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The concept of universal jurisdiction: A myth or reality?

Tamfuh YN Wilson

Abstract
This article unravels the arguments surrounding the concept of universal jurisdiction. It reveals that universal jurisdiction has undergone both condemnation and commendations from scholars and leaders such that it is not unconventional to question whether it is a myth or a reality. The article studies the different sources, both historical and recent, of the principle of universal jurisdiction. The author exposes how different nations have applied universal jurisdiction using varied legal considerations, and it seems the principle has not yet attained universal acclamation. Thus the *aut de dere* principle (extradite or prosecute) is discussed as a well as some statutory provisions that justify an application of universality principle. The author analyses major judicial decisions, some of which are quite recent, to establish the persistent application by some states of the principle of universal jurisdiction. The author concludes with some recommendations.

Keywords: Universal jurisdiction, international crimes, extradite, prosecute, statute

1. Introduction
Universal jurisdiction is the ability of the domestic judicial systems of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals (i.e. a crime beyond other bases of jurisdiction, such as territoriality or active/passive personality). [1] The principle of universal jurisdiction proclaims that particular crimes are a menace to mankind as a whole and therefore *whoever* (nationality or official rank) is caught in such a crime can be prosecuted *wherever* (within or outside his state of nationality). The genuine essence of this principle is that human rights violators should not find any nation that will shield them from being punished for their atrocities. Crimes such as torture, extrajudicial executions, piracy, war crimes, genocide, "disappearances", slavery, apartheid, terrorism etc, are all considered liable of invoking the principle universal jurisdiction.

Thus modern international law mitigates the rigor behind the principle of state sovereignty, which is to the effect that all states are equal in sovereignty, as affirmed by customary international law and the United Nations Charter, and so no state has standing to try a crime, no matter how heinous, in another state's jurisdiction, if they have no sovereign interest in the matter. The disadvantage of applying universal jurisdiction is that any number of states could set up such universal jurisdiction tribunals, and the process could quickly degenerate into politically-driven show trials to attempt to place a quasi-judicial stamp on a state's enemies or opponents. And so some countries like the United States, China and Russia are strong opponents of any kind whatsoever of international jurisdiction. [2] It may be to them an objective position, considering the fact that they have political enemies, interstate conflicts as well as are faced with terrorist attacks [3]. For example between 2004 and 2007 three complaints were filed in Germany and in France against members of the US Government, including former Secretary of

[1] United Nations, Basic Facts on Universal Jurisdiction, Prepared for the Sixth Committee of the United Nations General Assembly, October 19, 2009, https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction, last accessed 27 May 2022.
[2] See Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," *Foreign Affairs*, July/August 2001.
[3] Kenneth Roth, "The Case for Universal Jurisdiction," *Foreign Affairs*, September/October 2001.

Defense Donald Rumsfeld and members of the military forces in connection with war crimes, torture and other criminal acts which took place in the military prisons of Guantanamo and Abu Ghraib. In all three cases, however, the court authorities in Karlsruhe and Paris, where the cases were filed, refused to initiate investigations and rejected appeals against these decisions. The public was shocked when news broke of the torture and inhuman treatment in the US operated Iraqi prison, Abu Ghraib, and in the military base at Guantanamo Bay, Cuba against suspected terrorists [4]. The courts are also reluctant to give justice to persons who may actually be terrorists, and in the global fight against terrorism, national, regional and international legislation is becoming intolerant as the act of terrorism itself.

But international law seems to affirm that the principle can be used against heinous crimes. For example the UN Security Council Resolution 1674, which was adopted on April 28, 2006, "Reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and commits the Security Council to action to protect civilians in armed conflict. [5] For example a dossier of the European Centre for Constitutional and Human Rights (ECCHR) relating to human rights violations in Syria, states that "torture, execution and forced disappearances of civilians; air strikes targeting civilian buildings, and extensive bombing of residential areas; genocide and sexual enslavement of minorities…..these are just some of the violations of international law committed by all parties in the violent conflict in Syria since it began in 2011 [6].

Furthermore, many states in the international community are rapidly exploring reasons to accepting or qualifying universal jurisdiction with respect to heinous crimes by making revisions of their municipal laws compatible with the universality principle. Universal jurisdiction is an idea that is as much acclaimed as denounced. Much debated as a principle, the legal concept has attracted global attention since the dramatic 1998 arrest in London of former Chilean dictator Augusto Pinochet on charges of torture. [7] The exercise of universal jurisdiction for these crimes is permitted, at the present stage of its development, by customary international law. Its application must be accepted generally as a sound practice by civilized nations. This means states must see how effective the principle could be used to prevent atrocities. Yet in applying universal jurisdiction, states should ensure that it does not result in an unwarranted interference in the sovereignty of other states. Its application should not be open to abuse for political purposes. Its widespread use should not lead to instability in international relations [8].

1.1 The application of Universal jurisdiction by States

The first country in the world that took a bold step towards an application of the principle of universal jurisdiction is Belgium. In 1993, Belgium's Parliament voted the 'Law of Universal Jurisdiction', allowing it to judge people accused of war crimes, crimes against humanity or genocide. In 2001, four Rwandan people were convicted of sentences from 12 to 20 years of prison for their involvement in the 1994 Rwandan genocide. But there was quickly an explosion of suits deposed; Prime Minister Ariel Sharon was accused of involvement in the 1982 Sabra-Shatila massacre in Lebanon, conducted by a Christian militia ostensibly under his control, while some Israelis deposed a suit against Yasser Arafat for his presumed responsibility for terrorist actions. In 2003, Iraqi victims of a 1991 Bagdad bombing deposed a suit against George H.W. Bush, Colin Powell and Dick Cheney. Confronted with this sharp increase in deposed suits, Belgium established the condition that the accused person must be Belgian or present in Belgium [9].

The judicial attitude reflected by courts show reluctance to initiate investigations on the basis of universal jurisdiction alone, [10] even if many of them are currently enacting legislation to permit this. [11] For example in 1994, Jean-Paul Getti, a French investigating judge assumed competence under article 689 of the French Criminal Procedure Code, over a case instigated by five Bosnian Muslims resident in France concerning allegations of torture and war crimes against certain Bosnian Serbs. [12] Although the judge was able to ascertain his competence with respect to torture, he did not find a basis in the French law for investigating crimes against humanity or genocide committed outside France. On appeal to the French Court of Appeal, it was held that the judge was not competent to try the case. The Cour de Cassation, the French highest court, confirmed this decision on 26 March 1996 when it ruled that French courts had no jurisdiction to consider the allegation relating to acts committed in the former Yugoslavia based on universal jurisdiction. The case in France was initiated because two French citizens, who were part of the flight crew, died in the downing of the aircraft used by the late

[4] European Center for Constitutional and Human Rights E.V. Zossener Str. 55-58 Aufgang D 10961 Berlin, Germany, www.ECCHR.EU, Last Accessed 27 May 2022.

[5] Resolution 1674 (2006) by the Security Council was a landmark resolution which emphasised that the world has responsibility to protect people from genocide; see Oxfam Press Release, 28 April 2006.

[6] European Centre for Constitutional and Human Rights (ECCHR), DOSSIER, Human Rights Violations In Syria: Torture Under Assad, "The fight against impunity for state torture in Syria: German authorities set international precedent", March 2021, P.1.

[7] Universal Jurisdiction in Europe, THE State of the art, 27 JUNE, 2006, https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art

[8] George Fletcher, "Against Universal Jurisdiction," *Journal of International Criminal Justice*, vol. 1 (2003), p. 580, and Georges Abi-Saab, "The Proper Role of Universal Jurisdiction," *Journal of International Criminal Justice*, vol. 1 (2003), p. 596.

[9] Fiona McKay, "Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide", available at http://www.redress.org/documents/inpract.html, last accessed 27 May, 2022.

[10] For a similar view, se Fiona McKay, "Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide", available at http://www.redress.org/documents/inpract.html.

[11] For instance see S. 134 of the Criminal Justice Act 1988 (UK).

[12] Fiona McKay, Ibid, p. 84.

Rwandan President Habyarimana. Also, arrest warrants have sometimes been issued as a means to obtain testimony of the concerned persons (for example Rose Kibuye, Chief of Protocol of President Paul Kagamé) because investigations in the territorial state, Rwanda, had not been allowed.

However, in September 2005, Chad's dictator Hissène Habré (dubbed the "African Pinochet") was indicted for crimes against humanity, torture, war crimes and other human rights violations by a Belgians court. He was arrested in Senegal following requests from Senegalese courts, which also declined jurisdiction over him. It is due to the pressure of the Belgian Court of Universal Jurisdiction that the African Union was compelled to establish the Extraordinary African Chambers (EAC), to prosecute international crimes committed in Chad during the period from June 1982 to December 1990 by the regime of Hissene Habré. The EAC was created on 22 August 2012, following an agreement between the African Union (AU) and the Republic of Senegal, and was inaugurated on 8 February 2013. Victims of this civilian dictator's regime had to overcome various obstacles before the establishment of a court where they could obtain justice. The Republic of Senegal, where Habré was living since his exile in December 1990 when he was overthrown, had placed several barriers to different proceedings undertaken by victims. Senegal first refused to judge Habré, because the crimes for which he is accused were committed outside its territory. Then, it refused to extradite him to Belgium, where proceedings were opened against him on the basis of this country's law of universal jurisdiction. Facing this refusal, Belgium asked the International Court of Justice (ICJ) to order Senegal to prosecute or extradite Habré. The ICJ did so, in a landmark verdict delivered on 20 July 2012 in the case of Belgium v. Senegal [13]. The ICJ held that all the state parties to the UN Convention Against Torture (UNCAT), including Senegal and Belgium, have a common interest to ensure that acts of torture are prevented and that their perpetrators do not enjoy impunity. The ICJ went on to state that all the state's parties "have a legal interest" in the protection of the rights involved, and that these obligations may be defined as "obligations *erga omnes partes*", in the sense that each state party has an interest in compliance with them in any given case [14].

In October 2005, the *Audiencia Nacional*, the Spanish National Court, declared that the 'principle of universal jurisdiction prevails over the existence of national interests', following a suit deposed in 1999 against atrocities committed in Guatemala between 1978 and 1986. [15] With Spain, Belgium has thus far been the only country to put universal jurisdiction into its laws, and the United States pressured it into restricting prosecutions with threats to move the headquarters of North Atlantic Treaty Organisation (NATO) from Brussels. Over the past 15 years, a number of states have started to apply their universal jurisdiction legislation with regards to war crimes, crimes against humanity, torture or genocide (Australia, Austria, Belgium, Canada, Denmark, France, Finland, Germany, Norway, The Netherlands, Spain, Senegal, Sweden, Switzerland, the United Kingdom, and the United States). A limited number of cases have been brought to trial in that period of time. Most of these cases concern low- or mid-level alleged perpetrators who had found refuge on the territory of the state exercising universal jurisdiction. [16]

The French courts were faced the issue of universal jurisdiction in 1998 in *The Prosecutor v. Wenceslas Munyeshyaka*. [17] The facts concerned the role allegedly played by a Rwandese priest, Munyeshyaka, in the 1994 massacre of Tutsis in Kigali. Investigation was commenced in France under article 211 of the French Penal Code, and article 689 of the Criminal procedure Code. On 20 March 1996 the Nimes Appeal Court held that the facts related only to the crime of genocide and there was no basis in French Law for such acts. Although the *Cour de Cassation* reversed this ruling, this was, however, on the basis that the lower court erred in limiting the criminal charge to genocide, when the acts alleged could also be deemed to constitute other crimes. The *Cour de Cassation* therefore established jurisdiction on the basis of French Law 96-432 of 2 May 1996, enacted pursuant to Security Council Resolution 955, establishing the International Criminal Tribunal for Rwanda.

However, in 1999, the *Cour de Cassation* considered whether the 1949 Geneva Conventions conferred French prosecutors with the jurisdiction to pursue investigation of Bosnian Serb war crimes suspects. The alleged offenders were not present on the French territory and the crimes in question were committed against non-French nationals during the Bosnia-Herzegovina crisis. In its judgment, the *Cours de Cassation* held that in the absence of specific domestic implementing legislation, the provisions of the 1949 Geneva Convention "have too general a character" [18] to confer jurisdiction on the French courts. The Court also added that the French domestic law implementing the Torture Convention only permitted French courts to exercise jurisdiction "where the accused is found on the French territory." [19] This was despite that the French legal system is monistic and accords international treaties an authority superior to that of national law. [20]

Germany too has so far shown some willingness towards universal jurisdiction. But even then, this is a seriously qualified one and usually coupled with other jurisdictional bases. [21] The German Penal Code, *Strafgesetzbuch*, only permits universal jurisdiction in respect of crimes committed abroad against a close class of internationally

[13] ICJ Judgment, July 2012.

[14] Frederic Foka Taffo, Conflict Trends, "*How the establishment of the Extraordinary African Chambers brought the cruel dictator of the Republic of Chad to justice"*; December 23, 2015, p.1.

[15] Mills, 'Rethinking Jurisdiction in International Law', 84(1) *BYIL* (2014) 187, at 193.

[16] C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015), para. 1.3; J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 456; Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', 53 *British Yearbook of International Law* (*BYIL*) (1982) 1, at 1.

[17] http://www.redress.org/documents/annex.htm1.

[18] Brigette Stern, "Universal Jurisdiction Over Crimes Against Humanity Under French Law – Grave Breaches of the Geneva Convention of 1949 – Genocide – Torture – Human Rights Violation in Bosnia and Rwanda", 93 *American Journal of International Law* (1999) 525 at 527.

[19] *Code de Procedure Pénale*, Article 689.

[20] See 55 of the Constitution.

[21] Helmut Gropengieberm, "The Criminal Law of Genocide: The German Perspective." 5(3) *International Criminal Law Review* 329 (2005).

protected legal values, provided Germany is party to a treaty originating the concerned crime. [22] The initial trial of Dusko Tadic (before the transfer of the accused to the ICTY) by Germany was based on the fact that Tadic had lived in Germany for several months, coupled with the serious nature of the crime, and not just on a general right of universal jurisdiction. In the trial of Novislav Djajic [23] by the Bavarian High Court, Germany had first characterized the conflict in the former Yugoslavia as an international conflict, and thus asserted jurisdiction on the basis that the killing of 14 Muslim men in Eastern Bosnia in April 1992 fell under Article 6.9 of the German Penal Code. It remains a matter of conjecture whether, in the absence of such initial characterization, Germany would have asserted jurisdiction. In the 1997 trial of Nikola Jorgic [24] by the Dusseldorf High Court, although the court acknowledged that Article 6 of the Genocide Convention did not explicitly provide for universal jurisdiction over genocide, it took the view that the article was generally regarded as not excluding the possibility of national courts exercising jurisdiction. Most recently however, Germany decided that it lacked authority to exercise extraterritorial jurisdiction in respect of genocide and torture in the absence of the alleged criminals' presence on their territory. [25]

In 1998, Switzerland commenced the trial of N, a Rwandan, charged with war crimes and genocide. [26] This case is particularly interesting for two reasons. First, Switzerland is not party to the Genocide Convention. Second, the prosecution had based the charge relating to crimes against humanity entirely on customary international law while that of war crime was founded on Swiss law. The defendant contested the jurisdiction of the court over the crimes against humanity on the singular basis of customary international law. The court upheld this contention ruling that despite Switzerland's international obligations, the lack of provision under Swiss Law for jurisdiction over genocide and crimes against humanity and the lack of equivalent crimes under domestic law, made prosecution of these crimes impossible. Certainly if the Swiss court accepted universal jurisdiction in respect of these crimes, it would have asserted jurisdiction notwithstanding the absence of domestic legislation.

1.2. Universal jurisdiction and International Tribunals

The theory of universal jurisdiction is one of the most controversial topics in the field of international criminal law. Although efforts to apply universality to end impunity reached their peak in the 1990s, the International Court of Justice's failure to squarely address this jurisdictional issue in the Case Concerning the Arrest Warrant of 11 April 2000 (Arrest Warrant case), as well as the advent of substantial legislative and judicial restrictions being placed upon the exercise of universal jurisdiction by nations that had previously led the way in the expansion of the use of universality, have caused commentators to conclude that not only is universal jurisdiction on the decline, but it may soon be dead as an independent jurisdictional theory. [27]

In determining how judicial bodies have interpreted the universal jurisdiction principle, it is instructive to also consider how international tribunals have dealt with the provisions of the Geneva Conventions. The case of Congo *v. Belgium (Arrest Warrant) case* is instructive. The decision relates to an international arrest warrant issued in April 2000 by a Belgian judge against Abdulaye Yerodia Ndombasi, at the time Minister of Foreign Affairs for the Democratic Republic of Congo. It is alleged that Mr Yerodia held speeches inciting racial hatred, constituting serious violations of International Humanitarian Law. The proceedings are based on the doctrine of universal jurisdiction as defined by Belgian Law of 1993. The ICJ considered that, according to Customary International Law; a Minister of Foreign Affairs enjoys immunity from criminal jurisdiction throughout the duration of his office and a total immunity from prosecution overseas. In this respect, the Court considered that there are no grounds to make a distinction between acts committed in an official capacity and those claimed to have been performed in a private capacity, nor between acts that were committed before or during the duration of office. According to the Court, that immunity extends to the most serious crimes including war crimes, crimes against humanity and genocide. The decision is contrary to the recent evolution of International Criminal Law, defined particularly in the Statutes of the International Criminal Tribunals and the International Criminal Court. These Statutes do not recognise any jurisdictional immunity for the perpetrators of international crimes irrespective of their official nature. This new obstacle undermines individual criminal responsibility for the most serious crimes and emphasises the urgency of the International Criminal Court's jurisdiction where there is no prosecutorial immunity for perpetrators of international crimes, irrespective of the functions they perform. [28]

As with France, Spain and Germany, Belgium's position is that where the accused persons are not Belgium nationals, and are not *physically present* on the Belgium territory there is no obligation but an option to prosecute, although such optional prosecution, it argues, does not violate any rule of international law. The ICJ did not directly comment on the principle of *aut dedere* in the *Arrest Warrant* case, although it indicated that Belgian jurisdiction derived principally from customary international law. In addition, in their Separate Opinion, Judges Higgins, Kooijmans and Buergenthal, adopted a similar approach and set out the preconditions upon which states may exercise universal

[22] Penal Code, s. 6 (9).

[23] *Public Prosecutor v. Djajic, Bayrisches Oberlandesgericht*, 23 May 1997.

[24] *Public Prosecutor v. Jorgic*, Oberlandesgericht Dusseldorf, 26 September 1997.

[25] See Redress: Universal Jurisdiction in Europe, Criminal Prosecutions in Europe since 1990 for War crimes, Crimes against Humanity, torture and genocide, Annex, P. 15, at http://www.redress.org/annex, cited in summers, Ibid, at 79.

[26] Information based on the reports in the Swiss media, particularly Le Temps of 10 and 13 April 1999, reproduced by McKay, Ibid, at 42.

[27] Steven W. Becker, Universal Jurisdiction Global Report, *Revue Internationale de Droit Penal*, 2008/1-2/(Vol. 79), P.159

[28] *Congo v. Belgium*, 2002ICJ Reports, 13 (Decision 14 February, 2002). The ICJ has been criticized for regressing international law. For example the International Federation for Human Rights (FIDH) noted, with surprise and regret, the decision rendered by the International Court of Justice on 14 February 2002, that jurisdictional immunity of a Minister of Foreign Affairs prevails over the individual criminal responsibility of perpetrators of grave violations of human rights, was "*thus striking a blow to the rights of victims to take legal action.*"

jurisdiction in respect of the crimes concerned.

Interestingly, the Belgian parliament recently voted to reverse the rule of complimentarity contained in Article 17 of the Rome Statue, in relation to crimes that occur *outside* of the Belgian territory, committed by foreigners against foreign victims. In such cases, "the Minister of Justice can report such acts to the ICC and, where the ICC prosecutor instigates proceedings, the Belgium Court of Cassation (*Cour de Cassation*) shall declare the lack of jurisdiction of Belgian courts." [29] Thus, since the making of a report by Belgium to the ICC implies a declaration of lack of jurisdiction of its courts, and if needs be, the transfer of the accused to the ICC, the principle of *aut dedere* would, in this case, be respected. [30] Clearly, this new law demonstrates Belgium's reluctance to exercise universal jurisdiction on any crime not committed on its territory, which as been committed by foreigners against non–Belgians. [31]

The International Criminal Tribunal for the Former Yugoslavia (ICTY), has been reluctant to uphold universal jurisdiction where the accused is not present in the territory of the asserting state despite that the universality principle is no respecter of nationality or territoriality. In *Prosecutor v. Furundzija*, [32] for example, the Trail Chambers of the ICTY stated that: "at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction." [33]

Furthermore, in application of the Convention on the Prevention and Punishment of Genocide (Genocide Convention), two ad hoc judges of the ICJ directly addressed the jurisdictional basis of the Convention. According to Judge Kreca, the Convention "does not contain the principle of universal repression. It has firmly opted for the territorial principle of the obligation of repression." [34] Although Judge Lauterpacht argued that the purpose of Article 1 of the Convention is "to permit parties… to assume universal jurisdiction over the crime of genocide," it should be noted that he did not address the implications of Article 6 in his discussion of the issue. What these cases show is that the position of universal jurisdiction both under domestic and international adjudication is far from being secure.

12.1. European Center for Constitutional and Human Rights (ECCHR)

As a corollary, in March 2009, the ECCHR partner lawyer Gonzalo Boye filed a criminal complaint against six former US officials of the Bush administration, among them former government lawyers John Yoo and Jay Bybee. The aim was to ensure that the so-called "Bush Six" are held accountable for breaches of international law. They are accused of having aided and abetted crimes of torture, cruel, inhuman or degrading treatment and grave breaches of the Geneva Conventions of 1949 [35]. In the proceedings, ECCHR represents German citizen Murat Kurnaz, who was detained and tortured in Guantánamo from 2002 to 2006. The Center for Constitutional Rights (CCR) in New York also supports the case. The principle of universal jurisdiction was part of Spanish law until 2014. A law reform in that year, however, means that the Spanish judiciary can now prosecute international crimes only if the perpetrators are Spanish citizens or live in Spain. After six years of criminal investigations, Spain's National Court therefore decided in July 2015 to close the investigations into US torture in Guantánamo. The subsequent complaint submitted by ECCHR and CCR to the Spanish constitutional court was rejected in March 2019. In its decision, which is final, the court ignored evidence that indicated the involvement of Spanish suspects. With this decision, Spain has missed its opportunity to take a leading role in the fight against US torture. The "Bush Six" have never faced legal proceedings for their actions. The options of filing a complaint to the European Court of Human Rights and the UN are now being explored.

The absolute prohibition of torture is one of the central and universally applicable norms of international law. Since 2001, the US has ignored this fundamental principle in its counter-terrorism operations and has kidnapped and tortured persons suspected of involvement in terrorism. The "Bush Six" played a crucial role in this violation of the fundamental prohibition of torture. The complaint filed against them in Spain detailed how the six officials paved the way for the systematic torture in Guantánamo and Iraq by seeking to provide legal justification for the use of torture methods [36].

The case for rethinking judicial means and modes is particularly strong in the context of claims by states to exercise universal jurisdiction. On 3 August 2016, a verdict handed down in an English courtroom made front-page news in Nepal, though it was barely reported in the United Kingdom (UK) press. The trial of Kumar Lama, a colonel in the Royal Nepalese Army, took place in the Old Bailey in London from June to July 2016. Colonel Lama was charged with two counts of torture under section 134 of the Criminal Justice Act, relating to incidents that had allegedly occurred between April and May 2005 at the Gorusinghe Army

[29] Damine Vandermeerch, 'The ICC Reports', 13 (Decision 14 February, 2002).

[30] But see the opinion of the conseil d'Etat, Opinion 34, 154/VR of 16 December 2002 on the Draft bill to amend the Act of 16 June 1993 on the Criminalisation of Serious Violations of International Humanitarian Law (Doc, Parliament/Senate, S.O. 2001 – 2002, 2 – 1256/1).

[31] For a full analysis, see D. Vandermeersch, "*Quel avenir pour la competence universalle des jurisdictions belges en matiere de crime de droit international humanitarie*", *Revue Penitentiaire et de Droit Penal*, (2003), 229.

[32] Case No. IT-95-17/1-T (10 December 1998) at 60.

[33] Ibid, at 60.

[34] IC J Reports (1993), 325.

[35] USA - Guantánamo – Spain Torture in Guantánamo: Spain closes investigations into "Bush Six"

[36] The "Bush Six", as the six US officials became known, includes David Addington (former Counsel to, and Chief of Staff for the former Vice President Dick Cheney); Jay Bybee (former Assistant Attorney General, Office of Legal Counsel, Department of Justice); Douglas Feith (former Under Secretary of Defense for Policy at the Department of Defense); Alberto Gonzales (former Counsel to President George W. Bush, former US Attorney General); William J. Haynes (former General Counsel at the Department of Defense) and John Yoo (former Deputy Assistant Attorney General at the Office of Legal Counsel within the Department of Justice).

Barracks in Nepal. The Criminal Justice Act vests British courts with 'universal jurisdiction' over the offence of torture, meaning the offence can be prosecuted in the UK whatever the nationality of the offender and wherever the alleged torture was committed. Little mention was made of the jurisdictional basis at trial, save for the prosecutor's acknowledgement to the jury in his opening statement that 'this trial in a far-off land may seem a bit alien. [37]

2. The Syrian Conflict and Universal Jurisdiction

Many states are taking steps revealing a milestone towards justice and accountability for everyone affected by Syrian president, Assad, and his torture system. The testimony of Syrian torture survivors and activists whose has contributed to arrest warrants, and they work closely with the European Center for Constitutional and Human Rights (ECCHR). The first trial worldwide on state torture in Syria started at the Higher Regional Court in Koblenz, Germany, in April 2020. This follows the German Federal Prosecutor's indictment of two former officials of President Bashar al-Assad's Syrian General Intelligence Directorate in October 2019. Anwar R is accused of being involved in the torture of at least 4000 people between 2011 and 2012 at the General Intelligence al-Khatib Branch prison in Damascus. In February 2021, the court sentenced Anwar R's associate, Eyad A, to four years and six months in prison for aiding and abetting 30 cases of crimes against humanity. This is the first time a former member of the Syrian intelligence services was convicted of a crime under international law.

In June 2018, it became public that the German Federal Court of Justice (*Bundesgerichtshof*, BGH) issued an arrest warrant for Jamil Hassan, head of the Syrian Air Force Intelligence Service until July 2019. The Syrian survivors and activists have filed four criminal complaints in Germany based on the principle of universal jurisdiction since 2017. Working with lawyers Anwar al-Bunni (Syrian Center for Legal Studies and Research, SCLSR), Mazen Darwish (Syrian Center for Media and Freedom of Expression, SCM), the Caesar Files Group and ECCHR, their goal is to hold high-ranking officials of Assad's security apparatus to account. The criminal complaints in Germany were followed by similar complaints in Austria in May 2018, in Sweden in February 2019, and in Norway in November 2019 [38].

In June 2020, the German police arrested Alaa M, and detained him based on strong suspicion of complicity in crimes against humanity committed by the Syrian regime since 2011. Alaa M is alleged to have participated in sexual violence and the torture and killing of Syrian civilians while working as a doctor in a Syrian military hospital. This case clearly demonstrates that the systematic violence of the Syrian regime against the civilian population does not only take place within detention facilities. Evidence of the role of military hospitals in Syrian President Bashar al-Assad's apparatus of injustice was initially provided by the Caesar photos: the images, taken by a Syrian military photographer who defected and then brought them out of the country, reveal thousands of corpses, often with obvious signs of torture. A large portion of the photographs were proven to have been taken in military hospitals within and in the vicinity of Damascus. Germany assumed a pioneering role in addressing such crimes. The German authorities have succeeded in handling these highly complex cases in part through so-called structural investigation procedures. In addition, Germany applies the principle of universal jurisdiction, according to which the most serious crimes against humanity can be prosecuted even when they have no direct connection to Germany. [39]

2.1. Universal jurisdiction and International Statutes

Universal jurisdiction is the assertion of jurisdiction over offences regardless of the place where they were committed and the nationalities of the alleged perpetrator or of the victims. Universal jurisdiction is held to apply to a range of offences the repression of which by all States is justified, or required as a matter of international public policy and by certain international treaties.[40] Some of the treaties refer to piracy, slavery, war crimes, counterfeiting, genocide apartheid just to name a few.

2.1.1 Geneva Convention on Law of the High Seas 1958

Crimes like piracy have been considered subject to universal jurisdiction, mainly because pirates were considered as outlaws, deprived of any citizenship, and attacking people in a manner that shock the conscience of mankind. Hence, they were considered as participating in universal crimes. Since the nineteenth century, pirates have been recognized as *hosti humanis generic*, Latin for "enemies of the human race." The exercise of jurisdiction over pirates is well settled practice as part of universal jurisdiction.

Conventional law in the twentieth century clearly provides for universal jurisdiction in cases of piracy. Both the 1958 Geneva Convention on Law of the High Seas 1958 and the 1982 Montego Bay Convention on the Law of the Sea provide, in identical language, for universality, on the high seas, or in any other place outside the jurisdiction of any State. They provide that every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the property, subject to the rights of third states acting in good faith.

2.1.2. Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (also known as the Brussels Convention of 1890)

Although slavery has been analogized to piracy, especially because slave trafficking often occurred on the high seas, a survey of nineteenth century slavery conventions does not support reliance upon universal jurisdiction. For example, Article V of the Convention Relative to the Slave Trade and

[37] Devika Hovell, The Authority of Universal Jurisdiction, *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 427–456, 23 July 2018.

[38] European Center for Constitutional and Human Rights (ECCHR), The fight against impunity for state torture in Syria: German authorities set international precedent; www.ECCHR.EU, last accessed May 28, 2022.

[39] Human Rights Violations in Syria: Torture under Assad Proceedings against Doctor Alaa M, European Centre for Constitutional And Human Rights (ECCHR), 2020.

[40] See Advisory Service Factsheet entitled "*Universal jurisdiction over war crimes*".

Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (also known as the Brussels Convention of 1890) provides, in article 5 that guilty persons who may have escaped from the jurisdiction of the authorities of the country where the crimes or offenses have been committed shall be arrested either on communication of the incriminating evidence by the authorities who have ascertained the violation of the law, or on production of any other proof of guilt by the power in whose territory they may have been discovered, and shall be kept, without other formality, at the disposal of the tribunals competent to try them. According to one recent commentator, this language does not establish universal jurisdiction but simply provides for "delegated" jurisdiction, whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offense, effectively making each state an agent of the others.

2.1.3. United Nations International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973

The 1973 United Nations International Convention on the Suppression and Punishment of the Crime of Apartheid was the first binding international treaty which declared the crime of apartheid and racial segregation under international law. The Convention also provide for universal jurisdiction. More specifically, Article IV provides that the States Parties to the present Convention undertake to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons. In addition, Article V of the Apartheid Convention states that persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction. Yet, because this Convention "may have fallen into desuetude" as a result of the lack of prosecutions for *apartheid* practices arising under it, coupled with the new regime in South Africa, the effect of the Convention's reliance upon universality is minimized.

2.2. International Convention for the Suppression of Counterfeiting Currency (ICSCC) 1929

The International Convention for the Suppression of Counterfeiting Currency (ICSCC) [41], a pre-World War II treaty, became the first international convention to contain the *aut dedere* principle. In Article 9, the ICSCC provides that foreigners who have committed abroad any offence referred to in article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offenses committed abroad, should be punishable in the same way as if the offence has been committed in the territory of that country. The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which applications made cannot hand over the person for some reason which has no connection with the offence. The position is that each state acts basically in relation with the gravity of the crime, irrespective of the nationality of the criminal. And what is a universal crime is still contested by many individuals.

2.2.1. The Genocide Convention 1946

Analysis of the *travaux preparatories* of the Genocide Convention discloses what states understand their obligation to be under the Convention when the Convention was adopted. Curiously, most commentators did not make any reference to this *travaux* before drawing conclusions as to the nature of states' obligation under the Convention. The UN General Assembly adopted, on 1 December 1946, in Resolution 96 (1), affirmed genocide as an international law crime. [42] In the first draft of the Convention prepared by the Secretariat's Human Rights Division, [43] the rule of universal punishment of the crime of genocide was set out in article VII. Additionally, states pledged to transfer to an international court offenders who commit the crime of genocide, if they themselves, for whatever reason, cannot prosecute or extradite such offenders, especially where the latter happen to be functionaries of the territorial states.

However, despite their manifest readiness to accord universal jurisdiction to the crime of genocide, several states were not forthcoming when the UN Secretary-General invited them to comment on the draft article. Of all the UN members, only twelve countries responded. The US, Soviet Union, and the Netherlands were amongst the principal opponents of the universal basis of jurisdiction of the Convention enunciated in Article VII. The US insisted that where prosecution of a crime would be undertaken by the state other than the state upon which territory the crime was committed, the consent of the latter was required for such prosecution. In fact, only Siam (now Thailand) endorsed universal jurisdiction contained in the article. [44] When the draft was submitted to an Ad Hoc Committee composed by China, France, Lebanon, the Soviet Union, Poland, US, and Venezuela, the Committee abandoned the principle of universality altogether to a Sixth Committee of the General Assembly for a deeper consideration. [45] Various amendments were proposed to the new article. The Iranian proposal sought to establish subsidiary universal jurisdiction. Under this scheme, persons charged with genocide or any of the other acts enumerated in Article IV "may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition." [46]

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[41] Geneva, 20 April 1929; 112 League of Nations Treaty Series 371.

[42] This apparently followed from the General Assembly's adoption of the Principles of International Law recognized by the Charter of the Nuremberg Tribunals, UNGA Res olution 95(1) 1946; 188 UN Doc A/64/Add. 1(1946).

[43] The word 'genocide' was coined by Professor R. Lemkin who served, alongside Professors H. Donnedieu de Vabres and V. Pella, as expert advisers to the Secretariat's division responsible for the convention. Lemkin said the Latin for 'geno' means 'tribe' or 'ethic group' while 'cide' means 'massacre.' So genocide means to massacre a tribe or ethnic group.

[44] Schabas, Ibid, at 355.

[45] Official Records of the General Assembly, Third Session, Sixth Committee, Part 1, 97th, 98th, and 100th Meetings.

[46] UN Doc A/C.6/218

The Genocide Convention was unanimously adopted on 9 December 1946.

As seen above, the analysis of legal literature, judicial decisions and *travaux preparatoires* clearly indicate that there is no consensus to interpret the obligation contained in the Genocide Convention and anti-terrorist treaties as authorizing universal jurisdiction, much less, as constituting a precedent for the ICC. On the contrary, what appears to be preponderant is that academic and judicial opinions suggest that the obligation assumed by state parties to the Geneva Conventions and anti-terrorist treaties is to take measures to implement these treaties since they are not self-executory. With regard to the position of the obligation concerning the universality principle, the better view on the nature of the obligation contained in the conventions therefore is that they do not uncontroversially permit universal jurisdiction.

2.2.2. The Rome Statute of the International Criminal Court, 2002

Universal jurisdiction in the Rome Statute is non-consensual in nature. Some legal analysts argue that the ICC can exercise universal jurisdiction as a consequence of the criminal jurisdiction delegated to it by its states parties [47]. Supporters of this view contend that since states can individually exercise criminal jurisdiction, nothing prevents them from collectively exercising this power through an international court. It was further argued that in any case states could exercise universal jurisdiction under customary international law over most of the crimes contained in the ICC Statute. Another group in favour of ICC universal jurisdiction advocates that under general international law states have an obligation to prosecute or extradite criminals for crimes that are contained in the ICC Statute. According to this view, the *aut dedere aut judicare* principle supposedly contained in the Geneva Conventions and several anti-terrorist treaties authorize universal jurisdiction, and therefore constitute a precedent for the ICC. Others canvass that, contrary to the US's view, the ICC trial of non-parties' nationals neither create obligations for those states under the ICC Statute nor violate the principle that a court cannot try a case involving a state that has not accepted its jurisdiction. [48]

Several factors have helped bring to the fore the customary nature of the non-applicability of statutory limitations to war crimes and crimes against humanity such as the growing number of States having stipulated the non-applicability of statutory limitations to these crimes in their penal legislation and the codification of this concept in Article 29 of the ICC Statute, which its drafters considered crucial to preventing impunity for these crimes. [49]

The ICC Statute does not address itself directly on the issue of universal jurisdiction. According to article 12, the Court may exercise jurisdiction on a state party on whose territory a crime has been committed [50] and over a state of which the person accused of a crime is national. [51] In either case, the consent of the concerned state is required before the Court can exercise jurisdiction over nationals of non-parties only in two other circumstances: First, where the Security Council refers a situation involving nationals of non-parties to the ICC Prosecutor; [52] second, where a particular non-party state has otherwise accepted the ICC jurisdiction with regard to particular crimes including those committed by its nationals. [53]

Hints about a possible universal basis for the ICC jurisdiction first emerged when Michael Scharf, whilst accepting the "territorial basis of the ICC legitimizing its jurisdiction" suggested that "the universal basis is also relevant". [54] Although Scharf accepted that the ICC may not exercise universal jurisdiction without a referral by the Security Council, he noted that "where the territorial state gives its consent (as expressed by ratifying or acceding to the Rome treaty or by special consent on a case-by-case basis), in addition to the principles of territoriality, the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute the nationals of non-party states." In this limited context, the jurisdiction of the ICC can be deemed to be based on the universal and territorial bases of jurisdiction."

On the African continent the concept of universal jurisdiction is still gaining stronger grounds. In a South African administrative review case the question was whether the South African Police Service (SAPS) and National Prosecution Authority (NPA) are obliged by domestic law to investigate the commission of torture in neighboring Zimbabwe by members of that countries' security forces and their superiors (so-called "securocrats") [55]. The Constitutional Court affirmed an earlier ruling that the SAPS and NPA had in fact failed to carry out their statutory duties and had not acted "reasonably" in declining to investigate the alleged crimes against humanity. Although much of the opinion turns on domestic legislation coupled with the constitutional imperative to interpret South African law in accordance with binding international law, there are some important strands of analysis that will resonate beyond the South African context. In particular, the Constitutional Court reasoned that the exercise of universal jurisdiction is subject to some limitations imposed by an intermixture of international law and domestic law. The Court also acknowledged that the exercise of universal jurisdiction will have "political" ramifications, particularly vis-à-vis the state of nationality of the accused. However, the Court observed that the failure to prosecute crimes within the reach of the

[47] Michael P. Scharf, "The ICC Jurisdiction over Nationals of Non-Party States", in Sarah B. Sewall and Carl Kaysen (eds.) "The United States and the International Criminal Court," (Maryland, Rowman Littlefield, 2000), p.13.

[48] See State Department Fact Sheet on the International Criminal Court, Ruth Wedgwood, "The International Criminal Court: An American View", 10 *European Journal of International Law* 93 (1999); D. Scheffer, "The United States and the International Criminal Court" 93 *American Journal of International La*w 12 (1999) at 18.

[49] Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', 1(1) *London Review of International Law* (2013) 63; S. Dorsett and S. McVeigh, *Jurisdiction* (2012).

[50] Article 12(2)(a) ICC Statute.

[51] Article 12(2)(b) ICC Statute. See Security Council Resolution 1593, UN Doc S/RES1593 (2005), adopted by the Security Council at its 5158th meeting. This resolution refers the situation in the Dafur region of Sudan to the ICC.

[52] Article 13(b).

[53] Article 12(2) (a) and (3) ICC Statute.

[54] Scharf, Ibid, at 76.

[55] Beth Van Schaak, South Africa Constitutional Court On Universal Jurisdiction: Validating the Obvious, November 4, 2014, p.1.,

law yields its own "political" consequences, particularly for a country founded upon a commitment to promote international law and human rights. The SAPS indicated that it would comply with the Constitutional Court's judgment, thus paving the way for the formal investigation to commence.

By way of background, the law in question, the implementation of the Rome Statute of the ICC Act 27 of 2002 was passed following the ratification by South Africa— a dualist state when it comes to the domestic applicability of treaties—of the Rome Statute of the International Criminal Court. South Africa was the first African state to incorporate the Rome Statute into its domestic law. The lawsuit was brought by the Southern Africa Litigation (SALC) and the Zimbabwe exiles' forum (ZEF), which together compiled an enormous dossier on the systematic commission of torture and other crimes against humanity in Zimbabwe. They brought suit after the South African authorities declined to open an investigation on the grounds that the evidence was insufficient and, in any case, that the actual presence of the suspects in South Africa was required before an investigation could be commenced. In the earlier decision, the South African Supreme Court of Appeal had held that the NPA and SAPS were in fact obliged under the law to investigate Rome Statute crimes so long as the perpetrators might someday fall within the personal jurisdiction of the South African courts through, for example, their presence or habitual residence in the forum. The National Police Commissioner appealed, arguing among other things that the ruling invaded the SAPS' zone of prosecutorial discretion. The Court affirmed its jurisdiction. Appropriately, the Court began its opinion with a quote from the late Nelson Mandela; "South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations". The Court also invoked South Africa's history as a pariah state and the importance of it carrying out its sovereign obligations toward the community of nations. It stated that the extent of South Africa's responsibilities as a member of the family of nations to investigate crimes against humanity lies at the heart of this case; and that this appeal calls upon the judges to establish South Africa's domestic and international powers and obligations to prevent impunity and to ensure that perpetrators of international crimes committed by foreign nationals beyond their borders are held accountable. They proceeded to the position of South African as part of the community of nations in respect of these types of crimes. Thus the court ruled that the accused must not be present before the authorities can even commence an investigation because the exercise of universal jurisdiction may occur in the absence of a suspect without offending South African constitution or international law. It further stated that universal jurisdiction to investigate international crimes is not absolute; it is subject to two limitations namely; s*ubsidiarity and practicability. In the former*, ordinarily there must be a substantial and true connection between the subject-matter and the source of the jurisdiction; investigating international crimes committed abroad is permissible "only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state." In relation to practicability, the court stated that before South Africa asserts universal jurisdiction, it must consider whether an investigation "is reasonable and practicable in the circumstances of each particular case." This includes a consideration of "whether the alleged perpetrators are likely to be present in South Africa on their own or through an extradition request; the geographical proximity of South Africa to the place of the crime, the prospects of gathering evidence, and the nature and the extent of the resources required for an effective investigation." [56]

Another African state radiating juristic currents akin to universal jurisdiction is the Gambia. Between 1994 and 2016, Yahya Jammeh ruled the small West African nation of The Gambia with an iron fist. His authoritarian regime systematically targeted political opponents – subjecting them to torture, extrajudicial execution, arbitrary detention and enforced disappearance. Since 2017, the country has been engaged in a transitional justice process that aims to turn the page on this question of universal jurisdiction. For the time being, it is difficult to know exactly how many human rights violations occurred over the course of Yahya Jammeh's 22-year dictatorship. Nevertheless, The Gambia appears determined to shed light on this troubled period of its history. In 2017, victims of the regime, supported by local and international NGOs, gathered in Banjul to demand that the former president be prosecuted. The #Jammeh2Justice campaign was launched on this occasion by Gambian and international organizations, including Human Rights Watch and TRIAL International. Civil society actors are not alone in their efforts to address the dictatorship's legacy. Gambian legislators are in the process of reforming the constitution and the criminal code, and a national human rights commission; an independent and permanent institution, established in January 2018. While it is difficult to quantify the crimes and human rights violations that occurred during the Jammeh era, the information that is currently available; due in large part to the Truth, Reconciliation and Reparations Commission (TRRC), which began its operations in 2019, reveals the systematic nature of the regime's abuses. Every organ of the state was involved in wrongdoing.

Finally, as a result of TRIAL International's work, legal actors/tresses beyond The Gambia's borders have begun to take notice of crimes committed under Yahya Jammeh. This is notably the case in Switzerland, where the authorities opened an investigation in 2017 into crimes against humanity allegedly committed by former Gambian Minister of the Interior Ousman Sonko. Victims appear determined to shed light on the crimes committed under Jammeh's regime. TRIAL International supports victims of international crimes through the submission of legal complaints, particularly in connection with the prosecution of Ousman Sonko. TRIAL International has also conducted several investigative missions in The Gambia. Drawing on its extensive experience in the documentation of international crimes, it supports Gambian civil society actors/tresses who investigate crimes committed during the Jammeh era. At the request of partners on the ground, TRIAL International also provides thematic trainings, often in collaboration with the Gambia Center for Victims of Human Rights Violations, on the documentation of extrajudicial executions. The

[56] Beth Van Schaack, Stanford Law School, March 2022.

organization works closely with institutions, civil society actors/tresses and local organizations involved in the transitional justice process.

3. The *Aut Dedere Judicare* Principle

What then is the *aut dedere judicare* principle? How does it relate to the international tribunals? The principle means 'extradite or prosecute'. [57] It requires a state to prosecute an offender in its custody, or extradite him to another country having links with the offender or the alleged crime. A custodial state is a state on whose territory an offender has been discovered, but not necessarily arrested. Thus, the custodial state is to be distinguished from *judex loci deprehensionis*, a state which has the custody of an offender based on arrest. [58] But the evolution of the *aut dedere* principle in modern international law can be said to have begun with its recognition by the Institute of International Law at its 1931 session in Cambridge. Article 5 of the Institute's resolution on criminal jurisdiction states that every State has the right to punish acts committed abroad by a foreigner who is found on its territory, provided these acts violate general interest protected by international law (such as piracy, trade in Negroes, trade in white women, propagation of contagious diseases, attacks on international communication means and destruction of undersea cables, counterfeiting of currency and securities, etc), if extradition of the accused is not requested or if the territorial State or the State of nationality of the offender does not accept an extradition offer. [59]

In 1983, Oehler authoritatively asserted that the principle of universality (*Weltrechtspflefeprinzip*) entitled the *judex loci deprehensionis* to exercise an unfettered jurisdiction over offences which "pose an equal threat to all nations" [60] Similarly, Lombois would affirm twelve years later that the only required link with the asserting state is the voluntary presence of the putative offender on its territory. [61] The status of *aut dedere aut judicare* principle has also been reinforced by its recognition under customary international law. [62] Judge Weeramantry stated in the Lockerbie case that: "The widespread use of the formula 'prosecute or extradite' either specifically stated, explicitly stated in a duty to extradite, or implicit in the duty to prosecute or criminalize, and the number of signatories to these numerous conventions, attests to the general jus cogens principle." [63]

Thus the principle of *aut dedere aut judicare* is an important facet of a State's sovereignty over its nationals and is a well-established principle in customary international law. Given its objective of protecting and ensuring fundamental human rights, the *aut dedere aut judicare* principle has also been thought of as an obligation *erga omnes* meaning that states owe such obligation not just as between parties to a treaty, but to the international community at large. [64] Accordingly, Scharf argues that the *aut dedere aut judicare* principle is comparable to the obligation contained in the Geneva Conventions and antiterrorist treaties which authorize universal jurisdiction. [65]

The crucial issue upon which the argument that the ICC can exercise universal jurisdiction rests – is whether the anti-terrorist treaties and the Genocide Convention contain *aut dedere* principle. Considering anti-terrorist treaties, Scharf observes that none of these treaties purport to limit their application to offenses committed by the nationals of parties; nor do the United States criminal statutes implementing these treaties limit prosecution to the nationals of the treaties. Therefore, even if some of these crimes were deemed not to reflect customary international law, there is precedent for state parties to exercise universal jurisdiction created solely by treaty over the nationals of non-party states." [66]

Many commentators contend that the universality principle is extraneous to the ICC States. According to David Scheffer, the requirement of the consent of the state on whose territory the crime was committed would be unnecessary; if the court's jurisdiction were universality. However, to say that the requirement of consent is seemingly incompatible with universal basis of jurisdiction is one thing, but it is quite another to always insist on consent as the basis for prosecution. As Professor Morris argues; "those crimes [enshrined in the ICC Statute] are often committed by or with the approval of governments. It is unlikely that a government sponsoring genocide, war crimes, or crimes against humanity would consent to the

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[57] Van Krieken, "Terrorism and the International Legal Order" (The Hague: T.M.C. Asser Press, 2002).

[58] Luc Reydams, "Universal Jurisdiction, International and Municipal Perspectives." (Oxford: Oxford University Press, 2003), 37 et seq.

[59] Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', 25(1) *European Journal of International Law* (*EJIL*) (2014) 9, at 22.

[60] D. Oehler, *Internationales Strafreent Geltungsbereich des Strafrechts. Internationals Rrechtshilfercht. Recht der gemeinscharen.volkerstrafrecht* (2nd edn, 1983), 541, at 38.

[61] C. Lombois: "De la compassion territoriale' (1995) *Revue de science criminelle et de droit penal compare*, 399 at 403.

[62] Theodor Meron, "Human Rights and Humanitarian Norms as Customary International Law." (Oxford: Clarendon Press, 1989) 92-3.

[63] "Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie *Libyan Arab Jamahiriya v. United Kingdom*, (1992) ICJ Reports, 3.

[6431] See for example, African Commission: Communications 54/91, 61/91, 96/93, 164/97, 210/98, Various Communications v. Mauritania 83 reproduced in the Amicus brief on the Legality of Amnesties in International Law in *Prosecutor v. Morris Kallon* (Special Court for Sierra Leone), (Trial Chamber) at p.27.

[65] Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *VJIL* (2001) 81, at 108, 151–152; Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59(4) *Law and Contemporary Problems* (1996) 153, at 166, 171; Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991) 2537, at 2556–2557; Randall, 'Universal Jurisdiction under International Law', 66 *TLR* (1988) 785, at 788, 798; Cowles, 'Universality of Jurisdiction over War Crimes', 32(2) *California Law Review* (1945) 181; G. Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943), at 92, 98–99.

[66]Langer, 'Universal Jurisdiction Is Not Disappearing', 13 *JICJ* (2015) 245, at 249.

prosecution of its nationals for his or her participation."[67] Similarly, Professor Leila explained that "the universality principle does not disappear" with a referral of a matter to the ICC by its prosecutor or a state, but only "layered upon by a State consent regime". This contention would seem to imply that consent merely compliments universal jurisdiction in the ICC Statute thereby making universality a much more pivotal jurisdictional basis of the ICC. According to Scharf, no one at the Rome Diplomatic Conference disputed that the core crimes within the ICC's jurisdiction – genocide, crimes against humanity, and war crimes – were crimes of universal jurisdiction under customary international law (although there were debates about the scope and definitions of those crimes). Thus, the drafters did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court. Rather they adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction as a political expedient concession to the sovereignty of states in order to garner broad support for the statute.

Although a cursory reading of the negotiation records of the Rome Statute discloses that no state denied the universal nature of the grave crimes over which the ICC exercises jurisdiction, [68] a close examination reveals that states affirmatively rejected including universal jurisdiction in the Rome Statute. When the conference commenced, little attention was focused on universal jurisdiction, unlike other jurisdictional bases of the ICC. Initially, many participating states assumed that since the ICC would deal with grave crimes, then, "logically it would have some kind of jurisdiction based on universality." [69] As Professor Morris observes, the jurisdictional structure of the ICC is based on a view of the ICC as a criminal court. In his view, the job of the ICC is to adjudicate the guilt or innocence of individuals accused of recognized international crimes. With this model in mind, it makes sense to give the court meaningful powers of compulsory jurisdictions, lest perpetrators of serious international crimes should escape justice. From this perspective one might reason that, if the court's subject-matter jurisdiction is limited to established international crimes and the process of the court is fair, then no state, whether party or non-party – should have legitimate objections to the court's exercise of jurisdiction over its nationals." [70]

It was also argued that the ICC can exercise unlimited criminal jurisdiction because states have delegated to the Court such criminal jurisdiction as they may individually exercise. [71] Hans-Peter Kaul restates the theory thus: The universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes. It combines this assumption with the very simple idea that States must be entitled to do collectively what they have the power to do individually. Therefore, states may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf. [72]

At least two other scholars have so far supported this theory. Commenting on the effect of the German Proposal, Danilenko observed that "the essence of the proposal was that the ICC should have the same jurisdictional authority as contracting states have under international law and that this authority would be transferred by them, through ratification of the statute, to the ICC." [73] For Akande, "the power of the ICC to try nationals of non-parties where they commit crimes on the territory of a party constitutes a delegation to the ICC of the criminal jurisdiction possessed by ICC parties because the court is given the power to act only in cases where the parties could have acted individually." [74]

In principle, there is no rule of international law that prohibits states from delegating rights, powers of privileges, which they individually enjoy, to an international organization created by them for the sole or part purpose of exercising such rights, powers or privileges on their behalf. Such delegation of state jurisdiction, when legally done, will be no more than a transfer by a state of its traditional basis of jurisdiction to the recipient organization.

The delegation of state jurisdiction is not new in international adjudication. During the trial of Nazi war criminals, the International Military Tribunal at Nuremberg endorsed the principle of delegated legislation which it referred to as ceded jurisdiction. According to the IMT, "the signatory powers created this tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has a special right thus to set up special courts to administer law." [75] One commentator also noted that "The power of the Allies to set up the Tribunal may be said to flow either from their authority as the de facto territorial rulers of a defeated Germany, or, more congenially, as exercising the authority of the international community operating on a type of universal jurisdiction". [76]

As also argued elsewhere, the theory of delegated criminal jurisdiction appears to have enjoyed wider appeal amongst international criminal tribunals. [77]

However, to say that states may delegate their jurisdiction in international law does not necessarily mean that such power is unboundable. With regard to the ICC, a plethora of legal problems attend the theory. As Professor Morris observes, "if, for example, the jurisdiction to be exercised by the ICC were pre-existing jurisdiction of state parties which they had delegated to the court, then arguably, the ICC Treaty, far from conferring exorbitant jurisdiction, would be merely an agreement amongst state parties regarding the manner in

67 Morris, Ibid. at 13.
68 Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' in Antonio Casses, Paola Gaeta, John R. W. D. Jones, "The Rome Statute of International Criminal Court: a Commentary"; (Oxford, Oxford University Press, 2002), at 583.
69 Ibid., at 583
70 Moriss, Ibid, at 14.
71 Project of Princeton University (2001) at 43.
72 Cassese *et al*., at 587.
73 Danilenko, in Cassese *et al.*, at 598.
74 Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits" 13 *Journal of International Justice* 618 (2003), at 621-2.
75 Trial of the Major War Criminals before the International Military Tribunal, 171 (1947), at 218.
76 Roger Clark, "Nuremburg and Tokyo in Contemporary Perspective" in the Law of War Crimes: National and International Approaches (Timothy McCormick and Gery Simpson eds.), (The Hague: Kluwer Law International, 1997), 172.
77 Cowles, "Universality of Jurisdiction over War Crimes" 33 *California Law Review*, 177 (1945); Sponsler, "The Universality of Jurisdiction and the Threatened Trial of American Airmen," 15 *Loyola Law Review*, 43 (1968).

which they would exercise their lawful jurisdiction." [78]

Conclusion and recommendations

The author discusses the concept of universal jurisdiction as a significant method to intercept criminals who are no longer within the geographical location that confers natural jurisdiction over them. Universal jurisdiction proceedings should not ignore official immunities recognized under international law though the actual accused who have been brought to trial under universal jurisdiction laws have been low-level or mid-level perpetrators who would not have benefited from immunities.

To make universal jurisdiction a reality and not a myth, the ICTY, ICTR and ICC Statutes explicitly exclude the availability of functional immunities in cases of international crimes (Art. 7(2) ICTY Statute; Art. 6(2) ICTR Statute; Art. 27(1) ICC Statute). Only the ICC Statute expressly excludes the availability of personal immunities in cases of international crimes (Art. 27(2)). In practice, the ICTY indicted two sitting Heads of State although the Tribunal's jurisdiction was only effectively exercised once they had left office. The ICC Statute requires States to remove immunities regarding the perpetration of international crimes by enacting appropriate legislation in their national law (Arts 27 and 88). The waiver of immunity is qualified in Article 98(1) of the ICC Statute with respect to non-party States. It is to the effect that no person should be tried or punished more than once for the same offence. It ensures fairness for defendants since they can be sure that the judgment will be final and protects against arbitrary or malicious prosecution at both domestic and international level.

Most of the countries that have implemented universal jurisdiction have dedicated special resources to ensure quality investigations into cases. Some states have created special "war crimes units" to ensure the necessary degree of professionalization of the staff working on these cases. Investigations have sometimes involved several missions to the places where the crimes were committed. The actual practice of universal jurisdiction supports the conclusion that national judicial officers are generally committed to fairly pursuing justice for grave international crimes. [79]

According to this exposition, universal jurisdiction is one of those important principles that can be applied by judges to adjudicate on crimes that are a menace to mankind as a whole. It is a reality that criminals of a certain nationality or official rank may be prosecuted within or outside their state of nationality. The author questions whether this is a myth because various tribunals have styled their own version of universal jurisdiction; some of them actually reducing the temerity of application because of negative criticism against the principle of universal jurisdiction. However, the article reveals that this principle is designed to promote human rights, though its strict application could also amount to a violation of the internal law of some states.

Universal jurisdiction should not be used unfairly against Africans, or as a tool of conflict between post cold war arrangements of Russia, China, Japan on the one hand, and the US, UK, and France on the other; or the conflict blocs between Arab-Isreal, or Islam-Christian States, NATO and Russia and its allies etc. [80] States should exercise caution so as not to over stretch the notion of immunities under international law with regard to grave international crimes. Even if individual state practice differs, the decision of the International Court of Justice in the Yerodia case, which upheld the immunity from prosecution for a Congolese foreign minister, is limited to a very small group of officials holding governmental positions. Any effort to secure privileges (such as not being subject to arrest warrants) for a much broader category of individuals, defined as "foreign state officials exercising a representative function on behalf of his or her state," would be wholly inappropriate and contrary to the evolution of international law. This would seek to shield individuals from accountability for the most serious crimes known to humanity on an unprecedentedly broad basis.

The author believes universal jurisdiction should always be upheld, or else states and regional blocs, or key continents concerned, should create the judicial climate to arrest impunity for the alleged crimes. A glaring example was the establishment of the Extraordinary African Chambers (EAC) in 22 August 2012, following an agreement between the African Union (AU) and the Republic of Senegal, and was inaugurated on 8 February 2013, to fight against impunity for the crimes committed by Hissène Habré's regime. It was also created at a regional level, and was the first African initiative against the impunity for serious crimes committed on African territory by African citizens against African populations, whatever the rank they were occupying at the time. It shows the pressure on the case of Yayah Jammeh may equally lead to the establishment of another type of Habre court, if universal jurisdiction is rejected. It also reveals that an African International Criminal Court can become a reality, together with an African concept of universal jurisdiction that is justiciable.

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