Universal Jurisdiction: 
an analysis from a comparative and international law perspective
A future for universal jurisdiction over serious crimes under international law?

Masterproef van de opleiding
‘Master in de rechten’

Ingediend door

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Introduction

This Master Thesis strives to find an answer to the question whether there is a future for universal jurisdiction\(^1\) over serious crimes under international law.

Part 1 sets out with depicting the concept of universal jurisdiction in contrast to other types of jurisdiction. Subsequently, the origins of universal jurisdiction - piracy and slavery - are discussed. The developments pertaining to universal jurisdiction after the Second World War are deliberated on as well. Finally, the prevailing principles of universal jurisdiction are considered.

Part 2 debates case law featuring universal jurisdiction of the last quarter century. Cases prosecuted and tried in Spain, Belgium, Germany, Argentina, the United States of America and Senegal are dealt with.

Part 3 tackles the most pertinent questions in regard to the difficulties and challenges of universal jurisdiction over the most atrocious acts. It concludes with an attempt at answering the aforementioned question concerning the future of universal jurisdiction over the most heinous of crimes.

\(^1\) This Master Thesis focusses on universal criminal jurisdiction. However, universal civil jurisdiction is mentioned in the course of this work and a case is discussed.
Part 1

Concept, origins, history and principles of universal jurisdiction

« Injustice anywhere is a threat to justice everywhere. »

Martin Luther King
Chapter 1

Concept of universal jurisdiction

1.1 Other types of jurisdiction

1.1.1 Territorial jurisdiction

The jurisdiction of a state within its own territory is considered complete and absolute in international law. That state then exercises authority and power over all persons and all property within its territory as well as in relation to events taking place within its borders. This is inherent to a state’s sovereignty and to this state being an internationally recognised legal person. The United Nations itself has to refrain from enforcing jurisdiction within the territory of a sovereign state as we can read in the Charter of the United Nations (UN Charter):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Even in the case where crimes are committed by foreign nationals, the state where the crime has taken place can exercise jurisdiction and is thus able to accuse, sentence and punish a foreign citizen. Moreover, territorial jurisdiction can be interpreted in a broader sense than the jurisdiction of a state within its own territory as mentioned above. Territorial jurisdiction can also encompass crimes that only partly take place within the territory of a particular sovereign state. Both the state where a criminal event starts and the state where it comes to a stop have a right to exercise territorial jurisdiction. It is generally agreed upon that it is crucial for one constituent element of the crime at hand to have been consummated on the territory of the very state that claims jurisdiction. The contours of territorial jurisdiction are not as obvious as one might presume.

Only in exceptional cases, e.g. if a state happens to violate human rights, can situations belonging to the domestic jurisdiction of a state constitute the subject matter of international claims. However,

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3 Idem, p. 143-144.
4 Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.
5 The Charter of the United Nations of 26 June 1945, Article 2, paragraph 7.
general principles of international law and specific obligations a sovereign state has chosen to undertake can alter the aforementioned absolute and complete nature of territorial jurisdiction.\(^8\)

### 1.1.2 Nationality jurisdiction

#### 1.1.2.1 Active personality

Through the active personality principle a state is allowed to exercise jurisdiction over its nationals even in the case when these nationals are not found within the territory of that particular state. A state can thus exercise jurisdiction based on the nationality of the person accused of a crime.\(^9\) Common law countries tend to restrict exercising jurisdiction over their nationals abroad to crimes of a very serious nature such as murder, manslaughter and treason. This limitation is not an absolute necessity prescribed by international law.\(^10\)

Martin Dixon states “that international law permits (but does not require)\(^11\) a state to exercise jurisdiction over its nationals” and “jurisdiction will not be exercised until the national physically comes within the territory of his or her home state”\(^12\). However, certain international conventions such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)\(^13\) do require a state to exercise active personality jurisdiction if it refuses to extradite someone on the sole ground that he or she is a national of that state.\(^14\)

#### 1.1.2.2 Passive personality

The passive personality principle allows a state to exercise jurisdiction because a crime has been committed against one of its citizens.\(^15\) This principle thus permits a state to try a person for crimes committed abroad affecting one of its nationals.\(^16\) Although the passive personality principle is considered a rather dubious basis for jurisdiction, it is enshrined in international conventions, such as

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\(^11\) Own emphasis


\(^13\) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Article 5.


the International Convention Against the Taking of Hostages (Hostages Convention)\(^\text{17}\), and is recognised by the international community.\(^\text{18}\) Certain *aut dedere aut judicare*\(^\text{19}\)-provisions in international conventions thus authorise (but do not require)\(^\text{20}\) a state to exercise passive personality jurisdiction.\(^\text{21}\) Moreover, state practice proves that passive personality jurisdiction is also possible when not provided for in conventions, be it within certain boundaries.\(^\text{22}\) The passive personality principle is more generally accepted where more serious crimes are concerned that entail violations of state obligations toward the international community\(^\text{23}\). However, judicial cooperation between different states is of the utmost importance to put the passive personality principle into practice.\(^\text{24}\)

### 1.1.3 Protective jurisdiction

Protective jurisdiction permits a state to exercise jurisdiction in matters that could harm that particular state. This can constitute a form of extraterritorial jurisdiction. Where a criminal act takes place and who has committed the crime does not matter in the case of the protective jurisdiction principle. The protective jurisdiction principle allows to assert jurisdiction in matters of conspiracy, treason, national security, fraud or wilful misrepresentation concerning nationality or citizenship matters. Protective jurisdiction can be exercised in any matter that could damage a state and threaten its sovereignty or put its right to political independence at risk. However, it is not limited to certain crimes.\(^\text{25}\)

Although the protective jurisdiction principle can be perfectly justified when used to protect the vital interests of a state, it can also be easily abused and stretched to serve a state’s political and economic interests.\(^\text{26}\)

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\(^\text{17}\) The International Convention Against the Taking of Hostages of 17 December 1979, Article 9.


\(^\text{19}\) Own emphasis

\(^\text{20}\) Idem, p. 112.


\(^\text{22}\) Idem, p. 112.

\(^\text{23}\) *erga omnes*-obligations, JR


Regarding specific offences, grounds for protective jurisdiction can be found in certain treaties such as the International Convention Against the Taking of Hostages and the Convention on the Safety of United Nations and Associated Personnel.  

### 1.2 Universal jurisdiction

#### 1.2.1 General

Through the principle of universal jurisdiction every country can prosecute the core international crimes such as crimes against humanity, war crimes, genocide and torture. Contrary to the workings of international criminal courts and tribunals, the administration of universal jurisdiction is completely decentralised.

Universal jurisdiction can thus be exercised where certain heinous *jus cogens* international crimes are concerned. These crimes are so reprehensible in nature and threaten the international order in such a way that any state can establish jurisdiction in respect of the possible culprits of these terrible crimes. Concerning these *jus cogens* international crimes M. Cherif Bassiouni states:

Legal obligations that arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any...

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28 For the principles (and limitations) of universal jurisdiction: see infra, Chapter 2.


33 See supra
immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders” (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over perpetrators of such crimes. 34

As with protective jurisdiction, where these destructive acts take place or who has committed them does not matter in the case of the universal jurisdiction principle. 35 The crime of piracy, for example, has always 36 been considered a crime against the whole of mankind and pirates thus place themselves beyond the protection of individual states. 37 However, contrary to the protective jurisdiction principle, the possible exercise of universal jurisdiction is limited to those crimes that are so serious as to qualify as crimes under international law such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, enforced disappearances and torture. 38

The main difference between the universal jurisdiction principle and the jurisdiction principles mentioned above is that the state exercising jurisdiction does not do this in its own interest or in the interest of one of its nationals but in the interest of the international community as a whole. 39 A state prosecutes a crime committed abroad because it wants to defend and assure the safety and security of all mankind. 40 The crime committed thus concerns universally recognised rights the alleged culprit

36 See infra.
of the crime has violated. Especially when human rights are at stake, a state then defends and protects the interests of every member of the international community.\textsuperscript{41}

The basis of universal jurisdiction is to be found in international criminal law and public international law, in conventions\textsuperscript{42} and customary law. It exists in order to combat impunity\textsuperscript{43}. The alleged culprit thus has not been judged before by another national or international tribunal or court in the same matter. The principle of universal jurisdiction has to be incorporated in the domestic legislation of a state so that its judges can exercise this kind of jurisdiction. Punitive measures for the crime that has to be punished need also to be foreseen in the domestic legislation of the aforementioned state.\textsuperscript{44}

\subsection*{1.2.2 The Lotus Principle}

Concerning universal jurisdiction the Lotus Principle is often cited. This principle, derived from the Lotus Case\textsuperscript{45} prosecuted before the Permanent Court of International Justice (PCIJ)\textsuperscript{46}, entails that international law allows every regulation it does not explicitly proscribe\textsuperscript{47}:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, (international law) leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.\textsuperscript{48}

\begin{thebibliography}{99}
\bibitem{45} Lotus Case, France v. Turkey, Permanent Court of International Justice, The Hague. Judgement of 7 September 1927 (S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)).
\bibitem{46} The Permanent Court of International Justice, established by the Covenant of the League of Nations of 28 June 1919.
\end{thebibliography}
Concerning the aforementioned discretion left to sovereign states the PCIJ\(^{49}\) held that:

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.\(^{50}\)

1.2.3 Questions concerning the exercise of universal jurisdiction over serious crimes under international law\(^{51}\)

1. Can the balancing problem between sovereign states’ right to protection from interference and individuals’ right to protection from human rights abuses be solved?\(^{52}\)

2. Can conflicts of jurisdiction be deflected?\(^{53}\)

3. Can existing amnesty legislation be tackled?\(^{54}\)

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\(^{49}\) The Permanent Court of International Justice, established by the Covenant of the League of Nations of 28 June 1919.


\(^{51}\) Attempts at answers in Part 3 of this Master Thesis


4. Can the obstacle of personal and functional immunities be overcome?

5. Can the issue of retroactivity be resolved and can trials in absentia be held?

6. Can the right to due process be guaranteed?

7. Is there a future for universal jurisdiction?

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(Based on:) FOAKES, J., “Immunity for International Crimes? – Developments in the Law on Prosecuting Heads of State in Foreign Courts”, Briefing Paper – International Law Programme, Chatham House, November 2011, p. 4-8:

Immunity “ratione personae” or personal immunity constitutes an extensive immunity that can be wide enough to cover both public and private acts. It includes inviolability and immunity from criminal jurisdiction. Immunity “ratione personae” is derived from the office of the individual concerned and, according to the International Court of Justice (ICJ), is enjoyed by heads of state, heads of government, foreign ministers and, possibly, a limited category of other very high-ranking state representatives. It is also linked in its origin to the inherent dignity and majesty of sovereigns and their close identification with the state itself, both as organs of the state and as representatives throughout its external relations. This representative theory is founded on the premise that the office-holder concerned personifies the state itself. Although broad in its substantive application personal immunity is limited both temporally and to the category of office holders to whom it may apply. Once the individual has left office, he or she ceases to be entitled to this kind of immunity.


Immunity “ratione materiae” or functional immunity covers the official acts of all state officials and is determined by reference to the nature of the acts in question rather than the particular office of the official who performed them. Functional immunity rests on the practical rationale that an individual official should not be held responsible for acts that are in reality those of the state concerned. A former state official, including a former head of state or head of government, can thus claim the benefit of this type of immunity even after leaving the office. Functional immunity can only cover acts performed by officials and former officials in the exercise of their official functions and does not extend to private acts.


59 in absence of the alleged culprit, Joke Ruelens (JR).


Chapter 2

Origins and history of universal jurisdiction

2.1 Origins of universal jurisdiction

2.1.1 Piracy

Piracy is generally considered to be the basis of universal jurisdiction for international crimes. In his *Iliad* and *Odyssey*, Homer already mentioned “peiretes”, as did Thucydides in his *History of the Peloponnesian War*. Cicero epitomised “pirata” as “hostis humani generis”, enemies of the entire human race. They could thus be punished by the tribunals of all nations. This concept was elaborated upon by the Italian professor Alberico Gentili and the Spanish scholar and military man Balthasar de Ayala in the fifteenth century, who both explained piracy in a war-ridden context. Hugo Grotius held a broader view and advocated that ships on the high seas were part of the flag state’s territory, thus enabling that flag state to have jurisdiction over non-national ships and persons committing the crime of piracy. This constituted a recognition of the flag state’s right of self-defence and its right to implement both preventive and punitive measures.

The early notions of the law of piracy were further advanced through the national legislation and customs of the prominent seafaring states between the seventeenth and nineteenth century. These advancements were overall based on the recognition that the flag state could prosecute and convict pirates in the way it was defined by their national law. The act of piracy was considered as the quintessential international crime to which universal jurisdiction is applicable. Universal jurisdiction for piracy was codified in the twentieth century through the Geneva Convention on the High Seas and further established in the United Nations Convention on the Law of the Sea (UNCLOS).

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62 See supra.
63 Homer, *The Iliad*.
64 Homer, *The Odyssey*.
65 Thucydides, *The History of the Peloponnesian War*.
66 Cicero, *De Officiis (On Duties)*.
67 Alberico Gentili, *De Jure Bellicis (On the Law in Times of War)*.
68 Balthasar de Ayala, *De Jure et Officiis Bellicis et Disciplina Militari (On the Law and Duties in Times of War and Military Discipline)*.
69 Hugo Grotius, *De Jure Belli ac Pacis (On the Law of War and Peace)*.
Although universal jurisdiction for piracy is universally accepted, scholars all over the world are still debating the nature of the act of piracy and how universal jurisdiction for this crime came into being. In depth analysis of law and criminal jurisdiction concerning piracy brought forward the conclusion that, in a strict legal interpretation, piracy is not an international crime as such but strictly grounds for extraordinary (universal) jurisdiction. In most modern penal codes, piracy as such is not considered a truly wicked crime. It can be compared to arson, robbery or abduction on land. None of these crimes is punishable through universal jurisdiction. Moreover, these crimes cannot be viewed as unspeakable heinous acts that shake human conscience all over the world.

In the past, actions against pirates as enemies of the entire human race were rather seen as direct executive action instead of true criminal prosecution. Moreover, privateers - even though they acted in a similar way to pirates - were regarded as behaving in a legitimate way when raiding foreign ships because they committed these acts with the authority of a letter of marque provided by a head of state. Privateering was only outlawed through the Paris Declaration Respecting Maritime Law. As Malcolm N. Shaw points out: “the essence of piracy under international law is that it must be committed for private ends. In other words, any hijacking or takeover for political reasons is automatically excluded from the definition of piracy.”

Piracy prosecutions and convictions through the concept of universal jurisdiction appear to be an arrangement of convenience between states rather than an enforcement of universal moral conscience. Arguments seem to be based on a kind of extraordinary jurisdiction that enables nations to act out their municipal criminal law concerning a crime that has to be addressed by interstate cooperation. Such a jurisdiction constitutes a shared interest (by its nature, location and effects). The crime of piracy is usually committed on the high seas, where no nation can exercise exclusive jurisdiction. However, multilateral agreements such as the Regional Cooperation Agreement on

74 Idem, p. 99.
76 The Paris Declaration Respecting Maritime Law of 16 April 1856.
Combatting Piracy and Armed Robbery against ships in Asia (ReCAAP)\(^{80}\) expand the regulations concerning piracy to archipelagic and internal waters and territorial seas. Through United Nations Security Council Resolution 1816\(^{81}\) other states were allowed to enter Somalia’s territorial seas in order to combat piracy. United Nations Security Council Resolutions 1976\(^{82}\) and 2020\(^{83}\) then encouraged states to include the crime of piracy in their domestic legislation and create anti-piracy courts.\(^{84}\)

2.1.2 Slavery

The Declaration at the Congress of Vienna\(^{85}\) linked slave trade with piracy. The worldwide prohibition of slave trade came into being because slave trade primordially took place on the high seas and could thus be regulated through international law. By the end of the nineteenth century the prohibition of slavery was generally accepted as a peremptory norm. It took a lot longer for the crimes of slavery and slavery-related practices to be accepted as such. By the end of the Second World War there was finally sufficient state practice and these cruel crimes have been universally condemned ever since.\(^{86}\)

However, of the more than a hundred conventions of the nineteenth and twentieth century concerning slavery and slavery-related crimes only a few provided for the exercise of universal jurisdiction.\(^{87}\) UNCLOS\(^{88}\) urges each and every state to take measures to prevent and punish the crime of slavery committed by (the crew of) ships flying its flag lawfully or unlawfully.\(^{89}\) UNCLOS\(^{90}\) also allows any ship of war to board a ship that is suspected of the crime of slavery on the high seas.\(^{91}\)

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\(^{80}\) The Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia of 11 November 2004.


\(^{85}\) The Congress of Vienna of 20 November 1815.


In treaty provisions covering slave trafficking on the high seas universal jurisdiction is included. Slave trafficking is then equated with the crime of piracy. Contrary to the treaties covering slave trafficking, the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others holds a neutral position regarding universal jurisdiction. Even when slavery or slavery-related crimes are committed during an armed conflict and thus constitute war crimes, the jurisdictional theory relied upon remains the one of territoriality. While doctrine and customary international law consider slavery and slavery-related acts as grave crimes under international law, state practice does not yet show sufficient support for universal jurisdiction for all kinds and manifestations of (modern day) slavery and exploitations.

Although no specific irrefutable provision for universal jurisdiction concerning slavery can be found in the existing treaties on slavery and slavery-related crimes, the prohibition of these heinous acts has now reached the status of *jus cogens*. Various states such as Australia, Greece, New Zealand, Nicaragua have now claimed and exercised universal jurisdiction over slavery practices without being whistled back by other states. International law thus seems to allow universal jurisdiction regarding slavery. This is only the case for traditionally recognised slavery and not for the more modern variations of this age-old abuse. Modern day slavery and exploitation of other human beings are universally condemned through various human rights instruments. These crimes are however not yet universally punishable through lack of serious enforcement and reporting mechanisms. There also seems to be little political will to go further than the principles of territoriality and nationality in exercising jurisdiction regarding modern slavery and slavery-related practices.

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93 See supra.
95 See supra
2.2 Developments pertaining to universal jurisdiction after the Second World War

2.2.1 Nuremberg and Tokyo

2.2.1.1 Nuremberg

The turning point par excellence for the exercise of universal jurisdiction was the creation of the International Military Tribunal (IMT) and other trials held in Nuremberg right after the Second World War. The current claims of universal jurisdiction are mostly founded on the Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter) and in its later judgement. The Nuremberg Charter emphasised the individual responsibility for crimes against peace, war crimes and crimes against humanity. The Nuremberg principles were later enshrined in the United Nations’ General Assembly’s Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal, General Assembly Resolution 95 (I) (General Assembly Resolution 95 (II)).

This was also the starting point for the establishment of the International Law Commission (ILC) that was to undertake the mandate of the General Assembly, under the UN Charter to integrate the Nuremberg principles in a codification of international (criminal) law. Ultimately they had to draft a codex of international criminal law.

99 The International Military Tribunal, opened in Nuremberg, Germany, on 20 November 1945.
100 The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, signed in London on 8 August 1945.
The exercise of universal jurisdiction has expanded enormously since Nuremberg. Besides piracy and slavery it can now cover crimes against humanity, genocide, torture, war crimes ... The Nuremberg principles and judgements were based on the idea that international law should be able to criminalise war crimes, crimes against peace and crimes against humanity. By means of an international tribunal punishment had to be ensured in order that no individual, even a head of state, would be able to commit these terrible crimes with impunity.

2.2.1.2 Tokyo

In 1946 the International Military Tribunal for the Far East (IMTFE) was created in order to bring the alleged culprits of Japanese war crimes to justice. The IMTFE consolidated the legal findings of the IMT as well as the established principles.

However, the International Tribunal for the Far East Charter (IMTFE Charter) offered a slightly different definition of crimes against humanity:

**Crimes against Humanity:** Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

The IMTFE Charter does not mention persecution on religious grounds as Article 6,c of the Nuremberg Charter does.

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107 Idem, p. 102 & 108.
109 The International Military Tribunal for the Far East, opened in Tokyo, Japan, on 29 April 1946.
111 The International Tribunal for the Far East Charter, done at Tokyo, enacted on 19 January 1946.
112 The International Tribunal for the Far East Charter, done at Tokyo, enacted on 19 January 1946, Article 5, c.
113 CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
Only major criminals could be prosecuted through the Nuremberg and IMTFE Charters, other alleged culprits of grave crimes had to be brought to justice by the Allied Forces. This was possible in the different zones of divided Germany through Control Council Law No. 10 (CCL 10) supported by military and national tribunals that applied their own laws. This was not possible in Japan, where the United States acted as occupying power.\footnote{Nuremberg Trials Final Report Appendix D: Control Council Law No. 10 – Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity, done at Berlin on 20 December 1945.}

2.2.2 War crimes

Moreover, the Treaty of Versailles already enabled allied states to prosecute and try German War Criminals. However, this early attempt at universal jurisdiction for war crimes was not a successful one. The IMT and IMTFE constituted an important innovation in this matter. Now international courts could hold individual culprits of war crimes accountable under international law. After a gap of almost 50 years this was further developed with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and later the International Criminal Court (ICC). Under the principle of universal jurisdiction national courts also have the right to bring war criminals to justice.

2.2.3 Crimes against peace

The Nuremberg Charter defined a crime against peace: “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

Crimes against peace, also called crimes of aggression, were considered to be the main offence committed by the Nazis. The American view prevailed during the Nuremberg trials, but it is still under debate whether the Allied Forces retroactively applied criminal law. Since the Second World War different United Nations (UN) bodies have underlined the importance and gravity of crimes against peace, but several UN member states have uttered objections to prosecuting individuals for these

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125 See supra.
130 See supra.
132 The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, signed in London on 8 August 1945, Article 6, a.
crimes. This resulted in the UN Security Council’s reluctance to grant the ICTY\textsuperscript{134} and the ICTR\textsuperscript{135} jurisdiction over this particular crime.\textsuperscript{136} The jurisdiction of the ICC\textsuperscript{137} was restricted at first, but this changed after the Review Conference of the Rome Statute in Kampala\textsuperscript{138}. The crime of aggression is now enshrined in the Rome Statute of the International Criminal Court (The Rome Statute)\textsuperscript{139}, but not yet activated.\textsuperscript{140}

Moreover, the exercise of universal jurisdiction by national courts is considered to be politically sensitive. One of the warnings uttered is that prosecuting the crime of war could be regarded as prosecuting a state’s foreign and military policy.\textsuperscript{141} Others point out that prosecution by foreign national courts could constitute a form of harassment or intimidation. However, these possible disastrous consequences are not unique trials in domestic courts, they can occur in ICC trials as well.\textsuperscript{142}

2.2.4 Crimes against humanity

Crimes against humanity were also first defined in the Nuremberg Charter and have since risen to the level of \textit{jus cogens}:\textsuperscript{143} 144:

\textit{murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.}\textsuperscript{145}

\textsuperscript{134} The International Criminal Tribunal for the former Yugoslavia, established by United Nations Security Council Resolution 827 on 25 May 1993.
\textsuperscript{135} The International Criminal Tribunal for Rwanda, established by United Nations Security Council Resolution 955 on 8 November 1994.
\textsuperscript{137} The International Criminal Court, established by the Rome Statute of the International Criminal Court on 17 July 1998.
\textsuperscript{138} Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010.
\textsuperscript{139} The Rome Statute of the International Criminal Court on 17 July 1998, Article 8, c.
\textsuperscript{141} warning uttered by the first chief prosecutor of the ICTY, Richard Goldstone.
\textsuperscript{143} See supra
\textsuperscript{145} The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, signed in London on 8 August 1945, Article 6, c.
The jurisdiction of the tribunal was viewed as territorial in this matter. The statutes of the ICTY\textsuperscript{146} and of the ICTR\textsuperscript{147} as well as the ICC\textsuperscript{148} also provide for territorial jurisdiction. Only exceptionally, in the case of the ICC\textsuperscript{149} - when there is a referral by the UN Security Council - can universal jurisdiction be exercised\textsuperscript{150}. There exists no specialised convention\textsuperscript{151} regarding crimes against humanity and conventional law does not provide universal jurisdiction over these terrifying acts of violence as such.\textsuperscript{152}

However, through General Assembly Resolution 95 (I)\textsuperscript{153} crimes against humanity gained status in customary international law. Although General Assembly resolutions are not actually binding, they can, as is the case in this particular matter, mirror what states consider obligatory, \textit{opinio juris}\textsuperscript{154}, and what has, combined with state practice, become custom.\textsuperscript{155} But since no international convention codified the prosecution of these heinous crimes, certain grave offences categorised under the denominator of crimes against humanity have been dealt with separately throughout the codification of international (humanitarian) law in recent history. This shattered legislative system was partly remedied with the introduction of the ICC and the Rome Statute\textsuperscript{156}:

\begin{flushright}
\textsuperscript{146} The Statute of the International Criminal Tribunal for the Former Yugoslavia of 25 May 1993, Article 8.
\textsuperscript{147} The Statute of the International Criminal Tribunal for Rwanda of 8 November 1994, Article 7.
\textsuperscript{149} Idem
\textsuperscript{150} As for other crimes within the jurisdiction of the ICC
\textsuperscript{151} However:
\textsuperscript{153} Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, General Assembly Resolution 95 (I), signed in New York on 11 December 1946.
\textsuperscript{154} M. DIKON, M., Textbook on International Law, Oxford, Oxford University Press, 2007, p. 34.
\end{flushright}
For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\textsuperscript{157}

For universal jurisdiction to be exercised by national courts, a lot of opposition and reluctance still remain.\textsuperscript{158}

\textbf{2.2.5 The crime of torture}

Some horrible acts constituting crimes against humanity are dealt with in a separate way throughout international law (codification). The crime of torture is one of these acts.

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture) defines and criminalises the practice of torture as such:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\textsuperscript{159}

\textsuperscript{157} The Rome Statute of the International Criminal Court on 17 July 1998, Article 7, 1.
\textsuperscript{159} The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984, Article 1,1.
The crime of torture in a war context is also included and defined in the Rome Statute\textsuperscript{160} and in the statutes of the ICTY\textsuperscript{161} and ICTR\textsuperscript{162} as well.\textsuperscript{163}

Torture has not always been considered a crime. In ancient Greece and Rome it was seen as a thorough method of obtaining evidence. This practice of torture was popular and generally accepted in medieval Europe and Asia.\textsuperscript{164} The practice of torture in armed conflicts was banned under the Hague Conventions\textsuperscript{165} and later the Geneva Conventions\textsuperscript{166} and the additional Protocols\textsuperscript{167}. A strong statement against torture was later ordered in the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{168} of which the basis can be found in the Universal Declaration of Human Rights.\textsuperscript{169,170}

The Convention against Torture\textsuperscript{171} reflects the \textit{aut dedere aut judicare}\textsuperscript{172} principle rather than the one of universal jurisdiction. When a person is not extradited, he or she can and must be tried by the state where he or she is to be found. Here the courts or tribunals can rely on universal jurisdiction. The Torture Convention thus implicitly allows the exercise of universal jurisdiction.\textsuperscript{173}

2.2.6 The crime of enforced disappearances of persons

The International Convention for the Protection of All Persons from Enforced Disappearance of 2006 (ICCPED)\textsuperscript{174} defines enforced disappearance:

\begin{quote}
The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by
\end{quote}

\textsuperscript{160} The Rome Statute of the International Criminal Court on 17 July 1998, Article 7 and 8, 2.
\textsuperscript{161} The Statute of the International Criminal Tribunal for the Former Yugoslavia of 25 May 1993, Article 5.
\textsuperscript{162} The Statute of the International Criminal Tribunal for Rwanda of 8 November 1994, Article 3.
\textsuperscript{165} The Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907.
\textsuperscript{166} Common Article 3 of Geneva Conventions I, II, III and IV of 12 August 1949.
\textsuperscript{167} Protocol I of 8 June 1977, Article 11 and Protocol II of 8 June 1977, Article 5, 2, e and Articles 6 and 7.
\textsuperscript{168} The International Covenant on Civil and Political Rights of 16 December 1966, Article 7.
\textsuperscript{169} The Universal Declaration of Human Rights of 10 December 1948, Article 5.
\textsuperscript{171} The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984, Article 7, 1.
\textsuperscript{172} See supra
\textsuperscript{174} The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006.
persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.  

Very important in the case of enforced disappearance is the fact that this crime is considered to have a permanent character. The UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) stated that “enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends (...) until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.” The continuous character of the crime renders it possible to convict someone who has committed the act on the basis of a legal instrument that only came into being after the enforced disappearance had started.

Although the crime was not defined or recognised as a crime against humanity in the Nuremberg Charter, the Nuremberg Judgement regarding “Nacht und Nebel Erlass” (Night and Fog Decree) constitutes the first application of international law regarding enforced disappearances. Field Marshal Wilhelm Keitel was prosecuted, convicted, and hanged for his role in implementing Hitler’s Night and Fog Decree. This decree was explained by the High Command of the German Armed Forces as a “fundamental innovation”. Persons suspected to be members of the resistance could only be tried by military courts if it was absolutely sure that they would be condemned to death. In all other cases prisoners were clandestinely transported, whereafter these prisoners would vanish without a trace or no information whatsoever would be given concerning their whereabouts or their fate. Keitel’s conviction clearly put forward that enforced disappearances during an international armed conflict were strictly forbidden by international customary law and that the underlying conduct leading to this crime constituted a war crime and was prohibited by international customary law as well. The Nuremberg judges also established that enforced disappearance was a crime against humanity, even when committed outside a military context.

175 Idem, Article 2
177 Idem
179 Idem, p. 448.
180 Judgement of 1 October 1946 of the International Military Tribunal, opened in Nuremberg, Germany, on 20 November 1945.
181 Nacht und Nebel Erlass, Decree signed by Wilhelm Keitel on 7 December 1941 based on a Directive by Adolf Hitler.
The ICCPED\textsuperscript{183} also regards enforced disappearances as crimes against humanity, since these acts are considered to be crimes committed as a deliberate, systematic and widespread attack against civilians.\textsuperscript{184}

The aut dedere aut judicare\textsuperscript{185} principle is included in the ICCPED\textsuperscript{186}. The Convention implicitly allows the same exercise of universal jurisdiction as the Convention against Torture\textsuperscript{187}. “when a person is not extradited, he or she can and must be tried by the state where he or she is to be found.”\textsuperscript{188} Moreover, an even stronger (implicit) basis than the one of the Convention against Torture is to be found: “This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”\textsuperscript{189190}

2.2.7 The crime of genocide

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Convention on Genocide) defines and criminalises the practice of torture as such:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;  
(b) causing serious bodily or mental harm to members of the group;  
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;  
(d) imposing measures intended to prevent births within the group;  
(e) forcibly transferring children of the group to another group.\textsuperscript{191}

The Convention on Genocide was drafted after the Nazi genocide of more than 6 million Jews during the Second World War. This terrible crime constituted a tragic climax of genocides in times of war, e.g. the extermination of 1 million Armenians living in Turkey at the beginning of the First World War. The

\textsuperscript{183} The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, Article 5.


\textsuperscript{185} See supra

\textsuperscript{186} The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006

\textsuperscript{187} The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984, Article 7, 1.

\textsuperscript{188} Idem, Article 5.

\textsuperscript{189} Ibidem, Article 9,3.


Polish lawyer Raphael Lemkin\textsuperscript{192}, who later drafted the Convention on Genocide, first used the term genocide describing the aforementioned Nazi crimes against the Jews.\textsuperscript{193} The Nuremberg judges did not mention the Nazi genocide as such, but described the extermination and persecution of Jews and other population groups as war crimes and crimes against humanity.\textsuperscript{194}

The Convention on Genocide\textsuperscript{195} establishes that territorial jurisdiction over the \textit{jus cogens}\textsuperscript{196} crime of genocide is in order\textsuperscript{197}, but this reference to territorial jurisdiction is not exhaustive. Within the limits of customary international law a state can exercise its existing judicial powers over the crime of genocide.\textsuperscript{198}

Normally, only an international criminal tribunal can have universal jurisdiction and this only if state parties to the Genocide Convention are parties to the statute of this criminal tribunal as well. The statutes of the ICTY\textsuperscript{199}, the ICTR\textsuperscript{200} and the ICC\textsuperscript{201} provide(d) for the jurisdiction over the crime of genocide in their statutes. The jurisdiction of the first mentioned tribunals was and is territorial. However, there are exceptions as to the sole territorial jurisdiction of the ICC. Moreover, the Rome Statute renders the reach of the ICC universal regarding state parties\textsuperscript{202} and non-state parties\textsuperscript{203}. Both referrals reflect the theory of universal jurisdiction.\textsuperscript{204}

\begin{footnotesize}
\begin{enumerate}
\item R. Lemkin, \textit{Axis Rule in Occupied Europe, Laws of Occupation - Analysis of Government - Proposals for Redress (Chapter IX)}, Washington, 1944.
\item The Statute of the International Criminal Tribunal for the Former Yugoslavia of 25 May 1993, Article 4.
\item The Statute of the International Criminal Tribunal for Rwanda of 8 November 1994, Article 2.
\item Idem, Article 14.
\item Ibidem, Article 12.3.
\end{enumerate}
\end{footnotesize}
Although the universality principle can normally not be applied to the crime of genocide under conventional law, it can be applied under customary law as happened in the Eichmann Case\(^{205}\). Here, the Israeli court founded its jurisdiction on the Lotus Case\(^{206}\) stating that the law on which it based its jurisdiction was not one forbidden by international law. The Israeli Attorney General also argued that the international and universal character of the particularly heinous crimes of the accused entitled Israel to prosecute Adolf Eichmann\(^{207}\).


\(^{206}\) Lotus Case, France v. Turkey, Permanent Court of International Justice, The Hague. Judgement of 7 September 1927 (S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)).

Chapter 3
Principles of universal jurisdiction

3.1 The Princeton Principles on Universal Jurisdiction\textsuperscript{208}

3.1.1 Introduction

The objective of the Princeton Project on Universal Jurisdiction was to contribute to the further development of universal jurisdiction. Scholars and jurists from around the world assembled to draft consensus principles on the exercise and legitimacy of universal jurisdiction. Their main goal was to create greater legal accountability for the alleged culprits of grave crimes against international law and thus to fight impunity for these horrible acts.\textsuperscript{209}

The Princeton Principles were meant to be of use for legislators around the world assuring that national legislation was in accordance with international law. The drafters of the Princeton Principles also intended to assist national judges who have to interpret and apply international law and make sure that they interpret and apply their national law in conformity with aforementioned international law. The Princeton Project also envisaged to support government officials all over the globe exercising their functions under national and international law, non-governmental organisations as well as private citizens actively promoting international criminal justice and human rights.\textsuperscript{210}

The participants in the Princeton Project uttered the hope that implementing the Princeton Principles mentioned below would promote justice, the rule of law as well as other goals valuable to the whole of mankind. However, aware of the possibility of abuse, the authors of the Princeton Principles included safeguards to protect persons accused of crimes and prosecuted only on the principle of universal jurisdiction.\textsuperscript{211}


3.1.2 Principles

The Princeton Principles on Universal Jurisdiction first focus on the Fundamentals of Universal Jurisdiction, stating that universal criminal jurisdiction can be exercised irrespective of where the crime was committed and regardless of the nationality of the alleged culprit. Moreover, neither the nationality of the victim nor a connection to the forum state should be of importance. Simply the heinous nature of the crime committed constitutes the basis for the exercise of universal jurisdiction.212

On the basis of universal jurisdiction, a state can demand the extradition of the alleged culprit of serious crimes under international law if that state has built a prima facie case of the person’s guilt and is able to guarantee due process before a competent, ordinary and impartial judicial body in accordance with international norms and standards concerning human rights with regard to criminal proceedings.213 A possible death sentence and the threat of being subjected to torture, cruel and inhuman punishment or treatment constitute Grounds for Refusal of Extradition. A state that refuses to extradite should prosecute the alleged culprit or extradite that person to another state where the aforementioned treatment or punishment cannot be administered.214

Universal jurisdiction can be applied to Serious Crimes under International Law such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. This list is not exhaustive.215

Reliance on Universal Jurisdiction in the Absence of National Legislation is possible, but states are required to facilitate the possible exercise of universal jurisdiction through the Adoption of National Legislation with the purpose of Strengthening Accountability and Universal Jurisdiction. Moreover, the Inclusion of Universal Jurisdiction in Future Treaties is emphasised.216

213 Idem, Principle 1, 2-5.
All states have an **Obligation to Support Accountability** and to assist one another in the exercise of universal jurisdiction and combatting impunity while complying with international norms and standards.\(^\text{217}\)

Regarding the aforementioned serious crimes under international law, the exercise of universal jurisdiction cannot be forestalled or prevented due to **Immunities**, **Statutes of Limitations** or **Amnesties.**\(^\text{218}\)

For the **Resolution of Competing National Jurisdictions** the following criteria are of the utmost importance:

(a) multilateral or bilateral treaty obligations;
(b) the place of commission of the crime;
(c) the nationality connection of the alleged perpetrator to the requesting state;
(d) the nationality connection of the victim to the requesting state;
(e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
(f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
(g) the fairness and impartiality of the proceedings in the requesting state;
(h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
(i) the interests of justice.\(^\text{219}\)

Moreover, **Settlement of Disputes** concerning the exercise of universal jurisdiction should be resolved through all possible means of peaceful settlement of disputes and especially by submitting the dispute to the **International Court of Justice** (ICJ)\(^\text{220,221}\).

Finally, the **Non Bis In Idem/ Double Jeopardy** principle should be guaranteed at all times. States must recognise the proper exercise of universal jurisdiction by other states and the judgements rendered. A person cannot be tried and punished for the same criminal conduct if the prior proceedings were conducted in good faith and in conformity with international law.\(^\text{222}\)

\(^{217}\) Ibidem, Principle 4, 1-2.

\(^{218}\) Ibidem, Principles 5-7.

\(^{219}\) Ibidem, Principle 8.

\(^{220}\) The International Court of Justice, established by the Charter of the United Nations of 26 June 1945.


\(^{222}\) Ibidem, Principle 9, 1-3.
3.2 The Cairo - Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective

3.2.1 Introduction

Africa Legal Aid (AFLA) assembled African (legal) experts as well as leading experts from all over the world to discuss and draft principles on universal jurisdiction from an African perspective. They met in Cairo from 30-31 July 2001 and in Arusha from 18-21 October 2002.

The Cairo-Arusha Principles on Universal Jurisdiction were meant, as were the Princeton Principles on Universal Jurisdiction, to be of use for legislators around the world assuring that national legislation was in accordance with international law, to assist national judges in need of interpreting and applying international law while making sure they interpret and apply national law in conformity with international law. As was established in the Princeton Project, the experts working on the Cairo-Arusha Principles on Universal Jurisdiction envisaged to support governments all over the globe as well as non-governmental organisations and private citizens in their attempts to promote international criminal justice and human rights.

The Cairo-Arusha Principles on Universal Jurisdiction strove to aid the development of international law, but were especially put forward because of the concern that alleged culprits of certain heinous acts with a specific resonance in Africa, e.g. the crime of Apartheid, could thus far not be prosecuted under the principle of universal jurisdiction.

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224 Africa Legal Aid (AFLA), A Pan African NGO, launched on 21 October, 1995 to coincide with Africa Day of Human Rights.


Based partly on existing international law such as the Rome Statute\textsuperscript{229}, the Cairo-Arusha Principles also take into account the specific context of Africa as well as certain additional considerations and needs, including cultural, economic and social ones. The experts participating in the Cairo-Arusha Project thus hoped to promote the effective exercise of universal jurisdiction in Africa and in the world in general.\textsuperscript{230}

### 3.2.2 Principles

The Cairo-Arusha Principles, as mentioned above, also cater to supplementary considerations and needs, not yet included in the Princeton Principles\textsuperscript{231}. It is stressed that universal jurisdiction is applicable to gross human rights offences even when perpetrated in peacetime. Not only natural persons should be subjected to universal jurisdiction for having committed serious crimes under international laws, other legal entities should be held accountable as well.\textsuperscript{232}

Besides the acts recognised as subject to international law to date states should be able to prosecute and punish other grave crimes as well, such as human trafficking, plunder and serious environmental crimes. Moreover, in tackling gender crimes states should establish the right conditions to report these crimes, to prosecute them and to assist the victims. Witnesses of all crimes should receive sufficient protection.\textsuperscript{233}

The non-existence of enabling national legislation concerning universal jurisdiction does not mitigate the duty of all states to combat impunity. Moreover, monetary constraints do not diminish the duty of states to investigate, prosecute or extradite alleged culprits of serious crimes under international law. Developing countries should be able to ask the (financial) assistance of the international community.\textsuperscript{234}

\begin{itemize}
\item \textsuperscript{229} The Rome Statute of the International Criminal Court of 17 July 1998.
\item \textsuperscript{233} Idem, Articles 4, 7 & 12.
\item \textsuperscript{234} Ibidem, Articles 5 & 9.
\end{itemize}
The principle of non-interference in the affairs of other territorial states does not prevent states to prosecute the gravest crimes through the principle of universal jurisdiction. The existence of alternative forms of justice such as truth or reconciliation commissions does not grant states the right to abandon prosecution of alleged culprits of the most heinous crimes.\textsuperscript{235}

The absence of an extradition treaty should not prevent persons held responsible for serious crimes under international law to be extradited, surrendered or transferred to the state or international tribunal that is willing and able to prosecute. Refugee status of the alleged culprit does not alleviate a state of its duty to prosecute or extradite either.\textsuperscript{236}

Prosecuting and punishing persons accountable for the most atrocious acts should not only be aimed at combatting impunity and deterrence, but should also aid in rehabilitating and reconstructing the society where these acts were committed. The universal jurisdiction regime should also strive to ensure reparation for the victims.\textsuperscript{237}

In exercising universal jurisdiction all possible discrimination should be eradicated and the principle of universal jurisdiction can never be applied for politically motivated reasons.\textsuperscript{238}

\textsuperscript{235} Ibidem, Articles 6 & 14.
\textsuperscript{236} Ibidem, Articles 18 & 19.
\textsuperscript{237} Ibidem, Articles 16 & 17.
\textsuperscript{238} Ibidem, Article 8.
3.3 The Madrid – Buenos Aires Principles on Universal Jurisdiction

3.3.1 Introduction

The Madrid-Buenos Aires Principles on Universal Jurisdiction, also drafted by legal experts from all over the globe, were meant to strengthen the function of the ICC on the national level through the exercise of universal jurisdiction because of the ICC’s many limitations to date.

The drafters of the Madrid-Buenos Aires Principles on Universal Jurisdiction wanted to address the changes and developments the application of universal jurisdiction had undergone since the Princeton Principles on Universal Jurisdiction and the Cairo-Arusha Principles on Universal Jurisdiction had come into being. Gaps needed to be bridged and the existing principles updated and broadened.

The main objectives of the Madrid-Buenos Aires Principles were to reaffirm the preceding doctrinal efforts, to try to codify the elements of universal jurisdiction generally agreed upon and to fight impunity. Reporting new sources of impunity, e.g. on the economic and the environmental level, and new means of combating impunity of heinous crimes had to create an opinio juris. This was meant to strengthen the principle as well as the scope of universal jurisdiction and to achieve a comprehensive protection of victims all over the world through universal jurisdiction.

Important innovations in the Madrid-Buenos Aires Principles on Universal Jurisdiction are:

- Universal prosecution of economic and environmental crimes.
- Acknowledgement of criminal liability of legal persons.
- Promotion of Civil Universal Jurisdiction.
- Explanation and clarification of the relation between the International Criminal Court and the Universal Jurisdiction.
- Strengthening of mutual international judicial cooperation.

245 See supra.
- Special protection of victims and witnesses.
- Balance between Universal Jurisdiction and the processes of transitional justice.\textsuperscript{247}

### 3.3.2 Principles

In addition to the crimes mentioned in the Princeton Principles\textsuperscript{248} and the Cairo-Arusha Principles\textsuperscript{249}, the Madrid-Buenos Aires Principles also cite the following crimes: enforced disappearance, extrajudicial prosecutions and aggression. The scope of the exercise of universal jurisdiction should also be broadened to the crimes connected to the ones included in all the aforementioned Principles. States should also be allowed to widen the scope of the exercise of universal jurisdiction to prosecute the crimes incorporated in the international treaties and agreements they ratified. Actions and omissions pertaining to the crimes committed should be investigated and judged if necessary regardless of their (non-)codification in domestic law.\textsuperscript{250}

Universal civil jurisdiction should be allowed in so far as the damage is a consequence of the crimes listed in the aforementioned Principles.\textsuperscript{251}

Criminal and civil liability are to be applied no matter the manner or degree in which a natural or legal person has participated in the crime and regardless of the position of the alleged culprit. Assets, property and securities can be seized and bank or corporate secrecy can be ignored in the exercise of universal jurisdiction.\textsuperscript{252}


\textsuperscript{248} G.J. B\textsc{ass}, W.J. B\textsc{utler}, R.A. F\textsc{alk}, C. F\textsc{unterman}, B.B. L\textsc{o}ckw\textsc{ood}, S. M\textsc{acedo}, S.A. O\textsc{xman}, The Princeton Principles on Universal Jurisdiction, Program in Law and Public Affairs and Woodrow Wilson School of Public and International Affairs, Princeton University, International Commission of Jurists, American Association for the International Commission of Jurists, Netherlands Institute of Human Rights, Urban Morgan Institute for Human Rights, published by the Program in Law and Public Affairs, produced by the Office of Communications, printed by the Office of University Printing and Mailing, Princeton University, Princeton, United States of America, 2001.


\textsuperscript{251} Idem, Principle 7.

\textsuperscript{252} Ibidem, Principle 6, 1-5.
With regard to extradition the Madrid-Buenos Aires Principles add the following: the non-existence of double criminality or the non-recognition of universal jurisdiction by the requested state do not bar granting extradition or surrender.\textsuperscript{253}

Experts should be protected as well as witnesses and the rights of victims must be safeguarded at all times.\textsuperscript{254}

The independence and impartiality of competent authorities should be guaranteed and specialised judicial, prosecuting and police institutions set up. Mutual legal assistance and cooperation is of the utmost importance. However, the requesting state has to certify that it complies with international norms and standards regarding due process and respect for human rights.\textsuperscript{255}

When the alleged culprit is not present at the beginning of the enquiry, the competent authorities should be allowed to take all appropriate precautionary measures to guarantee his/her presence as well as to ensure the proper handling of evidence and a possible reparation for the victims. The person thought responsible for the crime need not be present in the forum state when the investigation into the crimes starts.\textsuperscript{256}

Complementarity and cooperation between national courts and tribunals and the ICC\textsuperscript{257} as well as other criminal justice mechanisms should always be guaranteed. Regarding Transitional Justice systems, the exercise of universal jurisdiction is possible when international standards and norms have not been respected or when a possible culprit of serious crimes under international law has been sheltered from the administration of justice.\textsuperscript{258}

\textsuperscript{253} Ibidem, Principle 15, 3-4.
\textsuperscript{254} Ibidem, Principle 20, 1-4.
\textsuperscript{255} Ibidem, Principles 18, 19 & 14, 1-4.
\textsuperscript{256} Ibidem, Principle 11, 1-3.
\textsuperscript{257} The International Criminal Court, established by the Rome Statute of the International Criminal Court on 17 July 1998.
Part 2

Universal jurisdiction around the world in the past quarter century

« When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant. Wherever men and women are persecuted because of their race, religion, or political views, that place must - at that moment - become the centre of the universe. »

Elie Wiesel
Note

In the following chapters the most relevant and most significant case law featuring universal jurisdiction of the past quarter century, as far as this Master Thesis is concerned, will be discussed. The different chapters represent various continents, depicting several states and a variety of case law.

The first chapter outlines a segment of the recent history of universal jurisdiction in Europe, starting with the Kingdom of Spain. The second chapter focusses on South and North America and the third on Africa.
Chapter 1

Europe

1.1 Spain

1.1.1 Spanish legislation concerning universal jurisdiction

The Ley Orgánica del Poder Judicial (the Organic Law of the Judicial Power)\(^{259/260}\) established universal jurisdiction in Article 23, 4:

Furthermore, Spanish courts have jurisdiction over acts committed abroad by Spaniards or foreigners, if these acts constitute any of the following offences under Spanish law: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offences in connection with prostitution and corruption of minors or incompetents; (f) drug trafficking; (g) any other offence which Spain is obliged to prosecute under an international treaty or convention.\(^{261}\)

The Spanish Organic Law of the Judicial Power was adapted several times and finally reformed in May 2014 as to almost totally eradicate the principle of universal jurisdiction in Spanish legislation. As Dr. Rosa Ana Alija Fernández correctly points out, through this Ley orgánica 1/2014, de modificación de la Ley orgánica 6/1985 del Poder Judicial relativa a la justicia universal\(^{262}\):

universal jurisdiction is replaced by other jurisdictional bases in order for Spanish criminal courts to prosecute internationally-defined offences committed abroad. International legal obligations undertaken by Spain are alleged to establish jurisdiction. Here it is contended, though, that two different trends can be observed depending on who is behind the commission of the offence: a state or a non-state actor. Access to Spanish criminal courts is further blocked by additional restrictions, such as the configuration of their jurisdiction as subsidiary and the limitation of those entitled to file a claim. The result is the removal of universal jurisdiction from the Spanish legal system, intended not only for the future but also retrospectively concerning past claims currently being under examination, a worrying trend that can endanger the fight against impunity if followed by other states.\(^{263}\)

The first 3 cases discussed below were tried before the 2014 reform and Spanish judges were then able to exercise the principle of universal jurisdiction. However, during the course of the investigations and in the event of judicial proceedings they met with considerable obstacles and major opposition.\(^{264}\)


\(^{260}\) La Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.


1.1.2 Case law

1.1.2.1 Scilingo

Adolfo Francisco Scilingo Manzorro (Scilingo), an ex-Argentinian naval officer, was the first person to stand trial in Spain for crimes against humanity committed in another state. He was accused of atrocious acts committed against Spanish citizens during Jorge Rafael Videla’s military dictatorship from 1976 to 1983, a period also known as Argentina’s “Guerra Sucia” (Dirty War).265, 266

In 1995 Scilingo confessed having drugged and murdered dozens of detainees during the Dirty War. After having travelled to Spain for a television interview in 1997, the former Argentinian naval officer appeared voluntarily before Spanish investigating magistrate Baltasar Garzón Real. He was finally arrested after having reiterated his previous confession.267

In 1998, the Audiencia Nacional (The National Court of Spain)268 ruled that Spanish judges were allowed to exercise jurisdiction since Argentina had failed to judge the alleged culprit of crimes against humanity due to its 1986-1987 amnesty laws269 and since the victims of these heinous crimes were Spanish nationals270. According to the preceding judges of the Audiencia Nacional the acts concerned constituted crimes against humanity that were not subjected to statutes of limitations since they violated international law.271

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265 Own translation
268 Own translation
269 La Ley de Punto Final n.° 23.492, promulgada en Argentina el 24 de diciembre de 1986; La Ley de Obediencia Debida n.° 23.521, dictada en Argentina el 4 de junio de 1987.
270 So also the passive personality principle at play
The ruling allowing Spanish judges to prosecute the Argentinian national Adolfo Scilingo was based on the Convention on Genocide, which Spain had joined on 13 September 1968, as well as Spain's Organic Law on the Judicial Power. Through Article 23, 4 of the aforementioned law Spanish courts obtain the (universal) jurisdiction over genocide and all other grave crimes Spain has to prosecute under international treaties and conventions, including the Convention against Torture, which Spain ratified on 21 October 1987, and the Geneva Conventions needed to be invoked.

At the time, genocide was punishable in Spain through Article 607 of the Código Penal (Spanish Penal Code). Subsidiarity was not in order because of the 1986-1987 Argentinian amnesty laws so neither Article 96 of the Constitución Española (Spanish Constitution) nor Article 27 of the Vienna Convention on the Law of Treaties needed to be invoked.

In 2005 Scilingo was found guilty of murder, illegal detention and torture and was sent to prison for 640 years. This included 21 years of imprisonment for each of the 30 persons drugged and thrown to their deaths from airplanes into the Atlantic Ocean in the so-called “vuelos de la muerte” (death flights).

275 The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984, Article 5.
278 Own translation
280 This principle entails that a state shall only investigate and prosecute serious crimes under international law committed in and/or by another state if that state fails to respond to its duties under national and international law, based on: A.M. Jiménez, M.M. Vergara Cespedes, La Jurisdicción Universal como Instrumento para la Protección de Pueblos Indígenas – Una guía práctica para defensores de derechos humanos, Copenhague, IWGIA, 2015, p. 32-33.
281 La Ley de Punto Final n.° 23.492, promulgada en Argentina el 24 de diciembre de 1986; La Ley de Obediencia Debida n.° 23.521, dictada en Argentina el 4 de junio de 1987.
282 Own translation
283 La Constitución Española, de 29 de diciembre 1978, Artículo 96.
284 The Vienna Convention on the Law of Treaties of 22 May 1969, Article 27.
286 Own translation
Scilingo’s lawyer immediately announced that his client would appeal to the Spanish Supreme Court.288 289

In 2007 el Tribunal Supremo (the Spanish Supreme Court) toughened Scilingo’s sentence to 1084 years of prison. The judges stated that the atrocities committed in “la Escuela Superior de Mecánica de la Armada (ESMA)” (Higher School of Mechanics of the Navy) such as enforced disappearances, torture and illegal execution, constituted crimes against humanity recognised as such by international (penal) law. In its judgement the Spanish Supreme Court also considered the atrocious acts committed to be war crimes recognised through e.g. the Geneva Conventions and the Convention against Torture. The Tribunal Supremo, as did the Audiencia Nacional, also made use of the jurisprudence of the ICTY and the ICTR and cited e.g. the Eichmann Case to strengthen its arguments.297

1.1.2.2 Pinochet

On 11 September 1973 General Augusto José Ramón Pinochet Ugarte (Pinochet) executed a violent coup d’état thus overthrowing the Republic of Chile’s democratically elected president Salvador Guillermo Allende Gossens (Allende). Afterwards Pinochet banned all political parties, dissolved the Congreso Nacional (Chile’s National Congress) and turned the Chilean Constitution into a dead letter. By the end of his bloody dictatorship Pinochet had caused the deaths and disappearances of thousands of innocent people. He was also responsible for the detention and

288 Own translation
290 Own translation
291 Own translation
293 The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984.
298 Own translation
torture of thousands more. A huge number of Chileans were forced into exile as well. Besides the aforementioned atrocious acts, the leader of Chile’s military junta also embezzled enormous amounts of money. He continued his gruesome reign until he had to resign due to ever-growing domestic pressure. However, he had managed to get a permanent seat as a senator and under his rule a law was adopted granting him everlasting amnesty.300

In March and July 1996 the Unión Progresista de Fiscales (the Progressive Union of Investigative Magistrates)299 initiated a process in Spain through criminal complaints against the former military leaders of Chile and Argentina and their role in the disappearances and deaths of Spanish nationals.302 Thereafter the charges were aggravated by adding genocide, torture and terrorism to the list. Through actio popularis, which allowed citizens and organisations to press criminal charges without actually being connected to the events, the investigating magistrates in the Chile initiative were joined by the Agrupación de Familares de Detenidos y Desaparicidos de Chile303 and the Fundación Salvador Allende304. As in the Scilingo Case305 the Audiencia Nacional ruled that the aforementioned magistrates had jurisdiction to investigate the grave crimes of genocide, torture and terrorism committed during the Pinochet era.306 Their investigations focussed i.a. on “Operación Cóndor”,307 an operation of the “Dirección Nacional de Inteligencia (DINA)”308 that aimed to eliminate communists and people opposing the military regime in general. Judge Baltasar Garzón invoked universal jurisdiction in order to be able to prosecute in the Chilean case.309

299 Ley de Amnístia – Decreto Ley 2191. Aprobada por la junta military presidida por Pinochet. Concede Amnístia a las personas que indica por los delitos que señala. Promulgada el 18 de abril de 1978 y publicado al día siguiente en el Diario Oficial.
301 Own translation
302 So also the passive personality principle at play
303 Chilean Group of Relatives of Detained and Disappeared Persons (own translation)
304 Salvador Allende Foundation (own translation)
305 See supra
306 Auto de la Sala de lo Penal de la Audiencia Nacional por el que se considera competente la Justicia española para perseguir delitos de genocidio, tortura y terrorismo cometidos en Chile. Madrid, el 5 de noviembre de 1998.
307 Operation Condor
308 The Chilean National Intelligence Directorate (Own translation)

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The Audiencia Nacional’s ruling allowing Spanish judges to prosecute was, as in the Scilingo Case\textsuperscript{310}, based on the Convention on Genocide\textsuperscript{311}, which Spain joined on 13 September 1968\textsuperscript{312}, as well as Spain’s Organic Law on the Judicial Power\textsuperscript{313}. Through Article 23, 4 of the aforementioned law Spanish courts obtain the (universal) jurisdiction over genocide and all other grave crimes Spain has to prosecute under international treaties and conventions, including the Convention against Torture\textsuperscript{314}, which Spain ratified on 21 October 1987, and the Geneva Conventions\textsuperscript{315, 316}.

At the time, genocide was punishable in Spain through Article 607 of the Spanish Penal Code\textsuperscript{317}. According to the judgement, the crime of torture had to be addressed as well, as it constituted part of the crime of genocide in this particular case. Similar to the Scilingo Case\textsuperscript{318}, subsidiarity was not in order because of the 1978 Chilean Amnesty law\textsuperscript{319} so neither Article 96 of the Spanish Constitution\textsuperscript{320} nor Article 27 of the Vienna Convention on the Law of Treaties\textsuperscript{321} needed to be invoked.\textsuperscript{322}

When Pinochet travelled to the United Kingdom in October 1998 judge Baltasar Garzón issued an international arrest warrant with the purpose of prosecuting the former dictator for genocide, torture and terrorism in Spain. As in the Scilingo Case, the Chilean government and Pinochet objected because

\textsuperscript{310} See supra
\textsuperscript{312} See: Boletín Oficial del Estado del 8 de febrero de 1969.
\textsuperscript{313} La Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, Artículo 23, 4.
\textsuperscript{314} The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984, Article 5.
\textsuperscript{315} Geneva Conventions I, II, III and IV of 12 August 1949.
\textsuperscript{318} See supra
\textsuperscript{319} Ley de Amnistía – Decreto Ley 2191. Aprobada por la junta military presidida por Pinochet. Concede Amnistía a las personas que indica por los delitos que señala. Promulgada el 18 de abril de 1978 y publicado al día siguiente en el Diario Oficial.
\textsuperscript{320} La Constitución Española, de 29 de diciembre 1978, Artículo 96.
\textsuperscript{321} The Vienna Convention on the Law of Treaties of 22 May 1969, Article 27.
of an alleged violation of an autonomous state’s sovereignty. Chile and Pinochet also argued that it was impossible to indict and try the former general and military leader because of his immunity as a (former) head of state and senator for life.\footnote{323}

Pinochet was detained in London and, as mentioned before, the Audiencia Nacional upheld Spain’s right to exercise universal jurisdiction\footnote{324} and to indict and try Pinochet.\footnote{325}

The case was judged by the British House of Lords\footnote{326} on 24 November 1998. The Convention against Torture to which Chile, the United Kingdom and Spain were all parties, was of the utmost importance for the judgement by the British Court. According to the House of Lords an exception to functional immunity\footnote{327} of (former) heads of state was possible where the international crime of torture was involved. However, Pinochet could only be extradited for crimes committed after 8 December 1988, when the ratification of the Convention against Torture by the UK had come into being.\footnote{328}

On 10 December 1998 Judge Garzón issued an indictment\footnote{329} that stated all the crimes committed during Pinochet’s bloody dictatorship including the mass executions of the Mapuche.\footnote{330}

\footnotesize{\bibliography{references}}

324 Auto de la Sala de lo Penal de la Audiencia Nacional por el que se considera competente la Justicia española para perseguir delitos de genocidio, tortura y terrorismo cometidos en Chile. Madrid, el 5 de noviembre de 1998.
326 Judgement in Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte PINOCHET / Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte PINOCHET. House of Lords, London, United Kingdom, 25 November 1998.
327 See supra
However, the British government ultimately allowed formal Chilean dictator Pinochet to return to his native country on ‘health grounds’. Under harsh political pressure, Labour Home Secretary Jack Straw put an end to the extradition proceedings on 2 March 2000 and thus handed Pinochet a free pass to retreat to his home country. The landmark case of Spain and Baltasar Garzón, backed by Belgium and other countries, thus fizzled out. Nonetheless, Pinochet’s sixteen months in prison and failed immunity claim held a faint promise towards ending impunity for crimes committed by (former) heads of state.

1.1.2.3 Ríos Montt

José Efraín Ríos Montt (Ríos Montt) was a Guatemalan general who came to power as president of the Republic of Guatemala after a coup d’état on 23 March 1982. Ríos Montt immediately executed his “Plan Nacional de Seguridad y Desarrollo (PNSD)”\(^\text{332}\) that, according to him and his followers, called for the annihilation of all ‘insurgents’. Ríos Montt’s reign constituted the bloodiest period in Guatemalan history. The dictator ordered and encouraged the rape, torture and murder of thousands of civilians and the destruction of hundreds of villages making use of the práctica de tierra quemada (scorched earth tactics)\(^\text{333}\). Especially indigenous Mayans fell victim to this grizzly campaign.\(^\text{334}\)

On 2 December 1999 Rigoberta Menchú Tum (Menchú), Nobel Peace Prize Laureate of 1992, brought charges concerning the crime of genocide against Ríos Montt and other contemporary Guatemalan government officials before the Audiencia Nacional\(^\text{335}\) in order to get the former military leaders to stand trial in Spanish courts under the principle of universal jurisdiction. Among the charges of

\(^{331}\) Own translation

\(^{332}\) National Plan of Security and Development (own translation)

\(^{333}\) Own translation


genocide featured the murder of Menchú’s father and thirty-five other people in the 1980 bombing of the embassy of Spain in Guatemala as well as the killing or enforced disappearance of four Spanish priests and a large number of other massacres, rapes, cases of torture, and enforced disappearances.336

The investigative magistrate Guillermo Ruiz Polanco found Menchú’s claim admissible. He based his decision on the same reasoning concerning legal grounds as argued in the Scilingo and Pinochet Cases327. Again the principle of passive personality was included as well. Regarding subsidiarity judge Ruiz Polanco stated that the tribunals and courts of Guatemala had thus far fallen short of trying the alleged culprits of the aforementioned heinous crimes.338

Afterwards the Audiencia Nacional decided that the inactivity of the Guatemalan justice system was insufficiently proved and that Spain’s exercising the universal jurisdiction principle was subsidiary to Guatemalan jurisdiction. The judges based their decision on the Convention on Genocide339. They also underlined that, contrary to their Argentinian and Chilean counterparts340, Guatemala’s amnesty law341 excluded the crimes of genocide, torture and enforced disappearances from amnesty. Nothing thus impeded the Guatemalan justice system to try the former military leaders and Spain had to refrain from doing so.342

337 See supra
On appeal, the Tribunal Supremo used the Scilingo precedent to allow a very narrow form of universal jurisdiction. Spanish judges were now allowed to prosecute in as far as a Spanish national interest was at play, or in as far as Spanish nationals were concerned. This decision to reject the competence of Spanish courts to prosecute the atrocious acts committed against the indigenous Maya population did not sit well with all the Tribunal Supremo’s judges concerned. They argued that the decision was incompatible with the Convention on Genocide, with Spanish law and with international law as such.

In a landmark decision el Tribunal Constitucional de España (Spain’s Constitutional court) revoked the Tribunal Supremo’s decision, setting aside the Scilingo precedent and stating that in this decision the Guatemalan plaintiffs’ right of access to the Spanish courts was unconstitutionally set aside. The judges of the Constitutional Court severely criticised the narrow and partly faulty interpretation of Spain’s Organic Law on the Judicial Power as well as of the Convention on Genocide. They also argued that because neither the Convention on Genocide nor any other treaty prohibits universal jurisdiction, Article 27 of the Vienna Convention on the Law of Treaties cannot be said to be violated. Most importantly, the judgement rejected the need for a link to Spanish national interests and stressed that universal jurisdiction is solely based on the very nature of the most heinous crimes affecting all mankind.

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343 See supra
347 Own translation
348 La Constitución Española, de 29 de diciembre 1978, Artículo 24, 1.
351 The Vienna Convention on the Law of Treaties of 22 May 1969, Article 27.
The Tribunal Constitucional then issued international arrest warrants, which the European Parliament voted to support. However, the Guatemalan Constitutional Court rejected the charges and Spain’s claim to universal jurisdiction. To this day the case remains open in Spain. Nonetheless, Spanish courts took testimonies from Ríos Montt’s victims and experts on the matter between 2007 and 2009 which constituted a solid foundation for the later trial of the former dictator in Guatemala. Ríos Montt thus became the first former head of state to stand trial in his native country.\(^{353}\) Again, as with the Pinochet Case, the judicial proceedings in Spain and later in Guatemala held a faint promise towards ending impunity for crimes committed by (former) heads of state. In the case of Ríos Montt the promise remains unfulfilled to this day.

1.1.2.4 The Tibet Case

In previous cases, Spain already experienced a lot of opposition and political pressure because of its exercising the universal jurisdiction principle. This came to a culmination (and turning point) in the Tibet Case, where former Chinese officials (among which former President Jiang Zemin) were accused of severe repression of and grave crimes against the Tibetan population. The People’s Republic of China (China) reprimanded Spain for its interference in China’s internal affairs and even threatened to put serious obstacles in Spain’s way and ruin the bilateral relations between the two countries. After the investigative magistrate’s first rejection of the case\(^{354}\) the Audiencia Nacional judged that Spanish courts could exercise jurisdiction\(^{355}\). Nonetheless, Spain finally caved in and in 2010 the case was dismissed\(^{356}\) because of the reform of the universal jurisdiction legislation.\(^{357}\) The Tibetan people were left in despair, still awaiting justice for the heinous crimes committed against them during the 1980s and 1990s including genocide, torture, forced sterilisation, arbitrary detention ... However, on 10 February 2014 judge Ismael Moreno issued arrest warrants against former Chinese officials, amongst whom Jiang Zemin\(^{358}\). Because of the second reform of the Spanish universal jurisdiction law\(^{359}\) the

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354 Auto del juzgado central de instrucción N° 2, la Audiencia Nacional, Querella contra diversos dirigentes chinos por delitos de genocidio cometidos contra el pueblo tibetano a partir de 1988. Madrid, el 5 de septiembre de 2005.
357 La Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.
359 La Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal.
case was, again, rejected. The victims’ appeal was denied on 6 May 2015 by the Tribunal Supremo. They lodged a subsequent appeal before el Tribunal Constitucional in June 2015, which is still pending.

The Tibet Case is one of the politically sensitive cases that triggered the first, minor, and the second, huge, reform of Spanish universal jurisdiction legislation. The limitations introduced by the 2009 reform included the following: the alleged perpetrator was in Spain, the victims were Spanish or a relevant link to Spain could be confirmed. The subsidiarity of Spanish jurisdiction became a *conditio sine qua non* as well. This reform did not suffice for the Chinese, Israeli and United States governments who wanted to keep their high-profile nationals from being prosecuted in Spain under the principle of universal jurisdiction. They continued exercising diplomatic and political pressure until the 2014 reform, which almost entirely erased the original 1985 law. Especially the imminent arrest of former Chinese leaders caused the Spanish conservative government of Mariano Rajoy to roll over and to almost totally eradicate the principle of universal jurisdiction in Spain.

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361 Sentencia de la Sala Segunda, del Tribunal Constitucional. Madrid, el 6 de mayo de 2015.
364 La Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal.
1.2 Belgium

1.2.1 Belgian legislation concerning universal jurisdiction

The Kingdom of Belgium’s Wet betreffende de bestraffing van de ernstige inbreuken op de Internationale Verdragen van Genève van 12 augustus 1949 en op de Aanvullende Protocollen I en II bij die Verdragen van 8 juni 1977 (Act to implement the Geneva Conventions and the Additional Protocols, War Crimes Act)\(^\text{368, 369}\) cited 20 atrocious acts that were in breach with the Geneva Conventions and the Additional Protocols\(^\text{370}\) and defined these acts as crimes under international law\(^\text{371}\). In 1999 the War Crimes Act was amended and seriously broadened. The Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht (Act Concerning the Punishment of Grave Breaches of International Law)\(^\text{372}\) then included genocide and crimes against humanity. A very broad form of universal jurisdiction was established in Article 7:

The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.

In respect of breaches committed abroad by a Belgian national against a foreigner, no filing of complaint by the foreigner or his family or official notice by the authority of the country in which the breach was committed shall be required.\(^\text{374}\)

Moreover, Article 5, 3 left no room for immunities and Article 9, 3\(^\text{375}\) allowed any person who thought himself/ herself victim of one of the crimes cited in the aforementioned act to initiate a criminal investigation.\(^\text{376}\)


\(^\text{370}\) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Geneva Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva Convention IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts of 8 June 1977 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts of 8 June 1977 (Protocol II).

\(^\text{371}\) See supra.


\(^\text{375}\) Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 10 februari 1999, Artikels 5, 3 & 9, 3.

Belgium’s pioneering role in the field of universal jurisdiction came to an abrupt ending in 2003 after strong diplomatic, economic and political pressure of the world’s most influential players.\textsuperscript{377} The Wet tot wijziging van de wet van 16 juni 1993 betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht (Act amending the 1993 Act Concerning the Punishment of Grave Breaches of International Law)\textsuperscript{378 379} almost completely eradicated the principle of universal jurisdiction in Belgian legislation, as was to happen in Spain ten years later.\textsuperscript{380} The Federal Attorney General\textsuperscript{381} was assigned the role of gatekeeper to the Belgian courts and the access of private citizens who had fallen victim to the aforementioned atrocious acts became almost non-existent. Functional immunities\textsuperscript{382} of foreign (former) heads of states and state officials were recognised as well. Ultimately the Act Concerning the Punishment of Grave Breaches of International Law\textsuperscript{383} was entirely revoked.\textsuperscript{384} Limited provisions concerning universal jurisdiction were added to the Wetboek van Strafvordering, Voorafgaande Titel (Preliminary Title of the Code of Criminal Procedure)\textsuperscript{385 386 387}, the Strafwetboek (Criminal Code)\textsuperscript{388}, the Code of Criminal Procedure and the Gerechtelijk Wetboek (Belgian Judicial Code)\textsuperscript{389 390 391 392}.


\textsuperscript{378} Own translation.

\textsuperscript{379} Wet tot wijziging van de wet van 16 juni 1993 betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 23 april 2003.

\textsuperscript{380} See supra

\textsuperscript{381} Own translation.

\textsuperscript{382} See supra.

\textsuperscript{383} Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 10 februari 1999.

\textsuperscript{384} Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 5 augustus 2003, Artikel 27.


\textsuperscript{386} Wetboek van Strafvordering van 17 november 1808, Voorafgaande Titel. Rechtsvorderingen die uit misdrijven ontstaan, Artikel 7.

\textsuperscript{387} Regarding access to the Belgian courts


\textsuperscript{389} Own translation.

\textsuperscript{390} Strafwetboek van 18 juni 1867, Artikels 43 quater, 70, 91, 136 bis – octies; Wetboek van Strafvordering van 17 november 1808, Artikels 86 bis & quinquies, 90 ter, § 2 and 144 ter, § 1; Gerechtelijk Wetboek van 10 oktober 1967, Artikels 144 ter & quater.

\textsuperscript{391} Regarding the (nature of the) crimes punishable through and the scope of (universal) jurisdiction in Belgium

1.2.2 Case law

1.2.2.1 The Butare Four

In July 1994 complaints were lodged against a number of Rwandan citizens under Article 4 of the Belgian War Crimes Act that encompassed criminal negligence in not stopping or preventing the crimes incorporated in the aforementioned acts. Vincent Ntezimana, Alphonse Higaniro and two Benedictine nuns, Sister Gertrude (Mukangango Consulata) and Sister Maria Kisito (Mukabutera Julienne), known as the Butare Four, were charged and eventually sent to prison by the Cour d’assises de l’arrondissement administrative de Bruxelles-Capitale (Brussels Assize Court) for violations against the 1949 Geneva Conventions and the 1977 Additional Protocols. Previously the Butare Four appeared before the Cour d’appel séant à Bruxelles (Brussels Appeal Court) and afterwards they tried to find a sympathetic response from the Cour de cassation de la Belgique (Belgian Court of Cassation). On 9 January 2002 the Belgian Court of Cassation confirmed the Brussels Assize Court arrest.

During the Brussels Assize court trial the chief prosecutor, Alain Winants, often spoke of the “African Genocide”. He referred to the massacres of the Hutu population in the period from April to July 1994 when the government army was fighting the Rwandan Patriotic Front. However, as Winants, and investigative magistrate Damien Vandermeersch before him, stated, the charge of genocide could not


396 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Geneva Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva Convention IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts of 8 June 1977 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts of 8 June 1977 (Protocol II).

397 Own translation

398 Arrêt de la Cour d’appel séant à Bruxelles, chambre des mises en accusation, du 27 juin 2000.

399 Own translation


be brought against the Butare Four as the crime at hand was only introduced in the reformed Act Concerning the Punishment of Grave Breaches of International Law of 1999.

Thus, Belgium’s first trial based on the 1993 War Crimes Act and the principle of universal jurisdiction ended in a conviction. However, it needs to be noted that in this case there was a clear link with Belgium because of the hate campaign against Belgium by Rwandan public media at the time and the consequent deaths of a considerable number of Belgian citizens as well as the fact that the defendants voluntarily found their way to Belgium. As the ICTR had declined to continue the judicial proceedings started in Belgium and an extradition to Rwanda was not legally possible, Belgium faced, as Luc Reydams put it: “the dilemma of whether to grant asylum to persons suspected of the most serious crimes under international law, or to prosecute them.” Belgium chose the latter.

1.2.2.2. Yerodia

The international arrest warrant issued by investigative magistrate Damien Vandermeersch against Abdoulaye Yerodia Ndombasi (Yerodia), then member of the government of the Democratic Republic of the Congo (the Congo), caused international uproar and led to a case before the ICJ.

The international arrest warrant, instigated by numerous complaints, stated that then Congolese Minister of Foreign Affairs provoked the killings of a huge number of Congolese Tutsi civilians through

402 Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 10 februar i 1999.
404 Also passive personality at play
409 The International Court of Justice, established by the Charter of the United Nations of 26 June 1945.
hateful statements on national television in August 1998. He was charged under the 1993 War Crimes Act, modified by the 1999 Act Concerning the Punishment of Grave Breaches of International Law. The international arrest warrant was issued in absentia.

The Congo filed an application for the ICJ challenging Belgium’s claim to international jurisdiction as well as its ignoring of official immunities through the 1999 Act Concerning the Punishment of Grave Breaches of International Law. The following legal grounds were stated in the Congo’s application:

1. Violation of the principle that a State may not exercise its authority on the territory of another and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations.
2. Violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations.

The ICJ’s ruling in the Yerodia / Arrest Warrant Case was in favour of the Congo and Belgium was ordered to cancel the international arrest warrant against Yerodia. The ICJ judges found with 13 votes to 3 that:

the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violation 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.

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411 Wet van 16 juni 1993 betreffende de bestraffing van ernstige inbreuken op de Internationale Verdragen van Genève van 12 augustus 1949 en op de Aanvullende Protocollen I en II bij die Verdragen, van 8 juni 1977 - Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 10 februari 1999, Artikel 1, §2 en § 3.
412 See supra
414 The International Court of Justice, established by the Charter of the United Nations of 26 June 1945.
418 Idem
The judges thus estimated that Vandermeersch’s international arrest warrant\textsuperscript{419} did not respect the immunity from criminal jurisdiction the Minister of Foreign Affairs had to obtain, as prescribed by international law. The first part of the aforementioned legal grounds in the Congo’s application remained unanswered.\textsuperscript{420}

As Joanne Foakes stated in her article “Immunity for International Crimes? – Developments in the Law on Prosecuting Heads of State in Foreign Courts”:

> The decision by the ICJ in the Yerodia/Arrest Warrant case held that serving heads of state, heads of government and foreign ministers enjoy a broad personal immunity\textsuperscript{421} from the jurisdiction of foreign domestic courts, including the immunity for international crimes. Following the judgement, a number of national courts have dismissed cases alleging the commission of international crimes by incumbent heads of state and heads of government on the ground that immunity \textit{ratione personae}\textsuperscript{422} bars proceedings.\textsuperscript{423}

A number of national courts thus began to dismiss cases implicating sitting heads of state or government. The Belgian courts\textsuperscript{424} did so as well. Moreover, the ICJ judgement\textsuperscript{425} was one of the factors eventually culminating in the revocation of the Act Concerning the Punishment of Grave Breaches of International Law\textsuperscript{426} and the erosion of the principle of universal jurisdiction in Belgium.\textsuperscript{427}

\textbf{1.2.2.3 Sharon}

In June 2001 a complaint was lodged against the head of government of Israel, former Prime Minister Ariel (Scheinermann) Sharon (Sharon). The plaintiffs were survivors of the 1982 Sabra and Shatila massacre in Lebanon where thousands of Palestinian and Lebanese civilians were killed. The UN

\textsuperscript{419} Pro Justitia, Mandat d’arrêt international par défaut, Tribunal de Première Instance de l’arrondissement de Bruxelles, Dossier N° 40/99 du 11 avril 2000.


\textsuperscript{421} See supra

\textsuperscript{422} Idem


\textsuperscript{424} See infra

\textsuperscript{425} International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits), Judgement of 14 February 2002.

\textsuperscript{426} Wet tot wijziging van de wet van 16 juni 1993 betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 23 april 2003.

General Assembly had already condemned the massacre as an “act of genocide”\(^{428}\) and an official Israeli commission of inquiry had stated that Sharon bore responsibility for the heinous crimes committed under his watch.\(^{429} \)\(^{430}\)

On 26 June 2002 the Chambre de mises en accusation de Bruxelles de la Cour d’Appel de Bruxelles (the Indictment Section of the Brussels Appeal Court)\(^{431}\) judged the complaint inadmissible\(^ {432}\). The judges of the Appeal Court stated that the proceedings could not be allowed to continue because a trial in absentia\(^ {433}\) would be contrary to the Convention on Genocide\(^ {434}\), to the Geneva Conventions\(^ {435}\), to the European Convention for the Protection of Fundamental Rights and Freedoms (ECHR)\(^ {436}\) and to the sovereign equality of territorial states as well. The judges did not conclude anything in their judgement about immunities, ratione personae or ratione materiae\(^ {437}\), or about the possible retroactivity of the 1993 and 1999 acts concerning war crimes and crimes against humanity\(^ {438} \)\(^ {439}\).

The Appeal Court judges could have cited the dissenting opinion of Belgian judge Chris Van den Wyngaert in the Arrest Warrant Case. She stated that universal jurisdiction in absentia\(^ {440}\) was possible under (the precedent of) the PCIJ’s judgement in the Lotus Case\(^ {441}. \)\(^ {442}\) They chose not to.

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\(^{431}\) Own translation
\(^{432}\) Arrêt de la Cour d’appel séant à Bruxelles, chambre des mises en accusation, du 26 juin 2002, Sharon & Yaron.
\(^{433}\) See supra
\(^{437}\) See supra
\(^{440}\) See supra
\(^{441}\) Lotus Case, France v. Turkey, Permanent Court of International Justice, The Hague. Judgement of 7 September 1927 (S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)).
The Belgian Court of Cassation did not agree with the *in absentia*-arguments of the Brussels Appeal Court and stated in its arrest of 12 February 2003 that Ariel Sharon could be tried, but only when he was no longer a head of government. Here the immunity *ratione personae* argument of the Arrest Warrant Case was thus invoked.

Despite then Prime Minister Guy Verhofstadt’s assurance that there would be no changes in the Act Concerning the Punishment of Grave Breaches of International Law after the February 2003 arrest of the Belgian Court of Cassation, Belgium got intimidated by the more influential world players and caved in. After complaints against United States General Tommy Franks had been introduced in Belgian courts, Belgium greatly diminished its Act Concerning the Punishment of Grave Breaches of International Law and ultimately withdrew it altogether.

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445 Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht van 10 februari 1999.


1.3 Germany

1.3.1 German legislation concerning universal jurisdiction

In the Federal Republic of Germany the principle of universal jurisdiction, das Weltrechtsprinzip\(^\text{448}\), is enshrined in §6 of the Strafgesetzbuch (StGB) (Penal Code)\(^\text{449}\):

German criminal law applies, irrespective of the law of the locus delicti\(^\text{450}\), to the following acts committed abroad:

(1) genocide (repealed on 30 June 2002)
(2) crimes involving atomic energy, explosives, and radiation in cases under §§307, 308(1) to (IV), 309(II), and 310;
(3) attacks on air and sea traffic (§316c);
(4) traffic in human beings (§180b) and aggravated traffic in human beings (§181);
(5) unauthorised destruction of narcotics;
(6) dissemination of pornography in cases under §184(III) & (IV);
(7) forgery of currency and securities (§§146, 151, and 152), forgery of credit cards and forms for euro cheques (§152a(I) to (IV)), as well as their preparation (§§149, 151, 152, and 152a(V));
(8) economic subsidy fraud (§264);
(9) acts that are to be prosecuted by the terms of an international treaty binding on the Federal Republic of Germany even if they are committed in another country.\(^\text{451}\)

International treaties encompass almost all crimes (not (8)) mentioned above, but even though no real basis for the exercise of universal jurisdiction can be found in certain treaties incorporating the aforementioned crimes, e.g. the Treaty on Genocide\(^\text{452}\), the International Convention for the Suppression of White Slave Traffic (Convention on Traffic in Persons)\(^\text{453}\) and the International Convention for the Suppression of the Circulation of and Traffic in Obscene Materials\(^\text{454}\), German law allows it. The final sentence can be seen as a facilitating clause that was also provided for by Spanish and Belgian law\(^\text{455 456}\).


\(^{450}\) JR place where the crime was committed, J.


\(^{453}\) The International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, amended by the Protocol signed at Lake Success, New York, 4 May 1949.


\(^{455}\) See supra

Germany thus employs a broad version of the principle of universal jurisdiction. Moreover, it also employs a subsidiary co-operative general universality principle or stellvertretende Strafrechtspflege (representation principle or vicarious jurisdiction):

German criminal law also applies to any act committed abroad if the act is a criminal offence under the law of the locus delicti, or if the locus delicti is not subject to any criminal jurisdiction, and if the offender

(1) was German or became a German citizen afterwards
(2) was a foreigner at the time of commission of the offence, is found in Germany and is not extradited - although by the nature of the crime he could have been extradited - because a request for extradition was not made or is rejected, or because extradition is not feasible.

The forum state acts on behalf of the territorial state when exercising this vicarious jurisdiction while applying its own laws. The representation principle requires double criminality and the impossibility of extradition. The punishment should not outweigh the one the alleged culprit would have received in the territorial state.

Unique is the Völkerstrafgesetzbuch (VStGB) (German Code of Crimes against International Law) that came into effect on 30 June 2002, a day earlier than the Rome Statute. It aimed to harmonise German criminal law with international criminal law, encompassing all core crimes mentioned in the (original) aforementioned Rome Statute. It was also meant to boost legal clarity and practical application as well as the advancement of international humanitarian law.

466 Before Kampala, JR
The principle of universal jurisdiction is apparent in §1 of the VStGB and the absence of statutes of limitation in §5.\textsuperscript{469} §§6 to 14 incorporate the different crimes the VStGB envisaged to punish - genocide, crimes against humanity, war crimes, violations of duty of supervision and neglecting to report a crime - as well as the penalties involved.\textsuperscript{470}

1.3.2 Case law

1.3.2.1 Rumsfeld

On 29 November 2004 a petition was filed against the then United States (US) Secretary of Defence, Donald Rumsfeld, resulting from the torture and maltreatment of prisoners in the Abu Ghraib prison complex in Iraq. Earlier that year revolting pictures of Abu Ghraib detainees were published causing worldwide outrage about the methods and morals of United States soldiers at the scene.\textsuperscript{471}

On 10 February 2005 the Generalbundesanwalt (GBA) (the Federal Prosecutor General)\textsuperscript{472} decided that the complaint concerning crimes against humanity, based on the VStGB\textsuperscript{473}, was inadmissible.\textsuperscript{474} In his decision the GBA recognised the universal jurisdiction principle enshrined in the VStGB\textsuperscript{475}, but made use of §153f, (2) 2 of the Strafprozessordnung (StPO) (German Code of Criminal Procedure)\textsuperscript{476} 477 to reject the aforementioned petition. §153f, (2) 2 StPO states:


\textsuperscript{477} Die Strafprozessordnung vom 12. September 1950, §153f, (2) 2.
The Federal Prosecutor General can decide not to proceed to prosecute a crime punishable through §§6 – 14 of the German Code of Crimes against International Law, in the particular cases mentioned in § 153c 1 und 2, when no German citizen has fallen victim to the aforementioned crime.478

The GBA’s decision was confirmed by the Oberlandesgericht Stuttgart (Stuttgart Higher Regional Court)479 on 13 September 2005.480 481

Both decisions were met with a lot of criticism. §153f StPO was meant to prevent forum-shopping in international crime proceedings and to restrict the exercise of universal jurisdiction to justifiable criminal procedures. It was not aimed at creating impunity for gross human rights violations or to justify bowing to political pressure in high profile cases.482

Wolfgang Kaleck, one of the instigators of the petition against Donald Rumsfeld, also reminded that:

Amnesty International criticised the approach of those involved in making the complaints, arguing that they were endangering the fledgling practice of universal jurisdiction in Europe, a practice that should initially be tested out only on less prominent defendants. In its view, it was important to avoid the kind of political confrontations that might lead to set-backs that could cause states to limit the scope of their laws as Belgium had.483

He rebutted these observations stating that:

if the concept of universal jurisdiction did not enable perpetrators of human rights violations from powerful states such as the USA to be brought to justice, it was not a legal practice worth defending. The most useful approach (...) is to work to ensure that the law is applied universally and equally in every case.484

478 Die Strafprozessordnung vom 12. September 1950, §153f, (2) 2; Own translation
As Kai Ambos pointed out, “a decision taken in accordance with §153f has no effect of res iudicata.” Wolfgang Kaleck could thus file a renewed petition, new matters included, and did so on 14 November 2006. In this Strafanzeige (criminal charge) he also mentioned §8 of the VStGB including war crimes in the charge brought against former US Secretary of Defence, Donald Rumsfeld. Besides the Convention against Torture, the third Geneva Convention was mentioned as well. The violations of human rights in Guantánamo Bay, Cuba were also referred to. Kaleck’s pleas fell on deaf ears.

1.3.2.2 Rwabukombe

On 29 December 2015 the Oberlandesgericht Frankfurt (Frankfurt Higher Regional Court) sentenced the former mayor of the Muvumba Commune, Rwanda, Onesphore Rwabukombe (Rwabukombe), to life imprisonment. He was found guilty of having actively participated in the killing of 450 Tutsi men, women and children in Kiziguro and having thus committed the crime of genocide.

Rwabukombe had previously been convicted by the same court to 14 years imprisonment for complicity to genocide. This constituted the first trial featuring universal jurisdiction that led to a

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485 Res iudicata pro veritate habetur: “Kracht van gewijsde”; final and conclusive judgement, JR.


488 Own translation


490 The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984.

491 Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Geneva Convention I II).


conviction in Germany.\(^{498}\) Since Rwabukombe was a former Rwandan mayor and not a US Secretary of Defence, §153f StPO had not been invoked by the GBA.

As with the Butare Four Trial in Belgium\(^{499}\), the ICTR\(^{500}\) had declined to continue the judicial proceedings started in Germany and an extradition to Rwanda had not been deemed feasible since the German authorities doubted the fairness of a trial in Rwanda. Unlike in the Butare Four Case\(^{501}\) there was no real link with the state exercising the universal jurisdiction principle in the Rwabukombe Case.\(^{502}\)

The former Rwandan mayor had appealed the aforementioned February 2014 decision before the Bundesgerichtshof (BGH) (German Federal Supreme Court)\(^{503}\). The BGH judges opted to uphold the first instance judgement but to repeal the decision on Rwabukombe’s individual criminal responsibility and issued a re-trial. They stated that only government and military leaders could be found guilty of genocide, but that everybody could be charged if suspected of this heinous act. They also noted that according to §6 of the VStGB\(^{504}\) the crime genocide could be punished with life imprisonment.\(^{505}\) On 29 December 2015 the Oberlandesgericht Frankfurt judges thus decided to do so.\(^{506}\)

Afterwards Rwabukombe again launched an appeal that is still pending.\(^{507}\)

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\(^{499}\) See supra


\(^{501}\) See supra


\(^{503}\) Own translation


Chapter 2

South and North America

1.1 Argentina

2.1.1 Argentinian legislation concerning universal jurisdiction

The principle of universal jurisdiction was recognised in the Constitución de la Nación Argentina (Argentinian Constitution): \(^{508}\)

\[\text{The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against public international law, the trial shall be held at such place as Congress may determine by a special law.}^{509}\]

It was elaborated upon by the Ley 26.200 de Implementación del Estatuto de Roma (Law implementing the Rome Statute): \(^{510}\)

\[\text{The acts described in articles 6, 7, 8 and 70 of the Rome Statute and any crimes and offences that may hereafter fall within the jurisdiction of the International Criminal Court shall be punishable in the Argentine Republic as provided for in this Act.}^{511}\]

No mention is made that a link with the Argentine Republic is indispensable to start proceedings. Irrespective of the place where the crime was committed and regardless of the nationality of the alleged perpetrator, Argentina thus holds the right to prosecute and judge the most atrocious acts: genocide, crimes against humanity, war crimes and offences against the administration of justice. \(^{512}\)

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\(^{508}\)Own translation


\(^{510}\)Own translation


\(^{512}\)The Rome Statute of the International Criminal Court of 17 July 1998, Articles 6, 7, 8 and 70; La Ley 26.200 de Implementación del Estatuto de Roma, aprobado por la Ley N° 25390 y ratificado el 16 de enero de 2001, de la Corte Penal Internacional, Artículo 2.
2.1.2 Case law

2.1.2.1 The Franco Case

After the death of Francisco Paulino Hermenegildo Teódulo Franco y Bahamonde Salgado Pardo (Franco) a pact of silence was established concerning one of the most atrocious periods in Spanish history, culminating in the Ley 46/1977, de Amnistía (Spain’s Amnesty Law)\(^{513}\) \(^{514}\). This law prevented prosecution of war crimes and crimes against humanity committed during the Spanish civil war and Franco’s gruesome dictatorship. Justice was denied to those who fell victim to the cruel regime of “el Caudillo”\(^{515}\) and to their descendants.\(^{516}\) However, in September 2004, during José Luis Rodríguez Zapatero’s premiership the Comisión Interministerial para el estudio de la situación de las víctimas de la guerra civil y del franquismo (Interministerial Commission for the Examination of the Situation of the Victims of the Spanish Civil War and the Franco Era)\(^{517}\) was installed and on 26 December 2007 the Ley por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura (Ley de Memoria Histórica) (Spanish Law of Historical Memory)\(^{518}\) \(^{519}\), was promulgated.\(^{520}\) This law recognised for the first time the atrocities committed under Franco’s reign, but proved inadequate in effectuating truth-finding, reparation and justice. Moreover, the Ley de Memoria Histórica did neither condemn nor abolish Spain’s Amnesty Law.\(^{521}\)

In 2008 Judge Baltasar Garzón started an investigation into enforced disappearances during the Franco Era, labelling these acts as crimes against humanity. He stated that Franco’s coup d’état was illegitimate and accused “il Caudillo” and 34 of his generals and ministers of crimes against humanity. Garzón also ruled that Spain’s Amnesty Law did not apply considering the nature of the crimes

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\(^{513}\) Own translation

\(^{514}\) Ley 46/1977, de Amnistía de 14 de octubre de 1977.

\(^{515}\) = the chief, like « il Duce » or « the Führer », JR


\(^{517}\) Own translation

\(^{518}\) Own translation

\(^{519}\) La Ley 52/2007, de 26 de diciembre 2007, por la que se reconocen y amplian derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura.


involved. However, his decision was reversed. Garzón met with huge opposition from el Partido Popular (PP) (Spain’s Conservative Party). This culminated first in suspensions for allegedly abusing his powers in the investigation of crimes during the Franco Era and in the Gürtel Case. In February 2012 the Spanish Tribunal Supremo cleared Garzón of having abused his powers in the Franco Era investigation, but convicted him of illegal wiretapping in the Gürtel Case. Garzón was removed from office for 11 years, a judgement he is still contesting before the European Court of Human Rights (ECtHR).

Because the victims of Franco’s bloody regime and their descendants thus were denied truth-finding, reparation and justice in their home country, they turned to the Argentinian judicial system. Their pleas did not fall on deaf ears. Argentinian federal judge María Romilda Servini de Cubría started investigating and first ordered arrest warrants against former government officials during the Franco Era on 23 september 2013. The first extradition requests were denied by the Spanish Audiencia Nacional. On 30 October 2014 judge Servini de Cubría issued detention orders against 20 Spanish citizens for serious crimes under international law committed during the Franco Era (1936-1975). They were accused of murder, torture, enforced disappearances … The enforced disappearances mostly concerned “los niños robados del franquismo”, children of Republicans who were taken away from their families by the Franco regime. Servini de Cubría asked the Argentinian department of Interpol to issue an international arrest warrant in order to prosecute two former ministers, Rodolfo Martin Villa and José Utrera Molina, as well as 18 other less prominent government officials who served under Franco. She mentioned the *aut dedere aut judicare*-provision in the Tratado de Extradición y Asistencia en materia penal entre el Reino de España y la República Argentina.

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524 Own translation
532 See supra
(the Extradition Treaty between the Kingdom of Spain and the Argentine Republic). The Argentinian federal judge invoked the principle of universal jurisdiction to finally bring justice to the many victims of Franco’s bloody dictatorship. Despite huge international pressure Spain refused to extradite the accused.

The aforementioned crimes are punishable through the Código Penal de la Nación Argentina (The Argentinian Penal Code) as well as of

Servini de Cubría based her decision concerning the extradition of Spanish citizens on the Convention on Genocide, on the ICCPR and on the ICCPED, all ratified by Spain. She made use of the jurisprudence of the ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) as well as of

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533 Own translation
534 El Tratado de Extradicción y Asistencia en materia penal entre el Reino de España y la República Argentina, adoptado en Buenos Aires, República Argentina, el 3 de marzo de 1987, Artículos 2, 3 y 11a.
536 Own translation
537 El Código Penal de la Nación Argentina del 30 de septiembre de 1921. Actualizado, Ley 11.179 (T.O. 1984), Artículos 79, 144bis, 1°, 142 1° & 5°, 144ter, §1 y 146; Resolución de María Servini de Cubría, Poder Judicial de la Nación, Juzgado Criminal y Correccional Federal 1 CFP 4591/2010, Buenos Aires, el 30 de Octubre de 2014.
539 The International Covenant on Civil and Political Rights of 16 December 1966, Article 15 and further.
543 The Special Court for Sierra Leone, established by the government of Sierra Leone and the United Nations on 16 January 2002.
the jurisprudence of the Argentinian Corte Suprema de Justicia de la Nación (CSJN) (Argentinian Supreme Court). She also mentioned the Nuremberg principles in her exposition.

The Argentinian federal judge considered the organised child abduction a continuing crime that could be prosecuted at any moment. Servini de Cubría also stated that Spain is a party to the ICCPED and that in 1936 Spain had already accepted the norms incorporated in this covenant through the prevailing customary law. Moreover, the Martens Clause was already in effect and international humanitarian law was rudimentary codified through the Hague Conventions.

Servini de Cubría also emphasised that penal law can be applied in a retroactive manner when international crimes are concerned citing the ICCPR. She unequivocally condemned Spain’s Amnesty Law and stressed the obligation of all states to face responsibility of international crimes and to deal with the past, however heinous it might be. The aforementioned crimes were not to be considered political crimes.

Spain still refuses to extradite the alleged culprits of the aforementioned atrocious acts during the Franco Era. Servini de Cubría has thus asked to be able to interview the accused in Spain. Her demand is pending to date.

To this day, the Argentinian federal judge has not been able to grant the victims of Franco’s bloody dictatorship and their descendants the truth-finding, reparation and justice they have been denied for so long. However, she may offer them a fragment of truth-finding and closure. The local tribunal of

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544 Own translation.
545 The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, signed in London on 8 August 1945, see supra.
548 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907, Preamble: Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.
549 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907.
551 The International Covenant on Civil and Political Rights of 16 December 1966, Article 15, § 2.
Guadalajara has answered favourably to her request to exhume victims’ bodies. The first exhumation started on 19 January 2016.\textsuperscript{554} Meanwhile, through orders of Spanish judges, exhumations have finally begun in “el valle de los caídos” (the valley of the fallen)\textsuperscript{555}. As the Scilingo Case\textsuperscript{556} instigated the truth-finding trials in Argentina\textsuperscript{558} that urged Garzón to start investigating the crimes of the Franco Era\textsuperscript{559}, the Franco Case could maybe instigate truth-finding trials in Spain. There is also hope for a more effective Ley de Memoria Histórica with a much broader scope\textsuperscript{560}.

\textsuperscript{555} Own translation
\textsuperscript{556} Á. VÁZQUEZ, “Un juez abre la puerta a exhumar los cadáveres en el Valle de los Caídos”, El Mundo, el 9 de mayo 2016, http://www.elmundo.es/espana/2016/05/09/57306a462601c3e178b4579.html
\textsuperscript{557} See supra
\textsuperscript{559} Idem, p. 120.
2.2 The United States of America

2.2.1 United States legislation concerning universal jurisdiction

The Code of Crimes and Criminal Procedures of the United States of America (US(A))\textsuperscript{561} does not exactly state its scope and limits. In the 19\textsuperscript{th} and early 20\textsuperscript{th} century the US Supreme Court\textsuperscript{562} regularly insisted on the common law rule of the prevailing territoriality principle within criminal law.\textsuperscript{563} Nowadays, the situation is completely reversed. Although the scope of US criminal law seems to be less broad compared to continental European countries, US courts are often eager to proclaim the possibility of extraterritorial jurisdiction.\textsuperscript{564}

Luc Reydams mentions the changed position of the US government regarding the universal jurisdiction principle. Totally opposed during the drafting of the Convention on Genocide\textsuperscript{565}, the US unequivocally backed the universal jurisdiction provision in the Convention against Torture\textsuperscript{566}.\textsuperscript{567}

The faculties of the US Congress need to be stressed as well. According to the US Constitution “The Congress shall have power (...) to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”\textsuperscript{568} \textsuperscript{569}

The USA was a forerunner of universal civil jurisdiction with the Alien Tort Statute (ATS) of 1789: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{570} Two centuries later, the Torture Victim Protection Act (TVPA) of 1991\textsuperscript{571} confirmed the USA’s role on the forefront of universal civil jurisdiction.\textsuperscript{572} Universal tort jurisdiction is subject to the rules of private international law.\textsuperscript{573} Similar to universal criminal jurisdiction, universal tort jurisdiction can be exercised regardless

\textsuperscript{561} The United States Code of 1926: Title 18 – Crimes and Criminal Procedure.
\textsuperscript{562} E.g. Decision of the US Supreme Court, American Banana Co. v. United Fruit Co., 213 U.S. 347, 26 April 1909.
\textsuperscript{564} Idem, p. 212.
\textsuperscript{566} The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.
\textsuperscript{570} The United States Code of 1926: Title 28, Part IV, Chapter 85, § 1350 - Alien’s Action for Tort.
\textsuperscript{571} The United States Code of 1926: Title 28, Part IV, Chapter 85, § 1350 – Torture Victim Protection Act.
of the place where the crime was committed and notwithstanding the nationality of the alleged culprit. The very nature of the heinous crime to be prosecuted justifies the exercise of universal tort jurisdiction.574

2.2.2 Case law

2.2.2.1 Belfast

On 6 December 2006, Roy McArthur Belfast Jr (Belfast), also known as "Chuckie Taylor", Charles Taylor Jr, Charles Taylor II and Charles McArthur Emmanuel Taylor, was charged under the US Torture Act (or Extraterritorial Torture Statute) of 1994575.576 The son of former Liberian president Charles McArthur Ghankay Taylor (Charles Taylor) was indicted with 8 offences including torture, conspiracy to torture and using a firearm in furtherance of a violent crime. Allegedly, Belfast, as leader of the Liberian Anti-Terrorist Unit, had thrown scalding water over his victims, held burning irons to their skin, rubbed salt in their open wounds ...577

Belfast contested the aforementioned indictment, stating that the foundation of the charges, §2340A of the Torture Act578, was unconstitutional. He argued that Section 8 of the US Constitution did not contain a power that supported the Torture Act and that this act disregarded sovereign immunity. He also stated that his right to a fair and speedy trial was infringed and the principle of due process violated, which contravened with the 5th and 6th Amendment of the US Constitution579. Belfast likewise made use of the 5th Amendment to dispute the extraterritorial application of the Torture Act. Moreover, he asserted that the broad scope of the Torture Act, with its focus on conduct, transgressed the correct implementation of the Convention against Torture580. Here, he relied on Article 1, Section 8, § 18 of the US Constitution:

The Congress shall have power (...) to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.581

574 Idem, p. 135.
579 The Constitution of the United States of 17 September 1787, 5th and 6th Amendment.
580 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.
581 The Constitution of the United States of 17 September 1787, Article 1, Section 8, § 18.
Belfast’s motion was denied on 5 July 2007.\footnote{582}{M. Lee, S.J. Mallesons, M. Sherman, “Universal jurisdiction: United States v Roy M Belfast”, Humanitarian Law Perspectives – Australian Red Cross, 2010, p. 5-7; Order on Defendant’s Motion to Dismiss the Indictment, United States of America v. Roy M. Belfast Jr, Case N° 06/20758, United States District Court, Southern District of Florida. Miami, 5 July 2007.}

Belfast contested that US Congress disposed of the constitutional power to execute a law based on the principle of universal jurisdiction applicable no matter where the alleged crime was committed. The Court of the Southern District of Florida dodged the question at the core of Belfast’s motion and claimed jurisdiction on the fact that Belfast was still considered to be a US citizen.\footnote{583}{Idem, M. Lee, S.J. Mallesons, M. Sherman, “Universal jurisdiction: United States v Roy M Belfast”, Humanitarian Law Perspectives – Australian Red Cross, 2010, p. 4 & 7.} The Taylor Case shows that the USA is only willing to exercise universal criminal jurisdiction when traditional jurisdiction principles such as territority or, in this matter, nationality, seem to apply.\footnote{584}{Order on Defendant’s Motion to Dismiss the Indictment, United States of America v. Roy M. Belfast Jr, Case N° 06/20758, United States District Court, Southern District of Florida. Miami, 5 July 2007; L. Richardson Brownlee, “Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles “Chuckie” Taylor JR”, Washington University Global Studies Law Review, Vol. 9, Issue 2, 2010, p. 336.}

The USA had to save face as well and strike a conservative pose regarding the exercise of universal jurisdiction. After having bullied other states, like Spain and Belgium, into diminishing the scope of their universal jurisdiction legislation or even into completely abolishing it\footnote{585}{See supra}, the USA could hardly administer the same sort of absolute universal jurisdiction\footnote{586}{L. Richardson Brownlee, “Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles “Chuckie” Taylor JR”, Washington University Global Studies Law Review, Vol. 9, Issue 2, 2010, p. 336.} as these aforementioned states.

On 9 January 2009, Belfast was eventually convicted to 97 years of imprisonment by Florida United States district court judge Cecilia Maria Altonaga for crimes related to torture, committed in Liberia in the period of April 1999 to July 2003.\footnote{587}{Judgement, United States of America v. Roy M. Belfast Jr, Case N° 06/20758, United States District Court, Southern District of Florida. Miami, 9 January 2009.} Belfast subsequently launched an appeal. The judgement and sentence were confirmed on 18 September 2009\footnote{588}{Brief for the United States, on Appeal for the United States District Court, Southern District of Florida, United States of America v. Roy M. Belfast Jr, Appeal N° 09-10461-AA. In the United States Court of Appeals for the Eleventh Circuit, Miami, 18 September 2009.} and 15 July 2010\footnote{589}{Brief for the United States, on Appeal for the United States District Court, Southern District of Florida, United States of America v. Roy M. Belfast Jr, Appeal N° 09-10461-AA. In the United States Court of Appeals for the Eleventh Circuit, Miami, 15 July 2010.}.
2.2.2.2 Sosa

The US Supreme Court decided on the scope of the ATS on 29 June 2004 in Sosa v. Álvarez-Machín.\textsuperscript{590}

In April 1990, the US Drug Enforcement Administration (DEA) had hired José Francisco Sosa (Sosa) and other Mexican citizens to kidnap Humberto Álvarez-Machín (Álvarez), another Mexican national, after having failed to obtain his extradition from the Mexican government. The abduction thus took place on Mexican soil and Álvarez was brought to Texas where he was arrested. The US government wanted Álvarez to stand trial in the USA for the kidnapping and murder of a DEA agent and his Mexican pilot in February 1985.\textsuperscript{592}

On 18 October 1991 the United States Court of Appeals for the Ninth Circuit dismissed the indictment and ordered the repatriation of Álvarez to Mexico.\textsuperscript{593} Afterwards the US Supreme Court reversed this judgement on 15 June 1992.\textsuperscript{594} The case was retried and the District Court for the Central District of California acquitted Álvarez’s motion for judgment of acquittal.\textsuperscript{595}

After having returned to Mexico, Álvarez started a civil action. He sued Sosa, a Mexican citizen, as well as DEA operative Antonio Garate-Bustamante, four DEA agents and five unnamed Mexican civilians. Moreover, he indicted the USA for false arrest, demanding damages under the Federal Torts Claims Act (FTCA).\textsuperscript{596} He filed charges against Sosa (and others) for violating the law of nations under the ATS.\textsuperscript{597, 598}

\textsuperscript{590} The United States Code of 1926: Title 28, Part IV, Chapter 85, § 1350 - Alien’s Action for Tort, see supra.
\textsuperscript{593} Idem
\textsuperscript{596} The United States Code of 1926: Title 28, Part IV, Chapter 171 – Tort Claims Procedure.
\textsuperscript{597} The United States Code of 1926: Title 28, Part IV, Chapter 85, § 1350 - Alien’s Action for Tort.
The District Court for the Central District of California allowed the Government’s motion to dismiss the FTCA claim, but granted summary judgement and $25,000 in damages to Álvarez on the ATS claim. The United States Court of Appeals for the Ninth Circuit afterwards asserted the ATS judgement, but abated the dismissal of the FTCA claim.\textsuperscript{599}

The US Supreme Court finally settled the matter on 24 June 2004. In relation to the ATS the Court dismissed Álvarez’ claim and ruled:

\begin{quote}
that federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when §1350 was enacted.\textsuperscript{600}
\end{quote}

As Cedric Ryngaert interprets the US Supreme Court’s judgement:

\begin{quote}
While the Court did not provide a list of what precise norms are actionable, it is fair to say that at this point in time possibly only the grossest violations of human rights, or perhaps only violations of jus cogens norms also giving rise to universal criminal jurisdiction, qualify as norms with a “definite content and acceptance among civilized nations” giving rise to universal tort jurisdiction under the ATS.\textsuperscript{601}
\end{quote}

\subsection*{2.2.2.3 Ali}

On 7 November 2008, Somali pirates attacked and caught hold of the M/V CEC Future, a Bahamian ship with a Danish owner, in the Gulf of Aden, close to the Horn of Africa. The Estonian, Georgian and Russian crew was held hostage and a ransom demand was made. On 4 January 2009, Clipper Group A/S, the owner of the vessel, paid the required 1,7 million US dollar. A few days later the pirates left the ship.\textsuperscript{602}

Two years later, Somali national Ali Mohamed Ali (Ali) was arrested on US soil while on his way to attend a conference on education in Raleigh, North Carolina. He was accused of having aided Somali pirates to hijack the aforementioned ship. Fluent in English, he had negotiated on behalf of the pirates to obtain the ransom they wanted from the Danish company that owned the ship. Ali boarded the ship a few days after it was seized and left the vessel after the pirates had got hold of the ransom money.\textsuperscript{603}

\textsuperscript{603} Idem
In the USA, Ali was indicted with conspiracy to commit piracy\textsuperscript{604}, piracy and aiding and abetting\textsuperscript{605}, conspiracy to hostage taking\textsuperscript{606} and hostage taking and aiding and abetting\textsuperscript{607}. Ali argued that his indictment was legally unsound, under domestic law as well as under international law. The court partly accepted and partly refused Ali’s motion.\textsuperscript{608}

With regard to the piracy charges, the United States District Court, District of Columbia, was of the opinion that universal jurisdiction over piracy did not include conspiracy to commit piracy. The court stated that:

The law of nations does not recognize conspiracy to commit piracy as a universal jurisdiction offense. Thus, because the universality theory is the only basis for extraterritorial jurisdiction over Ali’s alleged acts of piracy, his prosecution for conspiracy to commit piracy would violate international law.\textsuperscript{609}

The court also interpreted UNCLOS, Article 101\textsuperscript{610}. The judges concluded that universal jurisdiction over the crime of piracy is only applicable when the crime has been committed on the high seas and not when it has been committed in foreign countries. The court thus decided that Ali could only be indicted for piracy and aiding and abetting in so far as these acts were committed on the high seas.\textsuperscript{611}

However, on 11 June 2013 the appeal court reversed this decision. The United States Court of Appeals for the District of Columbia Circuit stated that the application for piracy and aiding and abetting piracy concerning acts within territorial waters was envisaged in UNCLOS\textsuperscript{612}. The appeal court also argued that the US Congress had explicitly characterised piracy in terms of the law of nations. The court agreed with the district court on the conspiracy charges. Considering the hostage taking counts, the appeal court also reversed the District Courts dismissal of the charges, stating that the relevant statute\textsuperscript{613} unquestionably proscribed Ali’s actions and that there was no doubt about its extraterritorial application either.\textsuperscript{614}

\textsuperscript{604} The United States Code of 1926: Title 18, Part I, Chapter 19, § 371 - Conspiracy.
\textsuperscript{605} The United States Code of 1926: Title 18, Part I, Chapter 81, § 1651 – Piracy under the law of nations.
\textsuperscript{606} The United States Code of 1926: Title 18, Part I, Chapter 55, § 1203 (a) – Hostage taking.
\textsuperscript{607} The United States Code of 1926: Title 18, Part I, Chapter 55, § 1203 (a) – Hostage taking.
\textsuperscript{609} Idem
\textsuperscript{613} The United States Code of 1926: Title 18, Part I, Chapter 55, § 1203 (a) – Hostage taking.
A jury eventually acquitted Ali of the charges of piracy and afterwards the US attorney for the district of Columbia decided to drop the charges of hostage taking.\textsuperscript{615}

Chapter 3

Africa

3.1 Senegal

3.1.1 Senegalese legislation concerning universal jurisdiction

Originally, where extraterritorial jurisdiction was concerned, Senegalese legislation seemed restricted to active personality\(^{616}\) and protective jurisdiction\(^{617,618}\). The Code de la Procédure Pénale de la République du Sénégal (Senegalese Code of Criminal Procedure)\(^{619}\) did not provide for passive personality jurisdiction\(^{620}\) nor did it enclose a facilitating clause for crimes that are to be prosecuted by the terms of an international treaty.\(^{621}\) As mentioned before, the German Criminal Code e.g. contains such a clause.\(^{622}\)

However, a basis for universal jurisdiction could\(^{623}\) and can be found in the Constitution de la République du Sénégal\(^{624}\):

> Treaties or agreements that are duly ratified or approved of, shall, from the time of their publication, have a superior authority in relation to domestic legislation. For every treaty and agreement, this is subject to the other party having implemented the treaty or agreement as well.\(^{625,626}\)

In 2007, Senegal accepted a new law that enabled Senegalese courts and tribunals to exercise jurisdiction over crimes against humanity, war crimes, torture and genocide, regardless of the place where these crimes were committed.\(^{627}\). This law adapted the Senegalese Code of Criminal Procedure

\(^{616}\) See supra

\(^{617}\) See supra

\(^{618}\) Le Code de la Procédure Pénale de la République de Sénégal du 21 juillet 1965, Articles 664 & 669.

\(^{619}\) Own translation

\(^{620}\) See supra


\(^{622}\) See supra

\(^{623}\) La Constitution de la République du Sénégal du 22 janvier 2001, old Article 79.


\(^{625}\) Own translation

\(^{626}\) La Constitution de la République du Sénégal du 22 janvier 2001, Article 98.

\(^{627}\) La Loi N° 207-05 du 12 février 2007, modifiant le Code de la Procédure Pénale relative à la mise en œuvre du Traité de Rome instituant la Cour Pénale Internationale.
to the Rome Statute\textsuperscript{628} \textsuperscript{629}. Thereafter the Senegalese constitution was modified to allow exceptions to the non-retroactivity-principle for genocide, war crimes and crimes against humanity.\textsuperscript{630}

3.1.2 Case law

3.1.2.1 Habré

After 7 Chadians had launched a complaint, Hissène Habré (Habré), the former dictator of Chad (1982-1990), was indicted\textsuperscript{631} for crimes against humanity, torture, ‘barbarous’ acts and forced disappearances on 3 February 2000.\textsuperscript{632} During his reign, supported by the USA and France as well as various African states, Habré gave the most important political positions to fellow Goranes, his own ethnic group. He also installed his own personal army, the Sécurité Présidentielle (SP), mainly consisting of Goranes. Through his political party, the Union Nationale pour l’Indépendance et la Révolution (UNIR) (National Union for Independence and Revolution)\textsuperscript{633}, he created a personality cult and transformed himself into a godlike figure. He held his people in check and silenced discordant voices through the Direction de la Documentation et de la Sécurité (DDS) (the Documentation and Security Directorate)\textsuperscript{634}. The DDS consisted of 23 branches and one of these branches was the Brigade Spéciale d’Intervention Rapide (Special Rapid Action Brigade)\textsuperscript{635}. The soldiers of this brigade were ordered to arrest, torture, murder and carry out large-scale (sexual) violence and killings. Another branch was the Service Mission Terroriste (SMT) (Terrorist Mission Service)\textsuperscript{636}. The SMT had to persecute and annihilate opponents. They abducted and murdered a great many people following Habré’s orders. Thousands of people were killed during Habré’s short but grisly reign.\textsuperscript{637}

\begin{thebibliography}{9}
\bibitem{628} The Rome Statute of the International Criminal Court on 17 July 1998.
\bibitem{629} Idem
\bibitem{634} Idem
\bibitem{635} Ibidem
\bibitem{636} Own translation
\end{thebibliography}
The aforementioned complaints and indictment were based on the Convention against Torture\textsuperscript{638} and Senegal’s supposed duty to prosecute the most heinous crimes regardless of where these crimes were committed and irrespective of the nationality of the alleged culprit.\textsuperscript{639}

Habré appealed before the Chambre d’Accusation de Dakar de la Cour d’Appel de Dakar (the Indictment Section of the Dakar Appeal Court)\textsuperscript{640}.\textsuperscript{641} He stated three grounds for dismissal of the charges: lack of jurisdiction under domestic law, violation of the legality principle and prescription under Senegalese law. The erstwhile despot did not call on immunity as a former head of state nor did he mention that Chad had not joined the Convention against Torture\textsuperscript{642} at the time when the aforementioned crimes were allegedly committed. His appeal was granted on the grounds of a lack of jurisdiction under domestic law. Neither the violation of the legality principle nor the prescription under Senegalese law were alluded to by the Dakar Appeal Court.\textsuperscript{643}

The decision of the Dakar Appeal Court was contested by the Advocate-General.\textsuperscript{644} He stated that in granting the appeal, the Court was bypassing the Senegalese Constitution\textsuperscript{645} as well as violating Article 5,2 of the Convention against Torture\textsuperscript{646}. The Cour de Cassation du Sénégal (Senegalese Court of Cassation)\textsuperscript{647} denied the appeal.\textsuperscript{648}

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\textsuperscript{638} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Articles 5, 2 & 7.


\textsuperscript{640} Own translation


\textsuperscript{642} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.


\textsuperscript{645} La Constitution de la République du Sénégal du 22 janvier 2001, Article 79 (now, amended, Article 98).

\textsuperscript{646} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Articles 5, 2.

\textsuperscript{647} Own translation

On 30 November 2000, victims of Habré’s repressing regime launched a complaint in Belgium based on Belgium’s universal jurisdiction regime at the time. They accused the former dictator of crimes against humanity, torture, arbitrary detention and enforced disappearances. Judge Daniel Fransen issued an international arrest warrant on 19 December 2005 and demanded the extradition of Habré to Belgium. On 25 November 2005, the Dakar Appeal Court claimed that it had no jurisdiction to grant or refuse the extradition request and sent the case to the African Union (AU) or Organisation on African Unity. The AU rejected Belgium’s extradition demand. They chose to let Habré’s trial take place in Senegal. The aforementioned modifications to the Senegalese Code of Criminal Procedure and the Senegalese constitution were thus in order.

Afterwards Senegal was repeatedly reminded of its duty to prosecute Habré and to honour its agreement to establish an ad hoc International Tribunal backed by the AU. On 20 July 2012, this culminated in the ICJ judgement obliging Senegal to extradite or prosecute the former dictator of Chad. Thereafter, the Chambres africaines extraordinaires (the Extraordinary African Chambers (EAC)) were finally established through an agreement between the African Union and the government of Senegal on 8 February 2013. The EAC formed an integral part of the Senegalese judicial system, they were established ad hoc and their jurisdiction was limited to a specific period and territory. The EAC had to exercise universal jurisdiction applying both international and domestic law. The EAC were internationalised through an agreement with the African Union, not with the UN, but they received worldwide monetary support. AU judges acted as presidents of both the trial and appeals chambers.

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653 See supra
655 The International Court of Justice, established by the Charter of the United Nations of 26 June 1945.
657 See supra
The trial against Habré, incarcerated since July 2013, began on 20 July 2015, but was immediately postponed when the former dictator’s lawyers decided to boycott the proceedings. On 30 May 2016 Habré was condemned to life imprisonment. He was convicted for crimes against humanity, including rape, forced slavery, murder, summary execution, torture and enforced disappearances. Habré was also sentenced for the autonomous crime of torture. Habré was penalised for war crimes as well: murder, torture, cruel inhumane treatment and illegal detention. Habré was the first former head of state to be convicted through the exercise of universal jurisdiction. Moreover, on 29 July 2016 the EAC rewarded reparation to thousands of Habré’s victims.

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661 Chambre extraordinaire africaine d’Assises à la Cour d’Appel de Dakar. Ministère Public contre Hissène Habré. Jugement du 30 mai 2016; Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990, Articles 10(2), 6(a), (b), (f) & (g).
Part 3

A future for universal jurisdiction over serious crimes under international law?

“Justice consists not in being neutral between right and wrong, but finding out the right and upholding it, wherever found, against the wrong.”

Theodore Roosevelt

As mentioned at the outset of this Master Thesis, the jurisdiction of a state within its own territory is considered complete and absolute in international law.\footnote{A.M. JIMÉNEZ, M.M. VERGARA CÉSPÉDES, La Jurisdicción Universal como Instrumento para la Protección de Pueblos Indígenas – Una guía práctica para defensores de derechos humanos, Copenhagen, IWGIA, 2015, p. 11; M.N. SHAW, International Law, 7th Edition, Cambridge, Cambridge University Press, 2014, p. 474; K. AMBOS, Internationales Strafrecht – Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht und Rechtshilfe, 4. Auflage, München, C.H. Beck Verlag, 2014, p. 31-33; M. DIXON, Textbook on International Law, Oxford, Oxford University Press, 2007, p. 143.} This is inherent to a state’s sovereignty and to this state being an internationally recognised legal person. The United Nations itself has to refrain from enforcing jurisdiction within the territory of a sovereign state as we can read in the Charter of the United Nations (UN Charter)\footnote{Idem, p. 143-144.}, but can do so if it is required to take action with respect to threats to the peace, breaches of the peace and acts of aggression\footnote{Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression; Own emphasis.}

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII:\footnote{Idem, p. 142.}

Only in exceptional cases, e.g. if a state has committed serious crimes under international law, can situations belonging to the domestic jurisdiction of a state constitute the subject matter of international claims.\footnote{M. DIXON, Textbook on International Law, Oxford, Oxford University Press, 2007, p. 144.} The crimes discussed in this Master Thesis amount to serious crimes under international law and can thus form the subject matter of international claims. As the drafters of the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences\footnote{X, The Cairo - Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective, Africa Legal Aid, Accra – The Hague, Pretoria. Meetings in Cairo, 30-31 July 2001, and Arusha, 18-21 October 2002.} stated: “gross human rights offences are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction”\footnote{Idem, Principle 6.}

Moreover, the principle of non-intervention does not prevent a state from exercising extraterritorial prescriptive jurisdiction or a well-balanced extraterritorial enforcement jurisdiction. It only impedes that state from exercising an excessive extraterritorial enforcement jurisdiction:\footnote{C. RYNGAERT, Jurisdiction in International Law, 2nd Edition, Oxford, Oxford University Press, 2015, p. 154-156.}
The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations. 676

Furthermore, the Lotus Principle entails that international law allows every regulation it does not explicitly proscribe677:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, (international law) leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. 678

Concerning the aforementioned discretion left to sovereign states the PCIJ679 held that:

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty. 680

Additionally, the exercise of universal jurisdiction is often a last resort for the victims of jus cogens681 international crimes. E.g. in the Franco Case682, the victims of Franco’s bloody regime and their descendants were continuously denied truth-finding, reparation and justice in their home country. Turning to the Argentinian judicial system constituted their last hope at finding justice and closure. Fortunately, their pleas did not fall on deaf ears with Argentinian federal judge María Romilda Servini


679 The Permanent Court of International Justice, established by the Covenant of the League of Nations of 28 June 1919.


681 See supra

682 See supra
de Cubría. In this case, Argentina clearly did not overstep the limits of its jurisdiction nor did it exercise excessive extraterritorial jurisdiction. Servini de Cubría just - and justly - tries to combat the impunity that reigned during Franco’s bloody dictatorship and is still in force to date in contemporary Spain.

2. Can conflicts of jurisdiction be deflected?

As the drafters of the Princeton Principles on Universal Jurisdiction suggested, for the resolution of competing national jurisdictions the following criteria have to be taken into account:

(a) multilateral or bilateral treaty obligations;
(b) the place of commission of the crime;
(c) the nationality connection of the alleged perpetrator to the requesting state;
(d) the nationality connection of the victim to the requesting state;
(e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
(f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
(g) the fairness and impartiality of the proceedings in the requesting state;
(h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
(i) the interests of justice.

Concerning the complementarity and cooperation with the ICC and other international criminal justice mechanisms, the authors of the Madrid-Buenos Aires Principles on Universal Jurisdiction added:

1. The governing principle of complementarity between the International Criminal Court and national courts shall also apply to those applying Universal Jurisdiction.

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684 Idem, Principle 8.
687 Ibidem, Principle 8.
690 Idem
2. States shall cooperate, through their national courts and the exercise of Universal Jurisdiction, with the International Criminal Court and other international criminal justice mechanisms in the investigation and/or prosecution of international crimes.  

Both suggestions to legislators and magistrates all over the world have important value. In my opinion, both the principles of subsidiarity and of supremacy should also be honoured.

The principle of subsidiarity links up with the principle of complementarity enclosed in Principle 12 of the Madrid-Buenos Aires Principles on Universal Jurisdiction and Article 17, 1-3 of the Rome Statute. It entails that a state shall only investigate and prosecute serious crimes under international law committed in and/or by another state if that state fails to respond to its duties under national and international law. When that territorial state neglects to scrutinise these heinous crimes and declines the task of bringing the alleged culprit(s) to justice, other states can and should step in to put an end to impunity. Spain, Belgium and Argentina were some of the countries that acted on this principle, as laid out in the aforementioned cases of Scilingo, Pinochet and Ríos Montt in Spain, of Yerodia and Sharon in Belgium and in the Franco Case in Argentina. Sometimes a state may be willing, but not able to investigate and prosecute atrocious acts committed in its territory. E.g. in the Rwabukombe Case an extradition to Rwanda was not deemed feasible because the German authorities doubted the fairness of a trial in Rwanda.

The principle of supremacy requires that a state can only exercise universal jurisdiction if no international court or tribunal has claimed jurisdiction or expressed its competence to investigate and prosecute the matter or has refused to continue legal actions. In the Butare Four Case the ICTR declined to carry forward the judicial proceedings started in Belgium and so, Belgium faced, as Luc Reydams put it: “the dilemma of whether to grant asylum to persons suspected of the most serious

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692 Ibidem, Principle 12.
693 A.M. JIMÉNEZ, M.M. VERGARA CÉSPEDES, La Jurisdicción Universal como Instrumento para la Protección de Pueblos Indígenas – Una guía práctica para defensores de derechos humanos, Copenhagen, IWGIA, 2015, p. 32-33.
694 Idem, p. 33-34.
697 A.M. JIMÉNEZ, M.M. VERGARA CÉSPEDES, La Jurisdicción Universal como Instrumento para la Protección de Pueblos Indígenas – Una guía práctica para defensores de derechos humanos, Copenhagen, IWGIA, 2015, p. 32-33.
698 See supra
699 See supra
700 See supra
701 See supra
702 See supra
703 A.M. JIMÉNEZ, M.M. VERGARA CÉSPEDES, La Jurisdicción Universal como Instrumento para la Protección de Pueblos Indígenas – Una guía práctica para defensores de derechos humanos, Copenhagen, IWGIA, 2015, p. 33-34.
704 See supra
crimes under international law, or to prosecute them." Fortunately, Belgium opted for the latter. In the Rwabukombe Case Germany did the same. The ICTR had also forgone on continuing the judicial proceedings started in Germany.

In my opinion - and as mentioned at the beginning of this Master Thesis - for a state to be able to exercise universal jurisdiction, the principle of universal jurisdiction has to be incorporated in the domestic legislation of that particular state. Punitive measures for the crime that has to be punished need also to be foreseen in the domestic legislation of the aforementioned state. I deem it difficult and controversial to exercise universal jurisdiction without the principle and the appropriate punitive measures being consolidated in domestic legislation as proposed e.g. in the Princeton Principles on Universal Jurisdiction and the Madrid-Buenos Aires Principles on Universal Jurisdiction. However, the provisions foreseen in Articles 11 and 12 of the Princeton Principles have great value and should be honoured:

**Principle 11 -- Adoption of National Legislation**

A state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.

**Principle 12 -- Inclusion of Universal Jurisdiction in Future Treaties**

In all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law as specified in Principle 2(1), states shall include provisions for universal jurisdiction.

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707 See supra


709 See supra


E.g. concerning the adoption of national legislation, in the Habré Case\textsuperscript{715}, Senegal modified its Code of Criminal Procedure and its constitution\textsuperscript{716} in order to facilitate the prosecution and judgement of Hissène Habré by the Extraordinary African Chambers\textsuperscript{717}.

The best example of codifying the principle of universal jurisdiction regarding serious crimes under international law is the Völkerstrafgesetzbuch (VStGB)\textsuperscript{718}. This code of crimes against international law came into effect on 30 June 2002, a day earlier than the Rome Statute\textsuperscript{719}. It harmonises German criminal law with international criminal law, encompassing all core crimes mentioned in the (original)\textsuperscript{720} aforementioned Rome Statute\textsuperscript{721} as well as the penalties involved. It boosts legal clarity, practical application and the advancement of international humanitarian law.\textsuperscript{722}

On the other hand, according to me - and as mentioned at the outset of this Master Thesis - a link with the forum state is not indispensable in order to exercise universal jurisdiction. Where serious crimes under international law have taken place and who has committed them does not matter in the case of the universal jurisdiction principle.\textsuperscript{723} The alleged culprit has violated universally recognised rights and thus, the state exercising jurisdiction should not do this in its own interest or in the interest of one of
its nationals but in the interest of the international community as a whole.\textsuperscript{724} A state prosecutes a crime committed abroad because it wants to defend and assure the safety and security of all mankind.\textsuperscript{725}

A link with the forum state was thought necessary in the cases against Scilingo, Pinochet and Ríos Montt and in the Tibet Case (Spain) and the Butare Four Case (Belgium).\textsuperscript{726} In the Belfast Case the USA showed that it is only willing to exercise universal criminal jurisdiction when traditional jurisdiction principles such as territoriality or nationality apply.\textsuperscript{727} This is not what constitutes the core of the universal jurisdiction principle. As the judges of Spain’s Constitutional Court finally ruled in the Ríos Montt Case\textsuperscript{728}, universal jurisdiction is solely based on the very nature of the most heinous crimes affecting all mankind\textsuperscript{729}.

3. Can existing amnesty legislation be tackled?\textsuperscript{730}

As rightfully pointed out in the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences\textsuperscript{731}:

> While amnesties for gross human rights offences granted to individuals may, in certain cases, be politically expedient, such amnesties are generally incompatible with international law and do not have any effect outside the borders of the country in which they are granted; nor do they absolve other States of their responsibility and their duty to prosecute or to transfer for trial such individuals.\textsuperscript{732}


\textsuperscript{726} See supra
\textsuperscript{727} See supra
\textsuperscript{728} See supra


Moreover, the prosecution and judgement of culprits of the most atrocious crimes through the principle of universal jurisdiction can serve as an incentive to abolish amnesty legislation in the state where the crimes were committed. This happened after the Spanish Audiencia Nacional found Scilingo guilty of murder, illegal detention and torture and sent him to prison for 640 years on 5 April 2005. On 14 June 2005 the Argentinian Supreme Court decided to abolish the country’s amnesty laws. Furthermore, no matter whether the amnesty legislation was enacted by the alleged culprit of serious crimes under international law (e.g. the Pinochet Case) or by the subsequent government (e.g. in the Scilingo and Franco Cases), this sort of legislation is, in my opinion, incompatible with international law and should be abolished. It certainly cannot constitute an impediment to prosecute the gravest of crimes through the principle of universal jurisdiction.

4. Can the obstacle of personal and functional immunities be overcome?

As befittingly brought up in the Princeton Principles on Universal Jurisdiction:

> With respect to serious crimes under international law (…), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

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735 See supra
736 See supra
737 See supra
738 See supra
In the Pinochet Case\textsuperscript{742}, the British House of Lords\textsuperscript{743} judged on 24 November 1998 that an exception to functional immunity\textsuperscript{744} of (former) heads of state was possible where the international crime of torture was involved. The exception identified in the Pinochet Case should and does include other core crimes such as genocide, war crimes and crimes against humanity.\textsuperscript{745}

Since the Pinochet Case there has been an emergence of a coherent and generally accepted exception regarding the functional immunity of officials in connection to serious crimes under international law. It is now agreed upon that these aforementioned crimes may be attributed not only to the state but also to the official who has perpetrated these crimes.\textsuperscript{746}

Moreover, the rules on immunity that are only procedural in character cannot clash with substantive \textit{jus cogens}\textsuperscript{747} norms proscribing international crimes. Serious crimes under international law do not receive protection under functional immunities because they can never be considered as being part of government duties\textsuperscript{748}, as was e.g. pointed out by Argentinian judge Servini de Cubría in the Franco Case\textsuperscript{749}.

Concerning personal immunity the ICI's ruling\textsuperscript{750} in the Yerodia / Arrest Warrant Case\textsuperscript{751} was of the utmost importance. The ICI\textsuperscript{752} ruled in favour of the Congo and Belgium was ordered to cancel the international arrest warrant against Yerodia. The ICI judges found with 13 votes to 3 that:

- the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violation 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;\textsuperscript{753}

In my view, the dissenting opinion of Belgian judge Chris Van den Wyngaert should also be taken into account and can and should constitute a precedent for future cases:

First, there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity.

Secondly, international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.

Consequently, Belgium has not violated an obligation under international law by issuing and internationally circulating the arrest warrant against Mr. Yerodia.

(...) I conclude that the International Court of Justice, by deciding that incumbent Foreign Ministers enjoy full immunity from foreign criminal jurisdiction (...) has reached a conclusion which has no basis in positive international law. Before reaching this conclusion, the Court should have satisfied itself of the existence of usus and opinio juris. There is neither State practice nor opinio juris establishing an international custom to this effect. There is no treaty on the subject and there is no legal opinion in favour of this proposition. The Court’s conclusion is reached without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State) (...) when there are allegations of serious international crimes". Belgium may have acted contrary to international comity, but has not infringed international law. The Judgment is therefore based on flawed reasoning.

We should have a look at the Rome Statute as well. In acceding to the aforementioned Statute State Parties agree to comply with Article 27 that implies waiving all immunities of their heads of state and other high-ranking officials:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

If a State Party has thus waived these immunities for investigations and prosecutions by the ICC, should this renouncement then not be upheld if a head of state or high-ranking official of that State Party is indicted by a national court for serious crimes under international law? Of course, the

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754 International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits), Judgement of 14 February 2002. Dissenting opinion of Judge Van den Wyngaert; Own emphasis
757 Idem, Article 27.
aforementioned principles of complementarity, subsidiarity and supremacy\textsuperscript{759} have to be taken into account before that national court can exercise universal jurisdiction.

Furthermore, through Article 13, (b) of the Rome Statute\textsuperscript{760}, the UN Security Council, acting under Chapter VII of the UN Charter\textsuperscript{761}, can refer a situation in a non-State Party to the ICC\textsuperscript{762}. The Rome Statute, including Article 27\textsuperscript{763}, can thus be made binding regarding that state. That state will then be treated as a State Party with the consequences thereof. By referring a situation in a non-State Party to the ICC\textsuperscript{764}, the Security Council urges the Court to take action, thus to investigate and prosecute as appropriate, in accordance with the statutory framework provided for in the Rome Statute.

Should it not be possible for the UN Security Council to refer a situation to a national court or an ad hoc international court acting out the principle of universal jurisdiction, obviously under the same conditions as in the aforementioned referral? Naturally, the principles of complementarity, subsidiarity and supremacy\textsuperscript{765} have to be taken into account. The Habré Case\textsuperscript{766} can serve as an example. As mentioned before, the EAC\textsuperscript{767}, internationalised through an agreement with the African Union, formed an integral part of the Senegalese judicial system. They were established ad hoc and their jurisdiction was limited to a specific period and territory and had to exercise universal jurisdiction applying both international and domestic law.\textsuperscript{768} Habré was the first former head of state to be convicted through the exercise of universal jurisdiction\textsuperscript{769}, but he should definitely not be the last.

\textsuperscript{759} See supra
\textsuperscript{760} The Rome Statute of the International Criminal Court on 17 July 1998, Article 13, (b).
\textsuperscript{761} Charter of the United Nations of 26 June 1945, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.
\textsuperscript{762} The International Criminal Court, established by the Rome Statute of the International Criminal Court on 17 July 1998.
\textsuperscript{763} Idem, Article 27.
\textsuperscript{764} The International Criminal Court, established by the Rome Statute of the International Criminal Court on 17 July 1998.
\textsuperscript{765} See supra
\textsuperscript{766} See supra
\textsuperscript{767} Les Chambres africaines extraordinaires or the Extraordinary African Chambers, established on 8 February 2013 by: Le Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990.
5. Can the issue of retroactivity be resolved\textsuperscript{770} and can trials \textit{in absentia}\textsuperscript{771} be held?\textsuperscript{772}

First, as properly pointed out in the Princeton Principles on Universal Jurisdiction: “Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law.”\textsuperscript{773} Not only continuing crimes such as the organised child abduction in the Franco Case\textsuperscript{774} should be subject to universal jurisdiction.

As is apparent from the cases discussed in Part 2 of this Master Thesis, a lot of magistrates apply the principle of non-retroactivity as stated by the ILC\textsuperscript{775}:

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.\textsuperscript{776}

An act being “criminal in accordance with international law or national law” does not necessarily mean that an act needed to be codified at the time of the crime in an international treaty or in national legislation. E.g. in the Franco Case\textsuperscript{777} Servini de Cubría stated, in relation to the crime of enforced disappearances, that Spain is a party to the ICCPED\textsuperscript{778} and that in 1936 Spain had already accepted the norms incorporated in this covenant through the prevailing customary law. Moreover, the Martens Clause\textsuperscript{779} was already in effect and international humanitarian law was rudimentary codified through

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\begin{itemize}
\item \textsuperscript{771} See supra.
\item \textsuperscript{774} See supra
\item \textsuperscript{775} The International Law Commission, established by the Statute of the International Law Commission 1947, adopted by the General Assembly in resolution 174 (II) of 21 November 1947.
\item \textsuperscript{777} See supra
\item \textsuperscript{778} The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006.
\item \textsuperscript{779} Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907, Preamble:
\begin{quote}
Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.
\end{quote}
\end{itemize}
the Hague Conventions. Besides, as e.g. established in the Ali Case (USA), treaties and conventions should not be narrowly interpreted, but as broadly and universally applicable as possible. Servini de Cubría has also justly emphasised that penal law can be applied in a retroactive manner when *jus cogens* international crimes are concerned citing the ICCPR:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Serious crimes under international law constitute, in my opinion, exactly the exception codified in the ICCPR and the issue of retroactivity concerning universal jurisdiction over the most heinous crimes should be a non-issue.

Secondly, although it is deemed better that the alleged culprit of the aforementioned crimes is present during the whole of the judicial proceedings in the forum state, a trial *in absentia* can be held. However, all measures should be taken to try to guarantee the presence of the indicted person.

In her dissenting opinion in the Arrest Warrant Case Belgian judge Chris Van den Wyngaert stated that universal jurisdiction *in absentia* is possible:

There is no rule of conventional international law, to the effect that universal jurisdiction *in absentia* is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IV Geneva Convention of 1949, which lays down the principle *aut dedere aut judicare*. A textual interpretation of this Article does not logically presuppose the presence of the offender (...) For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect.

There is no customary international law to this effect either. (...) And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. (...) The *Lotus* case is not only an authority on jurisdiction, but also on the formation of customary international law. (...) A "negative practice" of States, consisting

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780 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907.
782 See supra
783 See supra
785 The International Covenant on Civil and Political Rights of 16 December 1966, Article 15, § 2.
786 Idem
787 See supra
789 See supra
in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. (...)\(^790\)

In the Sharon Case the Belgian Court of Cassation did not agree with the *in absentia*-arguments of the Brussels Appeal Court and stated in its arrest of 12 February 2003 that Ariel Sharon could be tried, but only when he was no longer a head of government.\(^791\) Here the immunity *ratione personae* argument of the Arrest Warrant Case was thus invoked, but also the aforementioned dissenting opinion of Judge Van den Wyngaert.\(^792\)

6. Can the right to due process be guaranteed?\(^793\)

As consolidated in the Princeton Principles of Universal Jurisdiction, a state can demand the extradition of the alleged culprit of serious crimes under international law on the basis of universal jurisdiction. However, that state can only do so if it has built a prima facie case of the person’s guilt and is able to guarantee due process before a competent, ordinary and impartial judicial body in accordance with international norms and standards concerning human rights with regard to criminal proceedings.\(^794\) A possible death sentence and the threat of being subjected to torture, cruel and inhuman punishment or treatment constitute grounds for refusal of extradition. However, a state that refuses to extradite, should prosecute the alleged culprit or extradite that person to another state where the aforementioned treatment or punishment cannot be administered.\(^795\)

The Princeton Principles also cite the *Non Bis In Idem/ Double Jeopardy* principle. It should be guaranteed at all times. States must recognise the proper exercise of universal jurisdiction by other

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\(^795\) Idem, Principle 10, 1-2.
states and the judgements rendered. A person cannot be tried and punished for the same criminal
can not be tried and punished for the same criminal
conduct if the prior proceedings were conducted in good faith and in conformity with international
law.

The Madrid-Buenos Aires Principles on Universal Jurisdiction adequately assert that independence and
impartiality of competent authorities should be guaranteed and specialised judicial, prosecuting and
police institutions set up. Mutual legal assistance and cooperation is of the utmost importance.
However, the requesting state has to certify that it complies with international norms and standards
regarding due process and respect for human rights.

The Cairo-Arusha Principles in Respect of Gross Human Rights Offences add that in exercising universal
jurisdiction all possible discrimination should be eradicated and the principle of universal jurisdiction
can never be applied for politically motivated reasons.

Moreover, according to the Cairo-Arusha Principles, monetary constraints do not diminish the duty of
states to investigate, prosecute or extradite alleged culprits of serious crimes under international law.
Developing countries should be able to ask the (financial) assistance of the international community.

In my opinion, other countries should be able to do so as well if this proved necessary to guarantee
due process, to fight impunity and to grant the victims of the most heinous crimes justice, closure and
reparation.

The aforementioned principles should be honoured.

The right to due process is also codified and guaranteed in the ICCPR, with 168 State Parties to date.
Almost all over the world, the right to due process should thus be upheld because of the
aforementioned covenant.

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796 Ibidem, Principle 9, 1-3.
799 Ibidem, Articles 5 & 9.
800 The International Covenant on Civil and Political Rights of 16 December 1966, Article 14-16.
7. Is there a future for universal jurisdiction?

There is a future for universal jurisdiction, albeit a challenging one.

The balancing problem between sovereign states’ right to protection from interference and individuals’ right to protection from human rights abuses can be solved. The crimes discussed in this Master Thesis amount to serious crimes under international law and can thus form the subject matter of international claims. Moreover, the principle of non-intervention does not prevent a state from exercising extraterritorial prescriptive jurisdiction or a well-balanced extraterritorial enforcement jurisdiction.

Universal criminal jurisdiction for serious crimes under international law is possible if the principles of complementarity, subsidiarity and supremacy are taken into account to deflect conflicts of jurisdiction. However, for a state to be able to exercise universal jurisdiction, the principle of universal jurisdiction has to be incorporated in the domestic legislation of that particular state. Punitive measures for the crime that has to be punished need also to be foreseen in the domestic legislation of the aforementioned state.

Existing amnesty legislation can and must be tackled and the obstacle of personal and functional immunities can be overcome. Nonetheless, combatting the idea of personal immunity constitutes a huge challenge.

The issue of retroactivity should be a non-issue and there is no impediment for trials in absentia.

The right to due process can and must be guaranteed. Concerning due process, the Cairo-Arusha Principles in Respect of Gross Human Rights Offences state that in exercising universal jurisdiction all possible discrimination should be eradicated and the principle of universal jurisdiction can never be applied for politically motivated reasons. No judicial proceedings should be abandoned for political reasons either, nor should national legislation concerning universal jurisdiction be modified or abolished due to economic and political pressure exercised by the giants of this world. Moreover, there should be no different treatment of alleged culprits because of their political status, their nationality or the colour of their skin. This shall prove the biggest challenge of all.

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Annex 1: The Princeton Principles on Universal Jurisdiction

Principle 1 -- Fundamentals of Universal Jurisdiction

1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.

3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.

4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").

5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.

Principle 2 -- Serious Crimes Under International Law

1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.

2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

Principle 3 -- Reliance on Universal Jurisdiction in the Absence of National Legislation

With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.

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Principle 4 -- Obligation to Support Accountability

1. A state shall comply with all international obligations that are applicable to: prosecuting or extraditing persons accused or convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and under-taking such other necessary and appropriate measures as are consistent with international norms and standards.

2. A state, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another state, provided that the requesting state has a good faith basis and that the evidence sought will be used in accordance with international due process norms.

Principle 5 -- Immunities

With respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Principle 6 -- Statutes of Limitations

Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1).

Principle 7 -- Amnesties

1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle in 2(1).

2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.

Principle 8 -- Resolution of Competing National Jurisdictions

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

(a) multilateral or bilateral treaty obligations;
(b) the place of commission of the crime;
(c) the nationality connection of the alleged perpetrator to the requesting state;
(d) the nationality connection of the victim to the requesting state;
(e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
(f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
(g) the fairness and impartiality of the proceedings in the requesting state;
(h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
(i) the interests of justice.
Principle 9 -- Non Bis In Idem/ Double Jeopardy

1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.

2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial body or a competent international judicial body exercising such jurisdiction in accordance with international due process norms.

3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of non bis in idem in opposition to any further criminal proceedings.

Principle 10 -- Grounds for Refusal of Extradition

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.

2. A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

Principle 11 -- Adoption of National Legislation

A state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.

Principle 12 -- Inclusion of Universal Jurisdiction in Future Treaties

In all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law as specified in Principle 2(1), states shall include provisions for universal jurisdiction.

Principle 13 -- Strengthening Accountability and Universal Jurisdiction

1. National judicial organs shall construe national law in a manner that is consistent with these Principles.

2. Nothing in these Principles shall be construed to limit the rights and obligations of a state to prevent or punish, by lawful means recognized under international law, the commission of crimes under international law.

3. These Principles shall not be construed as limiting the continued development of universal jurisdiction in international law.
Principle 14 -- Settlement of Disputes

1. Consistent with international law and the Charter of the United Nations, states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and in particular by submitting the dispute to the International Court of Justice.

2. Pending the determination of the issue in dispute, a state seeking to exercise universal jurisdiction shall not detain the accused person nor seek to have that person detained by another state unless there is a reasonable risk of flight and no other reasonable means can be found to ensure that person’s eventual appearance before the judicial organs of the state seeking to exercise its jurisdiction.

1. Universal jurisdiction applies to gross human rights offences committed even in peacetime.

2. The principle of universal jurisdiction should apply not only to natural persons, but also to other legal entities.

3. States shall adopt measures, including legislative and administrative, that will ensure that their national courts can exercise universal jurisdiction over gross human rights offences, including, but not limited to, those contained in the Rome Statute of the International Criminal Court.

4. In addition to the crimes that are currently recognised under international law as being subject to universal jurisdiction, certain other crimes that have major adverse economic, social or cultural consequences -- such as acts of plunder and gross misappropriation of public resources, trafficking in human beings and serious environmental crimes -- should also be granted this status.

5. The absence of specific enabling domestic legislation does not relieve any State of its international legal obligation to prosecute, extradite, surrender or transfer suspects to any State or international tribunal willing and able to prosecute such suspects.

6. The principle of non-interference in the internal affairs of States, as enshrined in Article 4(g) but qualified by Article 4(h) of the Constitutive Act of the African Union, shall be interpreted in light of the well-established and generally accepted principle that gross human rights offences are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction.

7. In dealing with gender crimes, such as rape and other forms of sexual violence that are recognised as crimes subject to universal jurisdiction, States shall make every effort to create conditions favourable to reporting such crimes, investigate them, bring the perpetrators to justice and provide support to the victims.

8. In applying universal jurisdiction, prosecuting authorities shall avoid bias and selectivity based on race, gender, sexual orientation, ethnicity, colour, language, age, religion, political or other opinion, national or social origin, birth or other status of the suspect. In particular, the application of the principle of universal jurisdiction shall not be used as a pretext to pursue politically motivated prosecutions.

9. Financial and other constraints do not relieve States of their duty to carry out investigations or to prosecute, extradite or transfer for trial persons suspected or accused of gross human rights offences under international law. However, the international community should assist developing countries in the latter’s efforts in prosecuting such offences.

10. States shall provide mutual legal assistance in order to facilitate the effective exercise of universal jurisdiction.

11. Proceedings, including but not limited to, the investigation, prosecution, incarceration and/or sentencing of gross human rights offenders, shall be undertaken in conformity with internationally recognized human rights standards. These rights include the right to consular assistance under the Vienna Convention on Consular Relations, and the right to counsel, which shall include, in the case of

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self-funding defendants, the right to choose counsel from outside the legal profession of the prosecuting jurisdiction.

12. In proceedings based on universal jurisdiction, States shall ensure that victims and witnesses receive adequate protection.

13. A person who has been tried and convicted or acquitted of a gross human rights offence under international law before a national court may not be tried again, except where the prior proceedings shielded the person from justice.

14. The use of alternative forms of justice, including truth and reconciliation commissions, does not relieve States of their responsibility and their duty to prosecute individuals or to extradite or transfer for trial individuals suspected or accused of gross human rights offences under international law.

15. While amnesties for gross human rights offences granted to individuals may, in certain cases, be politically expedient, such amnesties are generally incompatible with international law and do not have any effect outside the borders of the country in which they are granted; nor do they absolve other States of their responsibility and their duty to prosecute or to transfer for trial such individuals.

16. Prosecution and sentencing of gross human rights offenders shall be guided not only by the need for deterrence, but also by the need to reconcile, rehabilitate and reconstruct the society where the offence was committed.

17. Responses to gross human rights offences shall include a requirement for the offender or other available mechanism to make appropriate reparation to the victims of the offences, to the extent possible.

18. Refugee status or applications for refugee status shall not relieve States of their obligation to prosecute or to extradite or transfer for trial to any other State or international tribunal willing and able to prosecute persons accused or suspected of gross human rights offences. This is without prejudice to the prohibition of non-refoulement.

19. A State in whose territory a gross human rights offence suspect is found shall prosecute him or her in good faith or extradite or surrender him or her to any other State or international tribunal willing and able to prosecute such suspect. The absence of an extradition treaty or other enabling legislation shall not bar the extradition, surrender or transfer of such a suspect to any State or international tribunal willing and able to prosecute the suspect.
Annex 3: The Madrid – Buenos Aires Principles on Universal Jurisdiction\(^{804}\)

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**Principle 1 – Concept**
Universal Jurisdiction establishes the right or the obligation of a national court to examine and, if appropriate, judge the crimes included in Principles 2, 3 and 4 by implementing national and/or international criminal law, regardless of where those crimes were committed, the nationality of the alleged perpetrator and the victims, or any other connection to the State exercising the jurisdiction.

**Principle 2 – Crimes subject to universal jurisdiction**
Universal Jurisdiction shall apply to international crimes such as genocide, crimes against humanity, war crimes, piracy, slavery, enforced disappearance, torture, human trafficking, extrajudicial executions and the crime of aggression. Such crimes may be committed in many ways, including through economic activities and those that affect the environment.

**Principle 3 – Economic and environmental crimes subject to universal jurisdiction**
Universal Jurisdiction shall also apply to economic and environmental crimes the extent and scale of which seriously affect group or collective human rights or cause the irreversible destruction of ecosystems.

**Principle 4 – Scope of universal jurisdiction**
Without prejudice to the provisions in Principles 2 and 3, States may extend the scope of the Universal Jurisdiction they exercise to include the crimes set out in international agreements they have ratified.

**Principle 5 – Connected crimes**
Similarly, the exercise of Universal Jurisdiction may also apply to the crimes connected to those included in Principles 2, 3 and 4.

**Principle 6 – Criminal and/or civil liability**
1. Natural or legal persons may be criminally and/or civilly liable for their actions or omissions in the crimes listed in Principles 2, 3 and 4, regardless of the manner and degree of their participation or concealment of the crime, without prejudice to the potential civil liability of the State.

2. Criminal liability extends to higher ranks in organised power structures, and to their subordinates, who may not allege due obedience.

3. The criminal liability of legal persons for the crimes listed in Principles 2, 3 and 4 shall be recognised by domestic or international law regardless of the trial and, where pertinent, sentencing of the individuals actually committing the crime. In the absence of legal provisions for corporate criminal liability, the legal or de facto representative of the legal persons concerned shall be liable.

4. All the assets, property and securities of the party committing the crime that are directly or indirectly related to the crime committed shall be seized, to the extent established in the judicial ruling, to repair in full the damages caused.

5. The competent authorities shall not recognise bank or corporate secrecy, or any other measure that could favour fraudulent corporate bankruptcy or lead to the mass withdrawal or transfer of funds in an attempt to circumvent the monetary obligations resulting from committing the crimes listed in Principles 2, 3 and 4.

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Principle 7 – Universal civil jurisdiction
Universal Jurisdiction may be applied in civil law separately from criminal law, provided the damage is due to one of the crimes listed in Principles 2 and 3.

Principle 8 – Application of the Principle of Universal Jurisdiction when not included in national legislation
1. All States shall include the principle of Universal Jurisdiction in their national laws.

2. The competent authorities should apply the principle of Universal Jurisdiction for the crimes set out in Principles 2 and 3, regardless of whether that principle is included in their national laws.

Principle 9 – Statute of limitations, amnesty, pardon and immunity
1. The provisions of the States where the crimes were committed in relation to the expiry of the statute of limitations, amnesty, pardon and other measures for the exclusion of liability shall not apply to the crimes listed in Principles 2 and 3.

2. Immunity and special procedural guidelines pertaining to the official position of a person that are the subject of national law shall not limit the exercise of Universal Jurisdiction by the judges of the State applying it.

Principle 10 – Principle of legality under international criminal law
The actions or omissions involved in perpetrating the crimes included in Principles 2 and 3 shall be examined and, where applicable, judged in accordance with the principle of Universal Jurisdiction if such acts or negligence constituted crimes under international law when they were committed, despite their not being codified as crimes in domestic law.

Principle 11 – Initiation of the enquiry and presence of the potential perpetrator during the proceedings.
1. In accordance with the principle of Universal Jurisdiction, the competent authorities shall initiate an examination of the facts and the persons responsible for any of the crimes set out in Principles 2 and 3, irrespective of the extent of their participation and without their needing to be present. In all cases, the alleged perpetrator shall be granted access to the proceedings and allowed the right of defence.

2. If the alleged perpetrator is not present when the enquiry begins, the competent authority of the inquiring state may agree to the appropriate precautionary measures, with a view to guaranteeing the presence of the alleged perpetrator, the evidence and the reparations for victims.

3. The competent authority of the State where the alleged perpetrator is located shall agree to the precautionary measures necessary to guarantee the presence of the alleged perpetrator, the objective of the proceedings and the reparations for victims, regardless of the existence of a prior request for extradition.

Principle 12 – Complementarity and cooperation with the International Criminal Court and other international criminal justice mechanisms
6. The governing principle of complementarity between the International Criminal Court and national courts shall also apply to those applying Universal Jurisdiction.

7. States shall cooperate, through their national courts and the exercise of Universal Jurisdiction, with the International Criminal Court and other international criminal justice mechanisms in the investigation and/or prosecution of international crimes.
Principle 13 – Conflicts of national jurisdiction
1. The national jurisdictions of two or more States may initiate an enquiry into the same act concurrently, in which case they shall cooperate in full to ensure that the case is resolved in the best possible way.

2. Priority in conducting the enquiry should be given to the State that, pursuant to the pro actione principle, proves to be in the best position to judge the acts, with no pre-established hierarchy regarding the rights of a given jurisdiction. In evaluating the conditions for the trial, the following aspects shall be considered among others:
   - the effective right of access to justice
   - the possibilities for a credible trial in the country where the acts were committed
   - the location of the alleged perpetrator
   - access to evidence
   - the measures of protection available to victims and witnesses, and
   - the independence and impartiality with which the proceedings are and shall be substantiated.

3. A mechanism for resolving potential jurisdictional conflicts shall be established.

Principle 14 – Mutual legal assistance
1. The competent State authorities shall assist one another in all proceedings initiated by virtue of the principle of Universal Jurisdiction, provided that the petitioner acts in good faith.

2. The principle of cooperation shall be subordinated to the existence of reasonable doubt in believing that the alleged perpetrator could be subjected to cruel, inhuman or degrading treatment, forced disappearance, sentenced to death or denied a fair trial, even if the petitioning State offers guarantees.

3. The allegation of the absence of double criminality by States shall pose no obstacle to providing legal assistance.

4. Non recognition of the principle of Universal Jurisdiction by the State from which assistance is requested shall pose no obstacle to providing legal assistance.

Principle 15 – Extradition
1. States shall refuse requests for extradition/surrender by another State, even one with Universal Jurisdiction, when there are firm grounds for believing that the alleged perpetrator could be subjected to cruel, inhuman or degrading treatment and punishment, forced disappearance, sentenced to death or denied a fair trial, even if the petitioning State offers guarantees.

2. Any State refusing a request for extradition on any grounds shall investigate and, if appropriate, conduct its own hearing.

3. The allegation by States of the absence of double criminality shall pose no obstacle to granting the extradition/surrender.

4. Failure of the requested State to recognise the principle of Universal Jurisdiction shall not prevent the granting of extradition/surrender.

Principle 16 – Ne bis in idem
States applying the principle of Universal Jurisdiction shall not judge any person already judged by another court, unless the purpose of the criminal proceedings before that court were for the purpose of shielding the person concerned from criminal responsibility.

Principle 17 – Transitional Justice
States may apply the principle of Universal Jurisdiction to Transitional Justice systems when impartially and independently applied international standards of justice have failed to be respected, or when they have been used to for the purpose of shielding the person concerned from criminal responsibility.
Principle 18 – Independence of the competent authorities
The competent authorities shall act with total independence and impartiality and without any interference whatsoever in relation to the proceedings initiated by virtue of the principle of Universal Jurisdiction.

Principle 19 – Specialised judicial, prosecution and police institutions
All States shall set up police, judicial and/or prosecution bodies specialised in investigating and judging the crimes listed in Principles 2 and 3.

Principle 20 – Rights of victims and protection of witnesses and experts

1. In applying the principle of Universal Jurisdiction, the term victim refers to all persons who have suffered harm, individually or collectively, as a consequence of the crimes listed in Principles 2, 3 and 4, as well as to their immediate family or dependants of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization, regardless of whether the alleged perpetrator has been identified, arrested, judged or sentenced.

2. The competent authorities shall safeguard the rights of victims during the proceedings and the execution of the sentence, and in all cases, prevent secondary victimisation.

3. All efforts shall be made to ensure the widest participation and the victims' right to receive legal information during the proceedings.

4. States investigating, judging and/or cooperating with another State during proceedings initiated by virtue of the principle of Universal Jurisdiction shall take all steps to guarantee the safety, privacy and physical and psychological wellbeing of victims, witnesses and experts.

Principle 21 – Procedural rights and guarantees of the alleged perpetrator
The rights and guarantees of the alleged perpetrator shall be respected during all stages of the enquiry and trial, in accordance with international law.

Principle 22 – Interpretation
Nothing in this document shall be interpreted as imposing restrictions on the application of the principle of Universal Jurisdiction pursuant to international law or as limiting the rights of the victims to truth, justice and full redress.
Deze masterproef poogt een antwoord te geven op de vraag of er een toekomst is voor universele jurisdictie over internationale misdaden.

Deel 1 bespreekt eerst het concept van universele jurisdictie tegen de achtergrond van andere vormen van jurisdictie. Vervolgens wordt de oorsprong van universele jurisdictie - piraterij en slavernij - verklaard. De verschillende ontwikkelingen na de Tweede Wereldoorlog met betrekking tot universele jurisdictie worden uiteengezet. Het betreft de meest ernstige schendingen van het internationaal humanitair recht zoals oorlogsmisdaden, agressie, misdaden tegen de menselijkheid, foltering, gedwongen verdwijningen en genocide. Tot slot worden de toonaangevende principes van universele jurisdictie toegelicht.

Deel 2 focust op case law in verband met universele jurisdictie in de voorbije 25 jaar. De volgende landen komen aan bod: Spanje (Scilingo, Pinochet, Rios Montt en de zaak i.v.m. Tibet), België (de Vier van Butare, Yerodia en Sharon), Duitsland (Rumsfeld en Rwabukombe), Argentinië (de zaak i.v.m. het Franco-regime), de Verenigde Staten (Belfast, Sosa en Ali) en Senegal (Habré).

Deel 3 behandelt zes pertinente vragen betreffende universele jurisdictie en tracht zo een antwoord te bieden op de voormelde vraag of er een toekomst voor universele jurisdictie over de ergst mogelijke misdaden? Het moeilijke evenwicht tussen het niet-interventiebeginsel en de bescherming tegen zware schendingen van internationaal humanitair recht komt aan bod, evenals mogelijke jurisdictieconflicten en amnestiewetgeving. Ook immuniteiten, het probleem van niet-retroactiviteit, processen in absentia en het recht op een eerlijk proces worden besproken.