often committed by those whose political power render their state a *de facto* safe – haven, a driving consideration in the post – War development of international criminal law.⁶⁸ The premise for universal jurisdiction should not ignore its origins and rationale in international law. **From its inception, universal jurisdiction has been a jurisdiction of last resort, a fail-safe solution called for by urgency and necessity.**⁶⁹

The doctrine of universal jurisdiction emerged within the classical (post – Westphalian) system of international law, grounded on the two cardinal principles of sovereignty and equality of its subjects and creators, the states. In such a system where there are no centralized organs, and where all the legal functions are discharged by the states themselves, how can the common interests of these states (or the “international” community) be protected? The answer to this question is illustrated by the paradigmatic, and until fairly recently the only, case of universal jurisdiction, that of piracy. Piracy is a criminal act that takes place in a space where there is no overall territorial sovereignty. A state captures a pirate on the high seas or in its national waters. It

⁶⁵ Bassiouni 42.

⁶⁶ Inazumi 52. He sets it out on 50: “*There are two rationales as to why universal jurisdiction was recognized for piracy under international law. The first was the gravity of the crime, amounting to hostis humani generis, inciting states to recognize that punishment of piracy served not only the interest of the individual state but also the interest of the States constituting the international community. The second rational was the lack of eligible or effective jurisdiction or the uncertainty as to which State had jurisdiction over a case. Because acts of piracy are committed on the high seas - the high seas belonging to no state - more often than not no state possessed jurisdiction to punish such acts, and States including the flag state were unable to prosecute effectively. For this reason it was held that any state that was capable of capturing suspects a prosecuting and punishing them effectively could take that opportunity. Otherwise it would be very difficult to combat the crime of piracy. In short because the gravity of the crime, the prosecution of piracy was recognized as a common interest among States. Also due to the lack of eligible or effective jurisdiction, it was necessary to allow all States that had the opportunity to capture suspects to actually exercise jurisdiction. As a consequence, universal jurisdiction for the crime of piracy was established under customary international law... In claiming the applicability of universal jurisdiction over certain categories of crimes other than piracy, discussions were often based on the nature of the crimes. It was argued that because they were similar in gravity the crime of piracy they should be susceptible to the exercise of universal jurisdiction as well.* (p 51 Inazumi)

⁶⁷ B Broomhall “Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International law” 35 *New Eng. L. Rev* (2000 – 2001) 399 - 420 [hereinafter Broomhall] 401.

⁶⁸ Broomhall 403.

⁶⁹ See conclusions in Chapter 7.

may have no other connecting factor with the acts of piracy or the pirate not being the state of nationality of the pirate or of the flag of attacked ships or of the victims except for being the place of capture the *forum deprehensionis*. But the criminal acts are considered injurious to the community at large, in view of the paramountcy of the perceived common interest in the security of maritime communications since the age of discoveries. In these circumstances, the state of capture is authorized, in spite of the absence of any of the traditional connecting factors, to prosecute the pirate, because it would not be acting in its own name but in the name of the community.⁷⁰

The elements of **necessity**⁷¹ and **urgency** underlying the conferment of universal jurisdiction on the state of capture are evident in the case of piracy, which is a warlike activity, by highly mobile agents over the immensity of the high seas. This should be taken into account for the short stay of an accused in present day circumstances. The same elements applied to the second crime subjected to universal jurisdiction, which emerged much later, that of slavery and slave trading, which was also mostly tracked on the high seas.⁷² Of course, piracy and slave trading, which were originally at the basis of the doctrine of universal jurisdiction, are quite different from the contemporary cluster of international crimes, namely war crimes, crimes against humanity, genocide and others. But the rationale of the doctrine remains the same in relation to those crimes as well. The danger for which universal jurisdiction purports to provide a modest and partial antidote is a passive conflict of jurisdiction, leaving the fundamental interests and values in the international community unprotected most of the time.

An unlimited extension of the doctrine of universal jurisdiction⁷³ like universal jurisdiction *in absentia* is not workable in the still largely interstate system of present day international law.⁷⁴ Nor does it tally with the origins of the doctrine which turned on the **captus** as the ratio of the exercise of universal jurisdiction by the *forum deprehensionis*.⁷⁵ Thus, neither the terms of practicality or of legal reasoning nor in those of positive law can such an extension be justified [to extent it to absolute universal jurisdiction].⁷⁶ Going back to the origins of the doctrine, what counts is the ‘**capture**’ of highly mobile persons accused of having committed very serious crimes. It would be self-defeating to add conditions which would render universal jurisdiction akin to a traditional connecting factor, and thus lose its specificity and *raison d’être*.

⁷⁰ This follows the logic of *actio popularis* (or in US parlance, class actions except that the class is here the whole community.) But it is not exactly the *action popularis*, conferring on the subject a *locus standi* (legal standing) before a judge.

⁷¹ The rationale of universal jurisdiction is then to enable a state that finds itself materially in a position to prosecute an act commonly perceived as extremely deleterious to the common interest to proceed with such a prosecution, despite the absence of any of the traditionally recognized connection factors. To that end, the doctrine of universal jurisdiction has to neutralize the effects of any claims of priority based on those traditional connecting factors that other states, although unwilling or unable to exercise jurisdiction themselves, could use to block the prosecution. This outcome would go against the common interest.

⁷² This does not, however, theoretically eliminate the possibility of positive conflicts of jurisdiction with states that have a traditional connecting factor with the crime such as the national state of the perpetrator or the victims (including the flag of attacked ships). In reality, these states were rarely in a position to prosecute. Indeed, in some case they were tolerant of, if not complicit in, the crime, as exemplified by the practice of issuing lettres de marque to notorious buccaneers.

⁷³ States are free to devise cooperative schemes for the suppression and prosecution of international crimes, including the extradition of suspects and accused *inter se*. However one of the states then must have such a suspect or accused in custody, if the prosecution is based solely on universal jurisdiction.

⁷⁴ See discussion of universal jurisdiction *in absentia* in Chapter 2.

⁷⁵ For an interesting Scottish case where *forum deprehensionis* was mentioned see Barea Phillip “Old Piracy Laws create Universal Jurisdiction: Modern International law learned from an Ancient Problem” 15 Oct 2008. www.suite101.com accessed 1/11/2011

⁷⁶ See discussion in Chapter 2 about absolute universal jurisdiction.

Some form of universal jurisdiction has existed for centuries. In the middle ages jurists assumed that certain dangerous criminals posed a threat to societies in which they were found. Hence these jurisdictions were entitled to investigate and prosecute crimes committed by these actors in other jurisdictions.⁷⁷ But universal jurisdiction was not based on the substantive heinousness of the offense *per se*. As such the procedure required the accused presence in the jurisdiction. Moreover for as long as sovereignty based jurisdictional principles have existed (that is at least since the early seventeenth century) any nation could try any pirates it caught, regardless of the pirates nationality or where on the high seas they were apprehended. However most of the jurists today falsely assume that piracy was universally cognisable due to the heinousness of preying on civilian ships. To the contrary the law of every nation and the law of nations countenanced such behaviour when carried out by state-licensed sea-robbers called privateers. Neither the middle ages nor piracy cases provided a tenable precedent to support the extension of universal jurisdiction to crimes chosen precisely because of their heinousness,⁷⁸ including genocide, crimes against humanity and torture.

By contrast two other prominent historical rationales for universal jurisdiction support the view that it should not be extended to cases where the accused is not present on the territory of the forum state. The first view is illustrated by the statement by Donnedieu de Vabres.⁷⁹

It was recognised during the middle ages, however, according to the Italian doctrine, and in the law that used to govern relationships between Lombardic cities, that regarding a certain category of dangerous criminals - [bandits, vagabonds, assassins,] that just the presence on the territory of an unpunished criminal, was a cause of trouble sufficient to give a right to the city to prosecute the crime.⁸⁰

Jurist in the middle ages assumed that certain dangerous criminals posed a threat to the societies in which they were found, presumably since they were likely to commit repeat offenses.⁸¹ For this reason, these jurisdictions were entitled to investigate and prosecute crimes committed by these actors in other jurisdictions. Therefore, the accused's presence in the jurisdiction and the danger he posed in that jurisdiction justified the exercise of universal jurisdiction.⁸²

Judge Guillaume, in his individual opinion in Arrest Warrant outlines a second historical justification for a more restrictive version of universal jurisdiction.⁸³ He indicates:

The question has, however always remains open whether States other than the territorial state have concurrent jurisdiction to prosecute offences. A wide debate on the subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius pointed out that the presence

⁷⁷ Rabinovitch 517.

⁷⁸ But see J Mugambi "Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond" Vol 35; *Ga.J Int'L & Comp L* 495 [hereinafter Mugambi] 500: "... however most jurists today falsely assume that piracy was universally cognizable due to the heinousness of preying on civilian ships. To the contrary the law of every nation and the law of nations countenanced such behaviour when carried out by state licensed sea robbers called privateers. Neither the middle ages nor piracy cases provide a tenable precedent to support the extension of universal crimes chosen precisely because of their heinousness, including genocide, war crimes and crimes against humanity."

⁷⁹ See Rabinovitz 517.

⁸⁰ Translation by Rabinovitch 517.

⁸¹ Rabinovitch 517.

⁸² See also Mugambi referring to Rabinovitz.

⁸³ *DRC v Belgium* ICJ 2002 Separate opinion Judge Guillaume par 4 on 2. See also Rabinovitch 518.

on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particular serious crimes not only in the State on whose territory the crimes were committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution in accordance with the maxim *aut dedere aut judicare*.⁸⁴

Thus, the basis for asserting universal jurisdiction lay in the impact⁸⁵ of the accused presence in the prosecuting State. Permitting the perpetrators of heinous crimes to remain in their State and be rewarded for fleeing States that could otherwise exercise jurisdiction, could cause a public outrage.⁸⁶

1.2. Piracy⁸⁷ and development thereafter

For more than three centuries, States have exercised universal jurisdiction over piracy on the high seas, even when neither the pirates nor their victims were national of the prosecuting state. Traditionally pirates were considered *hostes humani generis* (enemies of the human race). Today this expression refers to perpetrators of heinous crimes like piracy, slave trading, genocide, war crimes, and crimes against humanity, torture, extrajudicial executions and enforced disappearance.⁸⁸ In the aftermath of the atrocities of the Second World War the international community extended the principle of universal jurisdiction to war crimes and crimes against humanity.⁸⁹ Because these crimes often encompass serious crimes that are so grave and of universal concern they are deemed to affect the moral and even the peace and security interests of the international community as a whole and deserve condemnation. Thus the principle of universal jurisdiction holds that international law enables each state to assert jurisdiction over certain crimes on behalf of the international community in a manner equivalent to the Roman concept of “*actio popularis*”, which gave every member of the public right to take legal action in defense of public interests whether or not one was affected.⁹⁰ They act as agents for the international community.⁹¹

Piracy is deemed the basis of universal criminal jurisdiction for *jus cogens* international crimes. Grotius relying on Aristotle and Cicero elaborated on the theory of “enemies of the human race” and its application in wartime which was the context in which piracy was viewed at that time. Grotius who’s approached was more **pragmatic** as stated above saw the problem of dealing with pirates as part of his view of a certain order on the high seas.⁹² Positive international law in the twentieth century has clearly established universal jurisdiction for piracy. The principle of universal jurisdiction or the doctrine was thus proclaimed in customary international law in the seventeenth century, with regard to piracy. Any State was authorized to arrest and bring to justice persons suspected of engaging in piracy, whatever their nationality and the place of commission of the crime. The rationale behind this exceptional authorization to States to depart

⁸⁴ *DRC v Belgium* (Separate opinion of Judge Guillame) 2 par 4. Also see Inazumi on 49.

⁸⁵ Rabinovitz 518.

⁸⁶ Rabinovitz 518. Alternatively this might be perceived as an endorsement of such individuals conduct and have harmful effects on public morals.

⁸⁷ Also see Bassiouni 47.

⁸⁸ Dugard 154 does not refer to extrajudicial killings and enforced disappearances.

⁸⁹ Hoover 4 and footnote 13.

⁹⁰ Hoover 5 and footnote 16.

⁹¹ Dugard 154 and footnote 53.

⁹² Bassiouni 47.

from the classic principles of territoriality or nationality was the need to fight jointly against a form of criminality that affected all states. Universal jurisdiction was thus based on a joint concern of all States.⁹³ Each State knew that by bringing to justice suspected pirates it was acting to protect at the same time its own interests and those of other States.⁹⁴

Piracy is the best example of an offence that may be adjudged according to this principle of universal jurisdiction.⁹⁵ In accordance with Sect 14 of the Geneva Convention regarding the High Sea of 1958⁹⁶ all states must cooperate in suppression of piracy on the open sea or in any other place outside the jurisdiction of any state.

Article 19 of the Convention stipulates:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under control of the pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed,⁹⁷ and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

This article thus clearly established universal jurisdiction. Thus universal jurisdiction for the crime of piracy is thus firmly established in positive international law.

The classic formulation of universal jurisdiction is well described by Abi- Saab (2003)⁹⁸ who explains the history of the concept in relation to the international crime of piracy:

Piracy is a criminal act that takes place in a space where there is no overall territorial sovereign. A State captures the pirate on the high seas or in its national waters. It may have no other connecting factor with the acts of piracy or the pirate (not being the state of nationality of the pirate or of the flag or attacked ships or of the victims) except for being the place of capture, the forum deprehensionis. But the criminal acts are considered as injurious to the community at large, in view of the paramountcy of the perceived common interest in the security of maritime communications since the age of discoveries. In these circumstances, the state of capture is authorized, in spite of absence of any of the traditional connecting factors to prosecute the pirate, because it would not be acting in its own name *uti singulis* (which requires a special interest), but in the name of the community.⁹⁹

It would seem clear that the notion of universal jurisdiction originated from a need to bring pirates to book. Why exactly, the urge to combat piracy gave birth to the principle of universality has become a matter of controversy.¹⁰⁰ For as long as sovereignty based jurisdictional principles have existed any nation could try pirates it caught regardless of the pirate's nationality

⁹³ Cassese 284.

⁹⁴ Cassese 284.

⁹⁵ IBA manual 203.

⁹⁶ This convention came into force on the 30 September 1962. South African became part of this convention on 9 April 1963. Volkereg 203: footnote 15.

⁹⁷ Also see *Arrest Warrant* case Separate opinion Judge Guillame 3 para 5.

⁹⁸ According to M Du Plessis "Countering genocide, war crimes and crimes against humanity" *ISS paper* 172 (November 2008) [hereinafter Du Plessis *ISS paper* 172] on 4.

⁹⁹ G Abi-Saab "Proper Role of Universal Jurisdiction" 1 (2003) *Journal of International Criminal Justice* 596 - 602 [hereinafter Abi Saab] on 599 – 600 also referred to by Max du Plessis *ISS paper* 172 on 5.

¹⁰⁰ Van der Vyfer 116 and footnote 38.

or where on the high seas they were caught.¹⁰¹ However, most jurist today falsely assume that piracy was universally cognizable due to the **heinousness** of preying on civilian ships.¹⁰² However, there does seem to be a simple and logic explanation: pirates practised their evil trade on the high seas, which are beyond the territorial jurisdiction of any state; and purely for **practical reasons**, the highs seas were therefore, for purposes of jurisdiction, regarded not as *res nullius* but as *res omnium communes*.¹⁰³ Thus in earlier time, the principle applied to crimes of piracy and participation in slave trade. After World War II it was extended to a small number of offences against the basic code of humanity such as genocide and serious war crimes.

However neither the middle ages nor piracy cases provide a tenable precedent to support the extension of universal jurisdiction to crimes chosen precisely because of the heinousness, including genocide, crimes against humanity and torture. Universal jurisdiction for atrocity crimes only emerged in the post-World War II era.¹⁰⁴ While the Nuremberg Trials rested on a different doctrine, some military and civilian courts claimed universal jurisdiction to prosecute the Nazi's crimes. Notably the Israeli Supreme Court held that it had universal jurisdiction to try Adolf Eichmann for crimes against humanity. However the expansion of prosecutions in national courts did not occur before 1990.¹⁰⁵ The development of universal jurisdiction (through custom and practice) as discussed by Bassiouni clearly resembles a checkerboard. Later some conventions recognize it and some customary practices of states demonstrate its existence, although uneven and inconsistent.¹⁰⁶

As indicated above universal jurisdiction jumped from law reviews to headlines more than a decade ago, with the indictment of former Chilean President Pinochet. We can actually trace the growing of the concept through the history and development through the cases of the *Lotus*, *Eichmann* and the *Arrest warrant-case* and other matters.¹⁰⁷ It is said that the *Arrest Warrant Case* have, in an ingenious way helped to inject some calming elements back into international relations¹⁰⁸ but for universal jurisdiction it was a type of setback in one sense. For the establishment of a customary rule recognizing the legitimacy of universal jurisdiction one should really start from a dictum of the International Court of Justice in the *Lotus case*. Back in 1920s the exercise of jurisdiction over crimes committed in international waters but against one's own nationals, when it indicated that international law allowed anything that was not specifically prohibited worked well at that time,¹⁰⁹ but the question is can it be used as an argument to justify universal jurisdiction presently. The history of universal jurisdiction above have shown that the crime of piracy goes back to the earliest beginnings of the law of nations, and historically was the only crime to which universal jurisdiction has been applied. Pirates on the high seas, as *hostes humani generis*, were considered a danger to all nations and were subject to the jurisdiction of any nation in which they could be found, and so the unique circumstances which the crime of piracy presented to the Enlightenment – era jurist led to the formulation of a theory which allowed an entirely unaffected nation to assert jurisdiction. This has served as the foundation for the concept of universal jurisdiction, from the extension of the term *hostis humani*

¹⁰¹ Mugambi 500.

¹⁰² Mugambi indicates that “*To the contrary the law of every nations and the law of nations countenance such behaviour when carried out by state licensed sea robbers called privateers*” on 500 and footnote 31.

¹⁰³ The ratio of its origin might be relied upon by opponents of the concept of universality to protest the extension of its application to instances where crimes are not committed in no- man's land. However, the emphasis has shifted from the purely formal to the substantive legitimation of universal jurisdiction.

¹⁰⁴ Mugambi 500.

¹⁰⁵ Numerous examples are quoted by Mugambi.

¹⁰⁶ Bassiouni 62 and 63.

¹⁰⁷ There are other important cases. See Inazumi and his discussion as well as Hall 59 -69.

¹⁰⁸ Yee 503-4.

¹⁰⁹ See Rabinovitz 506 that stipulates that this basic concept not just accepted nowadays: 506- 507.

generis to encompass the slave trade in the nineteenth century to the assertion of universal jurisdiction over Nazi War criminals by the tribunal as well as the trial of Adolf Eichmann in Israel. The exceptional and heinousness of crimes in the case of Eichmann brought about that the objections to abduction and subsequent trial of Eichmann's case was overruled.¹¹⁰ The one underlying rationale of universal jurisdiction was expounded in this case. These important developments have set the scene for the most recent advances in the universal jurisdiction doctrine towards truly encompassing all war criminals, especially in the important precedent on the Spanish trial of *Augusto Pinochet*¹¹¹ and the *Butare four*¹¹² and others that followed on that.

Thus universal jurisdiction is not new. It has been provided for in a number of international conventions and in the national legislation of a number of countries. One can state that universal jurisdiction should play an important role in the emerging regime of international accountability for serious crime. The challenge is to define that role precisely and to clarify when and how universal jurisdiction can be exercised responsibly. In Europe¹¹³ the discussion and analysis on universal jurisdiction is quite developed. There is dire need for universal jurisdiction in Africa and see recommendation for international criminal law- "contact points"¹¹⁴ like "Eurojust" contact points in Africa.¹¹⁵ The African Union brought out a model law and after researched pronounced that Africa accepted universal jurisdiction but warned against the problem with the "misuse" or "abuse" of universal jurisdiction in the African context. Section 4 (h) of the Constitutive Act clearly demonstrates Africa support for idea of collective action if some of the core crimes are at stake. Universal jurisdiction precise role in Africa still being carved out¹¹⁶ and South African have a role in that.

However it remained the *Arrest Warrant* case, decided by the ICJ in February 2002 that confirmed the lingering uncertainties about the principle of universal jurisdiction, also confirmed during and revealed during the debates at the Rome Conference according to Schabas¹¹⁷ and confirmed in the present discussion at the General Assembly of the UN. The Arrest Warrant case was decided on immunities but universal jurisdiction which was central to the case, was also discussed albeit *obiter*. Actually before the court could decide whether Congo's foreign minister enjoyed immunity from prosecution, the legitimacy of Belgium exercise of universal jurisdiction should have been settled.¹¹⁸ Nothing however, stopped some of the judges from expressing their individual opinions on the subject of universal jurisdiction. Some of them had no trouble with universal jurisdiction. The president of the Court, Gilbert Guillaume, failed to find the requisite elements of international custom allowing States to prosecute crimes committed outside their territory by persons with no real connection to the country.¹¹⁹ After this important case it was however the negotiations and the conclusion of the Rome Statute that was another turning point in regard to universal jurisdiction especially with complimentary scheme and the "unforeseen" results from that.

¹¹⁰ Some people actually see it as territoriality.

¹¹¹ Batog 2/5.

¹¹² *Public Prosecutor v the "Butare Four"* Assise Court of Brussels 8 June 2001 and see L Reydams "Belgium's First Application of Universal Jurisdiction: the Butare Four Case" *Journal of International Criminal Justice* 1 (2003) 428 - 436. Hall 69.

¹¹³ Unfortunately the African continent lags behind in these matters.

¹¹⁴ See discussion of "Eurojust" contact-points in AU & EU expert report and discussion in 3 chapter and conclusion.

¹¹⁵ AU & EU expert Group Report on 48 and r 15 and 16.

¹¹⁶ 8 out of 34 states have implementing legislation regarding the Rome Statute. Compare section 4 H of African Constitutive Act and model law as discussed in Chapter 3.

¹¹⁷ Reydams on x in Foreword.

¹¹⁸ See the contrary opinion of Dugard in 4th Ed 156: "made it unnecessary for the Court to decide on question of universal jurisdiction."

¹¹⁹ *Arrest Warrant* [2002] ICJ 64, [2002] 42 ILM at 558 and 586 (separate opinion of President Guillaume).

There can be no denying that there is an underlying tension inherent in the concept of universal jurisdiction for national courts. It is bound to conflict with the absolute theory of national sovereignty.¹²⁰ The exercise of universal jurisdiction by one State may therefore infringe the sovereignty and sovereign equality of other States and can be abused, thereby destabilizing international relations.¹²¹ By and large the “encroachments” in the Eichmann situation was tolerated, but the *Arrest warrant*- case controversy highlight the underlying tension inherent in universal jurisdiction. The Belgium change of their legislation confirmed this. The movement for “universal jurisdiction” has possibly been “trending down” since the conspicuous silence on the legitimacy of universal jurisdiction in the *Arrest Warrant* case decided by the ICJ in 2002. The subsequent downtrend may have been in no small measure due to the cautious judgment in that case. As stated above, this judgment can be said to have, in an ingenious way, helped inject some calming elements back into international relations. With Belgium and Spain now having abandoned pure universal jurisdiction by narrowing down their statutes, the universal jurisdiction movement indeed appears to be a moving train that has lost some momentum.¹²² The African Union also raised objections at the “abuse” of universal jurisdiction in the African context. There were a number of setbacks after the *Butare 4* case. These unfortunate developments indicate that the future of universal jurisdiction is not automatically guaranteed.¹²³ Dr Reydams write that jurisdiction exercised by a State without its having any objective or legal link with either the offence or the offender erodes the very concept of jurisdiction.¹²⁴ The unilateral exercise of universal jurisdiction over accused *in absentia*¹²⁵ risk weakening the very international order that it pretends to guard. This deserves careful consideration for South Africa and Africa in general with the responsible development of this concept in international criminal law.¹²⁶ There are developments that suggest that new ground is being broken with regard to the application of the principle of universal jurisdiction. This is not to say however, that the exercise of universal jurisdiction is an easy matter. There are significant practical and legal challenges regarding the application of this principle. The obstacles faced when applying universal jurisdiction were elaborated by the International Law Association in a report on the subject.¹²⁷ However many of the reasons for the historic reticence to use universal jurisdiction, including the great costs and daunting complexity of prosecuting cases in far-away land and practical difficulties,¹²⁸ however cannot be said to have gone away. The practical difficulties must be assessed and solutions be proposed.

This has been a rapidly evolving area, with Princeton Project to strengthen universal jurisdiction as a tool to end impunity. The Arusha principles in Africa¹²⁹ have done the same for present day

¹²⁰ Batog refer to sovereignty in following terms: “*Outmoded positivists notion of absolute power of national sovereignty*”. And again: “*exception to the absolute nature of Westphalian sovereignty which dates back to... Cherished traditional notions of absolute power for sovereign nations...*”

¹²¹ Yee 503. It is stated by Pavlic 84: “Consequently, *one might argue that if universal jurisdiction is currently merely a paper tiger, it poses no threats to state sovereignty and is unlikely to cause serious changes in our international state-based system.*” [Own emphasis added]

¹²² Yee 503.

¹²³ Hall 69- 71.

¹²⁴ Reydams General Editors Preface vii.

¹²⁵ However see O’Keefe criticism of imprecise use of the terms prescriptive jurisdiction vz enforcement jurisdiction in chapter 2.

¹²⁶ Also compare the Preface to Reydams: “*deserves careful consideration by those concerned with the development of international criminal law.*”

¹²⁷ Mary Robinson Preface 16.

¹²⁸ See discussion infra in Chapter 3.

¹²⁹ The Cairo - Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective. Africa Legal Aid (AFLA). This was adopted at follow up meeting held at Arusha 18 – 20 October 2002, <http://ww.afla.inmaas.nl/en/act.index.html>.

universal jurisdiction implementing legislation in Africa. NGO's and civil society has done their part in preparing dockets to investigate in this area of law in South Africa. The question must be asked: Why no prosecutions for Rwanda and Zimbabwe and other war criminals in South Africa?

With the cornerstone principle of complementarity, the ICC Statute highlights the fact that international prosecutions alone will never be sufficient to achieve justice and emphasizes the crucial role of national legal systems in bringing an end to impunity. There will always be an impunity gap if provision is not made for universal jurisdiction in domestic legislation. How will the SA experience contribute to the evolution of universal jurisdiction? Is it in part an answer to the fight against impunity in Africa? What further refinement is needed? Will we see a first prosecution for international crimes using universal jurisdiction in Africa and South Africa?¹³⁰ What is needed for universal jurisdiction to be a useful instrument on the continent? The question is what guidelines are needed in the South African context. Universal jurisdiction remains contentious with a lot of complexities and underlying tensions. It is not a magic wand and a lot a work will have to be done to make it a meaningful instrument.

Only time will tell whether it is all symbolism or if the pledge in the Rome Statutes preamble that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes means states like South Africa will use the entire arsenal¹³¹ of mechanisms, including universal jurisdiction to ensure accountability for serious violations of human rights. However this is the one instrument in the arsenal that has to be used responsibly and with caution. If this arrow is to remain in the quiver, the exact parameters have to be ascertained and if this welcome evolutionary trend¹³² is not stopped in the cradle, one will have to reflect carefully about the limits of this instrument universal jurisdiction. I agree with Christopher Keith Hall who after describing the number of setbacks after the *Butare 4* case in relation to universal jurisdiction state: "*These unfortunate developments indicate that the future of universal jurisdiction remains in danger.*"¹³³

In parallel with the establishment of international criminal tribunals and some form of accountability to end in impunity, States increasingly dabble with and assert universal jurisdiction in respect of serious international crimes. Numerous countries in their implementing legislation relating to the ICC have adopted to accompany the ratification of the Rome Statute, with provisions to allow for some form of "universal jurisdiction". This applies also to South Africa. With the Implementation of the Rome Statute in South Africa sect 4 (3) of Act 27 of 2002 a distinctly universal element and flavour has been added to the SA law and legislation. The jurisdiction that is triggered in sect 4 (3) (c) is grounded in the idea of universal jurisdiction.¹³⁴ Via the civil society a number of "dockets" were presented to the National Prosecuting Authority. What one can describe as public interest litigation was bound to happen and followed with the

¹³⁰ With *S v Okah* (supra) already had one for terrorism with no adverse comments. Maybe consent is the answer to this question.

¹³¹ C F Swanepoel Universal Jurisdiction as procedural tool to institute prosecutions for international core crimes 2007 Journal of Juridical Science 32 (1) 118 – 143 on 140. (hereinafter Swanepoel) See also Swanepoel dissertation 326 stating utilize the opportunities it has created itself against international criminals.

¹³² As found by Joint Separate Opinion of Judges Higgins Kooijmans and Buergenthal in the *Arrest Warrant Case*. However see *Yee 520* that states that subsequent development has not strengthened the status of universal jurisdiction, rather it has weakened it..."

¹³³ It is stated by Hall 70-71 after describing the number of setbacks after the *Butare Four* case the principle of universal jurisdiction is still in danger: "*These unfortunate developments indicate that the future of universal jurisdiction remains in danger.*" The new developments in Africa points in the same direction.

¹³⁴ Dugard 199.

ground-breaking *SALT v NDPP*.¹³⁵ South Africa is not the first country in the world that is confronted with universal jurisdiction dilemma but the question is whether South Africa can follow a principled approach regarding universal jurisdiction and especially also in the light of the sensitivities around the ICC in Africa have to be answered. The question is thus whether the SA legislation does provide a proper solution to impunity in the African context. The further question is what can be done to enhance the principle and to ensure the positive complementarity¹³⁶ regime functions properly and impunity is addressed.¹³⁷ Thus the universal jurisdiction found in SA legislation is not without controversy and have already gave rise to what can be called public interest litigation. At the present time the heads of argument in the appeal by the State have been filed at the Supreme Court of Appeal. The decision by court of appeal is awaited.¹³⁸ Already there are voices for the abolishment even of the limited universal jurisdiction in the South African legislation and a critical look at the SA legislation is imperative. We are at cross-roads regarding universal jurisdiction in SA and Africa in general.

1.3. Approach in research

After the historic foundations¹³⁹ and especially the two underlying theories have been touched upon above with some reference to the most important cases in this opening chapter, it is imperative that the basic concepts, definitional- and foundational aspects relating to universal jurisdiction be clearly set out as there are lot of uncertainty about terms and concepts. Thus it is imperative that the conceptual framework be set out comprehensively for a full and proper understanding of the concept. The merits and flaws of the application of universal jurisdiction will be discussed after that, but it is especially the practical problems surrounding universal jurisdiction that must be highlighted. This constitutes a special challenge for the development of this concept not just in SADC region but over the whole continent of Africa. The present situation relating to universal jurisdiction in Europe has been adequately analysed¹⁴⁰ and need no further elaboration but especially the African attitude towards this concept universal jurisdiction and experience must be addressed. The role of universal jurisdiction in South African and the domestic legislation will be analysed before the role it can play in the continent's fight against impunity, will be evaluated. In this regard it is especially the ground-breaking inaugural case *SALT v NDPP*¹⁴¹ that will be analysed. Thus the South African Statute will be evaluated and shortcomings in and the requirements and institutional approach necessary especially on the African Continent will be addressed. The question of immunity is closely related to universal jurisdiction but it falls outside the scope of this study to address the complex and controversial issue.¹⁴² A sound and responsible approach to universal jurisdiction is required if this important "youthful infant" is not killed in the cradle and some recommendations and guidelines are made as to what is needed for the proper development of this concept to function especially in the African context.

¹³⁵ *South African Litigation Centre and another v National Director of Public Prosecutions and others* [2012] 3 All SA 198 (GNP) (hereinafter refer to as *SALT v NDPP*).

¹³⁶ See Du Plessis *ISS Paper 172*.

¹³⁷ Batog 1 and footnote 1.

¹³⁸ The parties will argue the matter before the SCA on the 1 – 2 November 2013.

¹³⁹ The legal underpinning of this concept is said to be uncertain, muddy and doubted by some.

¹⁴⁰ See Luc Reydam's and Human Rights Watch.

¹⁴¹ *SALT v NDPP supra*.

¹⁴² See also Lafontaine *Realistic Utopia* 1279 describing it as an issue of utmost contemporary relevance.

1.4. Basic premises

The dissertation will concentrate on the basic premise relating to universal jurisdiction in other words the pure ordinary case where universal jurisdiction is applied by a municipal court.¹⁴³ The exact parameters and conditions for the exercise of universal jurisdiction by a national legal order is thus the inquiry here. This dissertation will therefore primarily focus on the case in connection universal jurisdiction of national legal systems without any connection to the enforcing state other than the later presence of the accused in other words a case where none of the traditional jurisdictional nexuses exists and where the only nexus other than the later presence of the accused. The focus is not on international tribunals. However reference to international forums will have to be made for a proper consideration and evaluation of the principle of universal jurisdiction.

¹⁴³ Stephen A Oxman refers to this as “pure universal jurisdiction” and the other as “super pure case”: Macedo 64. I would rather opt for the use of **ordinary universal jurisdiction** but the traditional division of “absolute universal jurisdiction” and “conditional universal jurisdiction” must still be discussed. See Chapter 2. See however Inazumi and Yee regarding “newer” classifications and categorizations in next chapter.

2. FOUNDATIONAL ASPECTS AND BASIC CONCEPTS OF UNIVERSAL JURISDICTION

*The life of law has not been logic; it has been experience.*¹⁴⁴

In South Africa as in most of the countries influenced by Anglo-American common law, the principal basis for the exercise of criminal jurisdiction is the principle of territoriality.¹⁴⁵ In general there is no extra-territorial jurisdiction¹⁴⁶ in South African law. Moreover there is authority for the presumption against the extra- territorial operation of its criminal laws. Territoriality of criminal jurisdiction is the basic rule of most of the countries in the world.¹⁴⁷ Various countries, however, have historically claimed extensive extraterritorial¹⁴⁸ jurisdiction over offences of certain gravity. More generally, the trend in most States, including common law countries has been steadily to expand the ambit of their criminal law.¹⁴⁹ The expansion is the result either of new legislation or of judicial stretching of the territoriality and protective principle in existing laws.

Closely linked to the above is the doctrine of effectiveness which for a long time was regarded as one of the foundations of our law of jurisdiction.¹⁵⁰ In terms of that doctrine, a court should exercise jurisdiction only if it can give a judgment that will be effective or meaningful - in other words, if it can be enforced. Beccaria identified the dominant value of this system centuries ago:

The place of punishment can certainly be no other than **where** the crime was committed; for the necessity of punishing an individual for the general good subsists there and there only.¹⁵¹

Historically the rules of jurisdiction were thus exercised on the basis of the physical power of the state.¹⁵² In Roman law this jurisdiction was restricted to persons and property within the territorial control of the state. It has long been recognized that a judgment of court is worth nothing, if it cannot be enforced.

Jurisdiction takes various forms and the treatment of the basic concepts is very important. There should, for instance, not be a conceptual conflation of jurisdiction to **prescribe** (prescriptive jurisdiction) in criminal law with the manner of that **law's enforcement** (enforcement jurisdiction).¹⁵³ There should similarly be attention to crucial temporal considerations¹⁵⁴ namely

¹⁴⁴ Yee 511 and footnote 27 on 511. See D Morrison & JR Weiner "Curbing enthusiasm for Universal Jurisdiction" (2010) Berkeley J Vol 4 1 *International law Publicists* 1- 11 [hereinafter Morrison] 3 that states it makes both legal as well as common sense.

¹⁴⁵ F Jessberger & C Powell "Prosecuting Pinochet's in South Africa - Implementing the Rome Statute of the International Criminal Court" (2001) SACJ 14 [hereinafter Jessberger] on 351. See Dugard 135 and footnote 26: *R v Pienaar* 1948 (1) SA 925 (A).

¹⁴⁶ The exceptions high treason and terrorism for instance: *S v Basson* 2007 (3) SA 582 (CC) page 660 par 223.

¹⁴⁷ Reydams 220. Reydams discussion Part II shows. Inazumi also.

¹⁴⁸ The term extraterritoriality refers to the exercise of jurisdiction by a nation state over conduct occurring outside its borders: D Ireland- Piper "Extraterritorial criminal Jurisdiction: does the long arm of the law undermine the rule of law" Vol 3 (2012) 122 *Melbourne Journal of International law* [hereinafter Ireland-Piper] 127.

¹⁴⁹ Inazumi 4, 13, 31 and 37 and further.

¹⁵⁰ Pollak 207 – 208.

¹⁵¹ Beccaria "An Essay on Crime and punishment" 1958 reprint 135-6.

¹⁵² Christopher Forsyth Private International Law: The Modern Roman Dutch law including the Jurisdiction of the High Court 4 the Ed 2003 391 - 392.

¹⁵³ F Lafontaine "The Unbearable lightness of International Obligations: when and how to exercise jurisdiction under Canada's Crimes against humanity and war crimes act" 23.2 *Revue quebecoise de droit international* (2010) 1 - 50 [hereinafter Lafontaine *The Unbearable lightness*] on 12 discussing O' Keefe here. See also dissenting opinion of Judge van Wyngaert in *DRC v Belgium* 26 and par 49.

¹⁵⁴ O'Keefe 735.

when the requisite prescriptive jurisdictional *nexus* must be present. No dubious terminology¹⁵⁵ should be used. Therefore the basic concepts like: “What is meant by “universal jurisdiction” and the understanding of the concepts like *aut dedere aut judicare* is crucial. There is a tendency to elide prescription and enforcement in regard to jurisdiction.¹⁵⁶ It is also stated by Prof Sienho Yee: “as the term “universal jurisdiction” has been used by various people to indicate various things in varying degrees of density or looseness it will be helpful to offers some clarifications on the typology of situations that may constitute universal jurisdiction properly so called, or resemble it.”¹⁵⁷ Defining the concepts for a proper evaluation is therefore absolutely imperative. A call has thus been made for a more rigorous assessment of universal jurisdiction arguing that sometimes this term refers to such a broad range of things that it is hard to know what the different stakeholders mean when they use the term.¹⁵⁸

2.1. Terms and terminology

As the term universal jurisdiction has been used by various people¹⁵⁹ to indicate various things in varying degrees of density or looseness,¹⁶⁰ it is important to distinguish the different situations and provide some clarification. Great confusion¹⁶¹ has resulted from the fact that the “universality” has at least five meanings:

- (1) Universality of condemnation of certain crimes;
- (2) Universal reach of national jurisdiction which could be for international crime for which there is universal condemnation, as well as others;
- (3) Extraterritorial reach of national jurisdiction (which may also merge with universal reach of national legislation);
- (4) Universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and
- (5) Universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused.¹⁶²

It is imperative that some clarifications on the situations are offered as to what may constitute universal jurisdiction properly so called or resemble it.

¹⁵⁵ See O’Keefe’s conclusion that it led to unsatisfying conclusions regarding the permissibility of enforcement *in absentia* of universal jurisdiction and caused other judges to underestimate the degree of State practice in favor of universal jurisdiction on 735. I agree with Roger O’Keefe that this can bring about underestimation of the degree of state practice in relation to universal jurisdiction proper. It is also stated by him on 736 that the various judgments promote regrettable terminology.

¹⁵⁶ O’Keefe 735.

¹⁵⁷ Yee 508. Also see Inazumi 46: “*universal jurisdiction requires a thorough study as it is used with different connotations by many people.*”

¹⁵⁸ Tendayi Achiume “Domestic Treatment of Universal Jurisdiction” *American Society of International Law*. [hereinafter Achiume] This was stated by Professor Sienho Yee at this occasion on 6 2013.

¹⁵⁹ See also O’Keefe on 735: “*As well as fostering dubious terminology.*” See also 736: “*the various judgments promote regrettable terminology.*” See also Bassiouni 42 and footnote 17: “*The term universal has caused confusion and that is apparent in some judicial opinions.*”

¹⁶⁰ Yee 508.

¹⁶¹ See Inazumi 115: “*there is deep confusion as to the real meaning of universal jurisdiction.*”

¹⁶² Bassiouni 62 in Macedo.

2.2. Basic principles governing national criminal jurisdiction

The term jurisdiction refers to the ability of a State to make, apply and enforce rules of conduct upon persons both natural and legal, pursuant to its domestic laws.¹⁶³ By exercising jurisdiction, states assert a form of sovereignty.¹⁶⁴ Rules governing jurisdiction and international relations regulate the ability of each State to determine its own distinct societal and public order. In cases where States assert extraterritorial jurisdiction, sovereignties will overlap.¹⁶⁵ Within general international law there are currently no principles establishing a hierarchy of lawful jurisdictional claims. Jurisdiction refers therefore to the authority under international law to regulate the conduct of persons, natural and legal and to regulate property in accordance with its municipal law.¹⁶⁶ The emphasis in this study will be on criminal jurisdiction and the regulation of the conduct of persons.

There are three forms of jurisdiction: legislative, adjudicative and enforcement jurisdiction.¹⁶⁷ The extraterritorial assertion of legislative jurisdiction¹⁶⁸ is least controversial of these three forms, while extraterritorial assertion of enforcement jurisdiction will almost certainly impinge upon the territorial sovereignty of a State.¹⁶⁹ Legislative /prescriptive jurisdiction is the right of a State to enact legislation that influences the conduct of natural or legal persons. Adjudicative jurisdiction is the competence of domestic courts to receive, try and decide cases brought before them.¹⁷⁰ Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. Enforcement or executive jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws including the police or other government actors to investigate a matter, which might be referred to as investigative jurisdiction.¹⁷¹ Conduct that falls within the enforcement jurisdiction rubric includes conduct of judicial and non-judicial actors (like the police, prosecuting authorities and judges). Such conduct includes: "*interviewing witnesses, issuing search and arrest warrants, court orders for production of documents and attendance of witnesses, executing searches and seizures, detaining and arresting individuals, imposing of fines or imprisonment and other activities to 'use the resources of government' to induce or compel compliance with the law.*"¹⁷²

I agree with O' Keefe that jurisdiction is not a unitary concept.¹⁷³ Both the longstanding practice of states and doctrinal writings make it clear that jurisdiction must be considered broadly in two distinct aspects to wit jurisdiction to **prescribe** and jurisdiction to **enforce**.¹⁷⁴ Bassiouni also states the powers to enforce and prescribe law, are not always coextensive.¹⁷⁵ Jurisdiction to prescribe or **prescriptive jurisdiction** (sometimes called legislative jurisdiction) refers to a

¹⁶³ Bassiouni 40. O'Keefe 736. See interesting definition of Morrison 2: "*The term jurisdiction is a legal term commonly used to describe a state's authority to give effect to legal interests.*"

¹⁶⁴ See Inazumi 15 and 17.

¹⁶⁵ IBA Manual 334. See discussion under merits and flaws infra.

¹⁶⁶ O' Keefe 736.

¹⁶⁷ *R v Hape* [2007] 2 SCR 292, 2007 SCC 26.

¹⁶⁸ Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities *R v Hape supra* at 58.

¹⁶⁹ IBA Manual 334.

¹⁷⁰ It was also describe as "adjudicative" jurisdiction. It is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force: *R v Hape* at not 32 at 58.

¹⁷¹ S Coughlan et al in "Global reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalisation (2007) 6 C.L. L.T 32.

¹⁷² Perrin B "Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7 (4) of the Criminal Code (2009) 13 *Canadian Criminal Law Review* LR 175 179.

¹⁷³ O Keefe 736.

¹⁷⁴ O'Keefe 736. *R v Hape supra* 292.

¹⁷⁵ Bassiouni 40.

state's authority to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or in certain circumstances judicial ruling. Jurisdiction to enforce or **enforcement jurisdiction** - sometimes called "executive jurisdiction" refers to a state's authority to apply its criminal law, through police and other executive action and through the courts.¹⁷⁶ Simply put jurisdiction to prescribe refers to a state authority to criminalize given conduct, jurisdiction to enforce the authority *inter alia* to arrest and detain, to prosecute, try and sentence and to punish persons for the commission of acts so criminalized.¹⁷⁷ I agree with Fontaine that asserting jurisdiction is different from exercising it.¹⁷⁸

2.3. Traditional grounds¹⁷⁹ and accepted bases of heads of jurisdiction¹⁸⁰

In regard to jurisdiction to prescribe there are accepted bases and state practice reveal five basic types or heads of jurisdiction.¹⁸¹ As a matter of general international law and especially customary international law, states may assert their criminal law under each of these that has being thought to evidence sufficient link between the impugned conduct and the interest of the prescribing state.¹⁸² The two heads in regard to which there is no dispute are **territoriality**¹⁸³ and in relation to extraterritorial offences: **nationality**.¹⁸⁴ That is, a state may criminalize conduct performed on its territory as well as conduct performed abroad by one of its nationals. In addition, extraterritorial prescriptive jurisdiction over the conduct of non-nationals on the basis of so-called '**passive personality**' principle that is where the victim of the offence is a national of the prescribing state, appears to be generally permissible.¹⁸⁵ Extraterritorial prescriptive jurisdiction over the conduct of non-nationals is also permitted, although only in relation to certain offences, under what is known as the '**protective principle**'.¹⁸⁶ That is a state may assert criminal jurisdiction over offences committed abroad by aliens where the offences is deemed to constitute a threat to some fundamental or vital national interest for e.g. counterfeiting the national currency or threatening the State's security.¹⁸⁷ The assertion of criminal jurisdiction over extraterritorial conduct by aliens on the basis of the "**effects**" doctrine, that is where the offence is deemed to exert some deleterious effect within the territory of the prescribing state, remains controversial.¹⁸⁸ But apparently is not objectionable in all cases. Many states also assert prescriptive criminal jurisdiction over the extraterritorial conduct of non-nationals on a range of other bases thought to evidence a sufficient link with the prescribing state's interest e.g. on the basis of the offender's residency in that state or his service in that state's armed forces. Such assertions have seemingly excited no adverse reaction.¹⁸⁹ Finally even if the range of offences is contested, criminal jurisdiction over extraterritorial conduct of non-nationals also attaches to certain specific offences on the basis of **universal jurisdiction**¹⁹⁰ - that is, **in the absence of any other acceptable prescriptive jurisdictional nexus**.

¹⁷⁶ O'Keefe 736.

¹⁷⁷ O'Keefe 736 -7.

¹⁷⁸ Lafontaine 13. See dissenting opinion of Judge van Wyngaert par 49.

¹⁷⁹ Also see EU & AU expert group Report paragraph 12 on 8.

¹⁸⁰ See also O' Keefe 738.

¹⁸¹ Inazumi 21.

¹⁸² Rabinovitz 505.

¹⁸³ Inazumi 22.

¹⁸⁴ Also see Inazumi 22 – 23 and 24.

¹⁸⁵ O' Keefe 739. See also Inazumi 24.

¹⁸⁶ O' Keefe 739. See also Inazumi 25.

¹⁸⁷ AU & EU expert group Report par 12 on 8.

¹⁸⁸ O'Keefe 739.

¹⁸⁹ O'Keefe 739.

¹⁹⁰ O Keefe *ibid*. See too Dugard 154 as to the range.

2.4. Jurisdiction to enforce

While jurisdiction to prescribe can be extraterritorial, jurisdiction to enforce is by way of contrast, strictly territorial.¹⁹¹ A state may not enforce its criminal law in the territory of another state without that state's consent. The territorial character of the jurisdiction to enforce is seen most clearly with the impermissibility as of right of extra territorial police powers. The police of one state may not investigate crimes and arrest suspects in the territory of another state, without that other state's consent.¹⁹² It is also reflected in the judicial sphere; the criminal courts of one state may not as of right sit in the territory of another or subpoena witnesses or documents or take sworn affidavits abroad. The result of all this is that a state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce, do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but because the author of the conduct is abroad, not to enforce it.¹⁹³ At the same time general international law does not prohibit the issuance of an arrest warrant for a suspect or the trial of an accused *in absentia*, the legality of both being a question for the municipal law of each state. Nor does the territorial character of criminal enforcement jurisdiction, prevent the prescribing state from requesting extradition of a suspect from the territory of a state in which s/he is present or from requesting the police or judicial assistance from another state.¹⁹⁴

Therefore jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other.¹⁹⁵ The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that states asserted scope of application.¹⁹⁶ At the same time, while jurisdiction to prescribe and jurisdiction to enforce are mutually distinct, the act of prescription and the act of enforcement are **intertwined**.¹⁹⁷

Once again the well known principles of international law regarding normative jurisdiction stipulated in the *Lotus*¹⁹⁸ case can be referred to here. The general principle in international law is, therefore, that States are free to extend the application of their law as far as they desire, unless a rule of international law can be found which prohibits the exercise of such jurisdiction.¹⁹⁹ The above being said, in recent years the presumption of jurisdiction set out above in *Lotus* decision has been challenged by members of the ICJ and others.²⁰⁰

Many different types of universal jurisdiction have been discussed in the literature and in jurisprudence at different levels.²⁰¹ Debates were particularly fierce as regard the legality of exercising **universal jurisdiction in absentia** and whether imposing the presence of the accused on a state's territory would represent a form of "conditional" universal jurisdiction.²⁰²

¹⁹¹ O'Keefe 740.

¹⁹² O'Keefe 740.

¹⁹³ O'Keefe 740.

¹⁹⁴ O'Keefe 741.

¹⁹⁵ See also dissenting opinion of Judge Van Wyngaert in *DRC v Belgium* para 49 on 26.

¹⁹⁶ O'Keefe 741.

¹⁹⁷ O'Keefe 741.

¹⁹⁸ See discussion above dictum in *Lotus* case in Yee 524 - 526.

¹⁹⁹ See Dugard en and the Arrest warrant case.

²⁰⁰ See Rabinovitz 505- 506 and also Yee 525.

²⁰¹ See dissenting opinion of Judge van Wyngaert in the *DRC v Belgium* par 45 on 24 and 98-99.

²⁰² Lafontaine *The unbearable lightness* 11.

2.5. Universal jurisdiction in general

From the outset it should be stressed that universal jurisdiction is a species of jurisdiction to prescribe.²⁰³ Thus like the other heads of jurisdiction, universal jurisdiction is also a form of legislative jurisdiction.²⁰⁴ Sometimes separate reference is made jurisdiction to adjudicate²⁰⁵ or judicial- or curial jurisdiction. This specifically refers to municipal courts' competence to adjudge certain matters. O'Keefe stipulates that in the criminal context, this distinction is unnecessary.²⁰⁶ He states the application of a state's criminal law by its criminal courts is simply the exercise or actualization of prescription: both amounts to an assertion that the law in question is applicable to the relevant conduct.²⁰⁷ As a result a state's criminal courts have no greater authority under international law to adjudge conduct by reference to that state's criminal law, than has the legislature of the state to prohibit the conduct in the first place. Equally the trial and, in the event, conviction and sentencing of an individual for conduct prohibited by a state's criminal law is as much a means of executing or enforcing that law, as is the police's investigation, arrest and charging and prosecution of the individual under it. As such a state's criminal courts have no greater authority under international law to execute the state's criminal law than the police or other coercive organs and agents of that state have. Neither can operate as of right in the territory of another state.²⁰⁸ Thus the mainstream academic literature and the cases also premise their treatment of national criminal jurisdiction on the simple binary distinction between what are termed jurisdiction to prescribe and jurisdiction to enforce.²⁰⁹

Universal jurisdiction is also a form of extraterritorial jurisdiction. As was shown above in order for courts of a sovereign nation to assert jurisdiction over a crime, it traditionally must bear some special connection to that nation. This is traditionally accomplished one of two ways, either through the principle of territoriality, whereby the sovereign has jurisdiction over any crime committed within its borders, or, by means of active or passive extra-territorial jurisdiction, whereby a sovereign may assert jurisdiction over a crime which has occurred outside of its borders because either the victim or offender is a national.²¹⁰ As was also indicated there are additional means of extraterritorial jurisdiction to be found, for example in the courts of United States. These are based on the principles of "objective" territorial jurisdiction and protective jurisdiction, which extend jurisdiction to extraterritorial crimes with intended effects within national territory and to crimes with effects "dangerous" to the interests and integrity of the nation respectively.²¹¹

Universal jurisdiction by contrast is exercisable for a small number of crimes against international law, such as piracy, slavery, war crimes, drug trafficking, and genocide.²¹² Although these crimes do not directly affect the forum State in particular, they are of such a serious nature that perpetrators may be characterized as enemies of mankind in general, or *hostis humani generis*, and as such, any State has jurisdiction to try them.

²⁰³ O'Keefe 737. See also Yee 504.

²⁰⁴ See IBA Manual about the 4 types of jurisdiction. IBA manual International Criminal Law Manual 339

²⁰⁵ *Hape* at 58: Adjudicative jurisdiction is the power of the state's courts to resolve disputes or interpret the law through decisions that carry binding force.

²⁰⁶ O'Keefe 737.

²⁰⁷ O'Keefe 737.

²⁰⁸ O'Keefe 737.

²⁰⁹ O'Keefe 737 and see the cases *Arrest Warrant* and *Lotus* case before it.

²¹⁰ Batog 2/5.

²¹¹ Batog 3/5.

²¹² There is difference as to which crimes qualify under customary international law for this.

2.6. Definition: what is universal jurisdiction?

It is stated that there are no generally accepted definition of universal jurisdiction.²¹³ It broadly amounts to the assertion of jurisdiction by any State over crimes that are so heinous, regardless of any *nexus* the state may have with the offence, the offender or victim, and even if its nationals have not been injured by the acts. However, unlike the other heads of jurisdiction, there is no generally accepted definition of universal jurisdiction. Universal jurisdiction is usually defined negatively.²¹⁴ Thus, universal jurisdiction may be defined as jurisdiction that requires no reference to the place of perpetration, the nationality of the perpetrator, the nationality of the victim, nor any other recognized link between the crime and the forum State.²¹⁵

Reydams suggests that universal jurisdiction “*means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.*”²¹⁶ O’Keefe defines it as “*the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.*”²¹⁷

Universal jurisdiction has also been defined as follows:

*“Simply put, universal jurisdiction is the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offence took place and irrespective of the nationality of the offender or the victim.”*²¹⁸

According to the *Princeton Principles on Universal Jurisdiction, 2001* (‘the Princeton Principles’).²¹⁹

“Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”

It is stated by Prof Sienho Yee that given the fact that there is no internationally codified definition of universal jurisdiction at present, many proposed definitions and commentaries seem to have defined universal jurisdiction by an “absence” of the normal jurisdictional links to

²¹³ Hoover 6. See also dissenting opinion of Judge ad Hoc Van Wyngaert 3. This surprise O’ Keefe seeing the centrality of universal jurisdiction to the case. He queries the genuineness of the debate over the meaning of universal jurisdiction. He is of the opinion that it does not mean no single soundest definition of universal jurisdiction cannot be found or given: 744 – 745. See Jalloh 6. Arshakyan Mher Universal Jurisdiction: A Primer with a Note on Armenia on 1-2. Yee 504.

²¹⁴ See further O’Keefe 745.

²¹⁵ Thus under the principle of universal jurisdiction any State is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime or the nationality of the author or of the victim.

²¹⁶ Reydams 5; Principle 1(1).

²¹⁷ O’Keefe 745. The emphasis on “in the absence of any other accepted jurisdictional nexus” indicates to me that universal jurisdiction is an exception to the general rule. (like arrest by a lay person without a warrant)

²¹⁸ Swanepoel CF “ Universal Jurisdiction as procedural tool to institute prosecutions for international core crimes” 2007 Journal of Juridical Science (32) (1) 118 - 143 [hereinafter Swanepoel] and note 3 referring to Brandon

²¹⁹ Principle 1(1). Reydams suggests that universal jurisdiction: ‘*means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.*’ Reydams 5; O’Keefe 736 – 737, defines it as, “*the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.*” See also 745.

the national legal system attempting to exercise jurisdiction.²²⁰ He refers specifically to the definition of Institute de droit:

Universal jurisdiction in criminal matters **as an additional ground** of jurisdiction means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.²²¹ [Own emphasis added]

The AU & EU expert group defines it as follows:

*“Universal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory or another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exist at the time of commission of the offence.”*²²²

2.7. The essence of universal jurisdiction

In the view of the IDI rapporteur of the project:²²³ *“it was the absence of link between the crime and the prosecuting state that **captured the essence of universal jurisdiction.**”* [Own emphasis added].²²⁴ I agree that this captures the essence of universal jurisdiction.

The definition proposed by O’ Keefe’s also captures all the essential elements, is succinct and he states that it is sufficiently well agreed that **universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.**²²⁵ At the same time it must immediately also be stated that it is more usefully defined in opposition to what it is not.²²⁶

In positive slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are not resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to the effects within its territory.²²⁷

It must also immediately be said and emphasised that universal jurisdiction is short for universal jurisdiction to prescribe or universal prescriptive jurisdiction.²²⁸

²²⁰ Yee 504- 505.

²²¹ Yee 505 and footnote 3.

²²² It is very important to understand when the presence requirement is required to wit at the time of the commission of the offence. Subsequently is later explained in footnote 4 of AU & EU expert group Report to refer to subsequent to the commission of the alleged offence.

²²³ Yee 505 and especially footnote 4.

²²⁴ Yee 505.

²²⁵ O’ Keefe 745. I view this as the ultimate and correct definition. Also see Lafontaine 12.

²²⁶ O’Keefe 745 and see footnote 38.

²²⁷ O’ Keefe 745.

²²⁸ O’ Keefe 745 and 737.

2.8. Important distinctions

Universal jurisdiction under international law must not be confused with the validity of international law within a particular country, or the extra territorial operation of a national criminal statute.²²⁹

Universal jurisdiction as a concept of international law applies to the implementation of international law pertaining to the most heinous crimes under customary international law, which can be prosecuted in the municipal courts of any state irrespective of the locality of the crime. Some scholars categorize universal jurisdiction by its source. They contend that there are three forms of universal jurisdiction: unilateral universal jurisdiction, delegated universal jurisdiction and absolute universal jurisdiction.²³⁰

2.8.1. Distinction with jurisdiction of international tribunals²³¹

As a technical and conceptual matter, universal jurisdiction has to be distinguished at all times from the jurisdiction of international criminal courts and tribunals.²³² Universal jurisdiction relates to the competence of a state to prosecute persons before its own courts, rather than to the prosecution before an international judicial body. The jurisdiction of international tribunals is derived from the legal instruments creating them,²³³ whereas national universal jurisdiction as a rule requires legislative confirmation. See also Inazumi Mitsue²³⁴ that refers to **international criminal jurisdiction** exercised by various international criminal tribunals. The notions of universal jurisdiction and international criminal jurisdiction have been presented as being closely linked since the proposals of each have been simultaneously discussed on a number of occasions. Inazumi indicate that history shows, that the idea of universal jurisdiction gained support when international criminal courts were unable to be established, resulting in the incorporation of universal jurisdiction within conventional international law. Therefore it is understandable that there are schools of thought that consider universal jurisdiction and international criminal jurisdiction to be theoretical identical.²³⁵ However the similarities in the overall objectives and the rationales do not automatically lead to the conclusion that the same law and rule apply and that they should be exercised in the same manner. It should be emphasized that they are historically, theoretically and practically different.²³⁶

²²⁹ As to the distinction with extra-territorial jurisdiction see Pavlic 6 - 7.

²³⁰ *Inazumi 110 point 2.4.*

²³¹ Also see Yee 505 and Inazumi 114 point 2.5.

²³² AU & EU technical group Report par 29 on 33 – 34. Also see Gevers about the conference attendees in a conference in Africa that refers to it as “universal jurisdiction”. To a certain extent a tribunal have wider powers/competence than just territorial borders of one state. Different groups delegate/cede their competence and can prosecute for anywhere in area or nationality. Thus this has more universal application than to be restricted to one country. As to what is called an “indirect” type of universal jurisdiction: see infra.

²³³ Erasmus G and G Kemp “The Application of international criminal law before domestic courts in the light of recent developments in international and constitutional law” 2002 27 *SAYIL* on 66 and footnote 15. [hereinafter Erasmus & Kemp].

²³⁴ *On 239. Also see 114 point 2.5.*

²³⁵ See 117 and point 2.5.2

²³⁶ See chapter VI of Inazumi.

2.8.2. Security Council referral to ICC - universal jurisdiction?²³⁷

The Security Council referral of a situation to the ICC can also be viewed as some sort of quasi universal jurisdiction or a type of “delegated universal jurisdiction”.²³⁸ Therefore this type of referral is sometimes *referred to as* delegated universal jurisdiction.²³⁹ Similarly the Nuremberg International Military Tribunal can be seen as an international tribunal of **delegated universal jurisdiction**.²⁴⁰ Jalloh refer to the controversial ICC jurisdiction over the Sudan situation for instance and its treatment for all intents and purposes as equivalent to universal jurisdiction. Jalloh states that as a starting point the world penal court’s jurisdiction is treaty and consent based jurisdiction.²⁴¹ African leaders have taken the opportunity to make essentially the same complaint in relation to the ICC that they have been making about universal jurisdiction. Thus universality is seen as identical and the conjoined to the “evil twin” of ICC jurisdiction.²⁴² In the final analysis universal jurisdiction and ICC jurisdiction must as technical and conceptual matters always be distinguished.²⁴³ There is also a need to decouple universal jurisdiction from discussion about ICC jurisdiction.

The words “may” or “must” conceal an important nuance in regard to universal jurisdiction. In ordinary usage “universal jurisdiction” encompasses both permissive and mandatory forms, where a state **may** and where a state **must** exercise jurisdiction. This largely parallels the distinction between the doctrine’s manifestations under customary and under conventional international law.²⁴⁴ Inazumi also differentiate on the strength of the above according to the kind or type of universal jurisdiction people have in mind.²⁴⁵ He categorizes universal jurisdiction’s nature by two aspects: The first aspect is whether it is **permissive or obligatory** and the second is whether it is **supplemental or primary**.²⁴⁶

The phrase “universal jurisdiction” more accurately describes matters of custom than it does the jurisdiction that arises only *inter partes* through a convention.²⁴⁷

2.8.3. *Aut dedere aut judicare*²⁴⁸

The obligation *aut dedere aut judicare* is also conceptually distinct from universal jurisdiction *per se*. The establishment of jurisdiction under the universality principle or otherwise is logically a prior step. A state first vest its courts with competence to try given criminal conduct.²⁴⁹ It is only once such competence/jurisdiction has been established that the question whether to prosecute

²³⁷ Christopher Gevers chose to focus on indirect effects of the ICC on universal jurisdiction after most of the conference attendees were of the opinion that a SC referral to the ICC is universal jurisdiction. C Gevers “Africa and Universal Jurisdiction” 1 June 2012 warandlaw.blogspot.com [hereinafter Gevers *warandlaw*]

²³⁸ 138 of Swanepoel. One can also refer to it as **indirect** universal jurisdiction instead of “delegated” universal jurisdiction.

²³⁹ It is interesting that Christopher Gevers *warandlaw* did not view the ICC jurisdiction under a Security Council referral (Articles 13 (b) Rome Statute) as universal jurisdiction whereas the conference organizers (and many participants) did.

²⁴⁰ Dalila v Hoover 28 and footnote 123.

²⁴¹ Jalloh 25.

²⁴² See new development regarding Africa that want to withdraw from the ICC after the Kenyan matter *infra*.

²⁴³ Jalloh 26 and footnote 97.

²⁴⁴ Broomhall 401.

²⁴⁵ See Table on 29 and discussion from 28 – 30.

²⁴⁶ Inazumi 234.

²⁴⁷ Broomhall 401.

²⁴⁸ Also see Inazumi 121 and point 2.6.

²⁴⁹ It is stated by Yee: “*Extradite of prosecute*” is a means of exercising jurisdiction; it is not jurisdiction itself. The ways and means of exercising jurisdiction should not be conflated with jurisdiction itself “on 513 and footnote 31.

the relevant conduct or to extradite persons suspected of it arises. However the maxim may require a “type of universal jurisdiction” that has to be established beforehand, but universal jurisdiction nevertheless if the acts happened outside the forum state without any of the traditional bases for jurisdiction. It really makes provision for a type of quasi universal jurisdiction²⁵⁰ in given circumstances. The *aut dedere aut judicare* is a direction to establish *inter alia* universal jurisdiction “proper” between the treaty parties. I agree with O’Keefe in this respect. He states that the obligation to submit the case to the prosecuting authorities or to extradite applies as much in respect of the underlying jurisdiction based on territoriality, nationality, passive personality²⁵¹ as it does to universal jurisdiction.²⁵² I support whole heartedly the statement:

That the obligation *aut dedere aut judicare* is nonetheless relevant to the question of universal jurisdiction since such a provision compels a state party to exercise the underlying universal jurisdiction.²⁵³

In addition the state is also obliged to provide for this type of jurisdiction by treaty. It is stated by AU & EU expert group:

In short a state party to one of the treaties in question [with an *aut dedere aut judicare* provisions] is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extraditing.

See in this regard also Fontaine: “*The obligation aut dedere aut judicare is distinct from universal jurisdiction but it overlaps with it some extent.*”²⁵⁴ Bottini states the universality principle is certainly closely related to the maxim *aut dedere aut judicare*, but universal jurisdiction can apply to cases beyond the purview of that maxim.²⁵⁵ Fontaine refers to the Secretary General and concludes “*Therefore, in a sense an aut dedere aut judicare obligation is a direction as to how to enforce jurisdiction, which may or may not have been prescribed on the basis of universal jurisdiction.*”²⁵⁶

In the end I think O’Keefe is conceptually right here where he states “*as it might be mistaken to suggest that universal jurisdiction can never be grounded in treaty law*” (circumscribed as it is by the *pacta tertiis* principle). This is misapprehension and he refers to Higgins, Cameron and Cassese which states: “*as rightly pointed out by R Higgins, these treaties do not provide for*

²⁵⁰ Cassese Antonio points out: “*True as rightly pointed out by Higgins these treaties do not provide for universal jurisdiction proper, for only the contracting parties are entitled to exercise extraterritorial jurisdiction over offenders present on their territory. [therefore according to me no truly or totally universal) It may then be contended that such jurisdiction does not extend to offences committed by national of states not parties unless exceptional circumstances like the crime is indisputably prohibited by customary international law (like torture) . Nevertheless the fact remains that those treaties are important both on account of the high number of contracting state parties and because **they encapsulate the concept that states are entitled to sit in judgment over certain offences perpetrated abroad by foreigners.***[Own emphasis added]

²⁵¹ See Yee: “*The “extradite or prosecute” obligation may apply jurisdiction that has been justified on any basis, whether territoriality, nationality, national vital interests or even **universal concern**. Thus the adoption of this means of exercise of universal jurisdiction does not necessarily lead to the finding of a particular kind or basis of jurisdiction itself, but of all possible kinds utilized*” (on 513).

²⁵² But the universal jurisdiction applicable here, is universal jurisdiction nonetheless albeit between treaty parties and in that respect not truly universal in the true sense of the word.

²⁵³ However the underlying jurisdiction is universal jurisdiction in the true sense of the word.

²⁵⁴ Lafontaine 13.

²⁵⁵ Bottini 516 and footnote 59 and 60.

²⁵⁶ Lafontaine 13.

*universal jurisdiction proper for only the **contracting states are entitled to exercise universal jurisdiction** ...”* Cassese is substantially correct and sound but with respect it still can be proper universal jurisdiction in a given situation.²⁵⁷ O’Keefe correctly points out: “*The jurisdiction mandated by the relevant treaty provision is, in fact universal jurisdiction - that is prescriptive jurisdiction in the absence of any other recognised jurisdictional nexus.*”²⁵⁸ Judge Higgins, Kooijmans and Buergenthal view this as: “*By the loose use of language this has come to be referred to as “universal jurisdiction” though it is really an **obligatory territorial jurisdiction** over persons, albeit in relation to acts committed elsewhere.*” O’Keefe describes this terminology as unhelpful and with respect a trifle silly.²⁵⁹ In reality he states the exercises of jurisdictions in such cases are all manifestations of “universal jurisdiction” to wit universal jurisdiction to prescribe. All that is required is that the offender be subsequently be present in the territory of the prescribing state and this is a limitation strictly to enforcement.

2.8.4. A type of quasi universal jurisdiction²⁶⁰

Treaties setting out a regime of “universal jurisdiction” typically define a crime and then oblige all parties either to investigate and (if appropriate) prosecute it, or to extradite suspects to a party willing to do so. This is the obligation of *aut dedere aut judicare* (either extradite or prosecute) Once a state ratifies or accedes to a treaty, it has no option in the matter.²⁶¹ It is **obligatory**. Hence this form of jurisdiction is not truly “universal” but is a regime of jurisdictional rights and obligations arising **among a closed set of states parties**, and is thus not truly universal. Under customary law, states are (at least in the prevailing view) merely permitted to exercise universal jurisdiction over, for example, piracy on the high seas or crimes against humanity. Therefore the phrase “universal” jurisdiction more accurately describes matters of custom than it does the jurisdiction that arises *only inter partes through a convention*. Strictly speaking thus it is better to refer to this as a *type of quasi - universal jurisdiction* but universal jurisdiction nevertheless. Thus the principle *aut dedere aut judicare* by definition entails a **duty** of the state concerned to extradite or to prosecute the accused, while universal jurisdiction may refer only to a **right** of the state to prosecute.²⁶² Therefore it is a conventional regime that provide for mandatory universal jurisdiction, but universal jurisdiction nonetheless.

True universal jurisdiction applies only in the case of crimes under customary international law, in respect of which all states have the right to prosecute. Such crimes are limited to piracy, slave trading, war crimes, and crimes against humanity, genocide and torture. However in recent years a number of international crimes²⁶³ have been created by multilateral treaties, which confer wide jurisdictional powers upon states parties. It is stated by Dugard that this is a type of

²⁵⁷ And in this respect I agree with him. Maybe it is not truly universal in that encompass all the countries of the world, but the conceptual notion of jurisdiction outside of your territory with none of traditional bases come to the fore here for a bigger area comprising a number of states. In that sense it is ‘universal’ and not the traditional grounds.

²⁵⁸ O’Keefe 747. The only rider and proviso I would add is that in certain circumstances it can be proper universal jurisdiction nonetheless.

²⁵⁹ However Sienho Yee describe it as follows 509: “*if we were to call these situations “universal jurisdiction”, “universal jurisdiction” would be purchased at the price of diluting and cheapening the concept, we would be playing a game of words.*”

²⁶⁰ See Dugard 154. See also Sienho Yee on 517: “*Only when a treaty claims to give the parties thereto jurisdiction over crimes and suspects having no link with any of the parties to the treaty, one would see pure universal jurisdiction.*”

²⁶¹ Broomhall 399.

²⁶² Bottini 516 and footnotes 62 and 63.

²⁶³ See Erasmus & Kemp 66: *Some international agreements have established other crimes of international concern such as hijacking of an aircraft, terrorism, apartheid, drug trafficking crimes against protected persons. These agreements in principle only bind the states that are party to them. They have to prosecute offenders or extradite them aut dedere aut judicare.*”

quasi - universal jurisdiction²⁶⁴ in that signatory states are required to prosecute or extradite persons who happen to be present in their territory.²⁶⁵ But is proper to maintain the distinction between the universality principle and the principle of *aut dedere aut judicare* all the more so in the light that the latter has a mandatory character.²⁶⁶

2.9. The general principles of universal jurisdiction²⁶⁷

Judge ad hoc Christine Van den Wyngaert after stating that there is not a generally accepted definition of universal jurisdiction observed that states that have incorporated universal jurisdiction into their national laws, have reflected widely varied understandings of the concept.²⁶⁸ The AU – EU expert group reached the same conclusion.²⁶⁹ The panel refer among other difficulties to the diverse ways and legal bases (treaty or customary) that European as well as African states have understood and applied the doctrine in their national laws.²⁷⁰

International law, both customary and conventional international law regulates states' assertion of universal criminal jurisdiction. States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes, torture as well over piracy.²⁷¹ Over and above this and additionally numerous treaties oblige states parties to empower their criminal systems to exercise universal jurisdiction over crimes defined in those treaties, although the obligation extends only to the exercise of such jurisdiction when a suspect is **subsequently** present in the territory of the forum state.²⁷²

Van der Vyver states genocide, war crimes and crimes against humanity derive from customary international law and are furthermore subject to universal jurisdiction.²⁷³ It is stated that all crimes within the jurisdiction of ICC in other words genocide, war crimes and crimes against humanity are subject to universal jurisdiction.²⁷⁴ A survey of legislative approaches to universal jurisdiction in the national legislation of African States shows that jurisdiction over serious crimes of international crimes is exercised by virtue of customary international law²⁷⁵ and under treaties to which the African states are parties.²⁷⁶

Sometimes it is stated that it is the universally recognised heinousness of the alleged crime

²⁶⁴ It constitutes quasi universal jurisdiction but to me a type of universal jurisdiction nonetheless.

²⁶⁵ Dugard 154. See too Boister, Neil "The trend to 'universal extradition' over subsidiary universal jurisdiction in the suppression of transnational crime" *Criminal Justice in a New Society* 287 about subsidiary or secondary 290

²⁶⁶ Bottini 517.

²⁶⁷ As to universal jurisdiction Judge van Wyngaert in the Arrest Warrant case on 53 stated: "As a preliminary observation: I wish to make a linguistic comment. The term universal jurisdiction does not necessarily mean that the suspect should be present on the territory of the prosecuting state."

²⁶⁸ Jalloh 6 and footnote 19.

²⁶⁹ AU & EU expert group Report par 10 on 6.

²⁷⁰ Jalloh 6 and footnote 21.

²⁷¹ Dugard on 154 refer to the following in regard to customary international law: piracy, slave trading, war crimes, and crimes against humanity, genocide and torture.

²⁷² See footnote 5 in 5 of AU & EU expert commission Report for examples.

²⁷³ Van der Vyver on 108. See also later on 113.

²⁷⁴ With or without ratification of the ICC statute, SA is competent and not under an international obligation to bring to justice persons within its area of jurisdiction suspected of genocide, crimes against humanity, and war crimes (and certain other international offences) irrespective of where the crime was committed. Those crimes are, as a matter of customary international law, subject to universal jurisdiction and in terms of SA constitution customary international law is law in the Republic unless it is inconsistent with the constitution or an act of Parliament. See however Gerhard Erasmus and *Quagliani* case.

²⁷⁵ AU & EU expert group par 15 Report on 9 that refers to Cameroon, DRC, Ethiopia and South Africa.

²⁷⁶ As to the custom in African states see par 16 and further on page 10 and further AU & EU Expert Report.

itself²⁷⁷ that give rise to universal jurisdiction. It is also stated that universal jurisdiction trumps the principle of territoriality which in general determines the jurisdiction of courts of law in criminal matters. Crimes subject to universal jurisdiction - in a word - may be punished by any state having custody of the offender, irrespective of the place where the offence was committed.²⁷⁸

Very important treaty regimes that should be mentioned in regard to universal jurisdiction are grave breaches of the 1949 Geneva Convention and of 1977 Additional Protocol I, the crime of torture recognised in the Convention against Torture 1984, the crime of attacks on UN personnel under the Convention on Crimes against UN Personnel 1994 and the crime of enforced disappearance within the meaning of the Convention against Enforced Disappearance 2006.²⁷⁹ Each of the 1949 Geneva Conventions provides that States parties must seek out and either prosecute or extradite persons suspected of having committed 'grave breaches' of those Conventions, no matter if those suspects have any connection to that State party. The 1984 Convention against Torture similarly obliges States parties to prosecute or extradite suspected torturers regardless of whether there is any connection between that person and the State party.²⁸⁰

When not constrained by treaty or otherwise, states tend to exercise universal jurisdiction in a variety of ways.²⁸¹ Most national legislation and jurisprudence and practice may require that universal jurisdiction is to be exercised only if the suspect is subsequently present on the territory. I agree that clear distinction should be made between enforcement jurisdiction and prescriptive jurisdiction.

However the requirements as to subsequent presence or subsequent residency status have no impact on the characterisation of this head of jurisdiction as universal jurisdiction taken here to encompass all assertion of jurisdiction for crimes, which, at the time of the commission had no territorial or national link with the forum state.²⁸² The requirement that the offender subsequently be present on the territory does not affect the qualification of the head of prescriptive jurisdiction, and may be better understood as a political [and practical] choice as to the exercise of jurisdiction in other words - the enforcement. The practical reasons Lafontaine refers to are difficulties in relation to evidence gathering, fear of overburdening the court system and the municipal law's requirement that no trial *in absentia* should take place.²⁸³

In its modern incarnation the **doctrine** of universal jurisdiction asserts "national courts can and should try persons suspected of such international core crimes even if neither the suspect nor the victims are nationals of the country where the court is located and even if the crime took place outside that country." Thus universal jurisdiction allows courts in any nation to try crimes that rise to a standard which has been recognised by the international community as having a universal character.²⁸⁴ An aspect of this doctrine that its opponents find particularly distressing is that it functions to provide any court in the world with jurisdiction to hear charges against any

²⁷⁷ But see Inazumi that emphasize that second ground should also be taken into account.

²⁷⁸ Van der Vyver 114 - 115.

²⁷⁹ See also discussion in Dugard of International crimes 157 - till terrorism 169. Some confer universal jurisdiction some not.

²⁸⁰ For a more in-depth discussion of this obligation see section 'International Treaty Law Obligations or the "Aut Dedere Aut Judicare" Obligation' below. International Criminal Law Manual 339.

²⁸¹ AU & EU Expert group Report 9 par 10.

²⁸² La Fontaine 11 and footnote 46.

²⁸³ La Fontaine 12.

²⁸⁴ Respondeat 2/5.

alleged universal criminal. This jurisdiction persists (at least in theory) despite any objections on the part of the sovereign nation. The doctrine is at present a venerable part of international jurisprudence, tracing its origins to ancient times, being crystallised in many ways by jurists and legal scholars with the advent of Westphalian sovereignty²⁸⁵ but still under pressure from some quarters. This applies also to South Africa.

2.10. Concept and logic: The basic premise and ultimate rationale behind universal jurisdiction²⁸⁶

The justification for universal jurisdiction is that here the national court act as the agent of the international community in the prosecution of an enemy of all mankind in whose punishment all states have an equal interest.²⁸⁷ Swanepoel argues that the historical justification for universal jurisdiction and its current application are due to an age - old awareness of the international community that they share a common interest in the protection of universally held norms and values.²⁸⁸ Dugard also start with this presumption.²⁸⁹ “*Some conduct violates not only the domestic legal order of a state but also the international order.*” Swanepoel argues further about the premise²⁹⁰ of universal jurisdiction in his article: “*It has been illustrated in this article that the universal jurisdiction is premised on the notion that because of the heinousness of particular international crimes, national courts are afforded jurisdiction to prosecute these crimes in the absence of traditional jurisdictional links.*”²⁹¹

At the same time it must be stated that universal jurisdiction fills a gap left where other, more basic doctrines of jurisdiction provide no basis for national proceedings.²⁹² Under universal jurisdiction the fact that a crime did not occur within of have a discernible impact on the territory or security of the state (thus falling outside of territorial or protective principle jurisdiction) or that no national of the state perpetrated or was a victim of the act (active or passive personality jurisdiction), is no impediment to proceedings by that states authorities. Where international law recognise this form of jurisdiction, states have in effect acknowledge that any other state may or must investigate and prosecute a given crime even absent the usual jurisdictional links. As stated the words “may” or “must” is an important nuance. For universal jurisdiction encompass permissive as well as mandatory forms.²⁹³ The rationales underlying international law, in general, also support universal jurisdiction. First the serious crimes concerned are “of universal concern deserving condemnation in them and deemed to affect the moral and even security of interest of the entire international community. Second other bases of jurisdiction are insufficient to see perpetrators brought to account,²⁹⁴ as these acts are frequently committed by those who act from or flee to a foreign jurisdiction or by those that act under the protection of the state. As a result of these **normative** and **pragmatic** rationales, universal jurisdiction does not arise with respect to any and all crimes (as does jurisdiction under for example the territorial principle) but rather arises only with respect to particular offences. The pragmatic consideration is especially apparent with piracy on the high seas (the first crime to be subject to universal jurisdiction), slavery, and terrorism where the potential to evade justice through absconding and safe-havens

²⁸⁵ Respondeat 2/5.

²⁸⁶ Rabinovitz 516.

²⁸⁷ Dugard 157.

²⁸⁸ On 140 of Swanepoel.

²⁸⁹ 154.

²⁹⁰ Swanepoel 137.

²⁹¹ However see discussion about development above.

²⁹² Broomhall 401. See discussion in Chapter 1

²⁹³ Broomhall 401.

²⁹⁴ See discussion above about development.

is great. The normative impulse is more apparent with crimes against humanity and war crimes, the prosecution of which reinforces the declared interest of all states in upholding fundamental principles of humanity. Nonetheless both pragmatism and normativity play a role with respect of all these crimes. Pirates were labelled enemies of mankind (*hostis humani generis*) emphasizing the moral aspects of the condemnation, while war crimes and crimes against humanity are often committed by those whose political power renders their state as a de facto safe haven, a driving consideration in the post-War development of international criminal law generally.

The concept and logic of universal jurisdiction is understandable as each State has an interest in matters of universal concern.²⁹⁵ True or pure universal jurisdiction is jurisdiction solely based on the universal concern character of the crime in issue.

Behind the absence of any of traditional bases façade however rest the basis for such an assertion of universal jurisdiction, normally formulated this way: the alleged crime is an attack on the fundamental values of the international community as a whole (i.e. a violation of *jus cogens* or a species of law that is very close to that genus however described, such as *erga omnes obligations*)²⁹⁶ so that the crime is a matter of universal concern, considered as such by the international community as a whole and that every state in the world has an interest in prosecuting the perpetrator.²⁹⁷ Another instrumental reasoning which may apply with greater force to some situations than in others is that the exercise of universal jurisdiction is **necessary** in order to ensure that certain crimes be punished and not go unpunished. For example piracy, normally committed on the high seas, may go unpunished if universal jurisdiction does not exist. As such, these crimes are also of universal concern perhaps of a slightly different kind. Sienho Yee state that so understood it would seem better to characterize universal jurisdiction as **universal concern jurisdiction**.²⁹⁸ This is in some contrast to other forms of jurisdiction such as territoriality jurisdiction, nationality jurisdiction and national interest jurisdictions. These terms and terminology would make immediately apparent the justification behind each assertion of jurisdiction. A definition of universal jurisdiction of universal concern jurisdiction should be the exercise of national jurisdiction based on universal concern over crimes that attack the fundamental values of international society.

The logic of universal concern jurisdiction is thus easy to understand. Sienhou Yee refers here to Barcelona Traction case. Although not totally on all fours with the subject matter it is still regarded as the ultimate rationale for universal jurisdiction.²⁹⁹

By the very nature the former are the concern of all states. In view of the importance of the rights involved all States can be held to have a legal interest in their protection: they are 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.

²⁹⁵ Yee on 503.

²⁹⁶ However universal jurisdiction is not a necessary corollary of universal concern, even when that concern assumes *jus cogens* proportions. The sole fact of the violation of a rule that attains the *jus cogens* status does not give rise to the jurisdiction of the International Court of Justice or another international tribunal as the Court rule in *DRC v Rwanda* nor do violations of *erga omnes* rights of obligations alone as the Court also ruled in *East Timor*. Yee 505.

²⁹⁷ Yee 505 and footnote 6.

²⁹⁸ Yee 506.

²⁹⁹ Yee 506.

Thus as a general proposition there are certain matters in the world that are of universal concern, and this universal concern is sufficient to justify certain action on the part of states. This rationale alone or this rationale plus another factor potentially would justify a state to exercise of universal jurisdiction.³⁰⁰

Consent alone founds international jurisdiction or the jurisdiction of international courts and tribunals. However, everybody must agree that higher norms and principles are involved; although the justification of the exercise of jurisdiction by a national legal order is our inquiry here. The imperative to defend the fundamental interests of the international community through criminal process has frequently been said to endow national courts exercising universal jurisdiction with the *de facto* status of agents of the international community, the declared values of which the proceedings vindicate. To confer such a role on national authorities however raises complex practical difficulties.³⁰¹

It is also thus the act of capture, in the **forum deprehensionis** that provides the state with competence under international criminal law to prosecute the offender (the enforcement). It is the act of capture that allows enforcement. The ICC Act in South Africa in section 4 (3) (c) reflects this position under international law when it provides that a South African Court will have jurisdiction over a crime against humanity committed by a person outside South Africa where “that person after the commission of the crime, is present in the territory of the Republic.”³⁰² It must also immediately be stated that the degree to which any particular state will invoke the principles of universal jurisdiction will depend on a state’s constitutional and criminal justice system.³⁰³

2.10.1. Discretion and choice

It must be emphasized that the rules of pure universal jurisdiction are merely permissive and the forum state have choice or discretion. It must be emphasized that international law permits states to exercise jurisdiction over international crimes. It does not compel them to do so in the absence of treaty obligation.³⁰⁴ Under customary international law, these bases of jurisdiction are, like universal jurisdiction, merely permissive: a state is not obliged to assert a jurisdiction granted to it by custom.³⁰⁵ But the various treaties mentioned above oblige states parties to empower their courts to exercise jurisdiction over the crimes in question on the above and sometimes further cases.³⁰⁶

Some commentators assert that universal jurisdiction simply does not exist.³⁰⁷ Nevertheless, the prevalent view, which is consistent with current State practice, is that States have the right to assert universal jurisdiction over genocide, war crimes, crimes against humanity and torture.³⁰⁸

³⁰⁰ Yee 507. See discussion above about rationale for the development of universal jurisdiction.

³⁰¹ Broomhall 403.

³⁰² Du Plessis *ISS Paper* 172 on 5.

³⁰³ Swanepoel 120. Also see van der Vyver 115 – 116.

³⁰⁴ Dugard 155. AU & EU Expert group Report par 13.

³⁰⁵ AU & EU Expert Group Report par 13 on 8.

³⁰⁶ See the categorization by Inazumi on 29.

³⁰⁷ See Alfred Rubin, ‘Actio Popularis, Jus Cogens and Offences Erga Omnes’ (2001) 35 *New Eng. L Rev* 265.

³⁰⁸ See, e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Rep 3; Israeli Supreme Court *Adolf Eichmann v Attorney-General of the Government of Israel* (Case No 336/61) (29 May 1962) (1968) 36 ILR 227, para (196); *Prosecutor v Furundžija* (Trial Judgment) ICTY-95-17/1-T (10 December 1998); *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147; and *US v Yunis* 30 ILM 403 (1991). See also Amnesty International’s global study of domestic laws, *Universal Jurisdiction:*

Piracy, by its very nature, requires the assertion of universal jurisdiction, since by definition it occurs on the high seas, i.e. outside any territorial jurisdiction. Under some treaty arrangements, States are in fact obliged to assert a type of universal jurisdiction over certain crimes.³⁰⁹

2.10.2. Therefore: What is universal jurisdiction?

From the several ways in which the applicability of domestic criminal law can be extended to acts committed outside the territorial boundaries of the prosecuting State, the furthest reaching is universal jurisdiction.³¹⁰ The universality principle is based on the assumption that certain crimes are so 'universally condemned that the perpetrators are the enemies of all people' and therefore any nation which has custody of the perpetrators may punish them according to its law applicable to such offences.³¹¹ In principle, no link or connection between the prosecuting state and the act of the individual other than the 'international concern' of the crime itself is necessary. Most authorities agree that crimes under customary international law are eligible for universal jurisdiction. This principle entitles any state to try certain egregious offences regardless of wherever or by whomever they have been committed. It applies to international crimes *stricto sensu*. It is stated that it is not applicable to transnational crime *per se*.³¹²

In the case of certain crimes, the link establishing a state's jurisdiction may be absent when the crime by its nature is so heinous that it is viewed as a crime against mankind, a crime *contra omnes*. It is therefore the **heinousness of certain international crimes** that may be regarded as the dominant 'trigger' of universal jurisdiction³¹³.

The principle of universal jurisdiction derives from international customary law [now] and has been codified through certain international conventions, which have been adopted by almost all states.³¹⁴ The effect of these conventions is that perpetrators of certain crimes (such as genocide) may be punished by any state on behalf of the international community, regardless of the status of the offence and the nationalities of the offender and offended. Particularly since World War II there are certain crimes that are generally considered international crimes. Their violation is regarded as an offence in terms of international law and national or international courts /tribunals may try such crimes. Examples of such international crimes under customary international law are war crimes, piracy, slave trading, genocide, crimes against humanity and torture:³¹⁵

2.11. Two types of universal jurisdiction, the traditional approach

To simplify, the plethora of literature on universal jurisdiction a distinction is usually drawn between two basic types. In academic literature, universal jurisdiction is often split into two subcategories: 'absolute', 'pure' or 'true' universal jurisdiction (the broad notion of universality) and the second the narrow 'conditional' or strict universal jurisdiction (the narrow notion of universality).

The duty of states to enact and implement legislation, AI Index: IOR 53/002-018/2001, (31 August 2001), available at <www.amnesty.org>.

³⁰⁹ However, it has been argued that these treaties do not provide for universal jurisdiction proper, since only States Parties have the right to assert extraterritorial jurisdiction, though this argument seems to be proffered by the minority. See Roger O'Keefe 735 and 746.

³¹⁰ Floris en Jessberger 357.

³¹¹ *Demjanjuk v Petrovsky* 776 F2d 571 (582) (US courts of Appeals 1982).

³¹² On 295 of Boister, Neil The trend to 'universal extradition' over subsidiary universal jurisdiction in the suppression of transnational crime. *Criminal Justice in a New Society* 287

³¹³ Swanepoel on 119.

³¹⁴ Swanepoel on 119.

³¹⁵ Swanepoel on 120.

2.11.1. Absolute universal jurisdiction³¹⁶

Absolute universal jurisdiction³¹⁷ arises when a State seeks to assert jurisdiction over an international crime (usually by investigating it and/or requesting extradition of the suspect) regardless of whether the alleged perpetrator has been apprehended or is even present in its territory ('universal jurisdiction *in absentia*'). Under this version, so called universal jurisdiction in absentia state may at least theoretically investigate and or prosecute suspects for certain serious international crimes. They do not need any of usual territoriality nationality or other jurisdictional nexus to the offence. On this view the suspect need not even be in the forum state for a case to be initiated. Modern international law frowns upon trials *in absentia*. Often it is also the victims or the relatives residing within a jurisdiction that initiate complaints with investigative authorities setting the justice machinery in motion. Spain and Germany were among the best examples of this type of universal jurisdiction. Belgium was even more notorious for its universality law which did not require any connection to admit victim complaints. I agree with O'Keefe that one should actually subscribe to such jurisdiction but see Inazumi.³¹⁸

Absolute universal jurisdiction or **universal jurisdiction unbound** which would permit a state to prosecute for international crimes any person who is found any place in the world. It is stated by *Abi Saab*: A state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim and even of whether or not the accused is in custody or at any rate present in the forum state. However, as many legal systems do not permit trials *in absentia*, the presence of the accused on the territory is then a condition for the initiation of trial proceedings. Clearly this conception of universality allow national authorities to commence criminal investigations of persons suspected of serious international crimes, and gather evidence about these alleged crimes as soon as such authorities are seized with information concerning an alleged criminal offence. They may thus exercise criminal jurisdiction over such persons, without requiring that the person first be present, even temporarily, in the country. As stressed above, such exercise of jurisdiction should be premised on the failure of the territorial or national State to take proceedings, and should therefore not be activated whenever one of those States initiates proceedings

Some national states do not limit universal jurisdiction to the exercise over persons present in their territory and go further by allowing their courts to issue warrants for arrest of persons outside their own territory³¹⁹ and thus permits the exercise of universal jurisdiction *in absentia*.³²⁰ Question whether international law permits the exercise of universal jurisdiction by national courts over persons *in absentia* was decided in the *Arrest-warrant case - the DRC versus Belgium*. Judge Guillame President of the Court found that the international law does not recognize universal jurisdiction except for the crime of piracy and universal jurisdiction is unknown to internal law. Judge Higgins, Kooijmans and Buergenthal in a separate but joint opinion stated that universal jurisdiction may be exercise only over those crimes regarded as heinous by the international community such as piracy, war crimes, crimes against humanity and genocide, and that 'a state may choose to exercise a universal jurisdiction in absentia as

³¹⁶ Cassese 286.

³¹⁷ Also referred to as universal jurisdiction "unbound" Fletcher: *Abi Saab* on 4 ICJ reports. Australia calls it super universal jurisdiction 265 Macedo Lloyd Axworthy. See Inazumi 104.

³¹⁸ Inazumi 26 – 28.

³¹⁹ Dugard 155.

³²⁰ AU & EU expert group Report state on 6 par 10. Also see Dugard 155 that discusses the *Arrest Warrant case* here and the conclusion of the *Arrest Warrant state*.

there is no rule of international law that prohibits this.³²¹ Judge ad hoc Van Den Wyngaert likewise held that there is no conventional or customary international law or legal doctrine that supports the proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting state.

One of the few states that have adopted absolute universal jurisdiction Belgium has amended its legislation to essentially dispense therewith.³²² It can be stated that this was mainly because of political pressure. It is clear that there is no consent regarding such a wide jurisdictional ground to prosecute people who are not present in your territory. Other states such as Spain still retain wide jurisdictional statutes but in practice judges tend to require some connection with the forms as a precondition for the exercise of jurisdiction³²³. Professor Claus Kreb writing in 2006 expressed the views that the small number of states which have adopted universal jurisdiction *in absentia* is a minority and is insufficient to assert the creation of a new rule of customary international law in regard to this form of jurisdiction.³²⁴ Most of the States in Africa also chose to implement a limited universal jurisdiction.³²⁵

One must really ask if universal jurisdiction *in absentia* is a distinct head of jurisdiction, the lawfulness of which must be proved in its own right.³²⁶ O’Keefe starts off by discussing this “disaggregated” jurisdictional category and states that it is most open to question. One can specifically refer to Judge Guillaume speaking of the jurisdictional provision common to many criminal conventions. He stated: “*Universal jurisdiction in absentia is unknown to international conventional law.*”³²⁷ It is submitted that this also finds resonance in academic literature.³²⁸ Respectfully the approach by the judges conflates the states’ jurisdiction to prescribe with enforcement of criminal law. The fact is prescription is logically independent from enforcement. Since prescription is logically distinct from enforcement, the legality of the latter can in no way affect the legality of the former. Universal jurisdiction to prescribe is either lawful or it is not. Similarly the issuance of a warrant *in absentia* and trial *in absentia* is either lawful or is not. As far as international law goes, the last two are lawful as the quote from Judge Higgins, Kooijmans and Buergenthal demonstrate:

Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right to a fair trial but has little to do with the bases of jurisdiction recognised under international law.

As a matter of international law, if universal jurisdiction is permissible then its exercise *in absentia* is logically permissible,³²⁹ also whether it is prudent is a different question.

I agree with Antonio Cassese: “*In short the cases and legislative amendments referred to above, only sound the death knell for absolute jurisdiction (which one could also term*

³²¹ *Arrest Warrant* case separate opinion par 9. See also par 12.

³²² Cassese *JICJ* 589 – 590.

³²³ Dugard refers to Roth-Arriaza footnote 54 and Guatemala genocide case (2003) ILM 683; Peruvian Genocide Case (2003) 42 ILM 1200.

³²⁴ Prof Claus Kreb *Universal Jurisdiction over International Crimes and the Institut de Droit International Journal of International Criminal Justice* 4 (2006) 577.

³²⁵ See discussion in Chapter 4.

³²⁶ O’Keefe 749.

³²⁷ Separate opinion of Judge Guillaume par 9 *Arrest Warrant* Case. See also par 12.

³²⁸ Reydams refer also to Cassese.

³²⁹ Agree with O’Keefe 750 that it is a different question whether it is desirable.

“universality unbound” or “wild exercise of extraterritorial judicial authority”).³³⁰

If the novel term “universal jurisdiction *in absentia*” must be used at all, then it refers to a combined manifestation of two distinct aspects of national criminal jurisdiction namely the enforcement *in absentia* and of universal prescriptive jurisdiction. I agree with O’Keefe that one does not talk of territorial jurisdiction *in absentia*, nationality jurisdiction *in absentia* or passive personality jurisdiction *in absentia*.³³¹ Therefore one should not really talk of universal jurisdiction *in absentia*.³³² The enforcement should be kept distinct from the basic principle of prescription.

2.11.2. Criticism of absolute universal jurisdiction

One should not find universal jurisdiction nefarious,³³³ because of the perception that it corresponds to what Professor Cassese calls “absolute universal jurisdiction” or “universal jurisdiction unbound” which would permit a state to prosecute any person who is found any place in the world for international crimes. *Abi Saab*³³⁴ states that with due respect to the most esteemed three judges who appended a joint separate opinion to the judgment of the International Court of Justice (ICJ) in the *Arrest Warrant* case: “*I do not consider that such an unlimited extension of the doctrine of universal jurisdiction is workable in the still largely interstate system of present day international law. Nor does it tally with the origins of the doctrine which turned on the captus as the ratio of the exercise of universal jurisdiction by the forum deprehensionis. Thus, neither the terms of practicality or of legal reasoning nor in those of positive law can such an extension [to universal jurisdiction in absentia] be justified.*” He states that states are free to devise cooperative schemes for the suppression and prosecution of international crimes, including the extradition of suspects and accused *inter se*. However one of the states between them must have such as suspect or accused in custody, if the prosecution is based solely on universal jurisdiction.³³⁵

2.11.3. Conditional universal jurisdiction or narrow notion

The more accepted version of universal jurisdiction is the narrow one where there is at least the presence of the accused on the prosecuting state’s territory is required to trigger universal jurisdiction.³³⁶ Cassese refers to this as “the narrow notion” (conditional universal jurisdiction).³³⁷ According to this more widespread version - the narrow notion - only the State where the accused is in custody may prosecute him or her (the so-called *forum deprehensionis*) or jurisdiction of the place where the accused is apprehended. Thus, the presence of the accused on the territory is a condition for the existence of jurisdiction.

This class of jurisdiction is accepted, at the level of customary international law, with regard to piracy.³³⁸ At the level of treaty law it has been upheld with regard to grave breaches of the 1949 Geneva Conventions and the First Additional Protocol of 1977, torture (under Article 7 of the 1984 Torture Convention), as well as terrorism (see various UN - sponsored treaties on this

³³⁰ Cassese *JICJ* 595.

³³¹ O’Keefe 750 en 751.

³³² See also Yee 508: “*Sometimes universal jurisdiction in absentia is used to describe this type of jurisdiction but this term can be confused with “trial in absentia” and is not preferred here.*”

³³³ *Abi Saab* 601 referring to Professor Fletcher.

³³⁴ *Abi –Saab* 601.

³³⁵ *Abi –Saab* 601.

³³⁶ Swanepoel on 123 and note 22 on this page referring to Brandon and Cassese.

³³⁷ On 285.

³³⁸ Cassese 286 with reference to A Cassese, “When may Senior State Officials be Tried for International Crimes? Some comments on the *Congo v Belgium* Case” 13 *EJIL* (2002) at 857 -8.

matter.³³⁹ These treaties however do not confine themselves to granting the power to prosecute and try the accused. They also oblige States to do so, or alternatively to extradite the defendant to a State concerned (the principle of *aut prosequi aut dedere*).³⁴⁰ This version of the universal jurisdiction principle is also applied in the national legislation of some European states, such as Austria, Germany, and Switzerland.³⁴¹ The same is the situation with some of the states in Africa.

Conditional universal jurisdiction is universal jurisdiction requiring the presence of the alleged perpetrator on the territory of the apprehending State. Outside of the academic literature, the distinction between the narrow and broad notions of universal jurisdiction is 'non-existent at a conceptual level'.³⁴² States that have adopted the use of the more limited conditional universal jurisdiction have done so not so much as a matter of law but rather out of political pressure and international courtesy.³⁴³ In other words, States have generally not recognized absolute universal jurisdiction as a distinct category of jurisdiction since, as a matter of international law, if the prescription of universal jurisdiction is permissible so is its exercise *in absentia*. Nonetheless, it has generally been accepted that the use of absolute universal jurisdiction is less desirable than that of conditional universal jurisdiction. Indeed, the use of the narrower notion of universal jurisdiction has been advanced by a number of judges and writers as a more sensible, realistic and politically convenient approach to take. It is further argued that universal jurisdiction should only be used as a '**default jurisdiction**'.³⁴⁴ This means that unless the territorial State or State of nationality is unable or unwilling to carry out proceedings, much in line with the principle of complementarity that limits the operation of the ICC, other States should not assert jurisdiction based on universality. I agree with such an approach.

Under this approach the country where the accused is arrested has the right and perhaps even the obligation to prosecute. A pre-condition for the application is the presence of the accused in the territory of the concerned state. The examples of European states that rely on the narrower version of concept of universal jurisdiction in their domestic criminal law include Austria, France and Switzerland.

2.12. Modern expositions and classification as well as typology of situations of universality

As to the categorizing and clarification of the variations of universal jurisdiction Sienho Yee provide the following typology of situations that may constitute universal jurisdiction in order of

³³⁹ Cassese 286 and note 13 referring to : "See for instance Article 7 of the Hague Convention on the Suppression of unlawful seizure of aircraft of 1970; Article 7 of the Montreal Convention on the suppression of unlawful acts against the safety of civil aviation (sabotage), of 1971. Article 8 of the 1979 Convention against the taking of hostages, Article 7 of the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation".

³⁴⁰ A fine distinction should be made between universal jurisdiction and the *aut dedere aut judicare* principle as discussed above.

³⁴¹ Cassese 286 and footnote 14 on Switzerland. In France, courts have applied Article 2 of the law of 2 January 1995 implementing the Statute of the ICTY. For the application of the relevant provisions of the Geneva Convention of grave breaches, it was required that the offender be on French Territory. See footnote 15 on 286 of Cassese referring to *Javor and others case*.

³⁴² 1398 Cryer et al (n4) 45.

³⁴³ 1399 For example, in 2003 Belgium amended its universal jurisdiction laws, significantly narrowing their application, as a result of direct pressure from other governments including the US, which threatened to have the NATO Headquarters moved from Brussels; see Universal Jurisdiction in Europe, The State of the Art, Human Rights Watch Report Vol 18, No 5(D) (June 2006), 2, available at <www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe>. Accessed 30 November 2009.

³⁴⁴ 1400 Cassese *JICJ* 589, 595.

strength of “universalness”:

- (1) Pure universal concern jurisdiction;
- (2) Universal concern plus presence jurisdiction;
- (3) Universal concern plus treaty and presence jurisdiction;
- (4) Universal concern plus treaty, presence and intra-regime territoriality of national jurisdiction³⁴⁵

Regarding the categorization of universal jurisdiction Inazumi states that many people neglect the differences in the nature of the perceived universal jurisdiction. He states one has to be careful in comparing their opinions since the content of their arguments varies according to the kind of “universal jurisdiction” they have in mind. Therefore in order to avoid any misunderstanding whenever universal jurisdiction is discussed two aspects of its nature must be distinguished. First is it a right or an obligation? Second is it supplemental or primary? In accordance with this, he classifies universal jurisdiction as permissive/obligatory and supplemental / primary.³⁴⁶ As the difference between a right and obligations are clear, he explains supplemental universal jurisdiction as follows: “*Universal jurisdiction may entail a **supplementary character when the extradition of suspects is given preference over its exercise for instance.***” The exercise of universal jurisdiction is thus supplementary to the request. On the other hand, universal jurisdiction may become primary **jurisdiction** when a requested state demonstrates **no preference for extradition** notwithstanding the existence of an extradition request made by other states. In other words notwithstanding a request for extradition it does not carry priority, the country still exercise universal jurisdiction notwithstanding the extradition request. The above two aspects may produce different combinations. For instance universal jurisdiction can be considered a right as well as having a supplementary character, or it may be viewed as obligatory and primary. The four possible combinations are explained by him with the aid of a table.³⁴⁷

2.13. Conclusion³⁴⁸

The fact that states require **subsequent** presence, **subsequent** nationality and **subsequent** residency over crimes under general international law, and that there is more state practice to support the permissibility of universal jurisdiction over such offences than Judges Higgins, Kooijmans and Buergenthal and *a fortiori* President Guillaume and Ranjeva and Rezek agreed to, is significant. I agree that these three manifestations of jurisdiction are rightly to be considered and counted as exercises of **universal jurisdiction to prescribe**.³⁴⁹ In sum, the circumscribed enforcement of universal prescriptive jurisdiction is not without more cogent evidence for ambivalence on the part of states over the permissibility under general international law of the assertion of universal jurisdiction.³⁵⁰ This is potentially significant given the respective findings that general international law does not recognize universal jurisdiction over war crimes and crimes against humanity. The question is just how many states require subsequent

³⁴⁵ Yee on 3 to 4.

³⁴⁶ See the table on 29 of Inazumi’s book.

³⁴⁷ Inazumi 29.

³⁴⁸ I predominantly support O’ Keefe in this regard. The custom in Africa is also to implement “limited” or conditional universal jurisdiction in the implementing legislation. Compare discussion in Chapter 4.

³⁴⁹ O’ Keefe 759.

³⁵⁰ O’ Keefe 758.

presence, subsequent nationality and subsequent residency can we say it is custom and does it exhibit opinion juries. At least there is a trend.³⁵¹ It is stated by Antonio Cassese: “*Things do not go bad for ‘conditional universality’ - the moderate conception of universality as a default jurisdiction (or justitia supletoria - supplementary justice³⁵² as termed by the Spanish High Court). Such jurisdiction may only be triggered when the territorial or national state fails to act, and provided the prosecuting state shows an acceptable link with the offence.* It is stated by Cassese that this category of extraterritorial jurisdiction not only remains alive, but is also susceptible to important developments.³⁵³

A growing number of states condition the exercise of universal jurisdiction to the presence of the accused on the states territory³⁵⁴ or to the accused who subsequently become a resident of the state. There is however a need to differentiate universal jurisdiction *in absentia* from “ordinary” universal jurisdiction. Inazumi conducts a theoretical analysis of the status of universal jurisdiction under conventional and customary international law. It is observed that customary international law neither specifically recognizes nor prohibit it.³⁵⁵ The study of Inazumi concludes that universal jurisdiction in general is not prohibited under international law and is thereby legal.³⁵⁶ In the absence of a specific rule prohibiting it and in accordance with the wide discretion given to States in choosing what kind of jurisdiction they provide in their domestic law, permissive universal jurisdiction is therefore legal. More dubious is universal jurisdiction **in absentia** since there is much resistance from States and the practices of States are so small and to divergent to evidence its acceptance.³⁵⁷

When the AU & EU expert group discussed the outcomes and custom in the European situation the following is stated about the custom:

[S]ome proceedings have been initiated by the prosecuting authorities, but many others have been brought or sought by private individuals. There have been differing outcomes in these proceedings. Some prosecutions have led to convictions. The majority of these cases have been discontinued on various grounds, including the recognition of immunities accorded by international law. The prosecutorial discretion not to bring proceedings has been exercised in many cases. In several cases proceedings have been deferred in favor of proceedings in the International criminal court tribunal for former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).³⁵⁸

Similarly Prof van Shack highlighted some of the serious practical challenges and legal hurdles that are responsible for the limited number of universal jurisdiction prosecutions worldwide.³⁵⁹ One has to analyze these legal hurdles and practical difficulties before making a final assessment as to the central question regarding universal jurisdiction in the South African situation.

³⁵¹ However some see as a downtrend: Yee 520: “Subsequent development has not strengthened the status of universal jurisdiction; rather it has weakened it... In a sense, the fortune of universal jurisdiction peaked in 2002 when Arrest Warrant was decided.”

³⁵² See conclusion in Chapter 7.

³⁵³ As suggested by Louise Arbour in her editorial comment in the 2003 issue of *Journal of International Criminal Justice* JICJ: Cassese 589 - 595.

³⁵⁴ Fontaine 11 and footnote 44.

³⁵⁵ The same conclusion is made by Rabinovitch.

³⁵⁶ Inazumi 234.

³⁵⁷ Inazumi 235.

³⁵⁸ AU & EU expert group Report par 26 on 31.

³⁵⁹ Achiumne Domestic Treatment of Universal Jurisdiction 6 April 2013. This is discussed in the next chapter.

3. MERITS AND FLAWS OF UNIVERSAL JURISDICTION³⁶⁰

“Why my court? Why not theirs?”³⁶¹

As stated crime has its strongest impact on the territory where the crime took place.³⁶² It is far more likely that admissible evidence and testimony can be secured in a state where the offence is committed, than by transferring the process elsewhere. According to critics, the principle of universal jurisdiction justifies a unilateral act of wanton disregard of the sovereignty of a nation or the freedom of an individual concomitant to the pursuit of a vendetta or other ulterior motives, with the obvious assumption that the person or state thus disenfranchised, is not in a position to bring retaliation to the state applying this principle.³⁶³ The most obvious consequence of the application of universal jurisdiction that should be mentioned at the outset, is that as the exercise of universal jurisdiction in general would become more frequent, all States would become empowered to try serious international crime, which will obviously have the advantage of reducing the impunity enjoyed by the perpetrators of some of the most heinous crimes.³⁶⁴ However it must immediately be stated it would raise concerns regarding the stability of international relations, multiple prosecutions, disproportionate use against non-Western nationals and the role of international Tribunals.³⁶⁵ For a proper evaluation of this principle it is imperative that the main pitfalls and benefits of universal jurisdiction have to be analyzed properly. Legal limitations³⁶⁶ for example, the presence of the suspect³⁶⁷ on the territory of the prosecuting forum state, may be required before the commencement of trial proceedings. This has been discussed *supra*, but in particular also the practical limitations regarding universal jurisdiction that has to be fully comprehended. It should not be thought that states are eager to exercise universal jurisdiction. Such jurisdiction is cumbersome, costly and its results are uncertain.³⁶⁸ These prosecutions have the daunting complexity of prosecuting cases in a far-away country with the concomitant practical difficulties.³⁶⁹

It is stated by Broomhall:

[T]his doctrine stands to become an integral albeit supplemental component of the emerging international justice system. At the same time serious obstacles stand in the way of its realization as a consistently available tool of fair and impartial enforcement. These obstacles are in some measure technical bearing on the need

³⁶⁰ Some describe it as “pitfalls” and “drawbacks”. Others indicate it as a “criticism” of universal jurisdiction: Cassese 292. Hoover discusses this under the headings “Risks and Obstacles”. She also refers to the “dangers”. The other term that is being used is “limitations” (Hoover 20). It has also been referred to as “defects”, “flaws”, “vagaries” and “fluctuations”. Broomhall refers to “hard legal problems” on 406 and Inazumi on 201 and 211 refers to “problems.”

³⁶¹ Orentlicher 8 referring in footnote 10 to Michael Kirby “Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points” in *Universal Jurisdiction: National Courts and the Prosecution of International Crimes*” (J Macedo Ed) University of Pennsylvania Press in Macedo.

³⁶² Kaleck states that as such there are many practical, procedural, criminological, political and social reasons that crimes should be investigated and prosecuted where they were committed: Kaleck 961.

³⁶³ Hoover states that the phenomenon of the proliferation of cases highlights the dangers of universal jurisdiction and states that the damage caused remains considerable. Except for the toning down of legislation it is unclear what damage is referred to.

³⁶⁴ Rabinovitz 518.

³⁶⁵ See the solution Hoover recommends that to remove universal jurisdiction and confer it on the ICC so that these crimes are punished fairly and according to uniform laws.

³⁶⁶ This is discussed more broadly under evaluation in Chapter 7.

³⁶⁷ See AU & EU expert group Report 22. For Denmark see footnote 91; France footnote 92, Ireland footnote 93 and Netherlands footnote 94 and UK footnote 95 on 21.

³⁶⁸ *Abi Saab* 600.

³⁶⁹ See discussion later on in this chapter.

for implementing legislation and appropriate international agreements. They are also to some extent inherent in the nature of universal jurisdiction.³⁷⁰

He continues and state to confer such a role regarding universal jurisdiction on national authorities however raises complex practical difficulties which the international community are only beginning to address.³⁷¹ Finding the best place for a prosecution requires a sixth sense for political sensitivities.³⁷²

3.1. Main confrontation with sovereignty³⁷³

The notion of universal jurisdiction has always been subjected to two main criticisms. The first is that the national courts of a state would interfere in the internal affairs of another State, in violation of a fundamental principle of international relations.³⁷⁴ In effect what one is witnessing in this instance is a confrontation³⁷⁵ between two different concepts of international law. The first is the “archaic” concept under which non-interference in the internal affairs of other States³⁷⁶ constitutes an essential pillar of international relations.³⁷⁷ The second is a modern view, based on the need to further universal values; it implies that national judges are authorized to circumvent the shield of sovereignty. Sovereign equality of states and the prohibition on foreign intervention in the domestic affairs of a state has also long been a traditional feature and a founding principle in international law.³⁷⁸ The exercise of extra territorial jurisdiction in another state’s territory without permission is forbidden by international law. It is restricted by the “sovereign equality of states, territorial sovereignty and non-intervention.” See articles 2(1); 2 (4) and 2 (7) of the UN Charter respectively.³⁷⁹ The international architecture of 1945 preserved an insulated and carefully protected sphere of domestic affairs. Article 2 (7) of the U.N. Charter provides: “*Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.*”³⁸⁰ As recognised by the UN charter, Article 2 (1) all states enjoy “sovereign equality” that is all states are equal members of the international community of states and are to be treated accordingly.

³⁷⁰ Broomhall 400.

³⁷¹ Broomhall 403.

³⁷² Van der Wilt 1066.

³⁷³ *SALT v NDPP* on 211 d-e. See also Bottini 555 for discussion.

³⁷⁴ For example, Chile put forward this argument in a memorandum to the UK on the possible extradition of General Pinochet to Spain: Cassese 292. The same objection against the exercise of universal jurisdiction was raised by the Congo against Belgium before the International Court of Justice, in the Case concerning the *Arrest Warrant* of 11 April 2000.

³⁷⁵ It can also be referred to as “*inherent friction.*”

³⁷⁶ See Rabinowitz 506 about the shrinking of this idea. See also D Tladi The African Union and International Criminal Court: The battle for the Soul of international law: “*The characteristic of the new (and emerging) international law include a move away for a state-centric model of traditional law based on the preservation of sovereignty to one more concerned with humanity. This idea of a limited view of sovereignty “ which bring moral value to order” is also reflected in what Jones, Pascual and Stedman has referred to as “responsible sovereignty a notion that sovereignty entails obligations and duties to one’s own citizens and to other sovereign states.*” On 63 (2009) Sayil 34.

³⁷⁷ See also Rabinowitz on 505: “*That said, in recent years, the presumption of jurisdiction set ou int the Lotus decision has been challenged by members of ICJ.*” And further: “*...expressed doubts as to the doctrine’s continued applicability in the contemporary context of globalization, international cooperation and an increasingly limited conception of State Sovereignty.*” (on 506)

³⁷⁸ Swanepoel CF “ Universal Jurisdiction as procedural tool to institute prosecutions for international core crimes” 2007 *Journal of Juridical Science* (32) (1) 118 - 143. On 119 and see footnote 1 where the writer discusses territory of Dugard.

³⁷⁹ 290 of Boister, Neil The trend to ‘universal extradition’ over subsidiary universal jurisdiction in the suppression of transnational crime. *Criminal Justice in a New Society.* P 287. See also *S v Hape* para 40 on 31.

³⁸⁰ Kontorovich 2004: 240 as quoted by Swanepoel 137.

Universal jurisdiction by its very nature violates sovereign equality of states by allowing one state to judge the actions of the officials of another. The principle therefore disregards one of the precepts of international law.³⁸¹ This was also the second main complaint by the AU that the political nature and abuse of the universal jurisdiction-principle by European judges, violates the sovereignty and territorial integrity of the concerned African States.³⁸² It is noteworthy that the preamble to the Rome Statute specifically stipulates nothing shall be taken as authorising any party to intervene in an armed conflict **or the internal affairs of any State**.³⁸³ It is the opinion of Hakan Friman that this provision was specifically enacted in order to prevent States justifying interventions into the internal affairs of other States.³⁸⁴

The exercise of universal jurisdiction thus may impinge or at least detract from, the principle of sovereignty and sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecutions, thus destabilizing international relations. Henry Kissinger described this kind of jurisdiction as dangerous. It is also stated and argued that exercise of universal jurisdiction will most likely favour the big and powerful states.³⁸⁵ If such states are agents for the international community, one should ask whether such agents should be self-appointed by a particular State itself.³⁸⁶ Furthermore, the political nature of universal jurisdiction is on full display when the attempt to exercise universal jurisdiction by states, may indeed be tradable as in the case of Belgium which decided in 2003 to scuttle its strong universal jurisdiction authorization when threatened by the prospect of the NATO headquarters moving away. The same applies to some extent in the case of Spain which in 2009 dismantled its own strong universal jurisdiction authorization when Judge Garzon began to dig into some of Spain's old dirty laundry.³⁸⁷

Under this heading one should also refer to the "grounds of hesitation" mentioned by Judge Kirby.³⁸⁸ He mentions in the first instance the natural inclination of a judge who is asked to assert jurisdiction over crimes that have no natural link to their country to wonder: "*why my court? Why not theirs?*" This inclination stems in part from the belief that "*crime is by its definition an offence against the society in which it occurs.*" It is forcefully stated that this instinct is not a matter of myopic self-regard; rather it reflects what Justice Kirby calls: "*a proper sense of inhibition in intruding into an area that can readily be perceived as primarily the concern of the institutions (including the courts) of the country most concerned.*" To his mind, this sensibility reflects a proper regard for principles of self-government by the community most affected by atrocious crimes.

On the flip side of the coin of this regard for democratic legitimacy, is a keen awareness by national judges, at least those who operate within the framework of a democratic tradition, that they were appointed or elected to serve a particular community - the community in whose territory they render judgment. It is from that community that judges derive their legitimacy to exercise jurisdiction.³⁸⁹ It is very difficult to exercise criminal jurisdiction from afar and Abi-Saab agree with Fletcher that the territorial judge is the best placed for that purpose. He is closest to

³⁸¹ Morrison and Weiner Curbing enthusiasm 6.

³⁸² Jalloh 28 and footnote 105.

³⁸³ It is stated in *S v Hape* p 45: "...at the apex of which sits the principle of non-intervention."

³⁸⁴ Hakan Friman "The international Criminal Court negotiations and key issues. *African security Review* Vol 8 No 6 1999 on 7-8.

³⁸⁵ Yee 510.

³⁸⁶ Ibid.

³⁸⁷ Yee 510-511. See also Pavlic 84.

³⁸⁸ See Orentlicher 9.

³⁸⁹ Orentlicher 9.

the scene, the *dramatis personae*, and the social environment of the crime - not to mention the evidence and the witnesses. This is why in European doctrine he is called sometimes the 'natural judge.'³⁹⁰

Thus the inherent tension between two legitimate notions cannot be ignored in a discussion relating to universal jurisdiction and consent in International law also remains important.³⁹¹ A balanced approach is needed for weighing of different interests.³⁹² Perhaps a balanced solution could be found in the imposition of limits on the exercise of universal jurisdiction, coupled with an insistence on the protection afforded by personal immunities to some categories of incumbent senior state officials. Universal jurisdiction should only be exercised when the person accused is present on the territory of the prosecuting state or has close links for instance has residency with that state, or the alleged victims of the crimes are nationals of the state or resides there. In addition trial *in absentia* should be rule out.³⁹³ No one differ from the generous ideal underpinning this system to end impunity. Nonetheless, in Cassese's opinion various reasons militate against absolute universal jurisdiction, at least if resorted to with regard to political or military leaders.³⁹⁴ Critics have challenged the legitimacy of universal jurisdiction also on grounds relating to democratic values.³⁹⁵ An American critic denounced the proceedings on the grounds that "...morally and politically, what Pinochet's regime did or did not do, is primarily a question for Chile to resolve." Had British authorities extradited Pinochet to Spain one can argue: "A Spanish magistrate operating completely outside the Chilean system will effectively have imposed his will on the Chilean people. One is sorely tempted to ask: Who elected him. Also some worry whether the courts of bystander states have either the wisdom or resources to pass fair judgment on crimes committed a world away."³⁹⁶

The home State of the accused, or where s/he allegedly committed the crime, is likely to view the assertion of universal jurisdiction by foreign nations as an unwarranted intervention in its internal affairs. The potential result is obviously increasing taxed relations with the relevant state. The risk is even more acute in States that allow for the initiation of criminal proceedings by private individuals (*actio popularis*) or where the government does not tightly control prosecutors.³⁹⁷ In these countries, the institution of proceedings by prosecutors or private citizen could alienate states that the Government would not normally risk offending through the exercise of universal jurisdictions. It is stated by Bottini: "*Indeed some instances of the application of universal jurisdiction have already created tensions even among countries with long standing political ties.*"³⁹⁸

The prevalence of territorial jurisdiction which had ruled the classical jurisdictional regime, is still

³⁹⁰ Abi- Saab 600.

³⁹¹ See Pavlic 84.

³⁹² It is stated by Pavlic 84: "Consequently, one might argue that if universal jurisdiction is currently merely a paper tiger, it poses no threats to state sovereignty and is unlikely to cause serious changes in our international state-based system."

³⁹³ Cassese Antonio The Belgian Court of Cassation v the International Court of Justice: the Sharon and others Case. *Journal of International Criminal Justice* 1, 2 Oxford University Press 2003. See also Pavlic 84: "... in its 'pure' form it is largely a failure". See discussion in previous chapter supra.

³⁹⁴ Cassese 289 note 26.

³⁹⁵ Also see the article A Zemach "Reconciling Universal Jurisdiction with Equality before the Law" Volume 47 Issue 1 *Texas International law Journal* 143- 199.

³⁹⁶ Orentlicher 4-5.

³⁹⁷ This effect would be exacerbated in future decisions by internal tribunals. One can adopt Judges Higgins, Kooijmans and Buergenthal requirement that prosecutors must act "in full independence without links or control by government of that state" in order for universal jurisdiction to be exercised objectively. Governments would be unable to stay the prosecutions that threaten the stability of their international relations with other states and this can have an impact of international relations.

³⁹⁸ See footnote 225 that refers to Belgium a NATO ally.

relevant today.³⁹⁹ Even under the modern jurisdictional regime, territorial jurisdiction is considered to be the major and most ordinarily practiced jurisdiction and there is a strong presumption in favour of territorial jurisdiction. This is also especially true for Africa. There are always sovereignty sensitivities, but in the end I agree with Lloyd Axworthy that the application of universal jurisdiction does not entail the diminution of state sovereignty but rather the enforcement of a collective and fundamental international system of justice.⁴⁰⁰ It is stated by Inazumi: “*Universal jurisdiction is not per se in breach of the principles of State Sovereignty, the sovereign equality of States or non-interference in the internal affairs of another state.*”⁴⁰¹ A trend is however gradually emerging, at least in Europe (and to lesser extent in Africa) towards a weakening of the traditional principles of sovereignty and territoriality, to the benefit of transnational integration⁴⁰² or internationalism.⁴⁰³

Whenever the necessary prudence is not used, the exercise of universal jurisdiction may easily lead to international disputes. This for instance happened in the aforementioned case of the Congolese former foreign minister against whom a Belgian investigating judge had issued an arrest warrant. The Congo filed an application with the International Court of Justice, claiming that the arrest warrant ran counter to the principle of sovereign equality of States and the rules of diplomatic immunity attached to such a State official.⁴⁰⁴ Thus a case pertaining to the criminal responsibility of individuals became the subject of an interstate dispute. In other words, the case was moved from an inter-individual level to that of the State-to-State relations. This is contrary to the very logic of international criminal justice. In the absence of a jurisdictional hierarchy, reliance on these principles of universal jurisdiction may throw up problems of concurrent jurisdictions that will involve disputes about the comparative strengths of the connection between the crime and prescribing state. It is worth noting at the outset that the status of a ‘reasonable’ jurisdictional connection is as much a political as a legal problem.

3.2. Hindering of international diplomatic relations⁴⁰⁵

A second main objection closely related to the above, is that national courts would hinder international diplomatic relations, whenever the suspect or the accused is a State agent in office, all the more so when he is a high representative such as a Head of State or a foreign affairs minister, etc.⁴⁰⁶ Thus the frequency with which this type of jurisdiction is exercised will pose the risk of undermining the stability of international relations.⁴⁰⁷ It is also a practical limitation, the awareness of the part of many prosecuting authorities and courts of diplomatic sensitivities at stake when the conduct of a serving, and in some cases former, state officials is involved.⁴⁰⁸ One might end up seriously jeopardizing the smooth functioning of international

³⁹⁹ Inazumi on 246. See *R v Hape* (supra) para 43 on 33: “*Nevertheless, despite the rise of competing values in international law, the sovereignty principle remains one of the organizing principles of the relationship between independent states.*”

⁴⁰⁰ Lloyd Axworthy 268.

⁴⁰¹ Inazumi 234.

⁴⁰² Cassese 591 refers to the European arrest warrant which when issued in one European country under certain conditions, may automatically be executed in all the others.

⁴⁰³ Pavlic 84.

⁴⁰⁴ See in Cassese 15.6.

⁴⁰⁵ See *SALT v NDPP* supra indicating how it would influence the SARPCO -relations of the Police. On 212 a-b and again 216h-i.

⁴⁰⁶ In this connection, the case of Fidel Castro is relevant, for in that case Spanish Court propounded a balanced and legally apposite solution to this intricate matter. The case dealt with charges laid against an incumbent head of State, Fidel Castro, the Spanish Court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985: Rabinovitz 521.

⁴⁰⁷ Rabinovitz 521.

⁴⁰⁸ Par 25 AU & EU expert group Report 27.

relations. The African Union expressed similar concern and stated that exercise of universal jurisdiction over State officials can result in harassment while adversely impacting on the effective performance of their official functions.⁴⁰⁹

Finally, given the number of diplomatically and politically high profile cases which would be brought before the courts, the judge would eventually become entangled in roles normally played by the political authorities, with consequent danger of infringing the sound principle of separation of powers. As experience has shown, in both instances regional as well as domestic, the proceedings risk getting entangled in a web of political interests related to domestic as well as foreign policy considerations of the respective states.

The vagaries and fluctuations of international politics are well known. It is stated:

The worst problem with universal jurisdiction is not in diaphanous legal footing but is fundamental inappropriateness in the realm of foreign policy. In effect (and in intention), the NGO's and theoreticians advocating the concept and misapplying legal forms in political (and military) contexts. What constitutes crimes against humanity and whether they should be prosecuted or handled otherwise - and by whom - are not questions to be left to lawyers and judges. To deal with them as such is, ironically so bloodless as to divorce these crimes from reality. It is not merely naïve, but potentially dangerous.⁴¹⁰

The rather erratic practice of universal jurisdiction by the Belgian judiciary on the basis of the 1993 war crimes law - which was disposed of, by way of amendments, rather quickly at the initiative of an embarrassed government - has demonstrated to the most naïve observer of international affairs that the requirements of global justice are not compatible with foreign policy interests of a nation-state. In the end I agree with Antonio Cassese: Universal jurisdiction would no doubt entail the subjection of the judiciary to former or current high ranking dignitaries involved in actions showing a marked political dimension. The submission of high politics to judicial scrutiny may not be eschewed or else one should leave unchecked misconduct involving large scale murder torture, persecution or genocide. The dilemma is clear: either we take human rights seriously, which demands the consistent prosecution and punishment of those who grossly trample upon them, or else we only pay them lip service.⁴¹¹ With the application of universal jurisdiction one cannot shy away from the political dimension of these cases.

3.3. Abuse⁴¹²

An Israel lawyer has pointed to the application of universal jurisdiction in a certain instance as legal acrobatics and a clear abuse of the principle of universal jurisdiction, a new tool in the box belonging to his countries detractors and critics. Advocates of the Jewish state have coined the term "lawfare" to describe the situation: a strategy of using or misusing law as substitute for traditional military means to achieve military objectives. States may abuse universal jurisdiction

⁴⁰⁹ This is also inherent in objection to Kenyan situation and extraordinary session of AU on 11- 12 October 2013.

⁴¹⁰ Inazumi quoting John R Bolton see footnote 24. See also The Wall Street Journal where he describes the antidemocratic consequences in the real world of universal jurisdiction. Dec 15 2009. He opines: "*it has grown explosively in recent years as self-styled human rights activist advocates have pushed to criminalize national actions they find offensive. Today's version of universal jurisdiction masquerades as a legal concept but is in fact a form of political morality. He states command responsibility has been transmogrified* ... [Own emphasis added] He concludes: "*But to substitute the judgments of self-designated international Platonic Guardians for representative governments and independent judiciaries is perilous at best and authoritarian at worst.*"

⁴¹¹ Cassese 595.

⁴¹² See also on abuse by states: Inazumi 200 and Hoover 14.

to prosecute the nationals of enemy states as a means of gaining a political advantage or impugning their reputation in the international community. In some cases, States might initiate investigations and prosecutions even where the allegations against an accused are clearly baseless. As a result, the exercise of universal jurisdiction is likely to exacerbate tensions between States currently involved in conflict. Cherif Bassiouni states: “*Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes.*” Even with the best intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potentially abuses of legal processes and undue harassment of individuals.

Former Secretary of State, Henry Kissinger, who was himself the subject to questioning under the principle of universal jurisdiction, argued that universal jurisdiction must not allow legal principles to be used as weapons to settle **political scores**. In 2003, the US Secretary of State, Colin Powell, denounced the risks associated to the exercise of universal jurisdiction that may render the task of public officials carrying out their duties, more difficult. The Bush administration was also worried that anti-American activists around the world might invoke universal jurisdiction to bring frivolous and politically motivated prosecutions against US officials for alleged international crimes. As a result of the political pressures exercised by the US Belgium repealed its universal jurisdiction law.

3.4. Aimless investigations and useless costs

If the authorities are obliged to apply universal jurisdiction *in absentia* and if the accused never enters the country where the court is located, or is not extradited to that country, a situation that appears most likely, is that the judge may end up investigating hundreds of complaints about which he can do nothing.⁴¹³ Universal jurisdiction could lead to a grossly inefficient use of judicial resources. The question is: Why go to the trouble of investigating and preparing a case if there is no realistic prospect of ever actually prosecuting it? Implementing states can end up in the unwanted role of the world police force.⁴¹⁴

Furthermore the cost⁴¹⁵ involved in criminal prosecutions based on universal jurisdiction is huge.⁴¹⁶ If successful prosecutions based on universal jurisdiction are the aim, sufficient funds must be made available.⁴¹⁷ Funds made available for the previous international tribunals were always limited and the amount initially allocated to investigation work always had to be replenished. Universal jurisdiction also makes the ownership of the relevant entitlement - the right of a state to prosecute particular conduct - broad and hazy, and thus difficult to transact. It creates a barrier to the efficient resolution because no one state can guarantee “*non prosecution.*” It is thus unsurprising that states with a significant interest in international law enforcement appear to neither want other states to use subsidiary universality nor to use it themselves.

Bottini describe violating fundamental rights and due process as his number one objection

⁴¹³ Responses to Gregory Gordon: Should Mere Presence in the Forum State Be Enough to Trigger Universal Jurisdiction.

⁴¹⁴ However Jessberger 360 says it is unfounded and not justified.

⁴¹⁵ On 550. The cost involved in criminal prosecutions is huge. See footnote 20 on 5 of Fontaine. Also see Kontorovich Article “The Inefficiency of Universal Jurisdiction” that involves an economic analysis of universal jurisdiction.

⁴¹⁶ See footnote 20 on 5 of Fontaine.

⁴¹⁷ Kontorovich Article “The Inefficiency of Universal Jurisdiction”.

against universal jurisdiction.⁴¹⁸ A judge, who decides to go ahead with the trial regardless of the absence of the accused, conducting proceedings *in absentia*, is likely to be criticized for violating the fundamental rights of the accused. Moreover, the absence of the accused normally linked to the fact that the State of nationality refuses to extradite, could worsen the problem of establishing the facts because neither the accused nor the State in question will co-operate in the search for evidence. A further possible criticism is that, if all countries put a system modeled on the erstwhile Belgian (or Spanish) law into practice, the risk of inconsistent rulings would be great and no one would know how to establish priorities between competing courts.

3.5. Forum shopping

According to Cassese the existence of some states national law granting universal jurisdiction, may prompt victims of atrocities to engage in so-called “forum shopping”. In other words, it may attract such victims and induce them to file complaints against alleged perpetrators.⁴¹⁹ Another concern raised by the recognition of universal jurisdiction *in absentia* is that multiple prosecutions of the same individual could ensue, as the number of States entitled to exercise jurisdiction would substantially increase.⁴²⁰ The number of prosecutions in the case of universal jurisdiction *in absentia* could be virtually unlimited. In practice, many States would not initiate proceedings, due to the high costs associated with investigating crimes committed in another country. Increasing the number of prosecutions and investigations would inevitably lead to conflicts over access to evidence and to the accused, and would increase the likelihood of conflicting decisions which would undermine the legitimacy of the judicial systems in all States that have exercised jurisdiction.⁴²¹ Harm van der Wilt states that Albin Eser is certainly correct in holding that the problem of transnational **multiple prosecutions** cannot be imputed solely to universal jurisdiction, but it cannot be denied that the frantic exercise of this principle aggravates the problem.⁴²² The splintering of prosecutions with some accused in one country and other in the other state is also undesirable because no complete picture of the offence emerges to allow a court to attribute liability and penalties in an appropriate manner.⁴²³

3.6. Neo colonialist approach?⁴²⁴

It is stated by some that Western nations have traditionally exercised universal jurisdiction to prosecute non-Western nationals and leaders.⁴²⁵ It is not hard to understand how the selective use of universal jurisdiction is perceived as a new form of colonialism, a paternalistic exercise against the “lest civilized” nations among the international community. This is even more pronounced when one considers that most of the countries that can afford to expend resources on universal jurisdiction claims are wealthy and developed.⁴²⁶ Rabinovitch quotes Verhoeven that perceives universal jurisdiction as a means of imposing Western values on weaker developing nations. He provides the following translation:

⁴¹⁸ Under the heading “DUE PROCESS” on 550. Inazumi describe this on 200 undermining the suspect’s rights.

⁴¹⁹ Cassese 290 and note 27.

⁴²⁰ See Abi-Saab 599 that refers to Professor Fletcher which consider the risk of double jeopardy becoming even more acute with the exercise of universal jurisdiction, raising the specter of an accused being hounded ‘in one court after another until the victims are satisfied that justice has been done’.

⁴²¹ Rabinovitch 522.

⁴²² See footnote 88.

⁴²³ K Prost ‘ Breaking down barriers: International co-operation in combating transnational crime in Souvenir Brochure of the International Conference on Global Drugs Law Indian law Institute, New Delhi 1997 44 at 52.

⁴²⁴ See the discussion of Inazumi on 215 referring to jurisdictional imperialism.

⁴²⁵ Rabinovitch 522.

⁴²⁶ Morrison D & J R Weiner Curbing Enthusiasm 7. Harm van der Wilt: “Admittedly this final argument does not refute the accusation of legal colonialism.”

The universal competence ... is only the expression of a power, not justice, if some are only asserting their rights, the need of a 'lawsuit' is clearly understandable for the victims of particularly heinous crimes. More than serving the interest of justice or of the international community, the universal competence could only be useful to the western States, recently called neo-colonialist, and not to the countries on which they imposed their idea of democracy.⁴²⁷

He states further:

Quite apart from the increased potential for neo-colonialist practices, however a more frequent exercise of universal jurisdiction would mean an increase in the inequitable targeting of nationals of weaker and poorer states.⁴²⁸

See also Judge Bula- Bula in the *Arrest Warrant* case:

Developing nations being politically weaker in the international arena and highly dependent on Western powers for humanitarian aid are not in a position to initiate investigations and prosecutions of European and North American Nationals.⁴²⁹

Even if more powerful and wealthy nations are in a better position than developing countries to ensure that Western Nations are not insulated from liability, they cannot be expected to apply principles in international law consistently. Thus for example a request by seven Iraqi families that Belgian authorities investigate former US president George H W Bush, US President Richard Cheney, US Secretary of State Colin Powell and retired US General Norman Swarzkopf for perpetrating war crimes during the 1991 Gulf War, ended in the abrogation of Belgian's expansive universal jurisdiction legislation altogether. The United States threatened to refuse to fund a new headquarters building for NATO in Belgium and to consider barring its officials from travelling to the country unless the Belgium agreed to repeal its law.⁴³⁰

Some writers state that a final concern relating to universal jurisdiction is that it could undermine the role of the ICC⁴³¹ and international tribunals. A case can be ruled inadmissible in accordance with Article 17 of Rome Statute if on the basis of universal jurisdiction a national court prosecute an accused. Some argue that a State with universal jurisdiction *in absentia* and where there is a *bona fide* investigation by that state of any of the offences listed in Article 5 of Statute⁴³² would preclude a hearing by the ICC. He states that this could effectively render the Court unnecessary, assuming all the countries with universal jurisdiction exercise it. It is the submission that this criticism is more apparent than real.⁴³³ On the other hand Rabinovitch also argues that if the ICC is successful in bringing criminals to justice, municipal courts and prosecutors will stop exercising universal jurisdiction altogether, in which case there would be little point in recognizing the existence of universal jurisdiction *in absentia*.⁴³⁴

⁴²⁷ Rabinovitch 523.

⁴²⁸ Ibid.

⁴²⁹ Separate opinion of Judge Bula Bula in *Arrest Warrant* case.

⁴³⁰ Rabinovitch 523 and footnote 118.

⁴³¹ Rabinowitz 524. The DRC has suggested that the exercise of universal jurisdiction may even run contrary to the object and purpose of the Rome Statute in contravention of Article 18 of the Vienna Convention on the law of Treaties. See also Bottini about the role of ICC's and universal jurisdiction.

⁴³² Ibid. The writer states that arguably that there is universal jurisdiction over all of these crimes.

⁴³³ It is highly unlikely that another state would for instance prosecute the officials of Kenya to prevent the ICC from proceeding with their prosecution.

⁴³⁴ Rabinovitch 525.

3.7. Practical pitfalls in particular evidence gathering

Beyond the legal limitations⁴³⁵ certain practical limitations to the exercise of universal jurisdiction exist. One should never be unmindful that one of the most important pitfalls of universal jurisdiction is obtaining evidence. The difficulty of collecting evidence in relation to the crimes committed abroad, especially when the state where the crime is alleged to have occurred refuses to cooperate⁴³⁶ should never be underestimated. Prospective evidentiary problems are a major reason why few prosecutors in other States have initiated proceedings on the basis of universal jurisdiction to date.⁴³⁷ In essence, the search for and collection of evidence may prove extremely difficult in such a case,⁴³⁸ for most of the evidence may be found in the State where the crimes were committed, and the national authorities may not be forthcoming and co-operative, especially if the crimes were committed on behalf of or at the behest of those authorities.⁴³⁹ In practice, most prosecutions are unsuccessful unless senior officials in the forum state⁴⁴⁰ show a strong interest in the foreign prosecution. Sometime governments collude in these types of offences and one also finds collective collusion in these types of offences. It is true, the same drawback also occurs with regard to the passive nationality principle. In this case the State of nationality of the alleged perpetrator of the offence is just as reluctant often to hand over the relevant evidence to the State of the nationality of the victim.⁴⁴¹ It would seem however, that in the case of universal jurisdiction the danger or likelihood of lack of judicial co-operation by the foreign State is much greater. States tend to dislike the exercise of extraterritorial jurisdiction when even the link constituted by the forum State of the perpetrator or the victim, is lacking. Therefore, whenever faced with such situation, such states tend not to cooperate.

Thus the basic objections against universal jurisdiction are that it overlooks the logistical and legal difficulties of prosecution outside the territory of the state where the crime is committed.⁴⁴² These difficulties *inter alia* include language problems and problems getting evidence and witnesses from one state to another. Intimidation of witnesses can also not be ignored. Thus the acquisition of evidence from other States poses a substantial problem that may set back prosecution under the principle of universal jurisdiction.⁴⁴³ Consequently the process becomes extremely lengthy and challenging. When criminal proceedings require evidence involving a State official, the States government may obstruct the access to the victims, witnesses and to other relevant documents that may be necessary to make out a case. Thus the exercise of

⁴³⁵ This includes presence and inadequate legislation.

⁴³⁶ Compare the situation of Madagascar and Ravalomanana in the SA context. See Kaleck 1 .17: on 961 Kaleck describe it as the most significant problem. See footnote 242.

⁴³⁷ AU & EU expert group Report par 25 on 27. Prof van Schaack highlighted some of the serious practical challenges and legal hurdles that are responsible for the limited number of universal jurisdiction prosecutions worldwide. See Tendayi Achiumne Domestic Treatment of Universal Jurisdiction April 6 2013

⁴³⁸ See Lloyd Axworthy that states about the Australian experience: "*it became clear that collecting enough evidence to successfully prosecute in Canada, a war crime committed in another part of the world, and some fifty years earlier, was impossibly difficult. The practical difficulties were and still are apparent. Successful investigations require the cooperation of other governments some of which Canada may not have mutual legal assistance treaties with. The same obstacles apply to modern-day conflicts. The regimes that engage in crime against humanity or war crimes are not likely to cooperate with our investigations. ...*".

⁴³⁹ Hoover states that in many states, the legal system lacks the means to investigate or prosecute on the basis of universal jurisdiction. Kaleck 961.

⁴⁴⁰ That is the state that is trying the case.

⁴⁴¹ See Madagascar case and Ravalomanana (whereas when the active nationality principle is resorted to the reverse is true, because the State of the victim is normally all to glad to cooperate in the prosecution of the perpetrator).

⁴⁴² Bowett DW "Jurisdiction: Changing patterns of authority over activities and resources" in RSJ Macdonald and D M Johnston (Eds) *The Structure and Process of International Law* (1983) 555 at 564.

⁴⁴³ Hoover 13.

universal jurisdiction raises evidentiary challenges as another jurisdiction where the alleged crime occurred or where the perpetrator may be a standing official, retains control over most parts of the evidence. Even if the documents can be obtained, a court outside the jurisdiction of the crime may still face issue of authenticity.

Some of the other practical circumstance that must also be taken into account is the following: The criminal events under investigation usually accompany prolonged and pervasive social chaos and often, massive physical destruction. As a consequence, many normal data sources are interrupted or negatively impacted by the crimes under investigation or by the military and political activities that end them. Crimes against groups of people and continuing population movements disrupt family units, which are often the key element in population data collection. The physical and human conditions during investigations of crimes against humanity create severe time pressures. Much of the evidence and its sources - memory victims, survivors, damaged sites, and physical records - are perishable. Often, the investigators themselves are under physical duress, hostile observation, or receive overt threats. In addition, national and international pressures for immediate action can be intense, often because of the urgent need to construct a civil society. The *ad hoc* and international character of the process of investigation reduces efficiency. Investigators from different cultures and legal traditions must devote intense time and effort to obtain the evidence sometimes on short notice. They must “learn the ropes” of the affected region and its several component parts and the international and national rule governing the total effort, and find ways to operate in a multi - cultural and interdisciplinary environment. In addition in respect of evidence, since the exercise of universal jurisdiction necessarily means that the crime will have been committed in another State, there are substantial costs associated with evidence gathering, such as having witnesses flown in, or having to visit the State in which the alleged crimes have taken place in order to hear testimony and obtain evidence. Witness protection may also be imperative. In addition State officials in the jurisdiction where the evidence lies may be uncooperative, and make it impossible to visit crime scenes, or refuse to allow investigators access to witnesses.⁴⁴⁴ Even when prosecutors can obtain evidence it will be difficult for foreign officials to verify its authenticity, or interpret in properly (particularly where testimony in a foreign language is concerned). The result is that the foreign tribunal and officials will generally have access to evidence of questionable authenticity, in smaller quantities that they may be unable to properly understand. This would be particularly problematic in cases of universal jurisdiction *in absentia*, since not even the accused would be available to act as a source of information for prosecution and defense counsel. The results are that the likelihood of obtaining a conviction when universal jurisdiction is exercised is less likely than advocates argue.⁴⁴⁵ In any case, because of the practical difficulties of holding a criminal trial thousands of miles away from the crime scene of the relevant States, the propriety and practicality of ex colonial powers prosecuting foreign nationals from former colonies will ultimately depend on whether or not the concerned government supports the prosecution.⁴⁴⁶ If it relate to former enemies one might possibly get some cooperation.

⁴⁴⁴ There are also practical limits to the ability of the state to prosecute terrorism offences committed elsewhere. Terrorism prosecutions are difficult enough without a state asserting jurisdiction when another state is in a better position to prosecute. In Canada, two men charged with the murder in relation to the 1985 bombing of an Air India Airliner that killed 329 people were recently acquitted on the basis that the Crown had failed to prove their guilt beyond a reasonable doubt. See *R v Malik and Bagri* 2005 BSCS 350. One factor in this acquittal was the problem of cooperation between the Canada’s national police force and its security intelligence agency. Such problems can be even greater when more than one state is involved. Roach Kent: A Comparison of South African legislation and the Canadian Anti-terrorism legislation. 2005 SACJ 127. (Reference footnote 19).

⁴⁴⁵ Rabinowitz 526.

⁴⁴⁶ Jalloh 61.

Whatever the case, it has been suggested that more often than not, in Belgium and elsewhere in Europe public prosecutors have been hesitant to take the lead in initiating cases against foreign (including African) officials.⁴⁴⁷ This is probably because they are more likely to be aware of the practical obstacles involved in prosecuting such cases *vis-a-vis* victims and their supporters. The latter often have limited knowledge about the real challenges involved in distant prosecutions.⁴⁴⁸ Witness protection will also come to the fore.⁴⁴⁹

The practical problems likely to be faced by AU member States in exercising universal jurisdiction will probably be the same as those encountered by EU member states⁴⁵⁰ but given, the relative capacity of AU member states, it stands to reason that the impediment will be greater. No African state is known to have exercised universal jurisdiction effectively.⁴⁵¹

Thus one very compelling reason the restrictive enforcement of universal jurisdiction would seem to be practical. As Judge Van den Wyngaert observed: “[a] *practical considerations may be the difficulty in obtaining evidence in trials of extraterritorial crimes along with the reservations as to practicability of evidence gathering.*”⁴⁵² The concern for a linkage with the national order seems to be more of a pragmatic than of a juridical nature. It is also stated by Hall that although the common challenge to obtain evidence can be a serious problem it has been surmounted in criminal proceedings based on universal jurisdiction and by the Yugoslavia and Rwanda Tribunals without infringing the right of suspects.⁴⁵³

3.8. Overburdening

Another danger regarding universal jurisdiction is what is referred to as an explosion of lawsuits.⁴⁵⁴ With the concomitant misuses of universal jurisdiction there is a possibility of judicial chaos arising out of the implementation of universal jurisdiction. If many courts in various countries pursued universal jurisdiction, the result would not be justice but disarray.⁴⁵⁵ The failure of States to exercise pure universal jurisdiction on a frequent basis is quite possibly attributable to considerations such as political convenience, public opinion and a desire to avoid **overburdening their judicial systems**. This must be coupled with the practical challenges associated with gathering evidence and witnesses in a distant States.⁴⁵⁶ Thus another practical reason that States are afraid to apply universal jurisdiction is because of fear of **overburdening their court system**. The need to avoid overburdening the court was one explicit reason behind

⁴⁴⁷ Jalloh 22

⁴⁴⁸ Jalloh 22.

⁴⁴⁹ In F Patel Crime without frontiers; a proposal for an international narcotics court’ (1990) 22 New York University Journal of International Law and Politics 709 at 720 -1. Patel submits that **intimidation** of officials such as judges and law enforcement officers is also a problem in some states as is the lack of serious commitment by certain states to stopping drug trafficking.

⁴⁵⁰ See par 25 above.

⁴⁵¹ See however prosecution of *S v Henry Okah* (supra) in South Africa. In the Hissene Habre instance in one African state, an indictment was brought against a former African head of state, but proceedings were not pursued at that stage. In a decision of July 2006, the AU assembly mandated the African state in question to prosecute and ensure that the suspect be tried, on behalf of Africa, by a competent court of that state, with guarantees for fair trial. See footnote 67 on 15 of AU Expert group Report. See however new developments in this case: Liesl Louw-Vaudran “AU played vital role in Habre Arrest” Mail & Guardian July 12 – 15 21.

⁴⁵² O’Keefe 758.

⁴⁵³ Hall 64.

⁴⁵⁴ Dalila V Hoover on 2 talks about the proliferation of cases and state that the damage was done.

⁴⁵⁵ The ICJ warned against this possibility in the Arrest Warrant case when it state that to confer jurisdiction upon the courts of every state in the world to prosecute the perpetrators of certain crimes would risk creating total judicial chaos Separate Opinion of Judge Guillaume Curbing enthusiasm p 6. See also p 7 referring to countries overwhelmed by claims under newly enacted universal jurisdictions.

⁴⁵⁶ Rabinovitch 510. See footnote 65 op 510.

the subsequent nationality and residency restrictions in the UK War Crimes act 1991.⁴⁵⁷

Another strong argument in principle against the application of universal is that its operation is intolerable if implementation of international crimes vary from state to state.⁴⁵⁸ Only globally uniform offences can alleviate this problem and such uniformity does not exist. However the codification at the Rome Conference did go a long way to achieve uniformity. After this, courts can produce highly inconsistent verdicts. However in the absence of a jurisdictional hierarchy, reliance on these principles may throw up problems of concurrent jurisdictions that will involve disputes about the comparative strengths of the connection between the crime and prescribing state.

Finally a regime of universal jurisdiction could present severe challenges to **national reconciliation** efforts such as those made in post-apartheid South Africa or in some Latin American States.⁴⁵⁹ The tension between the goals of universal jurisdiction and national schemes of transitional justice has been noted.⁴⁶⁰ The application of universal jurisdiction can have a disruptive effect on domestic settlement.⁴⁶¹ For example the South African government of national unity and reconciliation can be disrupted, but many consider this an acceptable price for avoiding the impunity created by primarily effected states self-serving failures to prosecute.

⁴⁵⁷ O'Keefe 757.

⁴⁵⁸ The range of criminal conduct is too great for any person to comprehend and guide his conduct accordingly.

⁴⁵⁹ Yee 511 and point 11. See also curbing enthusiasm p 4 referring to SA that hinder reconciliation efforts. See AU and EU expert group Report: 17 alternative justice mechanisms. See also Morrison 6.

⁴⁶⁰ This is the Peace vs Justice argument.

⁴⁶¹ 392. See also Kissinger: It is an important principle that those who commit war crimes or systematically violate human rights should be held accountable. But the consolidation of law, domestic peace, and representative government in a nation struggling to come to terms with the brutal past has a claim as well. The instinct to punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy. Quoted by Yee on 511 too.

4. BENEFITS

4.1. Decreasing impunity⁴⁶²

The recognition of some form of universal jurisdiction would be likely to increase the effectiveness with which international crimes are prosecuted. Thus the most obvious benefit is that universal jurisdiction will have the advantage of decreasing the extent to which international criminals enjoy impunity. The main benefit or advantage of universal jurisdiction is thus the increase in effectiveness with which international crimes are investigated and prosecuted. There are gaps in the ICC regime⁴⁶³ and universal jurisdiction can fill some of that gaps.⁴⁶⁴ This could have important implications regarding the extent to which criminals are able to avoid justice for extended periods of time, and also facilitate the gathering of evidence necessary for obtaining convictions. It is also clear that in most cases, the exercise of universal jurisdiction would not lead to the incarceration or extradition of defendants particularly when they remain in their home states, which will likely refuse extradition. However Broomhall still has argued that the stigma associated with investigations and prosecutions will in some measure punish criminals, and have the effect of deterring those crimes for universal jurisdiction exists.⁴⁶⁵ Broomhall has also argued that investigations and prosecutions will provide relief for victims and their families even if the proceedings would not necessarily result in the incarceration of the accused.⁴⁶⁶

4.2. Multiplier effect: Catalyzing effect and enhancing investigations in the territorial state

Namoi Roht-Arriaza⁴⁶⁷ has suggested that the increasing ability of foreign countries to assert universal jurisdiction will have an catalyzing effect on States where crimes have been committed (and where the accused often continues to reside), increasing the likelihood that the accused will actually be brought to trail and punished. Following the incident of Augusto Pinochet and retired Argentinean Navy Captain Adolpho Scilingo, in the Spanish National Court, 280 complaints were brought by individuals against Pinochet in Chile. In addition the Chilean Supreme Court approved stripping Pinochet of his parliamentary immunity. The Spanish Case turned the issue into a topic of national conversation, which in turn led to the institution of a dialogue roundtable on the subject among military leaders, human rights lawyers and representative of civil society. The Spanish action also led to a strengthening of the anti-impunity movement in Argentina that has led to, inter alia the repeal of legislation barring the prosecution of Argentinean military officers and the introduction of legislation expanding the reparations offered to survivors of Argentinean concentration camps. Thus another benefit of implementation of universal jurisdiction is that this prompts or reinforces investigations in territorial states or home states. The example of former Chilean President Pinochet is a case in point.⁴⁶⁸ On the contrary it is likely that the mere fact that a person can be prosecuted in “third” states might lead to his or her prosecution in the territorial states as in the Pinochet cases.⁴⁶⁹ In

⁴⁶² Also see Inazumi 237 point 3.1 on 209.

⁴⁶³ See Jessberger on 359.

⁴⁶⁴ Not all countries part of ICC regime and also see AU and EU GROUP par 28 on 32 – 33 on tribunals additional to fill impunity.

⁴⁶⁵ Broomhall 417. Also quoted by Rabinovitz 520 and footnote 98.

⁴⁶⁶ See reference to Judge Goldstone: Rabinovitz 520 and see footnote 98.

⁴⁶⁷ Rabinovitz 520.

⁴⁶⁸ CK Hall “ universal Jurisdiction: New uses for an old tool’ In M Lattimer and P Sands (eds) Justice for crimes Against Humanity (Hart Publishing 2003) 47 at 54 - 55.

⁴⁶⁹ Floris and Jessberger footnote 58 on 360.

addition different and more positive reactions have been reported in Latin America, as compared to Africa when European States have prosecuted or attempted to prosecute former government officials based on the universal jurisdiction. In the Americas it said to have stimulated or boosted domestic prosecutions in countries like Argentina, Chile, Guatemala and Peru. In Africa universal jurisdiction has not (yet) had that kind of multiplier effect.⁴⁷⁰

4.3. Indirect effect of ICC on universal jurisdiction

I agree with Abi Saab that the complementary jurisdiction of the ICC will (and did) have a stimulating effect on states in asserting and exercising their jurisdiction over crimes within the purview of the Court (as did the *ad hoc* tribunals before it).⁴⁷¹ The evolutionary process in Africa regarding universal jurisdiction and specifically South Africa is a case in point and is an example of this.⁴⁷²

4.4. Deterrent value and preventive goal

The deterrent⁴⁷³ value of universal jurisdiction must not be underestimated. It is important to note that the mere existence of universal jurisdiction has a deterrent effect. Perpetrators are less likely to repeat international crimes if it is known within the community that domestic authorities can investigate crimes for purposes of prosecution and universal jurisdiction make it possible that prosecutions may follow when those perpetrators ultimately is found in the Republic. This preventative power of universal jurisdiction must thus always be kept in mind. In the first place it is a travel preventer. It is stated by Dugard⁴⁷⁴: “*Although universal jurisdiction has not often succeeded in judicial proceedings it has, however, succeeded in deterring persons suspected of international crimes from foreign travel.*” One can refer to a commentator at the International Crises Group that observed.⁴⁷⁵

There is some evidence that suggests national leaders are increasingly aware of the possibility of ICC prosecution, and that this can influence their decision-making evaluation, for better or worse. And if an ICC prosecution factors into a regime leaders determination to cling to power, it is not unreasonable to conclude that such a fear may also, in certain circumstances, act to curtail abuses and shift the deliberation in favour of avoiding war crimes or crimes against humanity.⁴⁷⁶

Examples of the deterrent effect of impending investigation and prosecution as a result of universal jurisdiction are *inter alia* the cancellation of the visit of Tzipi Livni to South Africa and likewise to the UK, and the cancellation of the Sudanese President Al Bashir’s visit to South

⁴⁷⁰ Jallow 59 – 60.

⁴⁷¹ Abi- Saab refers to Judge Louise Arbour in this regard on 601. Abi Saab also prefers international jurisdiction to universal jurisdiction on 602. In other words international tribunals should take precedence over municipal courts.

⁴⁷² Christopher Gevers chose to focus on indirect effects of the ICC on universal jurisdiction: C Gevers “Africa and Universal Jurisdiction” 1 June 2012 warandlaw.blogspot.com [hereinafter Gevers *warandlaw*]

⁴⁷³ It is submitted that the deterrent value of universal jurisdiction has value in itself. See also Pavlic 84 “*Consequently, one might argue that if universal jurisdiction is currently merely a paper tiger, it poses no threats to state sovereignty and is unlikely to cause serious changes in our international state-based system.* [Own emphasis added]

⁴⁷⁴ On 156-7.

⁴⁷⁵ N Grono ‘The deterrent effect of the ICC on the commission of international crimes by government leaders’ 5 October 2012: at <http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx> accessed on 29 Sept 2013.

⁴⁷⁶ N Grono ‘The deterrent effect of the ICC on the commission of international crimes by government leaders’ 5 October 2012: at <http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx>.

Africa in 2009⁴⁷⁷ and in 2010. These cancellations were precipitated by the statements by the South African Government affirming that Al Bashir would be arrested if he entered South Africa in accordance with South African obligations under the Rome Statute.⁴⁷⁸ See also the Office of the Prosecutor (OTP) and other court officials of the ICC that value prevention and see it as a critical indicator of the courts effectiveness. In public documents that OTP has stressed the benefits that the awareness of the ICC scrutiny can have. The announcement of the ICC activities can have a preventive impact. The mere monitoring of a situation can deter future crimes. It increases the risk of punishment even before the trials begin. This effect is not limited to the situation under investigation but extends to all State Parties and reverberates worldwide.⁴⁷⁹ The OTP use publicity surrounding its preliminary investigations to focus on quite specific preventive goals.⁴⁸⁰ One might conclude with the words of Floris and Jessberger:⁴⁸¹

“If all states were prepared to claim universal jurisdiction the perpetrators might still hide (in their own countries) but they could no longer run.” Or as somebody has put it “*they could no longer travel.*”

⁴⁷⁷ This was to attend the inauguration of President Zuma.

⁴⁷⁸ SA is obliged to arrest Al Bashir, says Ntsaluba 31 July 2009 at <http://www.buyanes.gov.za/rss/09/09073110251001>; and W Hartley SA Arrest Threat for Sudan's Al Bashir Business Day 28 May 2010.

⁴⁷⁹ ICC, Office of the Prosecutor, Report on Prosecutorial Strategy, 6 (Sept 14 2006).

⁴⁸⁰ The announcement of ICC activities can have a preventive impact. The mere monitoring of a situation can deter future crimes. It increases the risk of punishment even before trials begin. This effect is not limited to the situation under investigation but extends to all State Parties and reverberates worldwide.” ICC, Office of the Prosecutor, Report on Prosecutorial Strategy 6 (Sept 14 2006. See also D Bosco The International Criminal Court and Crime Prevention: By product or conscious goal? (2011) 19 (2) *Michigan State Journal of International Law* 163 at 179 – 180.

⁴⁸¹ 360.

5. AFRICA'S POSITION

The relationship between Africa and international criminal justice is complex.⁴⁸² The African Union, comprising of 53 countries from the world second largest continent, has also been quite busy regarding universal jurisdiction. Since July 2008, the Assembly of Heads of State and Government – the AU Assembly – has adopted three decisions⁴⁸³ regarding universal jurisdiction,⁴⁸⁴ noting the political abuse of universal jurisdiction against African officials. In those decisions the African Leadership acknowledged the rationale for universal jurisdiction and that it is to help close the impunity gap. However, the AU assembly's view was that the doctrine had been hijacked by judges in Europe to settle political scores by targeting African leaders. According to them these actions violated the sovereignty and territorial integrity of the African countries. In a nutshell it was put by the Assembly of the African Union and the AU that the politicized use, “misuse” and “abuse” of the universal jurisdiction undermines the stability of states in Africa and endangers international law, peace and security.⁴⁸⁵

It all started at the 11 ordinary session held in July 2008 at Sharm – El – Sheikh, Egypt when the AU assembly adopted the key decision in a trilogy of resolutions on universal jurisdiction. Thus the African Union seems to have launched the current conversation on the subject of universal jurisdiction with its 2008 “*Report on the Abuse of Universal Jurisdiction.*” African states insisted that they were not opposed to the principle of universal jurisdiction but that they were concerned it was being abused by States in the North who targeted states in the South. It condemned the abuse and misuse of indictments against African leaders through the universality principle.⁴⁸⁶ It also warned about the ‘destabilizing effect’ and the negative repercussions of misusing the doctrine for political, social and economic progress of countries from Africa and their ability to conduct international relations. Ultimately according to the resolution the political nature and abuse of universal jurisdiction by European States is a clear violation of the sovereign- and territorial integrity of concerned African countries especially Rwanda. The rest of the decision focused on what should happen to the indictment of African personalities in Europe.⁴⁸⁷ However the Chair of the AU assembly actually took two concrete steps. Thus in its 2008 Report of the Executive Council (Report) the African Union stated that the exercise of universal jurisdiction over States officials can result in the harassment while adversely impacting on the effective performance of their official functions.⁴⁸⁸ The report further stated that the exercise could have international repercussions by “embarrassing” or limiting a State in its conduct of foreign affairs. This could in turn generate tensions between states and open avenues for forum shopping. For African states in the end this evokes memories of colonialism.⁴⁸⁹

In its Addis Ababa, Ethiopia (Feb 2009) and Sirte, Libya (July 2009) resolutions the AU Assembly generally recalled and reiterated its earlier position objecting to the abuse of universal jurisdiction against African leaders and their states. A notable new element in the latter decision urged all countries involved to adhere to international law. In particular it underscored that due

⁴⁸² M du Plessis, A Louw and O Maunganidze “African efforts to close the impunity gap” *Institute of Security Studies paper* November No 241 (2012) [hereinafter *Du Plessis, Louw & Maunganidze*].

⁴⁸³ Even with the most recent developments of the Extraordinary session of the Assembly of the African Union where the *en masse* withdrawal from ICC was considered the AU reaffirmed its previous decisions on universal jurisdiction. See point 3 of Ext/Assembly/AU/Draft/dec.1-2 (Oct.2013) Rev 1.

⁴⁸⁴ Jalloh 1 – 2.

⁴⁸⁵ Jalloh 2 referring to all the decisions.

⁴⁸⁶ Par 5 iii.

⁴⁸⁷ For a critical assessment of allegations see Jalloh.

⁴⁸⁸ Hoover 16 and footnote 73.

⁴⁸⁹ Par 37 on 39: AU & EU expert group Report.

regard to international law **immunities** should be accorded to government officials wherever universal jurisdiction is invoked before national courts.⁴⁹⁰ The African side stated that there are abusive applications of the principle of universal jurisdiction which could endanger the international law and expressed concerns over it. The previous decision on the abuse of universal jurisdiction was reaffirmed in its most recent decision during the Extraordinary Session of the Assembly of the AU in Addis Ababa on the 12 October 2013.⁴⁹¹ With the above resolutions universal jurisdiction was put on the front burner of global politics.

There were also the 2 concrete steps referred to above. The 10th and 11th meeting of the AU – EU Ministerial Troika addressed the issue of universal jurisdiction in the context of the relationship between the AU and EU. The Ministers agreed to continue discussion on universal jurisdiction and to set up a technical committee to clarify the respective understandings on the African and EU side on the principle of universal jurisdiction and report thereon. An Advisory Technical Ad Hoc committee⁴⁹² was constituted by AU and EU to inform AU – EU discussions on the principle of universal jurisdiction and to report for the attention of 12th meeting of AU – EU ministerial Troika which took place and end of April 2009. The agreed technical *ad hoc* expert group clarified the respective understandings of the African and EU side on the principle of universal jurisdiction and reported back to the next Ministerial meeting.

The AU & EU Expert group was thus created to clarify the issue of universal jurisdiction⁴⁹³ and in this fashion Africa tried to get a diplomatic solution to the vexed question of universal jurisdiction. The AU & EU expert report had further fleshed out the African disquiet about the universal jurisdiction. Then the African Union also raised the matter in the United Nations General Assembly. The Group of African States requested in February 2009 the inclusion of an additional item of the “Abuse of the principle of Universal Jurisdiction” in the agenda of the 63d session of the United Nations General Assembly (UNGA). The request was accepted and universal jurisdiction has been the subject of heated discussion in the UNGA since that time. Debates were conducted on this topic in autumn of 2009. The UNGA then asked governments to submit observations and information on State practice. A resolution was adopted in January of 2010 calling upon the states to submit information on the subject of universal jurisdiction and requesting the Secretary General to prepare a report based on the replies. Again debates were held on the topic in the autumn of 2010. Further information has been sought and further work has been scheduled for 2011.⁴⁹⁴ Thus the African Group had successfully put the issue of the scope and application of the universality principle on the agenda of the UN General Assembly.⁴⁹⁵ A resolution was adopted referring the matter to the UN General Assembly Sixth committee (legal) for further consideration. That committee asked all UN members to make submissions on their universal jurisdiction practice within their territories by April 2010.⁴⁹⁶

The responses painted a rather confused picture.⁴⁹⁷ According to Schabas it is clear that some

⁴⁹⁰ Jalloh 65.

⁴⁹¹ The relevant part read as follows: “**Reaffirms** its previous Decisions on the abuse of the principles of Universal Jurisdiction adopted in Sharm El Sheikh in July 2008 as well as the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012 and May 2013 wherein it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace.”

⁴⁹² It included Prof Antonio Cassese (Italy); Dr Mohammed Bedjaoui (Algeria); Prof Pierre Klein (Belgium); Dr Chaloka Beyani (Zambia); dr Roger O Keefe (Australia) and Professor Chris Maina Peter (Tanzania).

⁴⁹³ Jalloh 6.

⁴⁹⁴ Yee 504 and footnote 1.

⁴⁹⁵ 64 Jalloh and footnote 230. UN GARO 64th session 105 plen mtg Unc Doc. See reference in footnote.

⁴⁹⁶ Jalloh 64 – 65.

⁴⁹⁷ Yee 503.

of the states do not even understand the issue.⁴⁹⁸ There is now a draft resolution adopted by the Sixth Committee of the General Assembly following debate in November 2010. It should be adopted by the plenary General Assembly. It calls for the establishment of a working group of the Sixth Committee to undertake a thorough discussion of the scope and application of universal jurisdiction.⁴⁹⁹ The report of states and the debates in the bodies like the Sixth committee provide significant additions to the sources of evidence of custom. It appears that the real custom is not the same as to that exist in academic literature and NGO materials. The debate may provide an opportunity to clarify agreements.⁵⁰⁰ The working group did not get off the ground because no consensus on a definition of universal jurisdiction could be found.⁵⁰¹

What partly started off as African anxieties about universal jurisdiction in mid-2008 translated in approximately mid 2009 into a negative and defensive policy stance⁵⁰² by many AU leaders towards the fundamental global justice project and the ICC. There was a growing view among African states that universal jurisdiction and the ICC jurisdiction is the same thing and that the two jurisdictional devices are weapons of choice of former colonial powers targeting weaker African nations. I agree with Jalloh that it was an initial concern about increased European reliance on universal jurisdiction which led to Africa's trepidation over all types of foreign administered justice. Over the last number of years international criminal justice as administered by the International criminal court has increasingly come under attack from African states. Since mid-2008 there was a noticeable African government initiative against notions of universal jurisdiction and more broadly internationalized and international justice. In particular the ICC has also been criticized: The Arrest Warrant for President Al Bashir⁵⁰³ troubled the AU members and gave rise to grave concern;⁵⁰⁴ the court's investigation and prosecution in respect of Kenya⁵⁰⁵ and more recently the Libyan situation aggravating the situation.⁵⁰⁶ Some even view the ICC as a tool to suppress African States.

The issue of an international arrest warrant against Sudan's incumbent President Al Bashir initially has prompted African political leaders to close their ranks. The African Union has formally requested the UN Security council to use it powers under Article 16⁵⁰⁷ of the Rome Statute in order to suspend the process against Al Bashir, arguing the prosecution might impede

⁴⁹⁸ William A Schabas humanrightsdoctorate.blogspot assessed 1/11/ 2011.

⁴⁹⁹ Discussion with Tania Steenkamp of DIRCO on 12 June 2013. The reason why no progress has been made is because no agreement on the definition of universal jurisdiction could be reached. The working group could not proceed yet.

⁵⁰⁰ William A Schabas humanrightsdocgtorate.blogspot assessed 1/11/2011.

⁵⁰¹ According to personal discussion with SA representative from DIRCO, Tanya Steenkamp, on 12 June 2013.

⁵⁰² Jalloh 4 and footnote 14. This position gained new traction when the Kenyan Parliament voted on 5 September 2013 to withdraw from the Rome Statute and "to suspend any links, cooperation and assistance "with the ICC. See also Extraordinary session of assembly of Au on 11- 12 October 2013.

⁵⁰³ I agree with du Plessis that it will ultimately fall to African States to ensure a positive outcome in relation to the UN Security council's decision to refer the Sudan situation to the ICC. With the example set by South Africa, Botswana and most recently Malawi at the very least the continent has been made a slightly smaller place for Al Bashir: Du Plessis, Louw & Maunganidze 20.

⁵⁰⁴ For an exhaustive discussion of the conflict in this regard see M du Plessis and C Gevers "Balancing competing obligations The Rome Statute and AU decisions" *ISS paper* 225 October 2011.

⁵⁰⁵ See report by Reuters in Pretoria News Friday Sept 20 2013 "Africa leaders to ponder position in ICC." Steps taken against Kenya top two fuelled backlash by states stating that African leaders will decide on October 13 to take a common stance whether to pull out from the ICC over the prosecution of its leaders.

⁵⁰⁶ Du Plessis 2. It is stated: "... *this view gained traction over the past few years and, through concerted and self-interested political machinations by the ICC'S opponents on the continent has been marshalled into an institutional position against the court at the level of the AU.*"

⁵⁰⁷ In February 2011 the AU made a similar request in respect of the ICC investigation into the post electoral violence in Kenya in 2008. Max du Plessis 2 and footnote 9. Also in respect of Libya 3.

the prospect of peace.⁵⁰⁸ Offended by the silence of the Security Council on the request the AU decided not to cooperate with the ICC in relation to the Bashir case. If it was not for the civil society from Africa, it could have effectively diminished the role of the ICC in Africa.⁵⁰⁹

5.1. Negative effect of ICC on universal jurisdiction in Africa?

Thus to a certain extent the ICC on the one hand made a somewhat negative imprint on universal jurisdiction in Africa. There is collateral damage to universal jurisdiction caused by the deterioration of the relationship between the ICC and African States over the past few years. It can be described as “the struggle for the soul of international law in Africa.” This relates to both the Bashir and Kenya⁵¹⁰ and matters. Regardless whether one accepts the merits of these concerns, they clearly have affected the principle of universal jurisdiction negatively as it has been painted with the same neo-colonial/imperial brush that has been used to call into question the international criminal justice project generally. As stated by Du Plessis “*Political acumen has turned domestic discontent into a regional African position in opposition to the ICC investigation and fuelled a more general anti ICC sentiment within Africa.*”⁵¹¹

5.2. Recent developments

In a recent decision on the principle of universal jurisdiction, the AU Assembly requested the “the African Union Commission in consultation with the African Commission on Human and Peoples Rights and the African Court on Human and People’s Rights to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity, and war crimes and report thereon to the Assembly in 2010.”⁵¹² Thus the AU effort to graft an international criminal court chamber onto the body of the African Court of Justice and Human Rights has started.⁵¹³ There are an AU project of expanding the jurisdiction of the African court of Justice and Human Rights to cover the prosecution of international crimes⁵¹⁴ and more.⁵¹⁵ Steps are now underway by the AU to create a regional international criminal chamber within the African court of Justice and Human Rights.⁵¹⁶ The AU commission explains that the expansion of the African Court is motivated by reasons other than an ICC sentiment.⁵¹⁷ It is stated that this process originates in an AU requirement also to deal with misuse of the principle of universal jurisdiction. How realistic this endeavor is, is an open question but one can remain skeptical with the extremely wide jurisdiction and the cost involved.⁵¹⁸

⁵⁰⁸ Van der Wilt 1064 and footnote 94.

⁵⁰⁹ See D Akande, M Du Plessis and C C Jalloh “an African Expert study on the African Union concerns about article 16 of the Rome Statute of the ICC” *Position Paper Institute of Security Studies* which pointed out the double standards.

⁵¹⁰ Du Plessis, Louw & Maunganidze 3. See footnote 23 above.

⁵¹¹ Du Plessis, Louw & Maunganidze 3.

⁵¹² See footnote 78 on 19. AU & EU expert Report. Also see U Salifu “AU – ICC relations under the spotlight again” <http://www.Issafrica.org/iss-today/au-icc-relations-under-the-spotlight-again> accessed 26/07/2013. Also compare the decision taken in Addis Ababa on 11-12 October 2013 in decision 9 vi: “**Stresses** that the ICC is a Court of last resort and **NOTES** that the AU is in the process of expanding the mandate of the African Court on Human and People’s rights (ACHPR) to try international crimes, such as genocide, crimes against humanity and war crimes.”

⁵¹³ See Du Plessis, Louw & Maunganidze 2.

⁵¹⁴ Du Plessis, Louw & Maunganidze 3.

⁵¹⁵ As to the extensive jurisdiction see M Du Plessis Implications of the AU decision to give the African Court jurisdiction over international Crimes *ISS Paper 235* June 2015 [hereinafter Du Plessis ISS Paper 235] on 7.

⁵¹⁶ Du Plessis, Louw & Maunganidze 6.

⁵¹⁷ O A Maunganidze & A Du Plessis The ICC and the African Union [hereinafter Maunganidze & A Du Plessis] 26.

⁵¹⁸ For a full discussion see Du Plessis M Implications of the AU decision to the African Court jurisdiction over international crimes *ISS Paper 235* June 2012.

5.3. African Union Model National Law on universal jurisdiction

Once again the Executive Council decision⁵¹⁹ at the 21st Ordinary session on the 9 – 13 July 2012 at Addis Ababa, Ethiopia⁵²⁰ endorsed the recommendations of the meetings of Justice and AG's on the **abuse of the principle of universal jurisdiction**. They approved the model national law on universal jurisdiction for international crimes. This called on African states to enact national laws also comprising universal jurisdiction. They inter alia recommended that the capacity of officials and institutions of African states be strengthened to effectively perform duties and mandates in execution of universal jurisdiction. The intention is that member states will adopt the model law and will legislate accordingly.⁵²¹

As to an evaluation or commentary on the model law, it can be stated that in the preamble once again it is recognized that genocide, war crimes, and crimes against humanity, in other words the core crimes, are crimes of concern to the AU and the international community as a whole. Reference is made to article 4 (h) which provides for the right of the AU to intervene in respect of grave circumstances relating to genocide, war crimes and crimes against humanity. It is important that the decision recognize that domestic courts have the primary⁵²² responsibility for the prosecution of international crimes and is mindful of the need for effective prosecution to be ensured by taking appropriate measure at a national level.

It is stated specifically in article 1 that the object of the act is to provide for the exercise of **universal jurisdiction** over international crimes and to give effect to obligations under international law. In this respect the AU model law is more explicit than the South African legislation. In the SA act there is no direct mention in the preamble or section 3 relating to the objects of the act, that the legislation want to provide court with universal jurisdiction as the model law does. The definitions⁵²³ specifically mention the highest Court with original jurisdiction.⁵²⁴ There is also specific reference to the Narcotic drugs conventions.⁵²⁵ The object of the act is spelled out again in Section 3 and the combating of impunity is repeated. There is specific reference in the objectives to immunities enjoyed by foreign State officials under international law. Victims and rehabilitation is mentioned in the objectives, but is only referred to perfunctorily in the Model Law.⁵²⁶ Section 4 confers jurisdiction and reads as follows:

The Court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the state or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State;

In exercising jurisdiction under this law, a Court shall accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that the state is willing and able to prosecute.

It is clear that a “limited” universal jurisdiction is proposed in the model law and that it is

⁵¹⁹ Executive council Twenty First Ordinary Session 9 – 13 July 2012 Addis Ababa Ethiopia EX.Cl 731 (XXI) c.

⁵²⁰ EX. CL/731 (XXI) C.

⁵²¹ This model law was the result of concerns express during the 11, 12, 14, 15 and 16th meetings of the AU.

⁵²² See du Plessis on positive complementarity in du Plessis, Louw & Maunganidze.

⁵²³ Article 2.

⁵²⁴ This reflects Africa's sensitivity that these matters should not be handled by lower courts.

⁵²⁵ Three (3) conventions are mentioned.

⁵²⁶ See article 19 relating to punishment that in subsection 5 of article 19 refer cursorily to the situation that before making an Order, the Court may invite and take account representations from or on behalf of the convicted person, **victims**, other interested persons or interested States.

subsidiary or “last resort” after priority is given to territorial state.

The power to prosecute threshold is set as “reasonable basis to believe” and that correlates with Article 53 of the Rome Statute. However that is threshold for the initiation of an investigation and not a launch of a prosecution. The highest standard of rights is accorded to accused persons. There is also specific mention of witness protection. The following offences are mentioned in the Model law: Genocide, Crimes against humanity, War Crimes, Piracy, and Trafficking in drugs and Terrorism. Later grave breaches of the First Additional Protocol are also mentioned as well as other serious violations of common article 3 to the four Geneva conventions in the case of an armed conflict not of an international character. Included are also piracy, terrorism and trafficking in drugs. Individual criminal responsibility is set out. There is specific mention that immunities must be respected and it is stated specifically in Article 16 that the jurisdiction provided under Article 4 of this law shall apply subject to any national or international law on immunities. It is interesting that the model law still use the term “extradition” and not “surrender” and in article 17 (b) it is stated specifically that where the state does not extradite a person, the prosecuting authority shall prosecute such a person. This is the well-known “*aut dedere aut judicare*” provision (with requirement also for *inter alia* universal jurisdiction)⁵²⁷ but subject to jurisdictional immunities as provided for in the law. Immunities is therefore of the utmost importance for the AU.⁵²⁸ Mutual legal assistance is catered for as well as punishment⁵²⁹ which should be commensurate with the gravity of the offence. The Model law is not as comprehensive and exhaustive as the Rome Statute. For instance it did not expand on matters relating to the initiation of proceedings.

It was stated by the expert group that African states welcome the principle of universal jurisdiction and are committed to addressing impunity as shown by Article 4(h) of the Constitutive Act of the African Unions 2000 and as emphasized in subsequent AU decisions.⁵³⁰ Article 4 (h) of the Constitutive Act lays down the right of the AU to intervene in a Member state pursuant to a decision of the Assembly in respect of grave circumstances namely war crimes, genocide and crime against humanity. This amounts to a statement that impunity for these crimes is unacceptable to AU member States. This article enshrines an intra-regime collective political action mechanism. It grants the right to the Union to take action in relevant situations, not to individual states to take action. Also the action is political collective enforcement action, not judicial enforcement action and it does not say anything about the Unions right to exercise universal jurisdiction, much less that of an individual state to exercise universal jurisdiction.⁵³¹ There are also national legal and institutional constraints on the capacity of many African States to address these crimes and to prosecute perpetrators of them. It is specifically mentioned that consideration should be given to building the national legal capacity of African states to combat genocide, crimes against humanity war crimes and torture.⁵³²

⁵²⁷ See discussion in Chapter 2 on *aut dedere aut judicare* and universal jurisdiction.

⁵²⁸ Once again the sensitivity of Africa regarding immunities is reflected in the model law. This is played out by most recent developments after Kenya pull out of the ICC.

⁵²⁹ Article 19.

⁵³⁰ Initially in 2009 the African Union stated that “the principle of universal jurisdiction is well established in international law”. They continued: “The African Union respects this principle which is enshrined in article 4 (h) of the Constitutive Act.” Later the AU toned it down in a statement made on behalf of the African group of States before the 6th Committee in October 2010. Rather than reiterating that the Constitutive Act of the African Union enshrined the principle of universal jurisdiction, the statement now said that: “the Constitutive Act of the African Union accorded the Union the power to intervene in the affairs of its member States in situations of genocide, war crimes and crimes against Humanity”. Compare Yee 519 and 523-4.

⁵³¹ Yee 523 states that these factors may not have received attention when the statements of the African Union were formulated.

⁵³² 37 and paragraph 33 in AU & EU Expert group Report.

5.4. Practical implementation of international criminal law and universal jurisdiction in Africa

Sienho Yee state it should be noted that no African State has ever exercised universal jurisdiction.⁵³³ Since the (in) famous case, the *DRC v Belgium*⁵³⁴ - Africa's tension and involvement with universal jurisdiction has also come a long way. African states for example Congo and Djibouti have already lodged various complaints regarding the misuse of universal jurisdiction and alleged misuse at the International Court of Justice and the African Union and AU & EU Expert group was quite involved in this matter. So universal jurisdiction and the "misuse" of this jurisdiction in Africa has a long history and involvement. Africa also has a mixed history with international criminal justice. That Africa provided the International Criminal Court with a number of "situations" is no secret.⁵³⁵ It actually started very early in the history of the ICC when the IBA wanted to investigate the situation in Zimbabwe. The atrocities committed in Liberia under General Charles Taylor have also moved that country into the ICC spotlights. African States remain to date the only states to have referred situations to the court. Four states have referred situations occurring on their territories to court: DRC, CAR and Uganda.⁵³⁶ The most recent one is Mali.⁵³⁷ It was also symbolic and much needed for the Review conference of the ICC to be in Africa in Kampala in May 2010. Against expectation agreement was reached on the crime of aggression. This raised the profile of domestic justice and the attention to international criminal justice on the Continent.

Thirty-four African States are part of ICC regime.⁵³⁸ Of these, 16 have drafted implementing legislation. This has been a slow process.⁵³⁹ The first two countries in Africa with implementing legislation were South Africa and Senegal.⁵⁴⁰ Slowly a trickle of other African countries followed.⁵⁴¹ Presently we have 8 countries in Africa with implementing legislation. The following states have implementing legislation to implement its obligations under the Rome Statute: Uganda⁵⁴², Kenya⁵⁴³, South Africa, Mauritius,⁵⁴⁴ Senegal, Burkina Faso,⁵⁴⁵ Comoros and Central African Republic.⁵⁴⁶ Thus first and foremost there are the implementing Acts adopted by

⁵³³ Footnote 64 on 522 point 36. This is not quite correct. One should refer to a case like *S v Okah* (supra) albeit a terrorism trial under the *aut dedere aut judicare* principle but nevertheless universal jurisdiction.

⁵³⁴ See discussion above.

⁵³⁵ See footnote 77 of AU & EU expert group Report and Dugard on 195 and further: December 2003 Uganda referred situation regarding Lord's Resistance Army in Uganda subsequently renamed situation regarding Northern Uganda. In April 2004 the Democratic Republic of the Congo referred the situation of crimes since 1 July 2002. In January 2005 the situation in Central African Republic was referred. Additionally in Feb 2005 the Ivory Coast became the first non- state party to accept the exercise of jurisdiction by the Court under article 12 (3) of the Rome Statute in respect of crimes committed on its territory since 19 Sept 2002.

⁵³⁶ Dugard 194.

⁵³⁷ Du Plessis, Louw & Maunganidze 2 and footnote 5.

⁵³⁸ O Maunganidze & A Du Plessis. However with recent developments at least Kenya has withdrawn.

⁵³⁹ It was stated that the record of African States in regard to implementing legislation is rather bleak. Van der Wilt 1051 and footnote 32. He refers to Olympia Bekou and S Shah that refers to South Africa that fully accomplished the task. Later it is stated that "*Four year later situation has not improved substantially.*" See 1051 and footnote 33. However the DRC provide interesting examples infra.

⁵⁴⁰ For some time it was only two. Later it was four (4) and now it is eight (8) African countries with implementing legislation with some other countries trying to implement the Rome Statute like Botswana.

⁵⁴¹ See for instance Van der Wilt referring to Olympia Bekou and Sangeet Shah and footnote 32.

⁵⁴² Uganda's ICC Act 2010.

⁵⁴³ Kenya's International Crimes Act 2008, which came into operation on 1 January 2009. See however the recent development of withdrawal by this country.

⁵⁴⁴ See Gevers for the detail of this legislation: However Max du Plessis and Gevers in Balancing competing obligations state

⁵⁴⁵ Footnote 52.

⁵⁴⁶ Footnote 14.

African ICC states parties to give effect to the principle of complementarity by providing for the domestic prosecution of international crimes. Although few African states have adopted this legislation (almost) all of those state that have done so elected to include a universal jurisdiction provision in their domestic prosecution regimes (see for example, section 8 (c) of Kenya International Crimes Act 2008,⁵⁴⁷ section 18 (d) of Uganda's International Criminal Act 2010; section 4 (3) (c) of South Africa s Implementation of the Rome Statute of the International Criminal Court act 27 of 2002; Section 4 (3) (c) of Mauritius International Criminal Court Act 2011, article 669 of the Code of Criminal Procedure of Senegal). Botswana has had a bill for 4 years now. However this Bill has still not been accepted by their Parliament. Notably most of these universal jurisdiction provisions in the African legislation contain a presence requirement for the exercise of such jurisdiction.

5.4.1. Ugandan example

Uganda, which has a close relationship with the ICC,⁵⁴⁸ has also enacted a domestic implementing act with a limited universal jurisdiction, the International Criminal Court Act of 2010. In 2008 the government established a War Crimes Division in Uganda. Later it was renamed as the International crimes division (ICD) which is a specialized division of the High Court with jurisdiction to try not only cases relating to war crimes, genocide and crimes against humanity but also serious transnational crimes like terrorism, piracy and human trafficking. Similar to the South African unit (the PCLU) the mandate of this unit is broader than just core international crimes.⁵⁴⁹ In 2011 it began operations with case of ***Uganda v Thomas Kwoyelo*** who was charged with committing grave breaches against civilians and specifically 65 counts of war crimes.⁵⁵⁰ The constitutional court ruled that this person qualified for amnesty.⁵⁵¹ This unit, with an expansive mandate⁵⁵² is busy with number of other cases, but face the same challenges as units in other African countries, to wit that is totally under resourced.⁵⁵³

5.4.2. DRC prosecutions of international crimes

The DRC is a monist state which means international treaties can be applied directly⁵⁵⁴ in this country. In 2004 the government referred the situation in Eastern DRC to the ICC. Five (5) arrest warrants have been issued. This conflict is mainly in Ituri and the provinces of North and South Kivu. The ICC has conducted trials against three accused and a first conviction was secured against *Thomas Lubanga Dyilo* in March 2012 for recruitment of child soldiers.⁵⁵⁵ Regarding the prosecuting of international crimes, the DRC also adopted a new military code.⁵⁵⁶ With this the military authorities undertook domestic prosecutions. The Government also passed

⁵⁴⁷ It is described by Du Plessis and Gevers that the legislation - the 2008 International Crimes Act - is impressive both in its detail and progressive nature. M Du Plessis and C Gevers "Balancing competing obligations" *ISS paper* 225 (October 2011) [hereinafter Du Plessis and Gevers] on 7. However see recent developments which show the interaction between international criminal justice and universal jurisdiction.

⁵⁴⁸ Uganda was the first country to refer crimes committed within its borders to the ICC. Maunganidze & A Du Plessis 21 and footnote 73. Investigations were initiated in 2004. The ICC has established a field office in Kampala.

⁵⁴⁹ The personnel did undergo intensive training workshops on international criminal justice, counter terrorism and mutual legal assistance to build the capacity of ICD. There was also training of the prosecutors and investigators.

⁵⁵⁰ *Thomas Kwoyelo alias Latoni v Uganda* HCT -00-ICD- Case No 02/10 and see Maunganidze & A Du Plessis 23.

⁵⁵¹ The amnesty act proved a hindrance to prosecution efforts.

⁵⁵² Du Plessis, Louw and Maunganidze 17 – 8.

⁵⁵³ Maunganidze & A Du Plessis 24.

⁵⁵⁴ Maunganidze & A Du Plessis states that international treaties carry the same weight as constitutional law and can be directly applied. See footnote 38.

⁵⁵⁵ To actively participate in hostilities in Ituri: *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-02/06.

⁵⁵⁶ The Military Penal Code Law 024/2602. See Maunganidze & A Du Plessis 12.

a national law on sexual violence.⁵⁵⁷ In addition to military tribunals there are mobile gender courts in South Kivu. On the 21st Feb 2011 Lt Col Mutuare Kibibi was found guilty of crimes against humanity for ordering the mass rape of 49 women in town of Fizi.⁵⁵⁸ The mobile gender courts also functions as a promising indication what can be achieved by targeted national support in the field of international core crimes with domestic courts. See also reference by Harmen van der Wilt to the case of *Mutins de Mbandaka* where the Rome Statute provisions were directly applied to fill *lacunae* in substantive law.⁵⁵⁹ This was followed in the *Gédéon* trial.⁵⁶⁰ One should also refer to situation in Ethiopia.⁵⁶¹

The Expert Group in the first place refers to the four (4) African countries relying on customary international law for universal jurisdiction over serious crimes of international concern. Secondly to the six (6) African state parties relying on treaties in this respect. Eight (8) Countries provide for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes while Mali also adds terrorism. Certain AU countries grant universal jurisdiction over grave breaches of the Geneva Conventions 1949.⁵⁶²

One way or the other Africa has for a long time been involved with international core crimes. While Africa is slowly coming to grips with its gloomy past, one by one more countries in Africa have implementing laws with universal jurisdiction. Not only is Uganda, the DRC and Ethiopia coming to terms with gloomy its past, new countries are promulgating implementing legislation. Sierra Leone tried people for international crimes and the ICTR handled a number of matters relating to this area of the law. The performance in Africa has not always been very impressive but it is improving. There are positive developments: Rwanda judicial system has matured considerably since genocide in 1994.⁵⁶³ Whether the traditional forms of justice and alternative dispute resolution like the Gacaca courts and the TRC in South Africa are an adequate response is open to question. As is well known, the vast majority of suspects of genocide in Rwanda has been and will be the subject to Gacaca proceedings.⁵⁶⁴ About 60 000 has been tried since 2005 and when it closed, some 2 million people will have being tried by these community courts. The record of African states relating to international criminal justice was at times rather bleak.⁵⁶⁵ However nowadays interesting examples is coming from Africa. Compare the DRC for instance. This country directly applied Rome Statute provisions. Rikhof has observed in 2009 that prosecutions involving war crimes, crimes against humanity and genocide have started in Republic of Congo, the DRC, Ethiopia and Rwanda. Uganda will follow soon. National prosecutions in Sierra Leone and Rwanda are also noteworthy. However the *sequelae* to the ICTR spelled a missed opportunity for African states to put commitment to universal jurisdiction into practice by trying genocidaires that fled Rwanda

⁵⁵⁷ DRC law on Sexual Violence (2006). See Maunganidze & A Du Plessis 13 and footnote 44.

⁵⁵⁸ See Maunganidze & A Du Plessis 13 and footnote 47. Eight (8) soldiers under his command were also convicted.

⁵⁵⁹ Van der Wilt 1052. See also footnote 36 and 37.

⁵⁶⁰ Van der Wilt 1052.

⁵⁶¹ See Van der Wilt 1054 stating the Ethiopia has succeeded in coming to terms with its past through the trial of form Derg dictator Mengistu Haile Mariam and his co-accused who were convicted to life imprisonment for crimes against humanity and genocide and the development regarding political groups.

⁵⁶² See page 11 for the countries which has legislation incorporating the grave breaches. Certain African countries of the civil law tradition have ratified the Geneva Conventions and accept universal jurisdiction on this basis.

⁵⁶³ Rwanda's construction of a new detention facility that meets international standards, adoption of legislation for the transfer of cases from ICTR tribunal, abolition of death penalty,

⁵⁶⁴ The SRCHR reported in 2000 that there were around 123 000 detainees still in detention six years into the transition, many without being charged. The overcrowding in Rwanda's prisons was caused by the stagnation of the judicial proceedings. Rwanda's judicial system was overwhelmed by the number of people in detention. As a solution the Gacaca system was reintroduced. Inazumi and footnote 47.

⁵⁶⁵ Van der Wilt 1051 and footnote 31.

themselves. To date no African state outside of Rwanda has done so.⁵⁶⁶ In addition the failure of African States to take advantage of ICTR's - 11 bis procedure by accepting the transfer of indictees from the ICTR in order for them to be tried domestically under the principle of universal jurisdiction represent an even greater missed opportunity to test the water with a form of controlled universal jurisdiction. There have, however been a number of prosecutions of African accused in eight of the twenty seven members States of the European Union under universal jurisdiction.⁵⁶⁷

The conclusion of Jalloh regarding universal jurisdiction and the European courts that unfairly target African leaders for prosecution within their national courts, is important. He concludes that while AU leaders may understandably feel targeted when one examine the continents situation in isolation, but when viewed on global perspective, the practice of the different courts of EU states, which have also issued indictments for senior official from other parts of the world, is undermined (not refuted) by this allegation.⁵⁶⁸ It might be that the AU have exaggerated⁵⁶⁹ its claims that it leaders and officials are being deliberately targeted by European courts but two of their other complaints regarding sovereign immunity and the destabilizing effect of the indictments have merit.⁵⁷⁰ In some respect the resentment by Africa that it is harassed by those who are particularly ill-suited to do so, is understandable.⁵⁷¹ It is however also stated by Jalloh regarding Africa:

Ruthless military dictatorship, famine, abject poverty, barbaric civil wars in which civilians were not just fair game but the only game, widespread human right abuses, including the commission of serious international crimes, have all regrettably become enduring features on the continent.

On a more positive note the AU did not just complain about universal jurisdiction. Besides calling for a diplomatic solution, it proposed how the dispute with the EU over the exercise of universal jurisdiction could be resolved and took practical steps to defuse the situation.⁵⁷² As part of this they suggested the creation of international watch dog to police the exercise of universal jurisdiction. Such a body would have the competence to review and resolve interstate complaints arising from the use of the principle.⁵⁷³ Maybe the one lesson one can learn is that notwithstanding recognizing universal jurisdiction in the fight against impunity, it is stressed that must be exercised with great care, taking the context and relevant immunities⁵⁷⁴ into consideration. The process in Africa slow and arduous. Immunities are high on the agenda. In that regard the SA implementation is not congruent with the African position. There is no question that Africa acknowledge universal jurisdiction and encourage member states it implement such legislation to fight impunity. Context and sensitivity must however be taken into consideration when applying universal jurisdiction especially in the light of new developments since Kenya voted to pull out of ICC.⁵⁷⁵

⁵⁶⁶ Belgium, Canada, The Netherlands, Switzerland, and Finland have done such prosecutions.

⁵⁶⁷ See paragraph 26 of AU & EU expert Report.

⁵⁶⁸ Jalloh 13.

⁵⁶⁹ Jalloh 19.

⁵⁷⁰ Jalloh 55.

⁵⁷¹ See Jalloh n 3 2010 in this regard.

⁵⁷² Jalloh 64.

⁵⁷³ Jalloh 64.

⁵⁷⁴ This is played out by the most recent developments.

⁵⁷⁵ See report by Reuters in Pretoria News Friday Sept 20 2013 Africa leaders to ponder position in ICC. Steps taken against Kenya top two fuelled backlash by states stating that African leaders will decide on October 13 to take a common stance whether to pull out from the ICC over the prosecution of its leaders.

I agree with Du Plessis that there is good reason to be skeptical of the AU decision to expand the jurisdiction of the African Court of Justice and Human Rights.⁵⁷⁶ The fact remains that international criminal justice is slowly taking shape on the continent and many governments are beginning to devote resources and attention to its implementation.⁵⁷⁷ We are starting with the process relating to universal jurisdiction in Africa's jurisprudence. The emerging state practice in Africa will be very important for future development of customary international law concerning universal jurisdiction. National courts exercising universal jurisdiction are actively involved in continuous process of international law making. There is a positive contribution to development of international criminal law and South Africa is but one example of this, as will be discussed in next section.

⁵⁷⁶ Du Plessis, Louw & Maunganidze 21. Maunganidze & A Du Plessis 26 – 27. Also see Msimang Sisonke “AU's attack on the ICC ignores the suffering of many women” 40 Mail & Guardian October 18 – 24 2013 that states: “In absence of funding for both the African Union Commission and the new African Court, however there are many questions to be asked about how independent such a court will be – either of Western influence (he who pays the piper plays the tune) or of African Political influence”.

⁵⁷⁷ Du Plessis, Louw & Maunganidze 21. One should not oversimplify the African position: Maunganidze & A Du Plessis. However see developments after Kenya voted on 5 September 2013 to withdraw from ICC and the Extraordinary Session of the Assembly of AU on 11 and 12 October 2013.

6. SOUTH AFRICA'S POSITION

In August 2002⁵⁷⁸ relatively soon after the Rome Statute came into force⁵⁷⁹, the South African Implementing legislation, Act 27 of 2002 took effect.⁵⁸⁰ SA was an African driving force⁵⁸¹ in relation to an independent ICC and the positive attitude also reflected how the implementing legislation (and a dedicated unit) was handled inside the country.⁵⁸² South Africa was the first on the African continent with implementing legislation. The domestic legislation was in order to give effect to South Africa's obligations under the Rome Statute. It is stated in the Preamble that "the Republic of South Africa is committed to bring persons who commit such atrocities to justice either in a SA Court or the International Criminal court." States are given the first opportunity and primary obligation to prosecute these heinous crimes⁵⁸³ under the principle of complementarity.⁵⁸⁴ It is also pertinently stated in the preamble: "to provide for the prosecution in South African courts of persons accused of having committed said crimes in South Africa *and beyond the borders of South Africa in certain circumstances*" [Own emphasis added]. It can thus be stated that the Rome Statute emphasizes in its Preamble that it is the duty of the state to exercise to exercise its jurisdiction over those responsible for international crimes with a hint of universal jurisdiction in the South African legislation. In the Preamble of the SA act, Parliament committed South Africa as a member of the international community to bringing persons who commit such crimes to justice under SA law where possible.⁵⁸⁵ It was found by the North Gauteng High court: "*Seen holistically therefore, all the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute crimes against humanity within the ambit of the provisions of section 4 (3) of the ICC Act, and it is in the public interest that the State does so.*"⁵⁸⁶

Generally it can be stated that all the bare essential elements⁵⁸⁷ of the Rome Statute have been incorporated in SA law for states that required the dualist⁵⁸⁸ approach like the Republic. The drafters of the legislation incorporated the Rome Statute's definitions of the core crimes (which in itself are codifications) directly into the SA law by referring to a schedule appended to the Act

⁵⁷⁸ A Katz stipulates that it was 18 July 2002, 17 days after the Rome statute entered into force." An Act of transformation" *African Security Review* 12 (4) (2003) 27, [hereinafter Katz] However the Act indicate 16 August 2002.

⁵⁷⁹ 1 July 2002.

⁵⁸⁰ See S Maqungo "Trial and Error Challenges facing the International Criminal Court" 1 that refer to July 2002 that the Parliament approved the legislation. As to the history see H Strydom "South Africa and the International Criminal Court" 345 *Max Planck Yearbook of United Nations Law* Volume 6 (2002), 345 – 366. See footnote 3 and 4.

⁵⁸¹ See Van der Vyver 129. See particularly Murungu C & J Biegon Prosecuting International Crimes in Africa (Eds) 311 in section by L Stone "Implementation of the Rome Statute in South Africa" 305-6.

⁵⁸² Florian Jessberger and Cathleen Powell "Prosecuting Pinochet's in South Africa - Implementing the Rome Statute of the International Criminal court." See reference to interdepartmental committee under direction of dept. of Justice. See also E De Wet & H Strydom "Implementing international humanitarian law: developments in South Africa and other jurisdictions with Special reference to international war crimes tribunals" 2000 25 *SAYIL* 67. There is also reference to the role in SADC. This is not only reflected by how soon legislation was promulgated but also with the creation of a specialized unit - the PCLU - created concurrently.

⁵⁸³ This is called indirect application but it should form the backbone of international criminal law: Erasmus en Gerhard Kemp The application of international criminal law before domestic courts in the light of recent developments in international and constitutional law.

⁵⁸⁴ This principle is mentioned 3 times in the domestic legislation. For an excellent exposition of why domestic jurisdictions have to implement universal jurisdiction in spite of the Rome Statute not prescribing such see Bruce Broomhall 408 – 409. See also Maunganidze O & A Du Plessis discussion of positive complementarity.

⁵⁸⁵ *SALT* case 225 b-c.

⁵⁸⁶ *SALT* case 225 e-f.

⁵⁸⁷ The Elements of Crime is a notable exception See Article 9 and Du Plessis *ISS paper* 172 on 3 and also the general principles of criminal law set out in articles 22 – 33. (Part 3 of Rome Statute.)

⁵⁸⁸ See discussion by Du Plessis M about dualist approach.

(Part 1 – 3). The codified genocide, crimes against humanity and war crimes are part of South African law through the Implementing Act. Shortly put, at that stage South Africa have also enthusiastically embraced the concept of international prosecutions for international crimes. The objects of the act is repeated and spelled out in Section 3 stating *inter alia* to enable as far as possible and in accordance with the principles of complementarity”... *the national Prosecuting authority of the RSA to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders the Republic in certain circumstances.*” Section 3 (d) read with Section 2 requires the High courts of South Africa to adjudicate cases brought against persons accused of these core crimes committed in the Republic, and even beyond its borders certain circumstances.⁵⁸⁹ The main jurisdictional provisions are found in Section 4. It has been more than a decade since SA implemented the Rome Statute and the domestic steps taken in that time must be evaluated.

6.1. Dedicated and specialized units

A Presidential Proclamation established a special unit to wit the Priority Crimes Litigation Unit (PCLU) within the NPA.⁵⁹⁰ Under section 13 (1) of the NPA Act on 24 March 2003, it is headed up by a special Director. The Priority Crimes Litigation Unit *inter alia* manage and direct the investigation and prosecution of crimes contemplated in the Implementation of Rome Statute of the International Criminal Court Act, Act no 27 of 2002.⁵⁹¹ This unit is also specifically task with dealing with ICC crimes together with other crimes against the state.⁵⁹² They work hand in hand with the SAPS Police service and specifically the Directorate for Priority Crimes Investigation (DPCI). Relatively recently this Directorate for Priority Crimes Investigation (DPCI)⁵⁹³ - the Hawks - has been established after the Scorpions were abolished. The crimes under the ICC act also specifically fall within the mandate of this Police grouping which also has a broader mandate.⁵⁹⁴ The custom is now that requests for investigation and prosecution are done jointly to the PCLU and DPCI. The mandate of the said Directorate for Priority Crime Investigation DPCI -Hawks -⁵⁹⁵ is set out in Section 17D (3) of the amended SAPS act.⁵⁹⁶ It took away the power of the NPA to initiate investigations in respect of such offences. This presidential Proclamation⁵⁹⁷ establishing the PCLU had not been recalled and the PCLU must therefore be considered to be the dedicated component of the prosecution in respect of domestic Rome Statute offences. Section 17 B (a) specifically deal with serious organized crimes. Section 17 D deals with National Priority offences as do Section 17 D (3) and section 17F which require a multi-disciplinary approach.⁵⁹⁸ Once an investigation has been launched and the NDPP decides

⁵⁸⁹ SALT case 225 c-d.

⁵⁹⁰ Proclamation No 43 of 2003 issued on 23 March 2003. See npa.gov.za/Uploadedfiles/about_pclu_singedoff.doc. The special Directors appointment was confirmed in terms of Government Gazette No 24876 of 23 May 2003.

⁵⁹¹ See Du Plessis, Louw and Maunganidze 16.

⁵⁹² Like other countries the mandate of the unit is combined with terrorism cases, conventional arms cases and matters referred to the unit by the NDPP. The *sequelae* of the Truth Commission are also on their plate.

⁵⁹³ South African Police Service Act, No 65 of 1998. This grouping was established in 2009 and at that stage were a 26 member unit - the Crimes against the state Unit [CATS-unit].

⁵⁹⁴ Du Plessis, Louw and Maunganidze 16.

⁵⁹⁵ Section 17 C (1) of the SAPS Act establishes the DPCI that is the Hawks.

⁵⁹⁶ Section 17 A read with ss 16 (1), 16 (2) iA and item 4 of the Schedule 1 of the SAPS Act classifies all offences under the ICC act as “national priority offences.”

⁵⁹⁷ Proclamation No 43 of 2003 referred to above in footnote 589.

⁵⁹⁸ SALT 236 c- d. All government departments and institutions must when required to do so, take reasonable steps to assist the Hawks. Section 17 F (4) specifically requires the NDPP to ensure that a dedicated component of prosecutors is available to assist in, and cooperates with the Hawks in conducting its investigations of priority crimes.

to prosecute, the PCLU will then have the responsibility for prosecuting the core crimes.⁵⁹⁹

A flurry of activity⁶⁰⁰ regarding this Act and international criminal justice in general followed in South Africa starting with the arrest of one Colonel Benjamin. A dossier relating to Gaza referring to the atrocities during Operation Cast Lead was also submitted.⁶⁰¹ Closely related was the breaking of the naval blockade at Gaza and the South African journalist, Gadija Davids that was part of the flotilla.⁶⁰² Thereafter there was the application for arrest for Tony Blair,⁶⁰³ Tzipi Livni,⁶⁰⁴ the late Ethiopian Prime Minister Miles Senawi regarding the Ogaden people,⁶⁰⁵ and a second Zimbabwe docket relating to rape, Mark Ravalomanana in Madagascar⁶⁰⁶ and the most recently the arrest of President of Obama.⁶⁰⁷ There were also the matters related to the endorsing of warrants of arrest by the ICC⁶⁰⁸ and rape in Zimbabwe.⁶⁰⁹ There were other instances.⁶¹⁰ Compare for instance that the Act was invoked against the President Mugabe by a South African citizen (who has a significant property interest in Zimbabwe) in September 2002 while Mugabe was attending the World Summit on Sustainable Development in Johannesburg.²¹ See also the reference by du Plessis relating to the handling of the Menghistu visit to the country in 1999.⁶¹¹ Ethiopia attempted to get him extradited.

6.2. Grounds of jurisdiction

Except for the usual grounds that implicitly apply in SA, the Implementing act did put into place a variety of jurisdictional bases by which a SA court might prosecute a person alleged to be guilty of the core crimes outside the borders in an extra territorial situation.

Section 4 (1) if the Implementing Act creates jurisdiction for South Africa courts over the core crimes by providing that : *“despite anything to the contrary in any other law of the Republic, any person who commits a crime⁶¹² is guilty of an offence and liable on conviction to a fine or imprisonment, including imprisonment for life...”* This establishes jurisdiction for SA Courts over the core ICC crimes. It is stated specifically by the court in *SALT-* case that section 4 (1) *per se* has no requirement of presence.⁶¹³ Section 4 (3) of Act 27 of 2002, the Implementation of the

⁵⁹⁹ See section 5 in general.

⁶⁰⁰ One can't call it an “explosion” of lawsuit or a “veldfire” yet, but there have been quite some “activity” in this regard.

⁶⁰¹ See Du Plessis, Louw & Maunganidze 16 for a description of this docket. In 2011 two civil societies MRN and Palestinian Solidarity Alliance brought this case. Lee Stone Prosecuting International crimes In Africa 328 and Maunganidze & A Du Plessis 17 and footnote 61.

⁶⁰² This relates more to Section 4 (3) (d) and was first case to be initiated.

⁶⁰³ See Otilia 3 and footnote 7. Maunganidze & A Du Plessis 18 and footnote 65.

⁶⁰⁴ Du Plessis, Louw & Maunganidze 16. Maunganidze & A Du Plessis p 17 and footnote 17.

⁶⁰⁵ See Du Plessis, Louw & Maunganidze 16. Maunganidze & A Du Plessis 17 and footnote 64.

⁶⁰⁶ See Du Plessis, Louw & Maunganidze 16. It is stated that it was the first international crime case that the NPA has decided to proceed with. This is in respect of abuses committed in Madagascar in 2009 with a view of prosecuting the countries ousted former President Marc Ravalomanana. The Gadija Davids matter was actually prior to this matter. Maunganidze & A Du Plessis 18.

⁶⁰⁷ The list is not complete. A number of investigations are still under consideration.

⁶⁰⁸ See Maunganidze & A Du Plessis 19 and footnote 66 and 67.

⁶⁰⁹ See Omar Al Bashir: Maunganidze & A Du Plessis on 9.

⁶¹⁰ The list is not exhaustive see discussion by du Plessis, Louw en Maunganidze on 10 - 11 regarding SA government support of the AU non-cooperation decision.

⁶¹¹ Floris and Jessberger footnote 60 on 361.

⁶¹² This refer to the core crimes

⁶¹³ I agree that this par excellence is an example of prescriptive jurisdiction wherever a core crime happens over the globe. It must be read in conjunction with section 4 (3) but read together it is clear that creates limited universal jurisdiction. On 241 e it is stated: “Section 4 (1) of the domestic Act merely criminalised the crime of inhumanity. It did not give the court any jurisdiction. Only sect 4 (3) could be relevant.”

Rome Statute of the International Criminal Court Act provides that any person who commits a core crimes outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if that person, after the commission of the crime, is present in the territory of the Republic. It empowers a South African court to exercise jurisdiction over a person who has committed such crimes outside South Africa if that person after the commission of the offence is present in the territory of the Republic.⁶¹⁴

I agree with Du Plessis that this provides for limited or conditional⁶¹⁵ universal jurisdiction.⁶¹⁶ See particularly the following: *that SA legislation uses the Canadian*⁶¹⁷ “limited” universal of custodial or conditional jurisdiction by allowing South Africa to prosecute any person who is present in South Africa after the commission of the offence under the law.⁶¹⁸ It is stated by du Plessis in Dugard: “The jurisdiction in trigger (c) is thus grounded on the idea of universal jurisdiction,⁶¹⁹ that is, jurisdiction which exists for all states in respect of certain crimes which attract universal jurisdiction by the egregious nature and consequently over the perpetrators of such crimes on the basis that they are common enemies of mankind.”⁶²⁰ This form of jurisdiction is to be welcomed because genocide, crimes against humanity and war crimes are amongst the crimes of most serious concern to the international community as a whole and as such is often

⁶¹⁴ Dugard 157.

⁶¹⁵ See Dugard in 2002 Annual Survey 140 with John Dugard and Garth Abraham Foreign Policy and International Relations stating: “This constitutes a **moderate form of universal jurisdiction** as contrasted with the more extreme form which would permit a prosecution to be instituted against a person even if that person is physically outside the territory of the prosecuting state” on 17 of 38. See also Chacha Murungu & Japhet Biegon Prosecuting International Crimes in Africa (eds) 311 referring to **relatively expansive** jurisdiction and footnote 25 ; Seville Mango Implementing the ICC Statute in South Africa Published in the Rome Statute and Domestic Legal Orders Vol 1 Claus Kress & Flavia Latanzi (eds) at 185. AU & EU expert group Report on 13 par 18 (i). See also du Plessis, Louw and Maunganidze on 6 on African efforts to close impunity gap.

⁶¹⁶ There was a previous publication that stipulated the contrary: M Du Plessis, “The Creation of the ICC: Implications for Africa’s Despots, Crackpots and Hotspots” *African security Review* No 12 45 – 15: “It should be pointed out however that the prospects of successfully invoking the South African Act against President Mugabe, or an official from any other State that has not ratified the Rome Statue (Liberia, for instance) seem doubtful. It will be recalled that under the Rome Statute the jurisdictional preconditions for the Statutes operation are that “ the alleged perpetrators of the crimes are nationals of a State Party or the crimes are committed on the territory of a State Party” While South Africa’s ICC act provides that a South African court may exercise jurisdiction over someone who extra territorially commits a core crime against a South African citizen or against a person who is ordinarily resident in the Republic or who after the commission of the crime is present in the territory of the Republic, the exercise of that jurisdiction is to be performed within the parameters of the objects of the ICC Act. Those objects include the creation of ‘a framework to ensure that the Statute is effectively implemented in the Republic’ and the ensuring that anything done in terms of the act conforms to the obligations of the Republic in terms of the Statute. Given that the Rome Statute – the Statute which the ICC act is aimed at implementing - itself provides that jurisdiction under the ICC scheme is limited to offences committed on the territory of States Parties and in respect of offences committed by national of States Parties wit will be open to an official from a non-State Party such as Zimbabwe or Liberia who has committed the alleged offence outside of South African territory to argue that the South African court’s jurisdiction is similarly constrained under the ICC Act.”

⁶¹⁷ Canada provides in Crimes against Humanity and War Crimes Act that it is an offence under Canadian law to commit the crimes of genocide, crimes against humanity or war crimes not only in Canada but also outside Canada. Any such crimes may be prosecuted in Canada. However section 8 clarifies that a prosecution for a crime under section 6 committed outside Canada will only be brought if there is one of several possible links to Canada present in the case. Section 8 (c) allows for something that might be called ‘limited’ universal or custodial jurisdiction. Under this provision the offender may be prosecuted in Canada even if the crime was committed outside Canada by a non-Canadian citizen against a non-Canadian if only “he is present in Canada. Floris and Jessberger 357 - 358.

⁶¹⁸ It was section 4 (2) (c) in the Bill. See Jessberger Powell 14.

⁶¹⁹ See also Du Plessis, Louw and Maunganidze 11. In regard to the Geneva Conventions Act see Du Plessis M “The Geneva Conventions and South African Law” *ISS Policy brief* 43 June 2013 on 2.

⁶²⁰ See also Swanepoel CF Universal Jurisdiction as procedural Tool to institute prosecutions for international core crimes *Journal of Juridical Science* 2007 p 121.

regarded as giving rise to “universal jurisdiction”.⁶²¹ If we compare it to the draft model laws devised by Commonwealth expert group we found that it correspond with conditional universal jurisdiction. Their recommendation that universal jurisdiction should be applied recognized conditional universal jurisdiction. The model law for conditional universal jurisdiction is almost identical to the domestic ICC Act.⁶²²

Du Plessis states that SA Act is a very progressive example of implementing legislation allowing for the potential prosecution of international crimes wherever and by whomsoever they may be committed (section 4 (3) (c) of the ICC Act which extends jurisdiction to a person who ‘after the commission of the crime, is present in the territory of the Republic and which thus provides South African Courts with universal jurisdiction.’⁶²³ Again on page 4 he describe this as a particularly progressive feature. It is noteworthy that the Court in SALT case referred to the following: “*In order to give affect (sic) to the **principle of universal jurisdiction**, and to confer jurisdiction on domestic courts for international crimes, the ICC Act deems that all crimes contemplated by that Act, wherever they may occur, are committed in South Africa*”⁶²⁴ and again: “*This would make a mockery both of the universal jurisdiction principle endorsed by the Parliament when enacting the ICC Act as it would render the legislative provisions redundant*”.⁶²⁵ It is stated again in relation to Section 4 (3) of the ICC Act is also relevant as it goes beyond “normal” jurisdictional requirements.⁶²⁶ Finally the court found: “... *is in my view correct in submitting that section 4 (3) of the ICC Act dealt with the jurisdiction of the court to try someone after an investigation.*” And later: “*Section 4 (3) was concerned with a trial. The ICC Act was silent on an investigation, but in my view it is logical that an investigation would have to be held prior to a decision by the first respondent whether or not to prosecute*”.⁶²⁷ In regards to the argument that “if a suspect was physically present in South Africa then an investigation could continue. If they left, even for a short period, the jurisdiction would be lost. If they then re-entered South Africa an investigation would continue. The court also agreed that such an interpretation would amount to an absurdity.”⁶²⁸

6.3. ***Southern African Litigation Centre and another v National Director of Public Prosecutions and others***⁶²⁹

At the end of March 2012, exactly 10 years after the *Arrest Warrant*-case, the North Gauteng High Court heard a landmark case on the domestic prosecution of international crimes which raised the issue whether domestic proceedings may be initiated under the principle of universal jurisdiction with regard to persons outside South Africa. This inaugural judicial pronouncement⁶³⁰ on SA ICC Act is wide ranging. The case was brought to court by the South African Litigation Centre (SALC) following unsuccessful attempts to persuade the SAPS and NPA to investigate and prosecute in SA, 17 Zimbabwean suspects for torture as a crime against humanity. The torture was allegedly committed in connection with a raid by ZANU PF on opposition MDC headquarters, Harvest House, in Zimbabwe in March 2007. The dossier was

⁶²¹ See also 155 by Dugard on Universal jurisdiction footnote 57 wrongly refers to 4 (3) (d) is should be (c)

⁶²² <http://www.thecommonwealth.org> 2004 and 2011 Expert Group reports at page 5-6 (2004 and 9 – 11 (2011)).

⁶²³ M Du Plessis South Africa’s International criminal Court Act Countering genocide, war crimes and crimes against humanity *ISS PAPER* 172 November 2008.

⁶²⁴ On p 222 f-g and again h – i.

⁶²⁵ On 222 par h-l and again on 225.

⁶²⁶ 225 e.

⁶²⁷ 242 a- b.

⁶²⁸ On 241j.

⁶²⁹ 2012 3 All SA.

⁶³⁰ It was stated by the court that: “...*litigating was first of its kind*” on 223 g.

hand delivered to PCLU.⁶³¹ In June 2009 a year after receiving the complaint from the SALC, the SAPS (supported by some members of the NPA) decided not to investigate the matter. The reasons given included issues regarding the sufficiency of the evidence, the ostensible problems obtaining further evidence from Zimbabwe and concerns over whether SA had jurisdiction in respect of investigation.

In December 2009 SALC launched a legal challenge asking the Court to set aside the decision not to open an investigation and to order that the matter be remitted to the authorities for them to reconsider their decision. On the eve of the proceedings Adv. Ackermann the Head of the unit deposed to an affidavit that he had been side lined because of his view that the SAPS reasons for refusing to initiate an investigation were flawed. Some of the arguments related to correct division of responsibilities between NPA and the police in respect of investigating international crimes. Some of the arguments related to the NPA's decision to accept the police's decision not to initiate an investigation. The North Gauteng High Court's decision in the Zimbabwe Torture Docket found that this presence requirement did not apply to the investigatory stage of proceedings (at the very least).⁶³² This decision could potentially have far reaching consequences firstly as the courts of other African states (particularly those with a common legal pedigree)⁶³³ might chose to follow this interpretation of their own "presence" requirement but also for the South African authorities working with these matters. South African authorities required the strict presence⁶³⁴ of an accused before proceedings can be initiated against them. One can legitimately asked if an investigation cannot be opened without presence, would the exercise of universal jurisdiction ever be possible in practice.

One of the first points taken was the standing, the *locus standi in iudicio* of the applicants. The court found that the Constitution requires a broader approach to standing and the High Court agreed with this approach.⁶³⁵ In the context of the *locus standi* argument it was the court's opinion that "the decisive factor in the present context was ICC Act:

In the present instance, the quality of locus standi has to be decided, not by mere reference to prior decisions of the Constitutional Court and the Supreme Court or Appeal which both adopted a broad approach in constitutional litigation but more importantly in the context of the Rome Statute and the domestic Act of 2002, the ICC Act.

The court took a holistic approach⁶³⁶ held that applicants had *locus standi*, not only in their own interest but in the public interest in particular.⁶³⁷ The court found that the South African Litigation Centre had a well-motivated compelling request and that they have a legitimate expectation that the request be properly considered, decided rationally in good faith and in accordance with the principle of legality. The court also found that there was a well-founded apprehension that the State institutions had not acted in good faith, but adopted a carping, defensive and evasive position to avoid their duties in law.⁶³⁸ For instance the applicants' bona fides were attacked; they were accused of seeking publicity and almost reprimanded for daring to place an undue

⁶³¹ Beyond the ICC: The Role of Domestic Courts in Prosecuting International Crimes Committed in Africa: Chatham House. Summary of Meeting N Fritz on 9.

⁶³² Gevers Christopher Africa and Universal Jurisdiction warandlaw.blogspot.com

⁶³³ Gevers Christopher Africa and Universal Jurisdiction warandlaw.blogspot.com

⁶³⁴ Also see their approach in other matters for instance the Zimbabwean rape docket.

⁶³⁵ 223 par c – d.

⁶³⁶ Du Plessis, Louw & Maunganidze 12.

⁶³⁷ 219b, 223c, 223i and especially 225 g-h.

⁶³⁸ The court found that the applicants' comments in this regards seem to well justified. On 231 i.

burden which was an obvious waste of time on the state institutions. The court found that these attacks herein were in unfortunate and unjustified.⁶³⁹

The decision taken by SAPS and the NDPP refusing to accede to request for an investigation to be initiated into acts of torture as a crime against humanity was reviewed and set aside. The relevant decisions were declared unlawful, inconsistent with the Constitution and therefore invalid. The Court found that the request must be assessed taking into account international law obligations. The PCLU was ordered to render all possible assistance to the SAPS in the evaluation of the request for initiation of an investigation. The PCLU was also ordered to manage and direct such investigation as provided for in the Presidential Proclamation creating the unit. The DPCI of SAPS was ordered in accordance with section 205 of Constitution, as far it is practicable and lawful to do the necessary expeditious and comprehensive investigation of the crimes alleged in docket. The court referred to the safety of witnesses and it was indicated that the DPCI is unable to ensure the safety of witnesses at all times. It was stated that the DPCI will not secure the attendance of witnesses located in Zimbabwe, but also that the NGO – South African Litigation Centre -the Applicants must render assistance in this regard.⁶⁴⁰ Interestingly the Dept. of Home Affairs and DIRCO were instructed to provide required assistance to ensure attendance of witnesses in South Africa through provision of visas and waiving the need for a passport. The court ordered that requests for MLA in accordance with the International Co-operation and Criminal Matters Act, No 75 of 1996 should be done by PCLU in cooperation of investigating unit DPCI.⁶⁴¹ The DPCI was instructed to communicate all findings to PCLU. After the mentioned investigation has been completed, the PCLU obviously have to make a decision whether or not to institute a prosecution. If a prosecution was to be recommended, the PCLU must refer this decision to NDPP for confirmation and the record must be submitted to the applicants.

It was pertinently found by the Court that political considerations should not have been taken into account at this stage to wit the initiation of investigation.⁶⁴² The NDPP admitted in his affidavit that a reasonable suspicion exists, in other words the threshold to open an investigation existed.⁶⁴³ Surprisingly the NDPP said that he did not take views of Head PCLU into consideration⁶⁴⁴ and the court found that the NDPP abdicated his view to that of National Commissioner.

The State authorities both the DPCI as well as the NPA asked for leave to appeal but this was refused and the Supreme Court of Appeal was approached. The only point in issue for determination is whether the SAPS and NPA had the power and duty to investigate the torture docket, in other words the interpretation of Section 4 (1) and 4 (3) of the Implementation Act which is in dispute. On the 28 May 2012 the first applicant NPA filed an application for leave to appeal in the North Gauteng High Court. The SAPS followed suit and filed its application for leave to appeal on 4 June 2012. Leave to appeal in relation to the judgment and order of Fabricius J delivered on the 8 May 2012 is sought. On the 7 June 2012 Fabricius J dismissed both applications with costs, finding that there is no reasonable prospect of success that another court will come to a different conclusion. The applicants filed an application for leave to appeal to the SCA in July 2012. On the 18 September 2012 the Supreme Court of Appeal referred the application for leave to appeal to oral argument. The court also informed the parties that they

⁶³⁹ 231.

⁶⁴⁰ See discussion of role of CSO's in Du Plessis, Louw & Maunganidze 19.

⁶⁴¹ Par 34.10 on 243 f-g.

⁶⁴² 240 d-e also 239 f –g.

⁶⁴³ 237 i-j.

⁶⁴⁴ 241 a- b.

must prepare to address the Court on the merits of the appeal if the Court required it. At the present time all the heads of argument by the different parties has been submitted and the matter will be argued on the 1 – 2 of November 2013. A *pro amico* group also joined the case.

6.4. Reluctance⁶⁴⁵ or reticence by state officials⁶⁴⁶

As stated by Dugard the political will to exercise universal jurisdiction is not always forthcoming.⁶⁴⁷ Dugard states this is illustrated in the manner in which governments and courts have refused to exercise jurisdiction over Israeli politicians and military leaders wanted for the commission of war crimes in Operation Cast lead (the 2008 – 9) assault on Gaza⁶⁴⁸. In this respect he submits South Africa is no exception as the National Directorate of Public Prosecutions refused to issue a warrant for the arrest for a dual South African/Israeli officer in the Israel Defence Forces in connection with crimes alleged to have been committed in Operation Cast Lead.⁶⁴⁹ It can be stated that the fact that public prosecutors have been hesitant to take the lead in initiating cases against foreign officials,⁶⁵⁰ may also be for other reasons. This is probably because they are more likely to be aware of the practical obstacles involved in prosecuting such cases *vis a vis* victims and their supporters and NGO's or CSO.⁶⁵¹ The real challenge of obtaining evidence involved in distant prosecutions⁶⁵² should never be underestimated.

⁶⁴⁵ This reticence is also referred to by Bruce Broomhall "Towards the Development of and Effective System of Universal Jurisdiction for Crimes under International law" 399. And see Cassesse and Inazumi 211-12: "*it is a fact that national courts are not inclined to institute proceedings for crimes that lack any territorial or national link with the state' and short term objectives or national concerns still prevail.*"

⁶⁴⁶ Also see Hall 58.

⁶⁴⁷ It is put brilliantly by Dianne Orentlicher: "Human rights activists who for the most part have pressed a maximalist agenda: "*The more universal jurisdiction the better.*" *Arrayed against them have been **government officials and other critics who have had a hard time imagining a hypothetical exercise of universal jurisdiction they will support***": Orentlicher 14.

⁶⁴⁸ The possibility that not enough evidence have been obtained should also be taken into account.

⁶⁴⁹ Dugard 4 Edition 156.

⁶⁵⁰ Vandermeersch Jalloh 22. This is especially so in the cases based on customary international law: Pavlic 36 – 7. See also Maunganidze & A Du Plessis 18 that states: "*However this is not necessarily an indication of a lack of commitment to international justice on the part of the authorities. One sign that the South African Authorities are committed to the principles of the Rome Statute is the on-going efforts to build capacity among the prosecutors and investigators who work on international crimes.*"

⁶⁵¹ Du Plessis, Louw and Maunganidze 19.

⁶⁵² Jalloh 22. Compare the *Okah*- case.

7. EVALUATION OF PRINCIPLE IN SOUTH AFRICA AND CONCLUSION

*“Good intentions; even political will is not enough. There must be precision and care in effecting the appropriate tools to give effect to the intentions”*⁶⁵³

One can broadly refer to two groups regarding universal jurisdiction. The human rights activists combined with NGO’s on the one side, who for the most part has pressed a maximalist agenda: *“The more universal jurisdiction the better.”* Arrayed against them have been reluctant government officials and other critics who have had a hard time imagining a hypothetical exercise of universal jurisdiction they will support⁶⁵⁴ or rather not support. This applies also to South Africa. The rapid change involving universal jurisdiction has also provoked some resistance from States, and recently one can observe more reluctance to its active exercise.⁶⁵⁵ This is also particularly true for South Africa.

Universal jurisdiction is at a turning point in South Africa. At the time of the negotiations for the creation of the ICC, South Africa embraced a positive attitude in relation to the trend for accountability for the core crimes. This is *inter alia* reflected in the implementing legislation regarding the Rome Statute.⁶⁵⁶ As indicated section 4 (3) of the South African implementing legislation introduced a welcome “limited” or conditional universal jurisdiction⁶⁵⁷ - a la Canada-regarding international crimes in South African law. South Africa was the first country in Africa⁶⁵⁸ to implement the Rome Statute and slowly a trickle of other African countries are following.⁶⁵⁹ South Africa can be a useful example and leader on the African Continent in the efforts to domestically give effect to Africa’s obligations under the Rome Statute to end impunity.

It has been more than 10 years after South Africa implemented the Rome Statute. There was the Review conference of the ICC in Kampala and quite some activity⁶⁶⁰ in connection with the international criminal justice in South Africa. Some would view it as a “veld fire” or “explosion of lawsuits.”⁶⁶¹ Still no prosecution using universal jurisdiction *per se* ensued in South Africa. Public litigation was bound to follow and the inaugural *SALT v NDPP*⁶⁶² was the important first decision on universal jurisdiction in South Africa. Already there are voices for the abolishment of even the “limited” universal jurisdiction that is found in South Africa legislation.⁶⁶³ It must

⁶⁵³ Adaption from Katz’ article *An Act of Transformation African Security Review* “The Incorporation of the Rome Statute of the International Criminal Court into National Law” 12 (4) 2003 25 – 30 in relation to the extradition provision in the Implementing Legislation of the Rome Statute in South Africa.

⁶⁵⁴ Orentlicher 14.

⁶⁵⁵ Inazumi 234. Also see Hall 70-71 after describing the number of setbacks after the Butare 4 case: “These *unfortunate developments indicate that the future of universal jurisdiction remains in danger.*”

⁶⁵⁶ Interestingly Du Plessis 9 states: “*As such, it demonstrates South Africa’s commitment and leadership at the time the Act was drafted and passed, at any rate, in respect of the larger international criminal justice project.*” See also Du Plessis, Louw and Maunganidze 11. Compare also the creation of a dedicated or specialised unit for these prosecutions discussed supra in Chapter 6.

⁶⁵⁷ Also see the Implementation of Geneva Conventions Act, No 8 of 2012 see Du Plessis M “The Geneva Conventions and South African Law” *ISS Policy brief* 43 June 2013 on 2. Regarding universal jurisdiction in the new Geneva act compare Sect 5 (1) read with Section 7 (1).

⁶⁵⁸ To an extent South Africa can be viewed as the Canada of Africa. As to Canada’s role see Lafontaine

⁶⁵⁹ See discussion in Chapter 5 above and article by Gevers warandlaw.

⁶⁶⁰ See discussion *supra* in Chapter 6 about SA situation.

⁶⁶¹ See discussion about SA situation above and compare Bassiouni in Macedo 63.

⁶⁶² *SALT and another v NDPP and others* [2012] 3 All SA 198 (GNP). The application for leave to appeal will be argued before the SCA on the 1 and 2 November 2013.

⁶⁶³ Ill-considered abolishment of this provision in our domestic legislation will in the first instance have in unjustifiable retraction from our international responsibilities to end impunity. It would not be in sync with the development relating to the Geneva Conventions Act and gradual development on the African continent. Compare Chapter 5.

immediately be stated that one should not throw away the baby with the bathwater.⁶⁶⁴ There are obstacles, challenges and pitfalls⁶⁶⁵ in implementing universal jurisdiction, but to totally abolish the limited universal jurisdiction in the South African legislation, will be a major step backward. To take the contrary view would amount to dismissing the thrust of the whole body of current international criminal law and even more gravely, turning a blind eye to some of the major trends⁶⁶⁶ in the law of the international community.⁶⁶⁷ Maybe limited or conditional universal jurisdiction as a ground to prosecute core international crimes is not customary international law yet⁶⁶⁸ but one cannot ignore the trend⁶⁶⁹ relating to “limited” or “conditional” universal jurisdiction. It would also ignore the whole development in Africa and the recommendations of the AU & EU expert group.⁶⁷⁰ Already in 2002 the ICJ assessed trends in international law regarding universal jurisdiction and found that the international movement is toward domestic jurisdictions exercising universal jurisdiction to varying degrees over international crimes.⁶⁷¹

In regard to ordinary criminal offences the traditional criteria with preference for territoriality still holds sway. It would seem that this proposition hold true even though a trend is gradually emerging, at least in Europe (and maybe to a lesser extent in Africa) towards a weakening of the traditional principles of sovereignty and territoriality, to the benefit of transnational integration.⁶⁷² Over the last decade after the *Pinochet* decision, a slowly emerging system of international justice has begun to break its pattern of accountability in national courts.⁶⁷³ This is a relatively new and welcome trend in the enforcement of international criminal law. To abolish the limited universal jurisdiction would amount to dismissing the whole new development. National legislation providing for universal jurisdiction is growing as Hays Butler makes clear.⁶⁷⁴ Also in Africa.⁶⁷⁵ South Africa up till now played its part and hopefully the jurisprudence from South African can play an important role in consolidating the principle of universal jurisdiction in

⁶⁶⁴ As Richard Falk observes in his essays in Macedo on the *Pinochet* case that flexibility may well be needed during the fragile early period of a transition lest the transition be killed in his cradle: Macedo 66 and footnote 9.

⁶⁶⁵ See discussion in Chapter 3 above.

⁶⁶⁶ Bruce Broomhall 400 describes it as follows: “*In spite of the obstacles, it is clear that a number of governments through the express provision for universal jurisdiction over core crimes during the process of International Criminal Court implementation are choosing a path that will speed rather than curb the entrenchment of this doctrine. The wave of legislative activity currently under way will in time give rise to cases and these will oblige legal systems to find working solutions to problems that at present elude consensus.*” That process has started in SA.

⁶⁶⁷ Cassese Antonio The Belgian Court of Cassation v the International Court of Justice: the Sharon and others Case. *Journal of International Criminal Justice* 1, 2 Oxford University Press 2003. See also par 47 on 11 of *Arrest Warrant case*: Joint Separate opinion of Judges Higgins, Kooijmans & Buergenthal. As to the trend that reflects a balancing of interests: par 75 on 18 of the same.

⁶⁶⁸ However I agree with O Keefe 758 that in sum, the **circumscribed enforcement of universal prescriptive jurisdiction** is not without more cogent evidence for ambivalence on the part of states over the permissibility under general international law of the assertion of universal jurisdiction: O Keefe 758.

⁶⁶⁹ Bruce Broomhall writing in 2001 state on 409: “... *Too early to describe definitively the direction of the early trend, but at the early stage of the process of ICC implementation...*” See footnote 15 above.

⁶⁷⁰ See recommendation to implement legislation with limited universal jurisdiction in chapter 5 supra.

⁶⁷¹ The ICJ assessed trends in international law regarding universal jurisdiction and found that the international movement is toward domestic jurisdictions exercising universal jurisdiction over international crimes. It is also stated by Erasmus and Kemp 65: “... *ever growing acceptance of universal jurisdiction by domestic courts over serious international crimes*”

⁶⁷² Cassese 591 refers to the European arrest warrant which when issued in one European Country under certain conditions may automatically be executed in all the others. In Africa you have the SADC and ECOWAS groupings that operate more on a regional basis for instance. Maybe in Africa the sensitivity regarding sovereignty is still high on the agenda. See SA position about Kenyan situation: SAPA The New Age ‘Let Kenya tackle issue internally’ Ebrahim 9/6/2013.

⁶⁷³ Kenneth Roth the Case of Universal Jurisdiction Sept Oct 2001. See also Jessberger on 359.

⁶⁷⁴ Bassiouni 62 in Macedo. See also Butler Chapter 12 in Macedo 243.

⁶⁷⁵ See discussion above in chapter 5.

Africa. Thus the debate surrounding the principle of universal jurisdiction should really not be whether the concept validly exists as a basis for jurisdiction in international law, but rather the parameters and scope of its applicability.⁶⁷⁶ Universal jurisdiction has received increasing support among legal scholars and increasing number of states enacted laws that provided for “limited” universal jurisdiction, but it has not yet been supported by **practice** of states. The process is slow and arduous also in Africa.⁶⁷⁷ There are only few cases known in which pure universal jurisdiction has been applied. This holds true also for Africa,⁶⁷⁸ but the principle of universal jurisdiction should not be abolished in SA.

While evidence of obligatory universal jurisdiction is not evident in state practice yet, the international community however seems to be increasingly accepting and emphasizing the idea of the interest of the international community as a whole in ending impunity. Universal jurisdiction is one measure to achieve this end. There is thus unmistakably a growing acceptance around the world of the notion that there should be accountability for heinous crimes. Similarly there can be no question of the growing consensus against safe havens for war criminals.⁶⁷⁹ No one seems to be seriously arguing that people credibly alleged to have perpetrated such crimes, should escape and get off scot free.⁶⁸⁰ Although the relative “new” international criminal legal development no longer is completely in its infancy - also in Africa⁶⁸¹ - there is no practical way of judging whether a state like South Africa can and will work “effectively” with universal jurisdiction. The same is true for other countries in Africa. One can also not predict how the political will to enforce universal jurisdiction will ebb and flow.⁶⁸² However one must ensure that the principle of universal jurisdiction is not totally abolished.⁶⁸³ To a certain extent the positivist notion of absolute power of national sovereignty is also dwindling and outmoded.⁶⁸⁴ It is imperative for the cause of human rights and social justice that the “narrow application” of the universal jurisdiction should not be lost. There should however, be a disciplined application of universal jurisdiction when it is needed. Checks and balances should be in place if the principle is applied, lest one kill universal jurisdiction in its infancy. Proponents of criminal prosecutions based of universal jurisdiction, however, need also to recognize that states in general have a legitimate interest in *inter alia* maintaining a manageable case load, which inevitably draws on public resources. States are also justified in taking into account the “potential political fallout” and costs of universal jurisdiction proceedings.⁶⁸⁵

It is true that the existing body of law on universal jurisdiction is imperfect in a variety of ways.⁶⁸⁶ In the first instance the international community lacks a coherent international criminal justice

⁶⁷⁶ Hoover 9 and footnote 36.

⁶⁷⁷ For instance compare situation with Botswana and its implementing legislation see Chapter 5 above.

⁶⁷⁸ *S v Okah and other* (supra)

⁶⁷⁹ Batog 1 / 5. Also Lafontaine: *Future conventions on gross human rights violations and other serious crimes should allow for multiple bases of jurisdiction (including universal jurisdiction) in order to dispense with safe havens for criminals*. Inazumi 245.

⁶⁸⁰ Jessberger 361.

⁶⁸¹ Floris and Jessberger 361 “The new international system not so new anymore. More than a decade has past, review conference has been completed and a number of cases have been brought before the authorities. It is clear it is not in its infancy anymore.

⁶⁸² After describing the number of setbacks after the Butare 4 case Hall 70- 71 states the principle is still in danger. Particularly the following is stated: “*These unfortunate developments indicate that the future of universal jurisdiction remains in danger.*” The developments in South Africa also sound a warning that the future of the principle in SA can be in danger.

⁶⁸³ Hall 69- 71.

⁶⁸⁴ However see Lafontaine¹²⁷⁷ that refers to Cassese: “... *although sovereignty ‘this old pillar of world society is far from waning’.*”

⁶⁸⁵ Fontaine 49 and footnote 234.

⁶⁸⁶ Macedo 66.

system. Universal jurisdiction ought to apply uniformly. Still, the application of universal jurisdiction is and could be a progressive development of vast importance in international justice, but for that aspiration to be realized, one must begin to generate shared legal standards to support and give practical structure to our principled political aspirations to end impunity. I agree with Professor Lori Damrosch that the legitimacy of universal jurisdiction is a function of *“the extent to which it is understood as integrally connected with and supportive of other equally valid principles of international law.”*⁶⁸⁷ We must enhance uniformity in Africa. One possibility is by creating “Afrijust”⁶⁸⁸ contact points for instance. Comparative international law show that states operationalize the three facets of prescriptive, enforcement and adjudicative jurisdiction in different ways, giving effect to their international obligations as well as at the same time recognizing each State’s unique legal, political and policy based concerns. South Africa is in the same position. Ultimately therefore, a vital ingredient (in Africa and elsewhere) for the success of international criminal justice will be the ability of governments to incorporate and operationalize their commitment to international criminal justice through universal jurisdiction.⁶⁸⁹

It is clear from the discussion in the previous chapters that one will always have obstacles, pitfalls, and challenges⁶⁹⁰ especially on a practical plane, if you want to implement universal jurisdiction. There are still many controversies surrounding universal jurisdiction. That there have been fewer ordinary cases of universal jurisdiction than one would have expected, is not surprising because nations and their officials, as well as the courts are wary and seem predisposed, for understandable reasons and the practical challenges to avoid the less familiar, somewhat scary waters of universal jurisdiction.⁶⁹¹ However these pitfalls, obstacle and shortcomings and risks of universal jurisdiction are not of such a magnitude that they should be allowed seriously to affect the principle of accountability.⁶⁹²

7.1. Answer to central question and evaluation of SA legislation

The stipulations relating to universal jurisdiction in the South African legislation is rather **terse** and not totally explicit relating to the intricacies relating to universal jurisdiction.⁶⁹³ The exact parameters of universal jurisdiction should be set out clearly. In the light of all the controversy surrounding universal jurisdiction, this doctrine requires an explicit and full exposition of the principles that will be applicable. Guidelines are required. Whereas the stated object of the act is to create a “framework” to ensure that the statute is effectively implemented in RSA⁶⁹⁴ one can safely say the framework need more flesh. Good intentions and political will is not enough as Anton Katz opined.⁶⁹⁵ The present act provide a scanty framework and detailed regulations is

⁶⁸⁷ Rabinovitch on 529 and footnote 132.

⁶⁸⁸ See discussion of Eurojust contact points in AU & EU expert group Report R 15 on 48 and footnote 174.

⁶⁸⁹ Du Plessis, Louw & Maunganidze 20.

⁶⁹⁰ Du Plessis, Louw & Maunganidze 19 -20.

⁶⁹¹ See Yee that refer to *“the experience and reality of international relations ...”* and the *“international law formation process”*.

⁶⁹² However see Bottini: *“it is true that in some cases the exercise of purported exercise of universal jurisdiction has had beneficial effects. Apart from providing a forum where persons accused of committing serious crimes can be tried without the risk of impunity, prosecutions in foreign courts have fostered domestic prosecutions, human rights activism, and ultimately led to justice in the country concerned. But, given the existence of the ICC, these beneficial effects do not outweigh the problems and deficiencies that come with the exercise of universal jurisdiction.* He refers to Roht- Arriaza regarding Argentina and Chile.

⁶⁹³ For instance it is not as elaborate and specific as the example from the model Law of the AU in its provisions relating to universal jurisdiction. A number of matters relating to universal jurisdiction are rather **implied** in the terms of the present legislation. There is however no question that the present legislation relates to universal jurisdiction proper.

⁶⁹⁴ See preamble and section 3 (a) of Implementation Act.

⁶⁹⁵ See Katz 25 – 30.

needed. There must be precision and care in effecting the appropriate tools to give effect to the intentions.⁶⁹⁶ Du Plessis suggest for the interest of clarity and completeness that SA follow example of other state parties to the Rome Statute and incorporate by regulation further clarifications.⁶⁹⁷ I would propose that SA incorporate by regulation certain guidelines and safeguards for the application of universal jurisdiction.⁶⁹⁸ The central question can then be answered that universal jurisdiction in the SA legislation partly fulfill the requirement to fight impunity in the African context. But our laws are not entirely adequate⁶⁹⁹ yet. Clarification and guidelines are needed and the submission is that it can be rectified with regulations with the legislation.⁷⁰⁰ Judicial pronouncement and jurisprudence will also go a long way in clarifying the obligations in this regard.⁷⁰¹ The central question can be answer that the South African legislation partially fulfill and provide some solution to impunity in the African context but it can be refined.

7.2. Self-restraint and cautious approach needed

There is no question that there is a need for prosecutorial self-restraint when exercising universal jurisdiction. Cassese, an international jurist with impeccable credentials, remarked⁷⁰² that a prosecutor should act only when he is fully satisfied that there is compelling evidence available against the accused. There is a need for check and balances with respect to the decision of a single prosecutor, who in theory also could be influenced by personal or political considerations.⁷⁰³ It is beyond question that universal jurisdiction is a *subject matter that one should approach with caution*.⁷⁰⁴ Compare for instance the responses to the request for input on universal jurisdiction at the General Assembly of the United Nations.⁷⁰⁵ A common theme in the responses of most countries was the idea that universal jurisdiction should be exercised cautiously and with discretion. On the other hand it is stated that the risk of positive conflicts of jurisdiction and ensuing double jeopardy has at least been partially warded off by the sometimes overly cautious approach of courts adhering to the principle of subsidiarity. To the dismay of the victims' organizations, national courts have shown great restraint in exercising universal jurisdiction out of fear for offending political sensitivities. Many states require some form of

⁶⁹⁶ Katz 29.

⁶⁹⁷ Albeit on the Elements of crime. Du Plessis state that the lack of reference to the Elements of crimes should be rectified by means of regulations: Dugard 202 and footnote 209 and 210.

⁶⁹⁸ States have voluntarily limited the scope of universal jurisdiction in several ways and thereby prevented the abuse of the lofty principles. South African can do the same.

⁶⁹⁹ Hoover 10 and footnote 38.

⁷⁰⁰ I agree with Dalila v Hoover that inadequacy of these systems in African states hampers the development of universal jurisdiction. Universal jurisdiction relies on national legal systems to enforce international norms, more often than not, is application is hindered by the inexistence of inadequacies of these systems. Some states that have ratified the Rome Statute, fail to include the definitions of international crimes in their national laws.

⁷⁰¹ At the present moment the *SALT v NDPP* case will be argued before the Supreme Court of Appeal on the 1 – 2 November 2013.

⁷⁰² Cassese "*International Criminal Law*" 2003 at 253. The full quote reads: "*It would be judicious for prosecutors, investigating judges, and courts to invoke this broad notion of universal jurisdiction with great caution, and only if they are fully satisfied that compelling evidence is available against the accused. Generally speaking it would seem harmful or at least illusory to transform national judges into some sort of 'knight's errant of human nature', in the words attributed to Beccaria, charged with righting the most serious wrongs throughout the world.*" [Own emphasis added]

⁷⁰³ Hoover 29 and footnote 128.

⁷⁰⁴ There are legitimate grounds for hesitation and why a cautious approach is needed. Even judges inclined to advance human rights through the common law are cautious when it comes to universal jurisdiction. The courts have been largely cautious so far as reliance on universal jurisdiction is concerned. Judicial restraint and deference to sovereignty and international relations should be kept in mind. Such a choice requires a considerable commitment to resources: Van der Wilt

⁷⁰⁵ See different responses at the UN discussing universal jurisdiction.

political control before prosecutions can be launched. Usually in the form of authorization by the Minister of Justice or something similar.⁷⁰⁶ I personally would not subscribe to politicians being part of such an evaluating or screening process, but would require the National Director of Public Prosecutions after consultations⁷⁰⁷ for instance to make such a decision.

The task is to develop principled guidelines for the exercise of universal jurisdiction that enjoy a broad and thorough consensus.⁷⁰⁸ Bassiouni calls it “a broader jurisdictional mechanism” that can “prevent, deter, punish, provide accountability, and reduce impunity and also enhance the prospects of justice and peace provided that it does not become a wildfire.”⁷⁰⁹

7.3. Guidelines⁷¹⁰ and safeguards⁷¹¹ on the exercise of universal jurisdiction

It is obvious that universal jurisdiction can be a positive tool in the efforts to vindicate the fundamental values of the international community and to promote and protect human rights and fight impunity. Its negative side is that the exercise of universal jurisdiction is at least in tension with the principle of sovereignty and sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations.⁷¹² After the *Pinochet* case, the decision of *Congo v Belgium* was an indication that had triggered efforts to define and enforce limits on the exercise of universal jurisdiction.⁷¹³ It is necessary to have guidelines⁷¹⁴ for the application of universal jurisdiction in order to avoid jurisdictional conflicts, disruptions to the world order, abuse and denial of justice and to enhance the predictability of international criminal law. Supplying such guidelines has been the purpose of the Princeton Project on universal jurisdiction.⁷¹⁵ Similarly in the African context the Arusha principles⁷¹⁶ also provide guidelines. Though difficulties with respect to costs and evidence gathering are inherent in the exercise of universal jurisdiction, clear guidelines should also be developed and publicized. This also relates to the exercise of prosecutorial discretion.⁷¹⁷ For argument sake, if the doctrine or principle is used and to attempt to reap the benefits of the tool while reducing its side effects, one can state that the exercise of universal

⁷⁰⁶ Schabas says it is striking (that is the number of states that say it is necessary in order to prevent the “politicization” of the process). He says this is really quite droll. He asks the question do we really depoliticize a process by taking its control out of the hands of judicial officials and by requiring a minister to give the green light. He refers to the hypocrisy of the process.

⁷⁰⁷ Consultations with a department of foreign affairs or DIRCO for instance can be valuable.

⁷⁰⁸ Orentlicher 14.

⁷⁰⁹ Macedo 65.

⁷¹⁰ AU expert group Report R 16 on 48: As part of this they suggested the creation of international watch dog to police the exercise of universal jurisdiction. Such a body would have the competence to review and resolve interstate complaints arising from the use of the principle: Jalloh 64.

⁷¹¹ Called “safeguards” by Diane Morrison and Justus Reid Weiner: Curbing enthusiasm for Universal Jurisdiction on 2 referring to the Justice of ICJ. ... absolutely essential to prevent abuse ... At the extreme end of the scale, some people seem to blindly worship universal jurisdiction as an ultimate solution for ending impunity. But scholars draw attention to the dangers of providing a blank cheque to states regarding universal jurisdiction. The question is does South Africa legislation need more detail?

⁷¹² Yee 527 and footnote 83.

⁷¹³ Orentlicher 6.

⁷¹⁴ Inazumi summary is as follows: “*In sum a state, in deciding to exercise universal jurisdiction, should also consider the following: the seriousness of the crime, especially when basing itself on customary international law; the presence of the suspect within its territory, and other jurisdiction that can be exercised effectively and impartially including that of other states, the possibility of extradition to States having such jurisdiction and the ability of its own institutions to conduct proceedings in a fair and impartial manner.*”

⁷¹⁵ Bassiouni M Cherif the History of Universal Jurisdiction in Macedo 45.

⁷¹⁶ The Cairo - Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective. Africa Legal Aid (AFLA). This was adopted at follow up meeting held at Arusha 18 – 20 October 2002, <http://www.afla.inmaas.nl/en/act.index.html>.

⁷¹⁷ Lafontaine Unbearable lightness 6 and Broomhall 416 - 418.

jurisdiction should be placed under a variety of conditions or guidelines. It remains a question whether such conditions⁷¹⁸ should be made part of “definition” of universal jurisdiction such as (1) limiting that exercise to the most heinous crimes; (2) giving priority to the territorial state; (3) applying the clean hands doctrine; (4) requiring a decision of the highest state authority to trigger the exercise; (5) respecting applicable immunities of officials and State; (6) possible approval of an international screening mechanism; and (7) the presence of the suspect.⁷¹⁹ Thus guidelines⁷²⁰ or restraints⁷²¹ upon the exercise of universal jurisdiction similar to those proposed by judges like Higgins, Kooijmans and Buergenthal, is important for responsible application of universal jurisdiction.⁷²² The judges of the ICJ warned against possible abuse of the principle of universal jurisdiction in the Arrest Warrant case in 2002 stating: “... *if as we believe to be the case a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse ...*”⁷²³ These guidelines or restraints include immunity⁷²⁴ and subsidiarity and correlate with the approach suggested by the African Union.⁷²⁵ The AU and EU expert group opined: “*It may be that **executive or special judicial authorization** is required before a prosecution may be brought on the basis of universal or other extraterritorial jurisdiction.*”⁷²⁶ The question is also whether such executive or special authorization would be needed before an “investigation” is launched.⁷²⁷

Several states have successfully made use of **inter-ministerial or inter-departmental bodies** to monitor and coordinate the application and enforcement of international humanitarian law.⁷²⁸ Also for the initiation of a matter in accordance with the Rome Statute one finds an elaborate and a more detailed system set out in the Rome Statute itself. Domestic jurisdictions can learn and borrow substantially from the ICC system especially in a domestic system like South Africa⁷²⁹ with its terse stipulations relating to universal jurisdiction. We need a critical approach to

⁷¹⁸ Giving priority to the Territorial State; Applying the clean hands doctrine [ex turpis causa]; requiring a decision of the highest State authority to trigger the exercise; respecting applicable immunities of officials of States; possible approval of an international screening mechanism and the presence of the suspect.

⁷¹⁹ Yee 527.

⁷²⁰ Cassese JICJ 595 call it “safeguards”.

⁷²¹ Bruce Broomhall 399 refers to **limits** and not guidelines and state the **reticence** is reason by an uncertainty about **the limits of universal jurisdiction**. It is argued by him that such limits are best imposed by **prosecutorial discretion** structured to take into account certain legitimate factors which he nonetheless require more clarification.

⁷²² Rabinovitch 529.

⁷²³ Curbing Enthusiasm on 2 and footnote 4: Case concerning 2002 ICJ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal

⁷²⁴ It is outside the scope of this study to fully address the complex and controversial issue of immunity.

⁷²⁵ All applicable immunities must be respected;

⁷²⁶ See footnote 102 on 222 of AU & EU expert group Report. In Belgium for example prosecution (including the preliminary phase) for crimes set forth in Book II, Part 1 bis of the penal code may be undertaken only at the request of the Federal prosecutor. In Finland an offence committed abroad may not be tried without the prosecution order from the Prosecutor general Footnote 103 on 23. In Ireland the consent of the Attorney General or the director of Public Prosecutions is required before a prosecution may be brought for, at least certain offences subject to universal jurisdiction. Similarly the UK (excluding Scotland) the consent of the Attorney General is needed before a prosecution may be brought for certain offences. In Spain proceedings for serious crimes of international concern must be brought before a specified superior court namely the Audiencia Nacional. See footnote 107 on 23.

⁷²⁷ With the comparable situation of obtaining a search warrant or arrest warrant before a magistrate or judicial officer, one can toy with the idea of confirmation before a judicial officer where the Court functions as a judicial checks and balances.

⁷²⁸ E De Wet & H Strydom “Implementing international humanitarian law: developments in South Africa and other jurisdictions with Special reference to international war crimes tribunals” 2000 25 SAYIL 67 on 68

⁷²⁹ It can be argued that in South Africa the courts should automatically take the Rome Statute into consideration (section 2 of Implementation Act), but the submission is that certain procedures of the Rome Statutes should

the concept of universal jurisdiction and clear rules on domestic application of universal jurisdiction over serious international crimes. The question is should there not be checks and balances on such a decision by a multi-disciplinary team? To a big extent SA rely on prosecutorial discretion⁷³⁰ as the necessary check and balances. In some states prior approval of state officials is required before claims can be instituted.⁷³¹ Under section 9 (3) and 9(4) Canada requires that all claims based on universal jurisdiction be personally approved by the Attorney General or deputy Attorney General before they can be introduced in any court. Domestic courts in South Africa also need clear jurisdictional guidelines. One should ask the question whether the initiation of an investigation should also not be restricted to a situation where written authorization of the NDPP⁷³² is required to prevent recourse to private complaints.⁷³³ One would not like to have political control over these types of decisions; however input from Department of foreign Affairs (DIRCO) could be important.⁷³⁴

Universal jurisdiction exercised without the guidance of responsible consensus principles such as those embodied in the Princeton or Arusha principles on universal jurisdiction could lead to increased tension, the denial of justice⁷³⁵ and ultimately to the demise of universal jurisdiction. To avoid these negative outcomes and enhance the responsible use of universal jurisdiction it is necessary to create norms that bind states and international adjudicating bodies. It is hoped that the Princeton principles and Arusha principles⁷³⁶ or perhaps a revised and refined principles will in time garner consensus among scholars and ultimately among governments. Then an international convention could be convened so that guidelines on universal jurisdiction can become positive international law. These guidelines should be borne in mind by governments as they shape state practice in the coming years and also by municipal tribunals for instance in South Africa called upon the rule on the scope of the doctrine of universal jurisdiction in the future.

One cannot but agree that to a certain extent the total positivist notion of absolute power of national sovereignty is dwindling and outmoded,⁷³⁷ however it still is and remain a building block of the present day international community and especially in Africa.⁷³⁸ Even when one is trying

explicitly be made applicable in given circumstances.

⁷³⁰ Regarding prosecutorial discretion see Broomhall 416 - 418. See also Lafontaine on 6.

⁷³¹ It is also stated specifically in *SALT v NDPP* supra that the NDPP's consent is not needed for the police to institute an investigation (on 232 d).

⁷³² So the question is whether no investigation for a core crime may be commence without the consent in writing from the NDPP and or National Commissioner of police?

⁷³³ This is in any case quite limited in SA law but theoretically possible.

⁷³⁴ It was however stated categorically that political consideration not is taken into account at time to initiate an investigation.

⁷³⁵ See Bottini 550, Inazumi 220 and discussion supra on 50.

⁷³⁶ The Cairo - Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective. Africa Legal Aid (AFLA). This was adopted at follow up meeting held at Arusha 18 – 20 October 2002, <http://www.afla.inmaas.nl/en/act.index.html>.

⁷³⁷ It is stated by Pavlic “Consequently, *one might argue that if universal jurisdiction is currently merely a paper tiger, it poses no threats to state sovereignty and is unlikely to cause serious changes in our international state-based system. It is also stated: that the international community is indeed developing its own system of norms, values and interests, different from the ones of its member states. In turn, this demonstrates that particular states are starting to lose their say in matters where the interests of international community are at stake and that the state system, while still strong, is undergoing significant changes.* However see Lafontaine referring to Cassese However see Lafontaine that refers to Cassese 1277 “. Although sovereignty ‘this old pillar of world society is far from waning...”

⁷³⁸ See *R v Hape* 34 and para 46: “Sovereign equality remains a cornerstone of the international legal system. Its foundational principles – including non-intervention and respect for the territorial sovereignty of foreign states cannot be regarded as anything less than firmly established rules of customary international law...”

to hold people accountable⁷³⁹ there should still be respect for national sovereignty and provision should be made for a balanced approach. Because universal jurisdiction can have dangerous consequences for the comity between nations if acceptable parameters of its scope and application are not established,⁷⁴⁰ a balanced approach is needed. Universal jurisdiction requires a comprehensive institutional framework as part of a functional system of checks and balances.⁷⁴¹ Sovereignty of states is still a basic building block of international law; but this fact should be balanced by a reminder to take the whole legal context into account within which it is exercised and with recognition of the sovereignty of other states and the rights of individuals. Here one can also refer to words of judges Higgins, Kooijmans and Buergenthal:⁷⁴²

On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. **A balance⁷⁴³ therefore must be struck between two sets of functions which are both valued by the international community.**⁷⁴⁴ [Own emphasis added]

If this assumption is correct, perhaps a **balanced** solution could be found in the imposition of limits on the exercise of extra territorial jurisdiction by way of universal jurisdiction, coupled with an insistence on the protection afforded by personal immunities to some categories of serving (incumbent) senior state officials. Universal jurisdiction should only be enforced when the person accused is present on the territory of the prosecuting state. Obviously if he or she has close links, for instance has residency in that state, or the alleged victims of the crimes are nationals of the state or resides there, there is sufficient reason to exercise jurisdiction. Universal jurisdiction *in absentia* as with trials *in absentia* should be rule out.⁷⁴⁵ It also goes without saying that universal jurisdiction should be limited to exercise to the most heinous crimes such as genocide, crimes against humanity and serious war crimes and in addition crimes like piracy and slavery.

Bassioni's essay would seem to indicate that the development of universal jurisdiction over time has not explicitly included much attention to the need for flexibility, much less possible mechanisms for flexibility such as truth commissions. As Richard Falk observes in his essays on the Pinochet case, flexibility may well be needed during the fragile early period of a transition lest the transition be killed in his cradle.⁷⁴⁶ In the end it's only reasonable and responsible exercise⁷⁴⁷ by national courts of universal jurisdiction by national courts that can promote greater justice for victims of serious crimes under international law. Thus a sensible and prudent

⁷³⁹ Nolan, Stephanie "Can Ottawa Act Against Mugabe" Nov 5 2004 Globe and Mail.

⁷⁴⁰ Swanepoel CF " Universal Jurisdiction as procedural tool to institute prosecutions for international core crimes" 2007 Journal of Juridical Science (32) (1) 118 - 143 on 135.

⁷⁴¹ Kochler, Hans Can the Exercise of Universal Jurisdiction be Regionalized. IPO Research Papers.

⁷⁴² *ARREST WARRANT CASE* Joint Separate opinion of Judges Higgins, Kooijmans & Buergenthal *refers* to the trends that reflect a balancing of interests: par 75 on 18.

⁷⁴³ As it is said by Antonio Cassese: *More generally, do they strike the right balance between the interest of the international community in punishing those accused of horrific crimes, and the will of states to safeguard their sovereign prerogatives and shelter their nationals from foreign interference*" Antonio Cassese Is the Bell Tolling for Universality? A Plea for a sensible Notion of Universal Jurisdiction Journal of International Criminal Justice 1 (2003) 589 - 595. See also Lafontaine Realistic Utopia 1277 and 1302.

⁷⁴⁴ Erasmus Gerhard & Gerhard Kemp The application of international law before domestic courts in the light of recent developments in international and constitutional law 81.

⁷⁴⁵ See discussion of Rabinovitch about the drawbacks of trial *in absentia*.

⁷⁴⁶ Macedo 66 and footnote 9.

⁷⁴⁷ Even the heading of Cassese's article is significant here: "A Plea for **Sensible notion** of Universal jurisdiction. See Lafontaine 1277.

approach needed.

7.4. Resources and training

It can be stated that in South Africa, the Police and NPA currently lack the means and resources to prosecute crimes properly.⁷⁴⁸ States must create the resources and the domestic legal infrastructure to use the power of universal jurisdiction. Dalila v Hoover states that in many states, the legal system lacks the means to investigate or prosecute on the basis of universal jurisdiction. Criminal justice actors must receive the requisite training and resources to build their capacity in order to carry out their responsibilities in respect of international core crimes. The AU and EU expert group stated: *Consideration should be given to building the national legal capacity of African states to combat genocide, crimes against humanity war crimes and torture.*⁷⁴⁹ The first and most important building block of this is the police and the investigators. They are the foundation on which any successful prosecution would rely. Sources have to be recruited and cultivated by the police in the diaspora communities.⁷⁵⁰ One should start from the basic foundation which is a proper investigation and reliable evidence. The foundation of any successful prosecution is the evidence and investigation. Thus it is imperative that specialist training must be provided to the investigators and the prosecution in the judging of such crimes.⁷⁵¹ A special status is accorded to international crimes and there is a need for special procedures and training to be developed and adopted. These crimes require a multidisciplinary approach.⁷⁵² Legal successes might not immediately be achieved but a professionally conducted, transnational and interdisciplinary universal jurisdiction case might be an important element in the struggle to end impunity.⁷⁵³

7.5. Partnerships with NGO's and CSO's

To overcome the obstacles and pitfalls of implementing universal jurisdiction **partnerships** will have to be forged for this challenging work on universal jurisdiction⁷⁵⁴ and to effectively investigate this kind of transgressions. The nature of these cases means that civil society

⁷⁴⁸ See for instance the African Union Model Law and the Executive Council Decision Ex. CL dec. 708(XXI) point 5: *“Request the commission to explore ways and means through which the capacity of relevant officials and institutions of member States may be strengthened to enable them to effectively perform their duties and mandates under the AU model Law.”* P ii

⁷⁴⁹ Also on 47 R 11 as well as R 17 on 49: “The relevant EU bodies should assist AU member States in capacity building in legal matters relating to serious crimes of international concern, for example within the framework of the Africa-EU Strategic Partnership. Such matters might include training in the investigation and prosecution of mass crimes, the protection of witnesses the use of appropriate forensic methods and so on’.

⁷⁵⁰ An information brochure can be disseminated and distributed in these communities to inform them of their rights. The Dutch War Crime unit has used this technique with success in the Netherlands.

⁷⁵¹ See 47 of AU & EU expert group report. It is stated by Maunganidze & A Du Plessis on 14: *“Third amongst other challenges facing the criminal justice system, there is a lack of qualified investigators, lawyers and judges with the requisite knowledge of international criminal law.”* Only a cursory once off training was provided to the Hawks.

⁷⁵² It is stated in *SALT v NDPP* 235 e-f: *“Having regard to the objects of the Act, there could be no doubt that the power incidental to or necessary for the achievement of the ICC act’s purpose includes the power of the PCLU to engage in investigations particularly in the multi- disciplinary manner envisaged under the SAPS Act and the NPA act.* The court states it required a multi- disciplinary approach (on 235f).

⁷⁵³ On 980 at conclusion of From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998 - 2008: Wolfgang Kaleck

⁷⁵⁴ It is stated as follows by A Louw: *“efforts must be made to bridge the gap between civil society organisation (CSO’s) working in the field, and the investigators and prosecutors who tackle these crimes. In South Africa prosecutors and investigators on the one hand and civil society actors on the other working ... have over time developed and respect and tolerance for one another.”* Still the SAP doesn’t want to accept statements from NGO’s in certain instances. They insist to take affidavits themselves as a point of departure. This is not necessary as experienced lawyers are sometimes responsible for taking proper statements from some of these witnesses.

organizations can often provide a much needed bridge between victims and the state in search for justice. The SA Police and NPA will have to work in partnership with civil society and Ngo's. Meaningful engagement is what is required. If surreptitious⁷⁵⁵ and confidential work has to be done in a "hostile" foreign state, the Police will have to trust NGO's in certain respects. There is no need to retake all the affidavits of prospective witnesses.⁷⁵⁶ Given the capacity limitations facing many police and justice departments the role CSO's can play as intermediaries should be seen as a potential asset rather than an obstacle.⁷⁵⁷ One should also consider the recommendation that AU members should consider establishing judicial contact points similar to the "Eurojust" contact points with a view of exploring and strengthening international cooperation in matters of criminal justice between AU members and EU member states.⁷⁵⁸ "Afrijust" contact points should be formed and expertise on universal jurisdiction should be fostered.

7.6. Outreach and more inclusive process needed

A big challenge, especially in Africa is the attitude towards international criminal justice. To an extent it is a struggle for the heart and soul of international law⁷⁵⁹ in Africa. The whole matter regarding the arrest of Omar Al Bashir and Kenya has provided warning lights. Outreach⁷⁶⁰ will have to be done, and ordinary citizens will have to be enlightened on the concept and reasons why universal jurisdiction is necessary. The cost involved would have to be justified. With the recent developments regarding the arrest warrant for Omar al Bashir in the African context and the difficult African dynamics it is very important to understand what has to be done to ensure that civil society, civil servants and the middle management in the state machinery work together to make universal jurisdiction work. African society does not reject universal jurisdiction outright but have a problem with misuse or abuse of the principle. The Charles Taylor and Hissene Habre - examples show what is possible in Africa. Outreach⁷⁶¹ is important not only because of cost⁷⁶² involved but also the moral duty to bring some kind of accountability for these crimes. This includes the widespread promotion, acceptance and use of the principle of universal jurisdiction. It is stated: "*The practice of universal jurisdiction is, therefore, unlikely to become significantly more regular unless sustained aware-raising initiatives, programs of law reform and marked convergence of opinion affect domestic decision makers over time.*"⁷⁶³ The debate in South Africa, SADC and Africa about universal jurisdiction should become more inclusive.⁷⁶⁴ The deterrent⁷⁶⁵ value of universal jurisdiction should also be underscored. This

⁷⁵⁵ See for instance the dossier prepared by exiles from Zimbabwe that were submitted to the Minister of Justice in Canada together with a draft indictment against Pres. Mugabe.

⁷⁵⁶ Sometimes these statements are taken by seasoned lawyers and constitute sufficient basis to proceed from.

⁷⁵⁷ Du Plessis, Louw & Maunganidze on 9 and see pages 14- 17 and 19.

⁷⁵⁸ See R 15 on 48 and see footnote 174 and recommendation that the EU network and AU commission should consider establishing co-operation with each other in this regard: AU & EU Expert Group Report.

⁷⁵⁹ Tladi D "The African Union and the International Criminal Court: The Battle for the soul of international law" SAYIL 2009 34 on 59.

⁷⁶⁰ Broomhall 400.

⁷⁶¹ See the public debate and acceptance of universal jurisdiction in Australia in Lloyd Axworthy article in Macedo. He also refers to fact the discourse on universal jurisdiction must continue.

⁷⁶² In this regard it is in more than one sense. Not just financial side of things but also the cost in regard to international relationships.

⁷⁶³ Broomhall 400.

⁷⁶⁴ Usually there is an exclusive cast of characters selected Ngo's, CSO's and human rights advocates are involved. Floris and Jessberger 361 correctly state the following: "*Although South African judges and lawyers are schooled in the common-law tradition and familiar with sources other than statute, they are not particularly well schooled in customary international law. Having been the pariah state during the apartheid era, South Africa is for the most part merely beginning to engage with international legal developments in legal education and practice. Most of the current judges were trained at a time when international law was barely considered relevant in South Africa and they are not particularly well equipped to deal with it.*"

preventative power of universal jurisdiction is a travel preventer and must always be kept in mind.

7.7. Supplemental⁷⁶⁶ or substitutive⁷⁶⁷

Whereas no mandatory hierarchy of international permissible norms relating to universal jurisdiction⁷⁶⁸ exists, the summary of at least the European practice shows that universal jurisdiction is a legal and social fact that can no longer be denied but due to its difficulties should only be used as a last resort⁷⁶⁹ in cases of impunity. The question whether the subsidiarity requirement has crystalized into a rule of customary international law is a matter of controversy⁷⁷⁰ but is stated: “*Most authorities however seem to agree from a policy point of view, subsidiarity would serve as a useful and desirable limitation.*”⁷⁷¹ Rabinovitz states that it is difficult to determine whether universal jurisdiction is the presumptive rule or where it does exist, the exception.⁷⁷² Antonio Cassese⁷⁷³ states that the territorial state or state of active personality may stake out a sort of primary claim,⁷⁷⁴ in other words universality only operates then as a default jurisdiction. The same idea is propounded by Bruce Broomhall “... *this doctrine stands poised to become an integral **albeit supplemental**,⁷⁷⁵ component of the emerging international justice system.*”⁷⁷⁶

Some obstacles are technical in a way (like the legislation in SA that has to be refined and fine-tuned.) Some obstacles are inherent like the tension with sovereignty and have to be taken into account with the prosecutorial discretion. Domestic decision makers in national jurisdictions will take the national interest and other criteria into consideration before deciding on such a prosecution. Today the principle of universal jurisdiction is waiting to become an integral part of the international justice system. Yet serious obstacles still stand on the way of its realization⁷⁷⁷

⁷⁶⁵ The positive outcome of universal jurisdiction of strongly **detering** would-be perpetrators is discussed supra. It has a salutary effect of preventing perpetrators from travelling.

⁷⁶⁶ See Inazumi 217 here.

⁷⁶⁷ See SA position at the UN. Also called subsidiary universality.

⁷⁶⁸ However see AU & EU expert report I.3 par 14 on 9.

⁷⁶⁹ See however Broomhall 406. The argument also makes practical sense in that the object of universal jurisdiction (to impose accountability for crimes of international concern and to eliminate safe havens) would be better served if the state where the perpetrators is found, did not have any discretion - least of all a political motivated discretion as to whether to proceed.

⁷⁷⁰ Van der Wilt footnote 26.

⁷⁷¹ Van der Wilt footnote 27 referring to Geneuss n 22 957. See also Lafontaine Realistic Utopia 1277.

⁷⁷² I would argue that it must be the exception. For me it is like stating that arrest by private persons without a warrant, must be the general rule. Arrest by private persons without a warrant must be the exception and left for a situation when it is called for by the seriousness (heinousness) of the crime and for pragmatic reason where it would be easy for the culprit to escape.

⁷⁷³ 593.

⁷⁷⁴ This is also approach of AU in regard to Kenya: SAPA Let Kenya tackle issues internally: Ebrahim 9/6/2013 “The AU decided that Kenya has primary jurisdiction on this case...”.

⁷⁷⁵ I fully agree with the supplemental or subsidiary approach.

⁷⁷⁶ Bruce Broomhall 399. The question remains does the analysis not boil down conceptually to determining what is the most appropriate forum? Everyone agrees that there must be accountability in some forum for such crimes. Lawyers are familiar with the weighing of traditional factors and interests under the rubrics of *forum non conveniens* and conflicts of law. There should not be a too simplistic approach: Macedo 66. Aspects that should be taken into account are the common law notion that there is a more convenient or appropriate forum in which the matter should be heard than the one to which it has been brought: More than one state or court or tribunal may seek to prosecute the same offense. The international community needs a principled approach for choosing among the various fora. Morriison 8 and 9 where discusses: *Forum non conveniens*. There is an international requirement to exhaust all local remedies.

⁷⁷⁷ Hoover 5.

and the uncertainty regarding this concept remain durable and resistant.⁷⁷⁸

In spite of the obstacles, it is clear that a number of governments through the express provision for universal jurisdiction over core crimes during the process of International Criminal Court implementation are choosing a path that will speed up rather than curb the entrenchment of this doctrine.⁷⁷⁹ The trend of legislative activity currently under way, will in time give rise to cases and these will oblige legal systems to find working solutions to problems that at present elude consensus.⁷⁸⁰ This is also specifically relevant to South Africa. The extent to which universal jurisdiction becomes a reliable part of a system of promoting the international rule of law in practice depends in a large measure on the unfolding of these developments over the coming years and this process is unfolding in South Africa.⁷⁸¹ The provision of universal jurisdiction even by a significant minority of ratifying states will be an enormous advance for the doctrine.⁷⁸² More importantly, the jurisprudence that could be expected to follow from this legislative process will offer an opportunity to wrestle with the thorny legal and political problems that attend universal jurisdiction. One cannot deny that there are thorny legal and political problems inherent in universal jurisdiction. It is possible that international law concerning obligatory universal jurisdiction may develop in the near future since law and practice relating to universal jurisdiction are still in transition.⁷⁸³ The important international building process is still unfolding presently state practice is developing in Africa. In this way a more realistic⁷⁸⁴ version of universal jurisdiction could be carved out and ultimately prove more effective for victims⁷⁸⁵ in a globalized system of justice.⁷⁸⁶

7.8. Africa and global multiparty treaty

Hopefully South Africa will lead a wider process in Africa. What is needed is a critical mass of countries in Africa with implementing legislation to meaningfully erode impunity on the continent. African states already have some experience with international criminal justice, universal jurisdiction and the jurisprudence is beginning to grow. This experience aligns with the African Union (AU) constitutive act and it is also a push for African solutions to African problems. Jalloh states that to the extent that universal jurisdiction continues to be pushed forward by the General Assembly it could lead to the development of a global instrument (ideally a multiparty treaty on universal jurisdiction.)⁷⁸⁷ Only time will tell. Jalloh also states that for the international community to realize the full potential of universal jurisdiction, the domestic jurisdictions must strictly comply with the requirements of customary international law immunities when pursuing universal jurisdiction cases.⁷⁸⁸

The exercise of universal jurisdiction is unlikely to become significantly uniform and recognized

⁷⁷⁸ Compare the discussion at the UN General Assembly. Consent is not easy to reach with the inherent tension in this concept.

⁷⁷⁹ Broomhall 400.

⁷⁸⁰ Broomhall 400.

⁷⁸¹ See discussion in Chapter 6 above and the *SALT v NDPP* case supra.

⁷⁸² On 410.

⁷⁸³ Inazumi 242.

⁷⁸⁴ There is potential in universal jurisdiction. But the issues go to the heart of legality, legitimacy and practicality of the universality principles. Furthermore it is only by confronting and resolving them that we can harness the potential of universal jurisdiction. See Jalloh 55.

⁷⁸⁵ A Ngari The Slow Turning cog- wheels of the International Justice system The Institute for Justice and Reconciliation Jul/Aug 2013 Vol 4 Issue 6 <http://ijr.org.za/newsletter/ijrnewlitterjulyhtml.html> accessed 01/08/2013.

⁷⁸⁶ Jalloh 57.

⁷⁸⁷ Jalloh 65.

⁷⁸⁸ This is particularly relevant to the sensitivity in the African context: Jalloh 5. In the SADC region one must develop regional norms that can provide evidence of the general customary international rules: Jalloh 3.

within the international community in the near future if there is no disciplined application. Without a comprehensive system of law at the national level and without such laws adopted by a certain number of States, the principle of universal jurisdiction cannot be expected to function in practice as an effective and reliable pillar of the international justice system to end impunity. Proper exercise of universal jurisdiction is currently lacking. The question is how it defects can be remedied.

Universal jurisdiction should not be overestimated but it is still an important tool. It should be considered and used alongside local, regional and international remedies. Legal efforts should be embedded in broader interdisciplinary strategies.⁷⁸⁹ Consent in the international law is very important and the implementation of universal jurisdiction needs to be based on consensus.⁷⁹⁰ The apparent stunning triumphs of the human rights movement may in fact be rather vulnerable if they have not been built on a solid foundation of genuine consensus. It is submitted that consent is the reason that the application of universal jurisdiction in some instances seemingly excited no adverse reaction.⁷⁹¹

In the end one has to ask the question whether the pledge in the Rome Statute's preamble that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, is all symbolism, or if it means States will use the entire arsenal of mechanisms, including universal jurisdiction to ensure accountability for serious violations of human rights. We already have precedents in inter alia Canada, Belgium and Spain? We have the trial of Taylor and the trial of Hissene Habre in Africa has only started.⁷⁹² One could ask: "If tiny little Sierra Leone could do it, why can't South Africa do it"?⁷⁹³ Given our leadership role in Africa why can't South Africa play a leading role regarding universal jurisdiction? For that investigators, prosecutors, Ngo's and Cso's each has to play its part. I agree with Harmen Van der Wilt: "*There is a modest,⁷⁹⁴ but indispensable niche for universal jurisdiction in the project of international law enforcement.*" Jalloh describe it as follows: "... *it is an increasingly useful, if not necessary tool in the modern fight against impunity.*" It is true universal jurisdiction attenuate the danger of international discord to some extent, but the other choice is to walk away, to ignore the moral duty to act⁷⁹⁵ and let impunity continue. SA must accept the heavy responsibility of living up to its role in Africa on moral and legal grounds, as light (and as politically tempting) as the consequences for failing to do so might be.⁷⁹⁶ To me the application of universal jurisdiction is a barometer of the development of a country's system of international criminal justice in a complex democratic setup and its conscience to see if it is truly serious about fighting impunity. This arrow – universal jurisdiction - must be available in the quiver with all the other tools in the arsenal to shoot straight but responsibly and prudently to end impunity.

⁷⁸⁹ Inazumi on 219.

⁷⁹⁰ Jalloh 55 state that it should not be one sided and be based on broad consensus.

⁷⁹¹ Compare the *Eichmann* case supra to an extent and see *S v Okah* (SS 94/2011) [2013] ZAGPJHI 21 Jan 2013 www.saflii.org.za that elicited no adverse comments.

⁷⁹² Full Voice of America Report 25 June 2013 where it is stated that the defence lawyer El Hadji Diouf said Senegal's special tribunal had no legal basis and were part of a deliberate effort to imprison Habre, regardless of the evidence.

⁷⁹³ Nolan, Stephanie Can Ottawa Act Against Mugabe. Globe and Mail Nov 5 2004.

⁷⁹⁴ One also has to agree with him that one should not overestimate the potential of universal jurisdiction (on 1064). Realism is what is required: See Harmen Van der Wilt 1046. As stated above *universal jurisdiction should not be overestimated but still important tool. It should be considered and used alongside local, regional and international remedies.* Legal efforts should be embedded in broader interdisciplinary strategies: Inazumi on 219.

⁷⁹⁵ Lafontaine 50 and footnote 237.

⁷⁹⁶ Lafontaine 50 said the same in regard to the Canadian position.

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