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Kalundu Kamwi

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Table of Cases

List of Abbreviations

ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the former Yugoslavia
PCIJ	Permanent Court of International Justice
CAHWCA	Canada's Crimes Against Humanity and War Crimes Act

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CHAPTER 4

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Faculty of Law

LLB Dissertation

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Topic: A Legal Critique of the principle of "Universal Jurisdiction" in Contemporary International law.

This paper is completed in partial fulfillment of the LLB (Honors) Degree.

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Chapter 1

Introduction

1.1 Problem statement

Universal jurisdiction is a breach on each state's sovereignty. There is a possibility for many states to use the principle for evil rather for good. Some states may use this principle to get rid of their enemies instead of the true enemies of all mankind. This could generate into politically driven show trials which are only aimed at decapitating enemy states.

Universal jurisdiction is a principle of public international law over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence and any other relation with the prosecuting country. The state backs its claim on the grounds that the crime committed is considered a crime against all, which any state is authorized to punish, as it is too serious to tolerate jurisdictional arbitrage.

The concept of universal jurisdiction is therefore closely linked to the idea that certain international norms are erga omnes, or owed to the entire world community, as well as the concept of jus cogens-that certain international law obligations are binding on all states and cannot be modified by treaty.[1]

According to critics, the principle 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 the state thus disenfranchised is not in a position to bring retaliation to the state applying this principle.[2]

[1] Lyal S. Sunga, (1992) *Individual Responsibility in International Law for Serious Human Rights Violations*, Nijhoff, P252.

[2] Starke JG. 1989. *Introduction to International Law*, 10th edition. London, Butterworths. Page 234.

1.2 Scope and Methodology

The compartmentalization of the law of jurisdiction stems from the very nature of the concept of jurisdiction. As an abstract concept, it is in need of application and elaboration in particular areas of substantive law. This study does not pretend to represent the ultimate source on the law of universal jurisdiction. Its focus will be in the field of international criminal law from which the theory of jurisdiction finds its roots.

Having said what this study does not pretend to do, it may be useful to state what it does pretend, in all modesty, to do. Its focus is on universal jurisdiction. In order to determine the source of international law, reference is given to Article 38 of the Statute of International Court Justice. The statute names, international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions, and the teachings of the most highly qualified publicists of the various nations. Because state jurisdictional practice has been highly influenced by case law, case law from different national jurisdictions will be used as the main point of reference.

The majority of the research will be desktop based; comprising of research through writings of some of the prominent scholars on the subject. The Web and Newspaper media will be used as well, as supplements.

1.3 General Principles of jurisdiction in International Law

The general principles of jurisdiction in international law are as follows: Territoriality, Subjective and objective territoriality, Protection of state, Nationality, Passive personality and Universality. Each of the principles of jurisdiction in International law will be discussed below, briefly.

i. The Principle of 'territoriality' is used when a state asserts its jurisdiction over all criminal acts that occur within its territory and over all persons responsible for such criminal acts, whatever their nationality.[3] In countries influenced by Anglo-American common law, this is the principal basis for the exercise of criminal

[3] R v Pienaar 1948 (1) SA 925 (A)

jurisdiction. Many states including Namibia, for the purposes of criminal jurisdiction include territorial waters and airspace as part of their territory.[4]

In certain instances states may refuse to exercise jurisdiction over crimes committed within their territory. Foreign diplomats are granted immunity from jurisdiction of municipal courts and a court will not try a person who has been brought before it as a result of an unlawful abduction from another state.[5]

ii. A state may exercise jurisdiction where the crime is commenced within its territory and completed in another state (subjective territoriality) or where a crime is commenced within a foreign state and completed within its territory (objective territoriality).[6] Objective territoriality is based on the 'effects' principle according to which the state in which the effect or impact of the crime is felt may exercise jurisdiction. This is the basis upon which Turkey exercised jurisdiction in the*Lotus Case*.The Lotus case will be discussed extensively in this paper.

iii. State may exercise jurisdiction over aliens who have committed acts abroad that are considered prejudicial to its safety and security. This is the principle of 'protection of the state'. In the case of **R v Neumann**,[7]it was stated that an alien resident who had committed acts of treason against South Africa abroad, could be tried by South Africa as it was a sovereign state and automatically entitled to punish crime directed against its independence and safety. Aliens tried in this way must have some connection with South Africa, usually in the form of residence.

iv. Many countries, particularly those with a civil-law tradition, prosecute and punish their own nationals for offences committed abroad. Thus state A may punish its national for the crime of murder committed in state B where the victim was a national of state B. This is known as the exercise of jurisdiction on the ground of 'active nationality'.[8]

[4] Section 4 and 7 of the Maritime Zones Act 15 of 1994
[5] S v Ebrahim 1991 (2) SA 553 (A)
[6] S v Dersley 1997 (2) SACR 253 (Ck)
[7] 1949 (3) SA 1238
[8]Dugard, J. 2005. International Law: *A South African Perspective*. 3rd Edition, Juta& Co Limited.Page 154.

v. The principle of 'passive personality' allows a state to exercise jurisdiction over a person who commits an offence abroad which harms one of its own nationals. In the case of **State v Yunis**,[9] a United States District Court invoked passive personality as a basis for exercising jurisdiction over a Lebanese national who hijacked a Jordanian aircraft with United States nationals on board and flew the aircraft over a number of Mediterranean countries.

The principles discussed above empower a state to exercise jurisdiction over a crime committed abroad in violation of its own national laws. Some conduct violates not only the domestic order but the international order as a whole. Such conduct is classified as an international crime. Ideally such crimes should be tried by an international court but before 1 July 2002 such court was not in existence. On 1 July 2002 the International Criminal Court came into operation.

However the jurisdiction of this court is limited to crimes committed within the territory of states that are parties to the Rome Statute establishing the court and to crimes committed by nationals of such states. Thus it is largely left to the national courts of states to enforce international criminal law, either by trying offenders or extraditing them to countries that will do so. When a national court exercises jurisdiction in this way over an international crime with which it has no jurisdictional link of any kind, it is said that it exercises universal jurisdiction. A national court acts as an agent of the entire international community in the prosecution of an enemy of all mankind in whose punishment all states have an equal interest.[10]

[9] 1988 82 ILR 344

[10] Attorney-General of the Government of Israel v Eichmann 36 ILR 277 at 298-304.

CHAPTER 2

2.1 An Overview of Universal Jurisdiction in International Law

The principle of universal jurisdiction seems unjustified if discussed without mentioning the ***Lotus case***.[11] This case concerns a criminal trial which was the result of the 2 August 1926 collision between S.S. Lotus, a French steamship (or steamer), and the S.S. Boz-Kourt, a Turkish steamer, in a region just north of Mytilene. 8 Turkish nationals drowned as a result of the collision.

The issue at stake was Turkey's jurisdiction to try Monsieur Demons, the French officer on watch duty at the time of the collision. Since the collision occurred on the high seas, France claimed that only the State whose flag the vessel flew had exclusive jurisdiction over the matter. The court rejected France's position, stating that there was no rule to that effect in international law.

In its judgment, the court expressed the following principles of jurisdiction:

- A State may not exercise its power in any form in the territory of another State, unless there is a permissive rule to the contrary.
- International law does not prohibit a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad. States have a wide measure of discretion to extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, which is limited in certain cases by prohibitive rules.
- The territoriality of criminal law, therefore, is not an absolute principle of international law.

This decision led to the empowerment of states to exercise jurisdiction over acts occurring outside their territory, except where there is proof of a rule of international law prohibiting such action.

[11] 1927 PCIJ Reports, Series A, NO 10

The law of jurisdiction is doubtless one of the most essential, but controversial fields of international law, in that it determines how far, *ratione loci*, a state's laws might reach. It ensures that powerful States do not encroach upon the affairs of the less powerful States.[12] This comes from customary international law principles of non-intervention and sovereign equality of States. Each nation is a co-equal in terms of rights and status, regardless of the economic and military power another State might possess. This theoretical description of jurisdiction, however, does not paint the picture in practice. The jurisdictional perception is not at odds with the jurisdictional reality. Practically in international law there exists what is known as extra-territorial jurisdiction or universal jurisdiction. This refers to assertions of jurisdiction over persons, property, or activities which have no territorial nexus whatsoever with the prosecuting State.[13] This principle of universal jurisdiction is the focus of this paper.

2.2 The Doctrine of Universal Jurisdiction

The principle of universal jurisdiction is a principle in public international law over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting State.[14] The exercise of universal jurisdiction is restricted neither by a requirement that the suspect be present on the territory of the prosecuting state, nor by considerations of subsidiarity.[15] Universal jurisdiction is exercised over international crimes, and international crimes refer to crimes committed not by states as such but by individuals who bear a personal criminal responsibility for commission of crimes defined by international law.[16] Some international crimes are defined by conventions and some by customary international law.

A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as a universal concern, such as piracy, slave

[12]Ryngaert, C. 2008. *Jurisdiction in International Law*. Oxford, University Press. P 6.
[13]Ibid, 7.
[14]Dugard, J. 2005. International Law: *A South African Perspective*, 3rd edition. Cape Town, Juta& Co.
[15] Geneuss, J. 2009. Fostering a Better Understanding of Universal Jurisdiction: *A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction*. Oxford University Press. P 945.
[16] Steiner, H. J and Alston, P. 2000. *International Human Rights in Context: Law Politics Morals,* 2nd edition. Oxford University Press Inc, New York. P 1132.

trade, attacks on or hijacking of aircraft, genocide, war crimes and certain acts of terrorism.[17]

The principle of universal jurisdiction allows the national authorities of any state to investigate and prosecute people for serious international crimes even if they were committed in another country. For example, this means that the German government could, if it chose to do so, prosecute U.S. officials for crimes committed in Iraq and Afghanistan. An offence subject to universal jurisdiction is one which comes under the jurisdiction of states wherever it is committed. The offence is contrary to the interests of the international community, it is treated as a delict jure gentium and all states are entitled to apprehend and punish the offender.[18]

Universal jurisdiction is based on the notion that some crimes – such as genocide, crimes against humanity, war crimes, and torture – are of such exceptional gravity that they affect the fundamental interests of the international community as a whole. Accordingly, there is no condition that the suspect or victim be a citizen of the state exercising universal jurisdiction or that the crime directly harmed the state's own national interests. The only condition for exercising universal jurisdiction is therefore not – as in traditional doctrines of jurisdiction nationality – location or national interests, but rather the nature of the crime.[19]

Under the principle of Universal Jurisdiction, each and every state has jurisdiction to try particular offences. The basis for this is that the crimes concerned are regarded as offensive to the international community as a whole.[20] These crimes are so heinous that every State has a legitimate interest in the repression.[21] States in this case have a moral duty to protect persons to whom harm is done and no place should be a safe haven for persons committing offences such as piracy, crimes against humanity and genocide. It is a jurisdiction that depends solely on the nature of the offence that the

[17] Steiner (note 16 above) 1132.
[18] Starke (note 2 above) 234.
[19] ibid
[20] Shaw, M. N. 2003. *International Law*. Cambridge, University Press. 5th Edition.P 592.
[21] Evans, D. M. 2003. *International Law*.Oxford, University press.P 343.

individual is alleged to have committed. The reasoning behind this principle is that some crimes are so universally repugnant that their perpetrators are considered as hostishumani generis or enemies of all mankind. The prosecuting state acts, therefore, on behalf of all states. National courts prosecute serious human rights violations committed anywhere in the world. As genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances are crimes under international law. All States should investigate and prosecute the crimes before their national courts.

According to critics of the Principle, the principle 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.

When a person commits a crime against all humankind, he places himself beyond the protection of any state.[22] In the case of **Attorney-General of Israel v Eichmann**[23], the District Court of Jerusalem had to decide whether Israel had any jurisdiction in respect of the alleged atrocities committed by the defendant during the Second World War. *In its opinion, 'the abhorrent crimes are not crimes under Israel law alone. These crimes…are grave offences against the law of nations itself (delictajuriusgentium). The jurisdiction to try crimes under international law is universal'.*

This principle is based solely on the nature of the crime. It has no connection with where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.[24] This form of jurisdiction is exercised absent a nexus or connection, which is usually required before a State exercises jurisdiction over a matter. In this sort of jurisdiction, the nature of the

[22] Dixon, M. 2007. *Textbook on International Law*.Oxford, University press.6th Edition.P 147.
[23] 1961 36 ILR 5.
[24] Dugard (note 8 above) 155.

offence may itself confer jurisdiction on any State. A State in exercising universal jurisdiction protects the interests of the international community.

Following international treaty law, states not only have a right to exercise universal jurisdiction over certain crimes but are sometimes required to exercise universal jurisdiction. Additionally, universal jurisdiction may be derived from customary international law.

The existence of crimes of universal jurisdiction is, of course, inextricably linked with the historical absence of international judicial bodies having jurisdiction over individuals.

2.3 Purpose of Universal Jurisdiction

Universal jurisdiction exists because of the so-called 'core crimes against international law', which are crimes against international humanitarian law and crimes of torture. Genocide became the object of international convention in 1948 (Genocide Convention), war crimes were internationally criminalized in 1949 and 1977 (the Four Geneva Conventions), and torture was prohibited as a matter of treaty law in 1984 (UN Torture Convention). Crimes against humanity have never been the object of a convention.

The exercise of universal jurisdiction over core crimes against international law could, however, be premised to customary international law. It has been argued that States have the authority to exercise universal jurisdiction over core crimes on the basis of jus cogens character of the prohibition of 'core crimes'.[25] Sovereignty entails responsibility, and that States are under an obligation not to become a safe haven for perpetrators of human rights violations. It would be as if the States themselves committed such crimes.

The moral of States has become the dominant legitimizing discourse of universal jurisdiction over core crimes against international law. Underlying this discourse is the idea that States may, if not obliged, at least be authorized, to exercise universal jurisdiction over violations which are so reprehensible as to shock the conscience of

[25] Ryngaert (note 12 above) 7.

mankind. The moral underpinnings of universal jurisdiction are emphasized by what is termed the 'normative universalist position' by Bassiouni[26]. According to this position core moral values of the international community, derived from religion or natural law, prevail over territorial limits on the exercise of jurisdiction.[27] Any State would have the right, or even obligation, to prosecute core international crimes without the consent of the territorial or national State. In so doing, such a 'bystander' State would not exercise its own sovereignty, but act as an agent of the international community enforcing international law in the absence of a centralized enforcer of the core values of that community.

Core crimes against international law, such as genocide, war crimes, crimes against humanity, and torture, are given their heinousness, generally considered to be the gravest offences imaginable. Because any State is expected to prevent and punish such crimes, their being amenable to universal jurisdiction may not spark international protest. If there is no protest, because no State feels harmed in its interests, universal jurisdiction over core crimes will be lawful.

Clearly the purpose of conceding universal jurisdiction is to ensure that no such offence goes unpunished.

2.4 Justification for breaking the walls of state sovereignty

Offences which may be tried under the principle of universal jurisdiction are those which are considered sufficiently heinous to be crimes against the entire community of nations and therefore their repression becomes a matter of International public policy.[28] The conduct of those who perpetrate serious international crimes in one State has an impact on other States: such conduct poses a potential threat to all States and thus all States have an interest in prosecuting the wrongdoer.[29] There exists a common interest among States regarding crimes such as piracy, drug offences, hijacking, hostage taking, and other terrorist acts.

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[26]Bassiouni, M. C. 2004. *The History of Universal Jurisdiction and Its Place in International Law.*
[27] Ibid.
[28]Kaczorowska, A. 2005.*Public International Law*.Routledge-Cavendish, Taylor & Francis Group.3rd Edition. P 130.
[29] Ibid.

Recognizing that impunity exists mainly when national authorities of countries affected by the crimes fail to act, it is important that the national criminal justice systems of all countries can step in to prosecute the crimes on behalf of the international community.

Amnesty International campaigns for all governments to empower their national courts to take on this important role by enacting and using legislation providing for universal jurisdiction. Such legislation should enable national authorities to investigate and prosecute any person suspected of the crimes, regardless of where the crime was committed or the nationality of the accused and the victim and to award reparations to victims and their families. In so doing, governments will ensure that their countries are not used as safe havens.

Punishment may set an example to persons within any jurisdiction that certain crimes, irrespective of where they occurred, are so heinous as to not warrant any tolerance. By sending this signal, 'no impunity', a State prevents future violations in other States, and serves the common interests of all States.[30] Apart from deterrence and prevention, states have an inherent mission to realize the ideals of justice and not only to protect their own narrowly defined-interests. Some crimes are considered to be breaches of obligations *ergaomnes,* owed to every State and which, thus, every State has an interest in prosecuting, even without a concrete link with the State.[31]

One crime that has always given rise to universal jurisdiction is piracy. This crime gave rise to universal jurisdiction under customary international law. Universal jurisdiction over piracy is premised on the legal fiction that pirates, as enemies of all mankind, are citizens of no country, on the *res communis* nature of the high seas, and on enforcement difficulties. High seas do not belong to any State and pirates could easily leave the crime scene, the possibility of a jurisdictional vacuum looms large.[32] Therefore, giving all States jurisdiction to punish piracy offenders would prevent impunity.

[30] Dixon (note 22 above) 107.
[31] ibid
[32] Dixon (note 22 above) 109.

Since the end of the Second World War, more than 15 countries have exercised universal jurisdiction in investigations or prosecutions of persons suspected of crimes under international law, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the United Kingdom and the United States of America and others, such as Mexico, have extradited persons to countries for prosecution based on universal jurisdiction.

Chapter 3

3. Universal Jurisdiction as practiced by States

Many countries regard universal jurisdiction to be of great importance in bringing to justice those perpetrators who wish to utilize other countries as safe havens for their inhumanity. Many countries like the kingdom of Belgium have incorporated into their municipal law, universal jurisdiction laws.

3.1 Universal Jurisdiction in Belgium

Belgian law probably provides for the most extensive exercise of universal jurisdiction over human rights crimes of any country. Under the Act on the Punishment of Grave Breaches of International Humanitarian Law, first enacted in 1993 and amended in 1999, Belgian courts can try cases of war crimes, crimes against humanity and genocide committed by non-Belgians outside of Belgium against non-Belgians, without even the presence of the accused in Belgium.[33]

In 1993, Belgium's Parliament voted a "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 and given sentences from 12 to 20 years' imprisonment for their involvement in 1994 Rwandan genocide. There was quickly an explosion of suits deposed. Praised in some quarters as a useful tool for bringing criminal perpetrators to justice, criticized by others as a threat to state sovereignty, universal jurisdiction has certainly emerged as a heated topic within international criminal law. In 1993, the Kingdom of Belgium enacted a domestic statute, which codified (in domestic Belgian law) the use and application of universal jurisdiction (for international crimes) in Belgian courts. The Statute, which went through two major revisions in February 1999 and April 2003, granted Belgian courts jurisdiction over war crimes, crimes against humanity, and genocide, regardless of where in the world they took place. While the idea of universal jurisdiction within international law is not a new one, it has been argued, with justification, that Belgium's universal jurisdiction statute

[33]Jennings, R and Watts, A. 1992.*Oppenheim's International Law*, 9th edition.Volume 1. P753

was the most extensive and far reaching attempt to date of a domestic state within the international system sanctioning the wide-scale use of its courts for trying international crimes.[34]

Universal jurisdiction was invoked by the kingdom of Belgium in the **Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)[35]** in which the International Court of Justice had to decide whether international circulation by Belgium of the arrest warrant of 11 April 2000 against AbdulayeYerodiaNdombasi failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Congo enjoyed under international law.

In its Judgment, which is final, without appeal and binding for the Parties, the Court found, by 13 votes to 3, "that the issue against Mr. AbdulayeYerodiaNdombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law"; and, by 10 votes to 6, "that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated".

The Court reached these findings after having found, by 15 votes to 1, that it had jurisdiction, that the Application of the Democratic Republic of the Congo ("the Congo") was not without object (and the case accordingly not moot) and that the Application was admissible, thus rejecting the objections which the Kingdom of Belgium ("Belgium") had raised on those questions.[36]

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[34]Baker.B. R. *Universal Jurisdiction and the Case of Belgium: A Critical Assessment*," *ILSA Journal of International and Comparative Law*, (Vol. 16, No. 1), P. 141-167 (Fall 2009).

[35] 2002 ICJ Reports 3.

[36] Shaw (note 20 above) 593.

The court limited its scope of its judgment to the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs and that as none of the treaties brought to the attention of the Court covered this issue that the Court must decide the issue based on customary international law. But it rejected Belgium's argument that because the parties had not raised the issue of "the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts, because that question was not contained in the final submissions of the Parties." and concluded that this did not stop the Court dealing with certain aspects of that question in the reasoning of its Judgment.[37]

Referring to the few existing decisions of national high courts, such as the House of Lords and the French Court of Cassation they concluded that immunity was not granted to state officials for their own benefit, but to ensure the effective performance of their functions on behalf of their respective States; and when abroad that they enjoy full immunity from arrest in another State on criminal charges including charges of war crimes or crimes against humanity.[38]

The Court noted that this immunity from jurisdiction of a foreign national court, existed even when foreign national courts exercise an extended criminal jurisdiction on the basis of various international conventions that covered the prevention and punishment of certain serious crimes. However the Court emphasized that "While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."

[37] ibid
[38] Geneuss (note 15 above) 947.

3.2 Universal Jurisdiction in the United States of America

In the case of **United States v Yunis**[39], the Appellant Fawaz Yunis challenged his convictions on conspiracy, aircraft piracy, and hostage-taking charges stemming from the hijacking of a Jordanian passenger aircraft in Beirut, Lebanon. He appeals from orders of the district court denying his pretrial motions relating to jurisdiction, illegal arrest, alleged violations of the Posse Comitatus Act, and the government's withholding of classified documents during discovery. Yunis also challenges the district court's jury instructions as erroneous and prejudicial. Among the challenges that were laid down Yunis, what is of particular interest to this paper is his challenge relating to jurisdiction.

The district court concluded that two jurisdictional theories of international law, the "universal principle" and the "passive personality principle," supported assertion of U.S. jurisdiction to prosecute Yunis on hijacking and hostage-taking charges. Under the universal principle, states may prescribe and prosecute "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," even absent any special connection between the state and the offense. Under the passive personality principle, a state may punish non nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly strong interest in the crime.

It was very easy for the United States to punish Yunis for his unlawful acts that are also reprehensible as acts against the human race, but the same enthusiasm to prosecute did not find application when it came to the prosecution of high level United States of America officials.

In 2004 a report of the International Committee of the Red Cross (ICRC) leaked and detailed numerous incidents of detainees being repeatedly beaten with various objects; kept naked and shackled in dark cells; subjected to sensory deprivation; subjected to food, water and sleep deprivation; being exposed to loud music for prolonged periods of

[39] 1988; 82 ILR 344.

time or extreme temperatures; and various acts of humiliation including forcing male, naked detainees to stand against a wall with women's underwear on their heads.[40]

It stands firm in my mind that the perpetrators of such degrading acts be subjected to prosecution under the principle of universal jurisdiction, especially now that it has become apparent that national jurisdiction (American) will not make any effort to bring those responsible before a competent court to adjudicate on their inhumane actions.

As the cases described above demonstrate, particularly when the target-defendants are from powerful countries, the results do not necessarily bode well for those who favour accountability over impunity[41]. Justice vs impunity: impunity seems to have the upper hand.

3.3 Universal Jurisdiction in Israel

The moral philosopher Peter Singer, along with Kenneth Roth[42] has cited Israel's prosecution of Adolf Eichmann in 1961 as an assertion of universal jurisdiction. He claims that while Israel did invoke a statute specific to Nazi crimes against jews, its Supreme Court claimed universal jurisdiction over crimes against humanity.[43]

Adolf Otto Eichmann[44] (March 19, 1906 – May 31, 1962) was a German Nazi equivalent to Lieutenant Colonel in Wehrmacht and one of the major organizers of the Holocaust. Because of his organizational talents and ideological reliability, Eichmann was charged by GeneralReinhardHeydrich with the task of facilitating and managing the logistics of mass deportation of Jews to ghettos and extermination camps in German-occupied Eastern Europe.

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[40] Gallagher, K. 2009. *Universal Jurisdiction in Practice: Efforts to hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture*. Oxford University Press. P. 1091.
[41] Ibid.
[42] Article by Singer, P. and Roth, K. 2001. "*The Case for Universal Jurisdiction*" www.en.wikipedia.org/wiki/Universal_jurisdiction
[43] Article by Singer, P. 2002. One World. Yale University Press, P114. www.en.wikipedia.org/wiki/Universal_jurisdiction
[44] Article from Wikipedia, the free encyclopedia, ^"EIchmann trial transcript". http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Judgment/Judgment-011

After the war, he fled to Argentina using a fraudulently obtained laissez-passer issued by the International Red Cross and lived there under a false identity working for Mercedes-Benz until 1960. He was captured by Mossad operatives in Argentina and taken to Israel to face trial in an Israeli court on 15 criminal charges, including crimes against humanity and war crimes. He was found guilty and executed by hanging in 1962. He is the only person to have been executed in Israel on conviction by a civilian court.

In the case of **Attorney General of Israel v Demjanjuk[45],** Demjanjuk is a retired auto worker and former United States citizen who gained notoriety after being accused numerous times of holocaust-related war crimes. He was deported to Israel and later sentenced to death there in 1988 for war crimes, based on his identification by Israeli Holocaust survivors as “Ivan the Terrible”. In a case of mistaken identity, his conviction for crimes against humanity was later overturned. He was later found guilty and sentenced to 5 years imprisonment for being an accessory to 29 700 counts of murder by a German court.

This is a direct exercise of the principle of universal jurisdiction by Israel, however the exercise of universal jurisdiction by other states on Israel’s officials is something that is considered as unfair by Israel. Spanish Judge Ferdinand Andreu refused to grant former Internal Security Minister AviDichter immunity from prosecution during his trip to Spain where he planned to participate in an international peace summit. Dichter faces charges for war crimes and crimes against humanity for his role in the 2002 targeted assassination of Salah Shehade, former senior Hamas member. Under Dichter’s supervision, the Israeli Air Force dropped a one-ton bomb on Shehade’s home located in Al-Daraj, a densely populated residential neighborhood in Gaza, killing fourteen civilians, including eight children, and injured at least 150 other civilians.

[45] 1993 784 F.2d 1114

3.4 Universal Jurisdiction in Spain

Spain's former Universal Jurisdiction law, passed in 1985, extended the courts' criminal jurisdiction to certain named crimes, for example genocide, terrorism and piracy, as well as "any other [criminal act] which, according to international covenants and treaties, should be prosecuted in Spain." Thus, any serious crime that violated international law could be heard in Spanish courts as long as it met certain procedural safeguards. Spanish law recognizes the principle of the universal jurisdiction. Article 23.4 of the Judicial Power Organization Act (LOPJ), establishes that Spanish courts have jurisdiction over crimes committed by Spaniards or foreign citizens outside Spain when such crimes can be described according to Spanish criminal law as genocide, terrorism, or some other, as well as any other crime that, according to international treaties or conventions, must be prosecuted in Spain. On 25 July 2009 the Spanish Congress passed a law that limits the competence of the *Audiencia Nacional* under Article 23.4 to cases in which Spaniards are victims, there is a relevant link to Spain, or the alleged perpetrators are in Spain.[46] The law still has to pass the Senate, the high chamber, but passage is expected because it is supported by both major parties.[47]

The arrest of **General Augusto Pinochet**[48] in October 1998 was a wake-up call to tyrants everywhere. The two subsequent rulings by the British House of Lords rejecting his claim of immunity forged legal history. In October 1999 a London Magistrate ruled that Pinochet could be extradited to Spain, but later Pinochet was released for health reasons.On 11 September 1973 General Augusto Pinochet led a bloody coup in Chile, and his military junta immediately embarked on a programme of repression: constitutional guarantees were suspended, Congress was dissolved and a country-wide state of siege was declared. Torture was systematic; "disappearance" became a state policy.

In November 1974 Amnesty International published its first report on the gross human rights violations in Chile, following a fact-finding mission to the country in the early

[46] "Spain reins in crusading judges". BBC News. 25 June 2009. http://news.bbc.co.uk/2/hi/europe/8119920.stm.
[47] "Spanish court ends Israel bombing probe". The Associated Press. 30 June 2009. http://www.google.com/hostednews/ap/article/ALeqM5g7nVX6JkK9c3ofnkBpgD 5eFF84AD9950VP00.
[48] 1999 Volume 2 ALLER 97

months after the coup. Since then the organization has published hundreds of documents and appeals on behalf of the victims and has supported the struggle of victims and their relatives seeking truth and justice.

The fate of most of those who “disappeared” in Chile during the military government remains unknown. However, there is overwhelming evidence that the “disappeared” were victims of a government program to eliminate perceived opponents. In the course of a long search by relatives, human remains have been discovered in clandestine graves and hundreds of former detainees have made statements confirming that the “disappeared” were held in detention centres.[49]

For more than 30 years, relatives of the victims in Chile have campaigned for justice and truth. They have been blocked by several mechanisms which guarantee impunity to those responsible and prevent effective judicial investigations within Chile. The government of President Eduardo Frei Ruiz-Tagle pursued all possible avenues to secure the release of Augusto Pinochet, to obtain his return to Chile and to prevent his trial in Spain. The Chilean government justified its endeavours in the name of national sovereignty, the right of the Chileans to deal with their own past and national reconciliation.[50]

While the Chilean authorities at the time repeatedly stated that Augusto Pinochet could be tried in Chile, no attempts were made to remove the obstacles to such a trial. Chief among these were the fact that Augusto Pinochet, as a senator for life, enjoyed parliamentary immunity; that cases involving members and former members of the armed forces accused of human rights violations came within the jurisdiction of military courts; and the application of the Amnesty Law by military and civilian courts.[51]

On November 4, 2009, the Spanish government enacted a bill that would limit the reach of its universal jurisdiction law and may restrict Spain’s ability to prosecute serious

[49]Reydams, L. 2003. *Universal Jurisdiction: International and Municipal Legal Perspectives*
[50] ibid
[51]Shaw (note 20 above) 595.

human rights crimes. The bill was passed by the Congress of Deputies, or lower house, on June 25 and then went to the Senate, which made minor amendments and approved the bill on October 15.

The new amendment changes this law in three important ways. First, it correctly adds crimes against humanity to the crimes listed as admissible under the statute. While crimes against humanity was admissible before as a criminal act in violation of international treaties, this new statute clarifies this cause of action.

Second, the amendment limits the law's application to cases where (i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish nationality, or (iii) there is some relevant link to Spanish interests. This new jurisdictional requirement could profoundly limit the Spanish courts' ability to prosecute human rights crimes. On the other hand, courts could interpret the third "Spanish link" condition broadly so that the law would continue to function largely unchanged. For example, courts could interpret a Spanish link to include any historical tie to the place of the crime. Likewise, courts could find that it is in Spain's interest to prosecute those crimes that are so heinous that they are an attack on all humankind. CJA supports this broad reading of the Spanish law as amended, and hopes that future litigation will establish the law's continued broad application in human rights cases.

Finally, the law as amended will not be a basis for jurisdiction if another "competent court or international Tribunal has begun proceedings that constitute an effective investigation and prosecution of the punishable acts." This amendment also has the potential to severely restrict human rights abuse victims' access to Spanish courts; but again, the true meaning will depend on Spanish courts' interpretation of this provision. CJA is optimistic that the courts will limit this provision to those instances where the investigation and prosecution are in fact effective, that is, Spanish courts will be barred from hearing only those cases where the defendant faces meaningful criminal punishment for his crimes.

All in all, this new amendment confuses the scope of Spain's UJ law rather than clarifying its application. But CJA is hopeful that the Spanish courts will interpret the amended law in such a way that it remains an effective tool for bringing human rights abusers to justice.

Since the 1998 prosecution of former Chilean dictator Augusto Pinochet, the Spanish National Court (SNC) has served as a forum for cases of genocide, war crimes and crimes against humanity, serving as a court of last resort for victims who are unable to seek justice in their own countries.

In June 2003, Spanish judge Baltasar Garzón jailed Ricardo Miguel Cavallo, a former Argentine naval officer, who was extradited from England to Spain pending his trial on charges of genocide and terrorism relating to the years of Argentina's military dictatorship.[52]

On 11 January 2006 the Spanish High Court accepted to investigate a case in which seven former Chinese officials, including the former President of China Jang Zemin and former Prime Minister Li Ping were alleged to have participated in a genocide in Tibet. This investigation follows a Spanish Constitutional Court (26 September 2005) ruling that Spanish courts could try genocide cases even if they did not involve Spanish nationals.[53] China denounced the investigation as interference in its internal affairs and dismissed the allegations as "sheer fabrication".[54] The case was shelved in 2010, because of a law passed in 2009 that restricted High Court investigations to those "involving Spanish victims, suspects who are in Spain, or some other obvious link with Spain".[55]

Complaints were lodged against former Israeli Defense Forces chief of General Staff Lt.-Gen. (res.) Dan Halutz and other six other senior Israeli political and military officials

[52] ^"Profile: Judge Baltasar Garzon".BBC. 2005-09-36. http://news.bbc.co.uk/1/hi/world/europe/3085482.stm
[53] Bakker, C. A. E. 2006. *Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?* Oxford University Press.
[54] ^Olesen, Alexa (2006-06-07). "China rejects Spain's 'genocide' claim". London: The Independent. http://news.independent.co.uk/world/asia/article656410.ece
[55] ^"Spanish court shelves Tibet human rights case against China". Deutsche Presse-Agentur. Madrid: phayul.com. 2010-02-26. http://www.phayul.com/news/article.aspx?id=26740.Retrieved 2011-09-06.

by pro-Palestinian organizations, who sought to prosecute them in Spain under the principle of universal jurisdiction.[56] On 29 January 2009, Fernando Andreu, a judge of the Audiencia Nacional, opened preliminary investigations into claims that a targeted killing attack in Gaza in 2002 warranted the prosecution of Halutz, the former Israeli defence Minister Binyamin Ben-Eliezer, the former defence chief-of-staff Moshe Ya'alon, and four others, for crimes against humanity. Israeli Prime Minister Benjamin Netanyahu strongly criticized the decision, and Israeli officials refused to provide information requested by the Spanish court.[57]

The attack had killed the founder and leader of the military wing of the Islamic terrorist organisation Hamas, Salah Shehade, who Israel said was responsible for hundreds of civilian deaths. The attack also killed 14 others (including his wife and 9 children). It had targeted the building in which Shahade was hiding in Gaza City. It also wounded some 150 Palestinians, according to the complaint (or 50, according to other reports).[58] The Israeli chief of operations and prime minister apologized officially, saying they were unaware, due to faulty intelligence that civilians would be in the house.[59] A regretful Ya'alon also mentioned that the army had passed up on several earlier opportunities to kill Shehade, because he was with his wife or children, and that each time Shehadeh went on to direct more suicide bombings against Israel.[60] The investigation in the case was halted on 30 June 2009 by a decision of a panel of 18 judges of the Audiencia Nacional. The Spanish Court of Appeals rejected the lower court's decision, and on

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[56] Service, Haaretz (January 20, 2010). "Spanish war crimes probe against Israeli officials to go on". Haaretz.http://www.haaretz.com/news/spanish-war-crimes-probe-against-israeli-officials-to-go-on-1.271096. Retrieved October 20, 2011.

[57] ^Spain investigates claims of Israeli crimes against humanity in Gaza, *The Guardian*, 29 January 2009. Retrieved May 20 2011

[58] ^ Walter Rodgers (September 4, 2002). "Palestinians grapple with collaborators". CNN.http://archives.cnn.com/2002/WORLD/meast/09/04/palestinian.collaborators/index.html. Retrieved May 19, 2011.

[59] http://archives.cnn.com/2002/WORLD/meast/07/23/hamas.assassination/index.html. Retrieved May 19, 2011.

[60] http://www.boston.com/news/packages/iraq/globe_stories/042003_code.htm. Retrieved May 20, 2011.

appeal in April 2010 the Supreme Court of Spain upheld the Court of Appeals decision against conducting an official inquiry into the IDF's targeted killing of Shehadeh.[61]

The **Guatemala Genocide Case**[62], is also one of the cases in which the Spanish government had an interest in. The Supreme Court found that article 27[63] was too general to allow criminal proceedings to be instituted on the basis of universal jurisdiction. The Supreme Court also found that it had no evidence that Guatemala would not address the alleged offences so that it could not affirm that this country was inactive or ineffective regarding prosecution.

This decision by the court is rather narrow in the sense that Guatemala failed to exercise jurisdiction over the Mayan genocide, and both international law and Spanish law clearly provide for the exercise of universal jurisdiction over genocide. The link required for Spain to exercise universal jurisdiction is established in this case through the numerous ties between Spain and Guatemala, notably the fact that numerous Spanish nationals were assaulted for defending Mayans in Guatemala.[64]

Similarly held by the Spanish Supreme court in the **Peruvian Genocide Case**[65], that Spanish courts could not at the time exercise universal jurisdiction over claims of genocide, terrorism, torture and illegal detention alleged to have been committed by Peruvian ex-President Alan Garcia, Alberto Fujimori and other government and military officials in Peru from 1986 to date. It was stated that Peru was in the process of initiating criminal investigations related to the crimes alleged by the petitioners in their claims. Therefore the Supreme Court held that for the present time there was no need for the Spanish courts to intervene on the basis of universal jurisdiction.

Nevertheless one does not fall short of expressing the fact that in the event that the Peruvian government showed no interest in bringing to justice the perpetrators of these

[61] http://www.jpost.com/International/Article.aspx?id=173480. Retrieved May 20, 2011.
[62] 2003 42 ILM 683
[63] Organic Law of the Judicial Power 6/1985 of 1 July 1985
[64] Shaw (note 20 above) above.
[65] 2003 42 ILM 1200

atrocities, it would justify the Spanish courts bringing the perpetrators to book through the principle of universal jurisdiction.

3.5 Universal Jurisdiction in Canada

In order to ratify the Rome Statute of the International Criminal Court, Canada's Parliament had to enact legislation to implement its obligations under the Rome Statute. Canada became the first country in the world to incorporate the obligations of the Rome Statute into its national laws when it adopted the **Crimes Against Humanity and War Crimes Act**[66]. Canada was then able to ratify the Rome Statute on July 9, 2000. To ensure that Canada can fully cooperate with ICC proceedings, the CAHWCA also amended existing Canadian laws like the **Criminal Code, Extradition Act** and **Mutual Legal Assistance in Criminal Matters Act**.

The Crimes Against Humanity and War Crimes Act officially criminalizes genocide, crimes against humanity and war crimes based on customary and conventional international law, including the Rome Statute of the ICC. Defining these crimes in Canadian law allows Canada to take advantage of the complementarity provisions under the Rome Statute.

The Crimes Against Humanity and War Crimes Act incorporates several grounds of jurisdiction:

- Active nationality and territorial jurisdiction, which ensures Canada holds jurisdiction over crimes committed on Canadian territory and by Canadians anywhere in the world;
- Passive nationality jurisdiction, which gives Canada jurisdiction over crimes committed against Canadian nationals; and
- Universal jurisdiction, which allows Canada to prosecute any individual present in Canada for crimes listed in the CAHWCA - regardless of that individual's nationality or where the crimes were committed

[66] CAHWCA on June 24, 2000

Under the Crimes Against Humanity and War Crimes Act, breach of command/superior responsibility is a criminal offence. This means that military commanders and superiors are obliged to take measures to prevent or repress genocide, crimes against humanity and war crimes. In the event that such a crime is committed by one of their subordinates, military commanders and superiors are responsible for submitting the matter to the competent authorities for investigation.[67]

Canadian and international defences are available to persons accused of crimes listed in the CAHWCA, with some exceptions. Arguing that a crime was committed in obedience to the law in force at the time and in the place of its commission does not constitute a defence. And though the defence of superior orders is consistent with the Rome Statute, if the accused's belief is based on information about an identifiable group of persons that is likely to encourage inhumane acts or omissions against that group, then the defence of superior orders cannot be based on a belief that the order was lawful.[68]

The Crimes Against Humanity and War Crimes Act provides for penalties ranging up to and including life imprisonment. Where intentional killing forms the basis of the offence, mandatory minimum sentences apply (such as life imprisonment for first degree murder). The parole eligibility rules for crimes involving intentional killing are the same as those for murder under the Criminal Code. Ordinary parole rules apply for all other sentences.

The Crimes Against Humanity and War Crimes Act protects the integrity of the processes of the Court and protects judges, officials and witnesses of the ICC against certain offences, including:

- Obstruction of justice,
- Obstruction of officials,
- Bribery of judges and officials,

[67] Inazumi, M. 2005. Universal Jurisdiction in Modern International Law: *Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*. P211.
[68] Ibid.

- Perjury,
- Fabrication or provision of contradictory evidence, and
- Intimidation.

Witnesses who have testified before the ICC are protected from retaliation against them or their families under the Criminal Code. Other existing Criminal Code offences also apply to protect judges and officials from harm when they are in Canada or abroad. All of these offences apply when committed in Canada or by Canadian citizens outside Canada.

The Crimes Against Humanity and War Crimes Act also makes it an offence to possess and/or launder proceeds obtained from crimes listed under the Act. This means that if proceeds from genocide, crimes against humanity or war crimes are located in Canada, they can be restrained, seized or forfeited in much the same way as proceeds from other criminal offences in Canada.

The Crimes Against Humanity and War Crimes Act established a Crimes Against Humanity Fund, which holds all proceeds obtained from the disposal of forfeited assets and the enforcement of fines and ICC reparation orders in Canada. The Attorney General of Canada may then use the Fund to make payments to the ICC, the ICC's Trust Fund established under the Rome Statute, or directly to victims. The Crimes Against Humanity and War Crimes Act obliges Canada to arrest and surrender persons sought by the ICC for genocide, crimes against humanity and war crimes.

Canada's surrender process under the CAHWCA is a streamlined version of Canada's existing extradition process. In 1999, Canada amended its Extradition Act so it could legally surrender accused persons to the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Under the CAHWCA, Canada simply added the ICC to this list.

Canada also eliminated all grounds for refusing requests for surrender from the ICC. Under the CAHWCA, the Extradition Act was also amended to ensure that a person requested for surrender in Canada could not claim statutory or common law immunity to

block their surrender to the ICC. Finally, Canada amended the Extradition Act so that evidence could be offered in a summary form.

The Crimes Against Humanity and War Crimes Act allows Canada to help the ICC investigate offences of genocide, crimes against humanity and war crimes in much the same way that it currently assists foreign states with normal criminal investigations. The Mutual Legal Assistance in Criminal Matters Act was amended to permit Canada to assist the ICC with many aspects of its investigations, from the identification of persons to gathering evidence in Canada for the purposes of prosecution.[69]

3.6 Universal Jurisdiction in Senegal

Habré ruled Chad from 1982 until he was deposed in 1990 by President Idriss DébyItno and fled to Senegal. His one-party regime was marked by widespread atrocities, including waves of campaigns against various ethnic groups. Files of Habré's political police, the Documentation and Security Board (Direction de la Documentation et de la Sécurité, DDS), which were discovered by Human Rights Watch in 2001, reveal the names of 1,208 people who were killed or died in detention. A total of 12,321 victims of human rights violations were mentioned in the files.[70]

Habre was first indicted in Senegal in 2000, but then Senegalese courts ruled that he could not be tried there. His victims then turned to Belgium, and after a four-year investigation, a Belgian judge in September 2005 issued an arrest warrant charging Habré with crimes against humanity, war crimes, and torture, and requested his extradition.[71]

Senegal then asked the African Union to recommend a course of action. On July 2, 2006, the AU called on Senegal to prosecute Habré. President Abdoulaye Wade accepted, but refused to proceed for several years, until Senegal was provided with

[69] Bakker (note 53 above).
[70] : African Union Proposed Special Court for Long-Awaited Trial of Chad's Ex-Dictator. http://www.hrw.org/legacy/justice/habre/habre-plocice Retrieved 27 September 2011.
[71] ibid

money to finance the trial. On November 24, 2010, international donors met in Dakar and agreed to fund the US$11.7 million budget for the trial.

Before the donors' meeting, the Court of Justice of the Economic Community of West African States (ECOWAS) said that Habré's trial should be carried out by "a special ad hoc procedure of an international character." That decision has been severely criticized by the Journal of International Criminal Justice, the American Society of International Law, and the President of the Irish Section of the International Law Association.

The AU responded to that decision by proposing the creation of a special court within the Senegalese justice system with the presidents of the trial court and the appeals court appointed by the AU. The court would prosecute the person or persons "who bear the greatest responsibility" for genocide, crimes against humanity, war crimes, and torture committed in Chad from June 1982 to December 1990.

The African Union relied on universal jurisdiction when it called on Senegal to prosecute HissèneHabré, 'in the name of Africa'. The President of Senegal Abdoulaye Wade said that Senegal would do so but the Chadians victims are still waiting for prosecution to begin, 19 years after Habre had fled to Senegal.[72]

The AU should promptly press Senegal to move forward on the trial of Hissène Habré, thereby sending an important signal of its commitment to the fight against impunity, of universal jurisdiction and of Africa's willingness to try perpetrators of human rights abuses in Africa.

The African Union plays an important role in the dialogue with the relevant European Union and United Nations institutions to advance the global commitment to the fight against impunity. The International Federation for Human Rights (FIDH) therefore urges the AU and its member states to use this role to render the fight against impunity more effective, to support and not to limit the exercise of universal jurisdiction, to cooperate closely with national authorities of third countries and to render absolute support to

[72] Senegal: *Chad asks for the Extradition of HisseneHabre to Belgium*. www.asil.org/insights Retrieved 27 September 2011.

national and international authorities in the investigation and prosecution of genocide, crimes against humanity and war crimes.[73]

Senegal has two choices. Either it accepts the African Union plan and begins proceedings against Habré right away, or it extradites Habré to Belgium. It would be a shame if Africa could not meet this challenge when everything is set for an African country to provide a fair trial for any crimes committed in Africa. As Africans we blame international tribunals for prosecuting African leaders, but we fail to prosecute them when presented with the opportunity. If Senegal fails to prosecute Habre then it would be more than justified for some international tribunals or certain states to prosecute, as this will be indicative of Africa's inadequate facilities to prosecute.

Habré is accused of thousands of political killings and systematic torture when he ruled Chad, from 1982 to 1990, before fleeing to Senegal. Senegal has raised one objection after another to bringing him to trial, while refusing to send him to Belgium, which sought his extradition in 2005.

3.7 Universal Jurisdiction in Kenya

Kenya opened a special court to try suspected pirates working from Somalia in the Gulf of Aden. The Court, which is funded by a number of international organizations and States including the UN, the EU, Australia and Canada, is a momentous step in the brawl against piracy. All States have universal jurisdiction under customary international law and the UN Convention on the Law of the Sea to prosecute captured pirates. However, there are a number of practical and legal difficulties with capturing, detaining and prosecuting suspected pirates.[74]

One of the troubles with the current attempt to combat piracy is that though, as a matter of international law, all States have jurisdiction to try pirates, few States have sufficient national laws for the prosecution of pirates who have not committed offences against

[73] ibid
[74] Okade, D. 2010. *Anti-Piracy Court Opens in Kenya:* http://news.bbc.co.uk

either their nationals or flag vessels. This has lead to some startling results, such as the German navy releasing some captured pirates on the basis that they had no authority to detain them.[75]

The Kenyan court has a national court exercising universal jurisdiction on behalf of the international community. It appears that this court will constitute the focal point for the prosecution of piracy since Kenya already has more than 100 suspected pirates in detention.[76]

Among the 100 pirates captured, there are pirates who were captured by the United States Navy and are challenging the jurisdiction of the Kenyan court to which it is rumored they would be prosecuted. These pirates were captured in international waters. In terms of the United Nations Convention on the Law of the Sea, every state has the jurisdiction to try pirates.[77]

The new piracy court could help reduce the number of pirates sailing the waters near Somalia and some international waters. This will send the message to all pirates that their crimes will not go unpunished.

[75] ibid
[76] http://www.ejiltalk.org/piracy-off-somalia-sketch-of-the-legal-framework
[77] Prosecuting Pirates: *What Ever Happened to Universal Jurisdiction?* http://news.bbc.co.uk/1/hi/world/africa

CHAPTER 4

4.1 Pros and Cons of the Principle of Universal Jurisdiction

Universal jurisdiction risks creating universal tyranny-that of judges.[78] Since any number of states could set up such universal jurisdiction tribunals, 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.

Israel has been of the view that universal jurisdiction may be used by other States as a weapon with which to use against another or other states in order to further one's own political interests.

More recently, a group of advocates created a new initiative called "The Lawfare Project" which defines lawfare as:

> *"The use of the law as a weapon of war" or, more specifically, the abuse of the law and judicial systems to achieve strategic military or political ends…It consists of the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted."*[79]

There may be instances in which the exercise of universal jurisdiction may result in arbitrary, politicized prosecutorial decision making. There is a theoretical possibility of misuse of universal jurisdiction laws for political ends. Any possibility of the misuse of universal jurisdiction points to the most developed states or the 'so called' super powers of the world, frankly speaking the United States reigns on top of such list.

Inherent in universal jurisdiction are the risks of politically motivated prosecution, loss of due process, abandonment of legal standards, and abrogation of state sovereignty. Selective enforcement, under-enforcement and over-enforcement all exacerbate the

[78] Kissinger, H. 2001. The Pitfalls of Universal Jurisdiction: *Risking Judicial Tyranny*. Foreign Affairs.
[79] Ibid.

risks of legal uncertainty, unpredictability, confusion, disparity and inequity. Selective exercise may also create the appearance of politicization, paternalism, neocolonialism, aggression or bias.

The abuse of universal jurisdiction is used as an extension of what has become “lawfare” against States such as Israel and other democratic nations. Friction between nations could result from misuse of the concept of universal jurisdiction. To prevent undue politicization of universal jurisdiction, the task force cited with approval a suggestion by the International Court of Justice to minimize the prospect of politicization or judicial overreaching.

One such mechanism is the requirement of prior approval by an appropriate cabinet officer, such as a minister of justice, before judicial proceedings may take place. Another limitation, suggested by the ICJ, is that prosecution must be conducted by a prosecutor independent of any state organ, in order to reduce the likelihood that charges are brought for political reasons.

It is absurd that **TzipiLivni** (former Israeli Foreign Minister) and **Condelesa Rice** (former US Foreign Secretary) are targeted for prosecution, while the likes of **Mahmoud Ahmadinejad** (President of Iran) and **Kim Jong-il** (North-Korean Dictator) enjoy complete impunity. Clearly this is an example of misusing universal jurisdiction as a political tool. The new lawfare stands in the way of Middle East peace. The misuse of judicial tools as weapons of war only escalates the current conflict and lessens the likelihood of diplomatic resolution.

Moreover, abusive practices can jeopardize peaceful relations among nations, by curbing international travel by senior governmental officers and provoking retaliatory actions by states whose officials are subjected to extraterritorial jurisdiction.

4.2 Is Universal Jurisdiction Necessary after the establishment of the International Criminal Court?

During the negotiations that led to the Rome Statute, a large number of states argued that the International Criminal Court should be allowed to exercise universal jurisdiction. However, this proposal was defeated due in large part to opposition from the United States.[80]

The ICC can generally exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council.[81] The jurisdiction that the ICC has is limited in the sense that it will not adjudicate on matters that occur in non-member States. The Rome Statute grants the court jurisdiction over four groups of crimes, which it refers to as the "most serious crimes of concern to the international community as a whole": the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[82]

This leaves out crimes such as that of piracy, which without doubt reigns top of the most heinous crimes in the world. Article 15 of the Geneva Convention on the High Seas[83], following a proposal of the International Law Commission, added that piratical acts may be committed against a ship, aircraft, persons or property in a place outside the jurisdiction of any state. This is repeated word for word in Article 101 of the Convention on the Law of the Sea 1982. This crime gives rise to universal jurisdiction under customary international law. Universal jurisdiction over piracy is premised on the legal fiction that pirates, as enemies of all mankind, are citizens of no country[84], on the res communis nature of the high seas, and on enforcement difficulties. The high seas do not belong to any State and pirates could easily leave the crime scene, the possibility of a jurisdictional vacuum looms large. Therefore, giving all States jurisdiction to punish piracy offenders would prevent impunity.

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[80] Wilmshurst, E. 1999.'*Jurisdiction of the Court*' p.136. In Lee, R. S (ed), The International Criminal Court: The Making of the Rome Statute. The Hague: Kluwer Law International.

[81] Article 12 & 13 of the Rome Statute

[82] Article 5 of the Rome Statute

[83] 1958 Geneva Convention on the High Seas

[84] Levitt, A. (1925) *'Jurisdiction over Crimes'*. 16 J Crim L and Criminology

All states should be entitled to arrest pirates on the high seas, and to punish them irrespective of nationality, and of the place of commission of the crime.

The International Criminal Court's jurisdiction does not apply retroactively: it can only prosecute crimes committed on or after 1 July 2002 (the date on which the Rome Statute entered into force). Where a state becomes party to the Rome Statute after that date, the court can exercise jurisdiction automatically with respect to crimes committed after the statute enters into force for that state.[85]

This therefore creates a crack in the legal engine in the sense that crimes that were committed before the establishment of the International Criminal Court would be left unresolved as no person would be punished for them. It then brings out the question of whether or not the world is in favor of impunity. I believe an answer to this is in the negative. We can rid ourselves of impunity by letting the principle of universal jurisdiction play its role in bringing to justice those who commit the most heinous crimes imaginable on the face of the earth. Universal Jurisdiction is not deterred by time or place but rather knows no bounds and creates an avenue in which crimes committed before or after the establishment of the ICC all find justice.

Universal jurisdiction is justified because serious violations of human rights are everybody's business. International treaties and international customary law permit and sometimes even require states to assert universal jurisdiction over grave breaches of international humanitarian law.

Belgium can create extraterritorial or universal jurisdiction beyond what is strictly required by the Geneva Conventions, namely over internal armed conflicts or conflicts otherwise not covered by the Geneva Conventions, without violating he international law. In a landmark decision, the International Tribunal for the Former Yugoslavia (hereinafter 'ICTY') referred to the Belgian Act as an example that today war crimes committed in internal armed conflict constituted grave breaches under customary international law and were subject to universal jurisdiction.

[85] Article 11 of the Rome Statute

While the courts of the country in which the crime took place would appear to be the preferred jurisdiction to obtain justice for victims of gross human rights violations, there are two central reasons why a system of universal jurisdiction is necessary in many instances:

1) Universal jurisdiction provides victims of international crimes with access to justice.
Courts in the "territorial state" are often inaccessible for victims for a variety of reasons, including the availability of domestic immunities or self-imposed amnesties and de facto impunity and security risks, especially when the crimes were state-sponsored. For instance, a domestic amnesty law in Chile protected former dictator Augusto Pinochet and other government officials in Chile, but the law was not able to proceedings filed against him in Spain using the doctrine of universal jurisdiction by victims who managed to escape his dictatorship.[86]

2) Universal jurisdiction bridges the impunity gap.
While in some cases victims may obtain justice through international tribunals and courts or the ICC, these courts are constrained by a mandate that is limited to a specific territory and a specific conflict. Examples are the two ad-hoc tribunals for Yugoslavia and Rwanda or the Special Court for Sierra Leone. The ICC is limited also in that it can only prosecute crimes committed after July 1, 2002. Additionally, neither the ICC nor the international courts and tribunals have sufficient resources to investigate or prosecute all alleged perpetrators.[87]
Indeed, the Office of the Prosecutor of the ICC indicated there's a "risk of an impunity gap," meaning some human rights violators may fall through the legal cracks, unless "national authorities, the international community, and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used." Similarly, the preamble of the Rome Statute of the ICC expressly provides that it "is the duty of every State to exercise its criminal jurisdiction over those responsible for international

[86] Rendall, K. C. 1988. *Universal Jurisdiction under International Law*. 66 Texas LR 785
[87] ibid

crimes" and emphasizes that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."
Universal jurisdiction is therefore an important complement to traditional jurisdictions as well as to international justice mechanisms.

4.3 Concluding Remarks

The creation of the International criminal court (ICC) in 2002 reduced the perceived need to create universal jurisdiction laws, although the ICC is not entitled to judge crimes committed before 2002.[88] What we should bear in mind is that states have a moral duty to prosecute an individual responsible for heinous crimes; no place should be a safe haven for those who committed such heinous crimes.

We are citizens of the world and what happens on the planet we inhabit is our concern. We live in a certain way as citizens of the world, by following rules that help to reduce or curb chaos. If one of us chooses to leave by rules that are contrary to the ones receiving general acceptance from us, then such person's actions should have adverse consequences.

Universal jurisdiction creates an opportunity for each and every state to be part of the idea of humanity, not only theoretically but practically by affording an opportunity to states to punish those who go against the values of humanity by committing crimes that shake the conscience of mankind.

Universal jurisdiction departs from the standard principle that there should be some kind of connection between an act and the state asserting jurisdiction over it. In other words, the normal rule is that states exercise justice in relation to crimes committed on their territory or crimes committed by their nationals abroad.[89] Indeed, this departure is the main criticism of universal jurisdiction: by allowing a state to prosecute individuals who are not its citizens, and who have committed crimes in other states, against people who

[88] Rome Statute of 2002
[89] Levitt (note 84 above)

are citizens of other states, we in fact allow this state to violate the right to self-determination of other states.

However, universal jurisdiction is nothing new, and most countries accept some kinds of universal jurisdiction. For example, few now oppose the right of Israel to judge Adolph Eichmann. The discussion, therefore, centers on the proper extent of universal jurisdiction. Human rights activists claim that states should be able to exercise universal jurisdiction in cases of genocide, crimes against humanity, torture, war crimes and slavery.

These crimes affect all of us, the whole of humanity, and not just the immediate victims. Those who commit these offenses are enemies of humanity. A society that allows torturers in its midst, can no longer be called a society. Universal jurisdiction is a good way to respond to those crimes, maybe not from a purely legal point of view (universal jurisdiction isn't the most effective jurisdiction) but from a human point of view.

Universal jurisdiction, although criticized by some authors brings to book the enemies of the world. If one thinks in a pure legalistic way, then such person may not be in favor of the principle of universal because of its breach on the walls of state sovereignty. However this beach is remedied by the fact that certain crimes are so heinous that they shock the conscience of mankind and therefore justifiably punished under the principle of universal jurisdiction.

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