



## THE UNIVERSAL JURISDICTION PRINCIPLE: NATURE AND SCOPE

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RESUMEN: La jurisdicción universal es una base excepcional para que un Estado juzgue a un criminal extranjero por ofensas no cometidas ni dentro de su territorio ni contra sus nacionales. Existe consenso respecto del carácter excepcional de este derecho, ya que pretende proteger los valores e intereses más fundamentales de la comunidad. Este derecho debe distinguirse del principio *aut dedere aut judicare*. Un factor relevante para determinar si una conducta está sujeta a la jurisdicción excepcional es la doble *opinio juris* respecto tanto de su *status* como crimen internacional, como de que está de hecho sujeta a jurisdicción universal. Parece claro que la piratería, la esclavitud, crímenes de guerra, crímenes contra la humanidad y el genocidio están sujetos a jurisdicción universal.

Existe una creciente práctica de los Estados respecto del ejercicio de la jurisdicción universal, aunque se le critica con base en el ataque a la soberanía de otros Estados.

ABSTRACT: Universal jurisdiction is an exceptional ground for a State to try a foreign criminal for offences not committed neither within national territory nor against its nationals. Consensus exists on the exceptional character of this right, since it is aimed at protecting the most fundamental values and interests of the international community as a whole. This right must be distinguished from the *aut dedere aut judicare* principle. A relevant factor to determine whether a conduct is subject to this exceptional jurisdiction is the double *opinio juris* to exist in favour of both its status as an international crime and specifically that it is indeed subject to universal jurisdiction. It seems clear that piracy, slavery, war crimes, crimes against humanity and genocide are subject to universal jurisdiction. There exists increasing state practice on the exercise of universal jurisdiction, though it is criticised on the grounds that it challenges other states' sovereignty.

SUMMARY: I. *Introduction*. II. *Rationale for universal jurisdiction*. III. *Crimes*. IV. *Implementation of the universal jurisdiction principle*. V. *Conclusion*. VI. *Bibliography*.

## I. INTRODUCTION

At the present state of development of international law we still lack a permanent criminal court with the power to prosecute and punish international criminals. Although great efforts have been undertaken towards this end, this type of court has not yet materialized.<sup>1</sup>

At the same time, there is a consensus in the international community that certain types of crimes are such a shock to the human conscience that they should not be left with impunity. The perpetrators of such crimes are considered enemies of humanity as a whole. Therefore, every State has the right under international law, to assert what is called universal jurisdiction over these particular kinds of international crimes, regardless of the place where the crime was committed or of the nationality of the criminal or the victim.

The purpose of the present analysis is to examine the nature and scope of the universal jurisdiction principle and to offer a critique.

In the first part, the rationale for universal jurisdiction will be defined, with an analysis of its content and distinguishing features. This section finishes with a schematic representation of our idea of universal jurisdiction.

In the second part, a crime by crime analysis is conducted highlighting the special characteristics of international crimes subject to universal jurisdiction. The intention to extend the scope of applicability of universal jurisdiction to other international crimes will be also examined.

Finally, an analysis of State practice will demonstrate how States apply universal jurisdiction.

1 *Cfr.* Rome Statute of the International Criminal Court A/CONF.183/9, July 17, 1998. In <http://www.un.org/icc/>. (Hereinafter Rome Statute of the ICC). The Statute has not yet entered into force.

## II. RATIONALE FOR UNIVERSAL JURISDICTION

### 1. *General considerations*

State jurisdiction may be defined as the extent of each State's rights to regulate conduct or the consequences of events<sup>2</sup> and reflects the basic principles of State sovereignty, equality of States and non-intervention in domestic affairs.<sup>3</sup> The definition which will be used here considers jurisdiction to be an aspect of sovereignty that is; judicial, legislative and administrative competence.<sup>4</sup>

Jurisdiction concerns both internal and international law. In internal law, the manner in which a State asserts its jurisdiction is usually by establishing competencies between its organs. International law, on the other hand, determines the permissible limits of State jurisdiction. The distinction between jurisdiction and competence in international law is rarely discussed.<sup>5</sup> Jurisdiction is a general or abstract concept, whereas competence is a specific or concrete notion. The relationship between the two concepts is asymmetric in the sense that while competence necessarily requires a preceding finding of jurisdiction, a finding of jurisdiction does not necessarily entail competence.<sup>6</sup> Competence is the sphere of action of jurisdiction. Thus, we could have different types of competencies, i.e., limited by the place, by the persons, by a period of time, etc., but one power for decision this is, jurisdiction.

2 Jennings, Robert and Watts, Arthur, *Oppenheim's International Law*, 9a. ed., UK, Longman, 1993, p. 456.

3 Shaw, M. N., *International Law*, 3a. ed., UK, Grotius Publications-Cambridge University Press, 1991, p. 393; Bowett, Derek William, "Jurisdiction: changing patterns of authority and resources", *BYIL*, vol. LIII, 1984, pp. 14-17.

4 Brownlie, Ian, *Principles of Public International Law*, 4a. ed., UK, Clarendon Press, 1991, p. 298. See also Randall, Kenneth, C., "Universal Jurisdiction under International Law", *TLR*, vol. 66, 1988, p. 786. See also Parry, Clive, Watts, Arthur, *et al.* (eds.), *Encyclopaedic Dictionary of International Law*, United States, Oceana Publications, 1986, pp. 199-200. Oxman, Bernard, H., "Jurisdiction of States", in Bernhardt, Rudolf, *Epil, Installment 10*, 1987, pp. 277-282. O'Connell holds, "Jurisdiction has been defined as 'the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court'. It is intimately connected with the conceptions of independence and of territory". O'Connell, Daniel Patrick, *International Law*, 2a. ed., vol. Two, UK, Stevens & Sons, 1970, p. 599.

5 Heiskanen, "Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction", *FYIL*, vol. V, 1994, p. 1. The distinction is usually clearer in the civil law system, while in the common law the confusion generally arises because of the use of the same word, jurisdiction, to denote both.

6 *Ibidem*, p. 5.

With respect to the limits for exercising jurisdiction at the international level the Permanent Court of International Justice (PCIJ) held the following in the *Lotus* case:

International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>7</sup>

The PCIJ has also established that every State is free to exercise its jurisdiction and that the State has the obligation not to overstep the limits “which international law places upon its jurisdiction” and therefore “within these limits, its right to exercise jurisdiction rests in its sovereignty”.<sup>8</sup>

## 2. Types of Criminal Jurisdiction<sup>9</sup>

The types of criminal jurisdictions which have generally been exercised by States are the following:

7 The case of the *S.S. Lotus*, PCIJ, Series A, núm. 10, 1927 (hereinafter *Lotus* case), p. 18. But not all the scholars share this position, see commentaries in Carnegie, A. R., “Jurisdiction over Violations of the Laws and Customs of War”, *BYIL*, vol. XXXIX, 1963, pp. 402-403.

8 *Ibidem*, p. 19. According to the American Law Institute “under international law, a state is subject to limitations on,

a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

b) jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or criminal proceedings, whether or not the state is a party to the proceedings;

c) jurisdiction to enforce, *i.e.*, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non judicial action”, American Law Institute, Restatement of the Law Third, the Foreign Relations of the United States, United States, American Law Institute Publishers, vol. 1, 1987, 401, p. 232. See also Rapport du Comité Européen pour les problèmes criminels, Conseil de l’Europe, Compétence Extraterritoriale en Matière Pénale, 1990, pp. 17-21.

9 The analysis of these jurisdictions are without prejudice of any other different meaning or application that they could have for instance, regarding civil or commercial matters. Thus, for example, the Restatement of the Law Third 404, Comment b., states “In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy” American Law Institute, Restatement of the Law Third, *op. cit.*, p. 255. See also *infra* practice of the United States.

### a) *Territorial*

Territoriality is considered to be the primary basis for jurisdiction.<sup>10</sup> According to this principle all the offences committed within the State's territory are subject to its criminal law.<sup>11</sup> This also reflects the exclusive power of sovereignty that each State possess in the realm of international relations.<sup>12</sup> With respect to crimes, this principle has the advantages of the *forum delicti commissi*<sup>13</sup> and the presumed involvement of the interest of the State if a crime is committed in its territory.<sup>14</sup> The State may claim jurisdiction only if the offence has been committed, in part or in whole within its territory.<sup>15</sup>

### b) *Nationality*<sup>16</sup>

Nationality as a legal term denotes the existence of a tie between an individual and a State by which the individual is under the personal jurisdiction of that State.<sup>17</sup> This definition of nationality may also be applied to juridical persons and ships.

10 Jennings, Robert and Watts, Arthur, *Oppenheim's International Law*, *op. cit.*, p. 458.

11 Wolfrum, Rüdiger, "The Decentralized Prosecution of International Offences through National Courts", in Dinstein, Yoram and Tabory Mala (eds.), *War Crimes in International Law*, The Netherlands, Martinus Nijhoff, 1996, p. 234. See also, Shaw, M. N., *op. cit.*, pp. 401-403. Art. 3 of the Harvard Law School Draft on Jurisdiction states, "A state has jurisdiction with respect to any crime committed in whole or in part within its territory. This jurisdiction extends to: a) Any participation outside its territory in a crime committed in whole or in part within its territory; and b) Any attempt outside its territory to commit a crime in whole or in part within its territory." Harvard Law School's Research on International Law, "Draft Convention on Jurisdiction with Respect to Crime", *AJIL*, vol. 29, núm. 3, 1935, p. 480. Bassiouni, Cherif, "Draft Statute of an International Criminal Tribunal", *ÉRS*, núm. 9, 1992, pp. 143-144.

12 *Cfr.* Nguyen, Quoc Dinh, Pellet, Alain and Daillier, Patrick, *Droit International Public*, 5a. ed. France, LGDJ, 1994, p. 449. See also Malekian, Farhad, *International Criminal Law, the Legal and Critical Analysis of International Crimes*, vol. I, Sweden, Borgströms Tryckeri Publishers, 1991, p. 11.

13 See *locus delicti* in La Rosa, Anne-Marie, *Dictionnaire de Droit International Pénal*, Termes choisis, París, Presses Universitaires de France-IUHEI, 1998, pp. 63-64. See also Harvard Law School's Research on International Law, "Draft Convention on Jurisdiction with Respect to Crime", *op. cit.*, pp. 559-560.

14 Brownlie, Ian, *op. cit.*, p. 300.

15 Akehurst, Michael, "Jurisdiction in International Law", *BYIL*, vol. XLVI, 1972-1973, pp. 152-153. But the State where the act has been completed has jurisdiction under the "objective territorial principle (also sometimes called the 'effects doctrine', based on the fact that the injurious effect, although not the act or omission itself, occurred on the territory". Akehurst, Michael, *Akehurst's Modern Introduction to International Law*, 7a. ed., UK, Routledge, 1997, p. 111.

16 *Cfr.* Buergethal, Thomas and Maier, Harold G., *Public International Law in a Nutshell*, United States, West Publishing, 1990, p. 163.

17 Randelzhofer, Albrecht, "Nationality", in Bernhardt, Rudolf, *Epil, Installment 8*, 1987, p. 417.

### b.1) Active personality

This principle provides that the State of which the criminal is a national can exercise its jurisdiction regardless of the place where the crime was committed.<sup>18</sup>

### b.2) Passive personality<sup>19</sup>

According to this principle, a State can claim jurisdiction over a crime committed abroad if the victim of such crime is one of its nationals.<sup>20</sup>

Thus, for instance the United States has held that, the universal and passive personality principles... provided ample grounds for this Court to assert jurisdiction over Yunis... Not only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threaten the very foundations of the world order, but the United States has its own interest in protecting its nationals.<sup>21</sup>

Sometimes the two principles, of active and passive personality, are considered by doctrine under the heading of nationality principle.<sup>22</sup>

See also Harvard Law School's Research on International Law, "Draft Convention on Jurisdiction with Respect to Crime", *op. cit.*, pp. 519-539.

18 Sucharitkul, Sompong, "International Terrorism and the Problem of Jurisdiction", *Syr. J. Int'l L. & Com.*, vol. 14, núm. 2, 1987, p.169; Akehurst, Michael, *Akehurst's Modern Introduction to International Law, op. cit.*, p. 111. See also Oehler, Dietrich, "Criminal Law, International", in Bernhardt, Rudolf, *EPIL, Installment 10*, 1987, p. 53.

19 The principle was adopted by Mexico in the so-called Cutting Case in Moore, J. B., *A Digest of International Law*, United States, vol. II, 1906, pp. 228-242. See also commentaries in Sucharitkul, Sompong, *op. cit.*, p. 169. Buergenthal, Thomas and Maier, Harold G., *op. cit.*, p. 174. See also Attorney-General of the Government of Israel v. Adolf Eichmann, *ILR*, vol. 36, 1968 (hereinafter Eichmann case), pp. 31-38 and 304. O'Connell, Daniel Patrick, *op. cit.*, p. 828.

20 Anne-Marie La Rosa holds "Le lien d'allégeance est généralement la nationalité mais les Etats peuvent étendre la compétence personnelle par la loi ou par traités et fonder cette dernière sur le domicile ou la résidence de son auteur. C'est du reste en fonction de ce système que les Etats peuvent atteindre, pour les faits commis à l'étranger, les apatrides, réfugiés ou étrangers installés sur leur territoire", in La Rosa, Anne-Marie, *op. cit.*, p. 6.

21 United States of America v. Yunis, District Court, February 12, 1988, in *ILR*, vol. 82, 1990 (hereinafter Yunis, District Court case), p. 351. Generally this principle has been invoked by USA in terrorist cases, see Higgins, Rosalyn, "International Law and the Avoidance Containment and Resolution of Disputes. General Course on Public International Law", *RCADI*, tome 230, vol. V, 1991, pp. 102-103.

22 *Cfr.* Buergenthal, Thomas and Maier, Harold G., *op. cit.*, pp. 164-167.

### b.3) *Nationality of ships*

All ships, or air/spacecraft should possess a nationality. Thus, the State whose flag flies over the ship is the one which exercises jurisdiction.<sup>23</sup> Regarding the Law of the Sea, all ships are required to sail under the flag of one State only,<sup>24</sup> and these ships are —with some exceptions— subject to the exclusive jurisdiction of the flag State. Hence, for instance, if a ship sails under more than one flag, it can be considered as a ship without nationality and can thus lose the protection of any State.<sup>25</sup> The basic principle regarding the exercise of jurisdiction on the high seas is that “vessels on the high seas are subject to no authority except that of the State whose flag they fly”.<sup>26</sup> In the event of a collision or any other incident relating to navigation, the penal jurisdiction is exercised by the flag State or by the State of which the master, or any other person involved in the service of the ship, is a national.<sup>27</sup> This is of course, contrary to the ruling regarding collision established by the PCIJ in the *SS. Lotus* case.<sup>28</sup>

The exceptions to the flag State jurisdiction are the right of visit,<sup>29</sup> piracy<sup>30</sup> and slave trade.<sup>31</sup> It is asserted here that the reason for these exceptions is the idea that beyond the sovereign rights of each State there are certain values common to all nations which should be preserved.

23 The Harvard Law School considered that “...a State has with respect to such ships an aircraft a jurisdiction which is similar to its jurisdiction to its territory”, Harvard Law School’s Research on International Law, “Draft Convention on Jurisdiction with Respect to Crime”, *op. cit.*, p. 509. Nowadays, this position has no wide support. Buergenthal holds, “Actually, jurisdiction over vessels is based on a theory akin to the nationality principle”, Buergenthal, Thomas and Maier, Harold G., *op. cit.*, p. 166.

24 *Cfr.* art. 91 of the Law of the Sea Convention, United Nations Convention on the Law of the Sea, 10 December 1982, A/CONF.62/121 and Corr. 1 to 8. Hereinafter the Law of the Sea Convention. See also Nguyen, Quoc Dinh, Pellet, Alain and Daillier, Patrick, *op. cit.*, pp. 1101-1103.

25 *Cfr.* art. 92 of the Law of the Sea Convention, *op. cit.*, and art. 6 of the High Seas Convention. Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 11. Hereinafter the High Seas Convention.

26 *Lotus* case, p. 25.

27 *Cfr.* art. 97 of the Law of the Sea Convention and art. 11 of the Convention on the High Seas.

28 “The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown”. *Lotus* Case, p. 30. Nowadays with the entered into force of the Convention of the Law of the Sea it seems clear that such position is not anymore supported.

29 *Cfr.* art. 110 of the Law of the Sea Convention.

30 *Cfr.* Touret, Corinne, *La piraterie au vingtième siècle, piraterie maritime et aérienne*, Paris, LGDJ, 1992, pp. 147-149.

31 See *infra*.



### c) *Protective*<sup>32</sup>

“This principle provides that States may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular State concerned”.<sup>33</sup> This jurisdiction is also extended to those activities which may constitute an attack upon a State’s economy. The classic crime for this type of jurisdiction is that of counterfeiting currency.<sup>34</sup> Nevertheless, the range of acts covered by the principle is not free from controversy.<sup>35</sup>

### d) *Universal*<sup>36</sup>

This principle allows every State the possibility of exercising its jurisdiction over a limited category of offences<sup>37</sup> generally recognized as of universal concern, regardless of the place of the offense or the nationalities of the offender and the victim.<sup>38</sup> While other types of jurisdiction can

32 Cfr. “competence réelle”, in La Rosa, Anne-Marie, *op. cit.*, p. 9. Vabres, Donnedieu de, *Les principes modernes du droit pénal international*, Paris, Recueil Sirey, 1928, pp. 86-115.

33 Shaw, M. N., *op. cit.*, p. 410. See also O’Connell, Daniel Patrick, *op. cit.*, p. 829. Jennings, Robert and Watts, Arthur, *Oppenheim’s International Law, op. cit.*, p. 471. Art. 7 of the Harvard Draft on Jurisdiction states, “A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed”. Harvard Law School’s Research on International Law, “Draft Convention on Jurisdiction with Respect to Crime”, *op. cit.*, p. 543.

34 Cameron, Jain, *The Protective Principle of International Criminal Jurisdiction*, UK, Dartmouth Publishing Co., 1993, p. 82. Cfr. art. 8 of the Harvard Law School’s Research on International Law, “Draft Convention on Jurisdiction with Respect to Crime”, *op. cit.*, pp. 561-563. Bowett, Derek William, *op. cit.*, p. 11.

35 Cfr. Akehurst, Michael, “Jurisdiction in International Law”, *op. cit.*, pp. 158-159. Gilbert, Geoff, “Crimes sans Frontières: jurisdictional problems in English Law”, *BYIL*, vol. LXIII, 1992, p. 419.

36 According to the Restatement of the Law Third, 404 Universal Jurisdiction to define and Punish certain offenses, “A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of certain aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in 402 is present”, in American Law Institute, *Restatement of the Law Third, op. cit.*, p. 254.

37 “...the offences which are agree to be subject to the universality principle are very limited in number”, in Higgins, Rosalyn, *op. cit.*, p. 91.

38 Randall, Kenneth, C., *op. cit.*, p. 788. See also Reydams, Luc, “Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice”, *EJCLJ*, vol. 4, núm. 1, 1996, p. 22. Green, Leslie C., “International Criminal Law and the Protection of Human Rights”, in Cheng, Bin and Brown, E. D. (eds.), *Contemporary Problems of International Law Essays in Honour of George Schwarzenberger on his Eightieth Birthday*, UK, Stevens & Sons Limited, 1988, p. 118-119. Eichmann case, p. 306. But Donnedieu de Vabres is quite critic regarding the idea of international crimes, he holds, “La

be exercised in cases of common crimes, universal jurisdiction is only applicable with regard to international crimes.<sup>39</sup> Thus, the principle of universal jurisdiction reflects the main concerns of the international community: on one hand to punish criminals acting in a space outside the jurisdiction of any State as in the case of piracy —this was in fact the origin of the principle—<sup>40</sup> and on the other hand, to punish the perpetrators of a special category of international crime that due to its gravity every State is entitled to prosecute.<sup>41</sup>

The crime of piracy *jure gentium* is generally considered to be the classic example of a crime for which universal jurisdiction may be exercised.

Within Europe, some States have applied an apparently similar principle which is called the principle of “vicarious administration of justice”. This is basically a German practice which assumes that it is possible to apply German criminal law to crimes committed by a foreigner who has been apprehended on German territory but has not been extradited because a request for extradition was never made, was refused or was infeasible.<sup>42</sup> Again, this is not a general principle in the international community, but is limited to the European context.<sup>43</sup>

théorie dite ‘des délits de droit des gens’ reste, platonique et inutile dans l’arsenal des législations particulières qui ont cru devoir se l’approprier: excroissance morbide, verrue inélégante greffé sur le corps vigoureux du droit pénal international”, Vabres, Donnedieu de, *Rapport en Compétence Universelle*, Congrès International de Droit Pénal in *RIDP*, núms. 3-4, 1932, p. 329. Carnegie argues the existence of a subsidiary universality principle, he holds that, “a State may only exercise a universal jurisdiction after the State entitled to exercise jurisdiction under one of the other heads of jurisdiction has refused to accept the proffered extradition of the offender”, Carnegie, *op. cit.*, p. 405. This type of jurisdictions seems more to the vicarious administration of justice, see *infra*.

39 It is important to note that in the past some States attempted to apply universal jurisdiction for common crimes and not only for international crimes, see for instance Universal Jurisdiction (Austria) case, Austria Supreme Court, 1958, in *ILR*, vol. 28, 1963, pp. 341-343. See also Vabres, Donnedieu de, *Les principes modernes du droit pénal international*, *op. cit.*, pp. 153-160. Schultz, Hans, “Compétence des juridictions pénales pour les infractions commises à l’étranger”, *RSCDPC*, núm. 1, 1967, p. 324.

40 See *infra* part 1.3 for further details.

41 Sunga, Lyal S., *The Emerging System of International Criminal Law, developments in Codification and Implementation, The Netherlands, Kluwer Law International*, 1997, pp. 252-532.

42 *Cfr.* article 7.2 of the German Penal Code. The Penal Code of the Federal Republic of Germany, translated by Joseph J. Darby, United States, Fred B. Rothman & Co. And Sweet & Maxwell Ltd., 1987. *Cfr.* also the decision Public Prosecutor v. Djajic. No. 20/96. Supreme Court of Bavaria. May 23, 1997. Abstract of the sentence translated. Document obtained from the ICRC in which the Court also relied on the principle of vicarious administration of justice. See also Meyer, J. “The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction”, *Harv. Int’l L. J.*, vol. 31, núm. 1, 1990, pp. 115-116.

43 Wolfrum, Rüdiger, *op. cit.*, pp. 235-236.

There also exists the possibility of applying a different kind of jurisdiction called “representational jurisdiction” (*principe de la représentation*)<sup>44</sup> according to which the tribunals of one State can exercise jurisdiction by request of the State in which the offense was committed.<sup>45</sup>

### 3. *Universal Jurisdiction*

International law at its current stage of development does not possess a centralized legal system as exists within States and therefore, there is no legislative power for enacting laws, no judicial power with compulsory jurisdiction to adjudicate upon them, and no executive power to enforce them. Thus, the implementation of international criminal law remains primarily dependent upon the will of States.<sup>46</sup> In this sense, it is international law which authorizes the application of universal jurisdiction.

The meaning of universal jurisdiction is that any State has the power to try and punish a person who has committed a particular international crime (*delicta juris gentium*),<sup>47</sup> even when the crime was committed outside its territory by a foreigner, against any person or group of persons without any link with the prosecuting State, providing that the criminal is in the State’s custody (*judex deprehensionis*) when brought to trial.<sup>48</sup> It

44 Cfr. “Ce terme désigne les cas dans lesquels un état peut exercer sa compétence extraterritoriale lorsqu’il est réputé agir pour un autre Etat qui est plus directement concerné, sous réserve que certaines conditions soient réunies”, Rapport du Comité Européen pour les problèmes criminels, Conseil de l’Europe, Compétence Extraterritoriale en Matière Pénale, 1990, p. 14. Schultz holds, “On peut se demander s’il s’agit vraiment d’une compétence indépendante... il peut paraître quelque peu difficile de distinguer le principe de la compétence par représentation du principe universel. Toutefois il y a une différence claire et nette: le principe de la compétence par représentation dépend toujours de la condition qu’un autre Etat demande de poursuivre le prévenu, tandis que la compétence fondée sur le principe universel peut être exécutée indépendamment d’une demande d’un autre Etat de reprendre la poursuite pénale”, Schultz, Hans, *op. cit.*, pp. 325-326. See also Gilbert, Geoff, *op. cit.*, p. 423.

45 Cfr. La Rosa, Anne-Marie, *op. cit.*, p. 13.

46 Even the *ad hoc* tribunals such as those for Rwanda and former Yugoslavia required the cooperation of the international community.

47 “Le droit pénal des Etats contemporains connaît l’institution des *Delicta juris gentium*, délits visant les intérêts essentiels de l’humanité et à la répression des quels toute l’humanité est solidaire”. Michelis, Vitold de, *Rapport en Compétence Universelle*, Congrès International de Droit Pénal in *RIDP*, núm. 1-2, 1932, p. 14. See analysis on international crimes in Malekian, Farhad, *op. cit.*, vol. I, pp. 19-27.

48 Eichmann case, p. 298. This condition, that the criminal or suspect should be present in the territory of the State which wishes to exercise universal jurisdiction seems to be one the most fundamental, see commentaries in Mason, Rafaëlle, “Les premiers cas d’application des dispositions pénales des Conventions de Genève par les juridictions internes”, *EJIL*, vol. 6, núm. 2 1995, pp. 264-265. According to Donnedieu de Vabres, the origin of the universal jurisdiction is within a text in the Code

is the interest of the international community which makes the exercise of such jurisdiction justifiable, thus Donnedieu de Vabres holds, “L’Etat qui... exerce sa compétence universelle... intervient, à défaut de tout autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse”.<sup>49</sup> It can be said, therefore, that when one State exercises universal jurisdiction is acting as the organ and agent of the international community in defense of the law of nations.<sup>50</sup> Therefore, “unless the act is an international crime subject to universal jurisdiction as a matter of customary law, the prosecuting nation cannot claim to be vindicating the interest of all States in trying the perpetrator”.<sup>51</sup> The rationale for this particular jurisdiction is that “some crimes are so universally condemned that the perpetrators are the enemies of all people”.<sup>52</sup> Therefore, the particular interests and values affected by those kinds of crimes represent the fundamental rights and obligations of the international community. Some writers have argued that the norms affected by crimes subject to universal jurisdiction, are norms of *jus cogens*.<sup>53</sup> The problem with this suggestion is that the content of the concept of *jus cogens* is difficult to define. Charles de Visscher argues that, “l’obstacle véritable à l’introduction du *jus cogens* dans le droit international positif réside dans son défaut d’effectivité”.<sup>54</sup> The response to the vio-

of Justinian in which the competence for the criminal courts was given to the tribunal of the place where the crime was committed and to the tribunal where the criminal was apprehended (*judex deprehensionis*). Vabres, Donnedieu de, *Les principes modernes du droit pénal international*, *op. cit.*, p. 135. See also Sucharitkul, Sompong, *op. cit.*, p. 171. See also articles 12, and 13-16 for the guarantees of the detainee, of the Harvard Law School’s Research On International Law, “Draft Convention on Jurisdiction with Respect to Crime”, *op. cit.*, pp. 594-630. See also Javor *et al.* v. X, Cour d’Appel de Paris, November 24, 1994. Reprinted in *RDI*, Italy, vol. LXXVIII, fasc. 3, 1995, p. 829, and commentary regarding the practice of France, *infra* 3.4.

49 Vabres, Donnedieu de, *Les principes modernes du droit pénal international*, *op. cit.*, p. 135.

50 Eichmann case, p. 300. See also Kobrick, Eric S., “The ex post facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes”, *Col. L. Rev.*, 87, núm. 7, 1987, p. 1530.

51 Kobrick, Eric S., *op. cit.*, p. 1520.

52 *Ibidem*, p. 1532. For Donnedieu de Vabres the basis for the exercise of universal jurisdiction is in “la nature du délit lui-même et dans ses conséquences”, Vabres, Donnedieu de, *Les principes modernes du droit pénal international*, *op. cit.*, p. 143. See also Bassiouni, Cherif, *Crimes Against Humanity in International Law*, The Netherlands, Martinus Nijhoff Publishers, 1992, pp. 512-513. Shubber, Sami, *Jurisdiction over Crimes on board Aircraft*, The Netherlands, Martinus Nijhoff, 1973, p. 83.

53 *Cfr.* Randall, Kenneth, C., *op. cit.*, pp. 831-832. For instance in Bassiouni’s opinion crimes against humanity are part of *jus cogens*, see Bassiouni, Cherif, *Crimes Against Humanity in International Law*, *op. cit.*, pp. 489-498.

54 Visscher, Charles de, “Positivisme et «Jus Cogens»”, *RGDIP*, tome LXXV, 1971, p. 7.

lation of norms of *jus cogens* is what has been considered as obligations *erga omnes*.<sup>55</sup> Here the decision of the ICJ in the Barcelona Traction case has helped in the development of this doctrine. The ICJ held the following:

... an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising vis a vis another State.... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>56</sup>

Obligations *erga omnes* include acts of aggression, genocide, slavery, racial discrimination and various fundamental principles and rules concerning respect for human rights.<sup>57</sup> Nevertheless, the idea of some type of *actio popularis* of the whole community, which would have been the consequence for such *erga omnes* obligations, has already been rejected by the ICJ.<sup>58</sup> Furthermore, some writers have argued that the dictum in the Barcelona Traction case has been incorrectly used because the ICJ was not affirming universal jurisdiction with respect of each of these offences, but rather referring to diplomatic protection.<sup>59</sup> In this sense there is a lot of truth in the statement made by Prosper Weil that, “la théorie de l’obligation *erga omnes* exige une maîtrise et une élaboration qui jusqu’à présent font défaut”.<sup>60</sup>

55 See commentaries respect to the idea that violations to *erga omnes* obligations may be punishable by any State under the universality principle in Schachter, Oscar, *International Law in Theory and Practice*, The Netherlands, Martinus Nijhoff, 1991, pp. 269-270. See also Hoogh, André, *Obligations erga omnes and International Crimes, A theoretical inquiry into the implementation and enforcement of the international responsibility of States*, The Netherlands, Kluwer Law International, 1996, pp. 53-56.

56 Case concerning the Barcelona Traction, Light and Power Company Limited, ICJ Reports, 1970. (Second Phase), p. 32.

57 *Ibidem*, pp. 32-33. See also Weil, Prosper, “Le Droit International en quête de son identité. Cours Général de Droit International Public”, *RCADI*, tome 237, vol. 6, 1992, pp. 285-286.

58 *Cf.* South West Africa cases, ICJ Reports, 1966. (Second Phase), p. 47. As Prosper Weil point out “Il s’agit d’obligations *erga omnes*: le mot était lâché”, in Weil, Prosper, *op. cit.*, p. 286. It seems that between some members of the ILC the idea of *actio popularis* is not closed at all. See participation of Jiuyong Shi, *YILC* 1990, vol. I, p. 55. See also Hoogh, André, *op. cit.*, pp. 69-70.

59 Higgins, Rosalyn, *op. cit.*, p. 90.

60 Weil, Prosper, *op. cit.*, p. 291. For a position more in favor of the doctrine see Randall, Kenneth, *C. op. cit.*, pp. 830-831.

Interpretations of doctrine have been divided in respect of the limits and possibilities of the application of the universal jurisdiction principle. In this respect there are three different positions:

1. One position on the Doctrine holds that the application of the universal jurisdiction principle is limited to the crime of piracy. As Professor Guillaume has said, “[le droit international] n’a longtemps connu et ne connaît encore qu’un seul cas de compétence universelle absolue, celui de la piraterie”.<sup>61</sup> This is also the position of Judge Moore in the Lotus case, who after having established the nature of the crime of piracy and the exceptional<sup>62</sup> application of the universality principle stated, “Piracy by law of nations, in its jurisdictional aspects is *sui generis*”.<sup>63</sup> Therefore, it is considered as an exceptional jurisdiction.

2. The second position maintains that this principle should be applied as an auxiliary jurisdiction because the State which wishes to enforce the principle must first offer the extradition of the offender to the State of the *forum delicti commissi*.<sup>64</sup> The Israeli Supreme Court held in the Eichmann case that there is a, “limitation upon the exercise of universal jurisdiction ... namely that the State which has apprehended the offender must first offer to extradite him to the State in which the crime was committed [is] implicit in the maxim *aut dedere aut punire* [thus the principle is not absolute]”.<sup>65</sup> Nevertheless, the Supreme Court was of the opinion that such a restriction could be avoided if the majority of the witnesses and the greater part of the evidence were concentrated in the State in which the criminal was in custody, this is called the *forum conveniens* principle.<sup>66</sup> In fact this was held to be the case in the matter of Eichmann.

3. The third school of thought states that by analogy with the crime of piracy, it is possible to apply the principle of universal jurisdiction to other international crimes. The problem with this point of view is “the difficulty of securing general agreement as to the offences to be included in the [universal jurisdiction]”.<sup>67</sup> The determination of the crimes subject to

61 Guillaume, Gilbert, “Terrorisme et Droit Pénal International”, *RCADI*, tome 215, vol. III, 1989, p. 349. See also Sorensen, Max, *Manual of Public International Law*, United States, St. Martin’s Press, 1968, p. 365.

62 Maison, Rafaëlle, *op. cit.*, pp. 263-264. On the contrary see Higgins, Rosalyn, *op. cit.*, p. 91.

63 Lotus Case, p. 70. See also O’Connell, Daniel Patrick, *op. cit.*, p. 658.

64 *Cf.* Eichmann case, pp. 298-299.

65 *Ibidem*, p. 302.

66 *Ibidem*, pp. 302-303. It is also important to point out that West Germany did not ask for extradition.

67 *Ibidem*, p. 299.

universal jurisdiction is a very difficult task. The practice of the States, however shows that the extension of universal jurisdiction by way of analogy is possible. In this sense, the Supreme Court of Israel held that “...the substantive basis upon which the exercise of the principle of universal jurisdiction in respect of the crime of piracy rests, justifies its exercise in regard also to the crimes which are the subject of the present case [crimes against humanity, genocide and war crimes]”.<sup>68</sup>

We suggest that none of the above mentioned positions are completely right or wrong, but that each one of them has something that can help to construct a more comprehensive rationale for universal jurisdiction. Thus, we agree that universal jurisdiction is an exceptional jurisdiction which can be exercised when there is no other jurisdictional basis to prosecute. We do not agree with the idea that it is just limited to piracy, but rather, suggest that it includes a limited number of other international crimes. We propose that universal jurisdiction could be used as an auxiliary principle in the fulfillment of the international rule of law, but we do not accept the requirement that the State which apprehends the criminal should first offer the offender to the State of the *forum delicti commissi*. It is possible to imagine that the State in which the crime was committed is unwilling or unable to prosecute the criminal.<sup>69</sup> Finally, it is agreed that analogous reasoning may be used as a method for analyzing the elements of the crime, since according to the principle of *nullum crimen sine lege*, *nullum poena sine lege* it is not possible to prosecute someone in the absence of a well-established offense.

Before continuing this analysis it is important to establish the distinction between universal jurisdiction and the *aut dedere aut judicare* principles.<sup>70</sup> The first, as has already been mentioned, implies only the right to punish for the commission of a particular category of international crime without any obligation.<sup>71</sup> It is international law which authorizes all Sta-

68 *Ibidem*, p. 300.

69 Think for instance of some of new States of the former Yugoslavia and of the case of Rwanda.

70 See commentaries in Higgins, Rosalyn, *op. cit.*, pp. 96-100. It is important to point out that even within the ILC the distinction between both concepts is not clear *i.e.* “...the rule of universal jurisdiction expressed in the formula ‘obligation to try or extradite’ (*sic*) might make it possible to reconcile State sovereignty and international cooperation to combat international crimes” see participation of Jiuyong Shi, *Yilc* 1990, vol. I, p. 53.

71 “It is harder to be sure that there currently exists a customary obligation imposed in all the States, either singularly or collectively to exercise this ‘universal jurisdiction’ whenever they possible can”, in Bassiouni, Cherif and Wise, Edward, *Aut dedere aut judicare, the duty to extradite or to prosecute in International Law*, The Netherlands, Martinus Nijhoff, 1995, p. 54. “...universal juris-

tes to punish in the name of the whole community.<sup>72</sup> The purpose of the establishment of universal jurisdiction is the protection of the most important values of the international society.<sup>73</sup> Universal jurisdiction is an exceptional jurisdiction. International law, through universal jurisdiction, only authorizes rather than obliges States to try and punish criminals.

On the other hand, the *aut dedere aut judicare*<sup>74</sup> principle represents an alternative obligation, this is, a State's duty to prosecute or to extradite.<sup>75</sup> But, in the absence of this principle and/or of an extradition treaty, it is quite doubtful to hold the existence of an obligation to extradite.<sup>76</sup> The *aut dedere aut judicare* principle has been established in a large number of multilateral treaties. As these treaties are effective only between the par-

dition is permissive rather than mandatory and as such does not require any particular State to prosecute". Sunga, Lyal S., *The Emerging System of International Criminal Law, developments in Codification and Implementation*, *op. cit.*, p. 254.

72 A different approach is granted by Cowles who holds, following the Lotus case reasoning, that what is necessary to do is not "to show that international law permits States to exercise such jurisdiction, but that it does not prohibit them from so doing", in Cowles, Williard B., "Universality of Jurisdiction over War Crimes", *Cal. L. R.*, vol. XXXIII, núm. 3, 1945, p. 178.

73 Cfr. Guillaume, Gilbert, "La compétence universelle formes anciennes et nouvelles", in *Mélanges offerts à Georges Levasseur*, Paris, Gazette du Palais, Librairie de la Cour de Cassation, 1992, pp. 23-33.

74 This expression is a modern adaptation of the original phrase used by Grotius *aut dedere aut punire*. See Book II, chapter XXI section II and IV. Grotius held, "... a people or a king is not absolutely bound to surrender a culprit, but as we have said, either to surrender or to punish him... There is in fact an alternative in the liability" at book II, chapter XXI section II and IV, para. 3. Grotius, Hugo, *De jure belli ac pacis libri tres*, English tr. by Francis W. Kelsey, Classics of International Law, vol. 2, Oxford at the Clarendon Press, 1925, reprinted 1995, p. 528.

75 "The expression *aut dedere aut judicare* is commonly used to refer to the alternative obligation to extradite or prosecute which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct", in Bassiouni, Cherif and Wise, Edward, *Aut dedere aut judicare, the duty to extradite or to prosecute in International Law*, *op. cit.*, p. 3. See also La Rosa, Anne-Marie, *op. cit.*, pp. 1-5.

76 "Il n'existe en droit coutumier aucune obligation d'extradition et le droit international de l'extradition est de ce fait exclusivement conventionnel", in Guillaume, Gilbert, "Terrorisme et droit pénal international", *op. cit.* p. 355. "In so far as general international law is concerned, extradition, is a sovereign decision of the requested State, which is never under the obligation to carry it out. Moreover, in general international law there is not obligation to prosecute in default of extradition", in Joint Declaration of Judges Evensen, Tarassov, Guillaum and Aguilar Mawdsley in case Concerning questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom). *ICJ Reports*, 1992, p. 24 reprinted in 94 *ILR*, p. 507. See also Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. res. 3074 (XXVIII), 28 U.N. Gaor Supp. (30A) at 78, U.N. Doc. a/9030/Add.1 (1973). Nevertheless Ziegler holds the existence of a duty to extradite and a duty to effectively exercise universal jurisdiction. Cfr. Ziegler, Andreas, "Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The case of Switzerland", *RSDIDE*, 5/1997, pp. 561-586.



ties,<sup>77</sup> it is untenable to suggest that all the crimes incorporated in such treaties are subject to universal jurisdiction<sup>78</sup> and that those States which are not parties to these conventions have the obligation to extradite or to prosecute an alleged offender. Moreover, the customary status of this alternative obligation is doubtful.<sup>79</sup> In the event that the treaty in which the *aut dedere aut judicare* principle is included becomes universal, it could be possible to speak of a kind of “conventional universal jurisdiction”. This would, however only represent the universalization of the *aut dedere aut judicare*. Shaw is clear on this point:

In addition to the accepted universal jurisdiction to apprehend and try pirates and war criminals, there are a number of treaties which provided for the suppression by the international community of various activities, ranging from the destruction of submarine cables to drug trafficking and slavery. *These treaties provided for the exercise of state jurisdiction but not for universal jurisdiction. Some conventions establish what might be termed a quasi-universal jurisdiction or multiple exercise of jurisdiction.*<sup>80</sup>

Akehurst holds that,

Such conventions [*i.e.* hijacking, terrorism, etc.] create an obligation to prosecute or to extradite the accused (*aut dedere aut judicare*) and thereby confer jurisdiction under the provisions of the relevant treaty. But how can such treaties, which are binding only among the parties to them, by themselves create true universal jurisdiction in relation to non-parties?<sup>81</sup>

<sup>77</sup> It is a well established principle of international law that a treaty does not create either obligations or rights for a third States without its consent, *pacta tertiis nec nocent nec prosunt*. This principle is included in art. 34 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

<sup>78</sup> “[the *aut dedere aut judicare* formula] is not universal jurisdiction *stricto sensu*... none of them [treaties], properly analyzed, provide for universal jurisdiction”, See Higgins, Rosalyn, *op. cit.*, pp. 98-100. See also Cameron, Jain, *op. cit.*, p. 80.

<sup>79</sup> “If the question is whether state practice in this sense supports the assertion that the principle *aut dedere aut judicare* has become a customary norm, the answer may well be no. Contemporary practice furnishes ‘far from consistent evidence of the actual existence’ of a general obligation to extradite or prosecute with respect to international offenses” ... “The arguments which have been made in favor of the customary status of the obligation to extradite or prosecute do not primarily rely on evidence that the practice of the States is to do one or the other in cases involving international offenses”, in Bassiouni, Cherif and Wise, Edward, *Aut dedere aut judicare, the duty to extradite or to prosecute in International Law*, *op. cit.*, pp. 43 and 68.

<sup>80</sup> Shaw, M. N., *op. cit.*, p. 414. Emphasis added. We do not agree with Shaw that only two crimes are subject to universal jurisdiction. As we hold it is a limited list of crimes subject to that jurisdiction. But we agree with the difference made between *aut dedere aut judicare* and universal jurisdiction. See *infra* analysis on the different crimes. See also Bowett, Derek William, *op. cit.*, p. 12.

<sup>81</sup> Akehurst, Michael, *Akehurst’s Modern Introduction to International Law*, *op. cit.*, p. 113. Question mark in original. See also Higgins, Rosalyn, *op. cit.*, pp. 98-100.

At the present time, it is hardly justifiable to maintain that because “X” treaty contemplates such a principle it is establishing universal jurisdiction, unless, of course, “it can be shown that customary law has also come to accept these offences as subject to universal jurisdiction”.<sup>82</sup> Nevertheless, some scholars,<sup>83</sup> even within the ILC, have sometimes used these terms interchangeably, thereby causing some confusion.<sup>84</sup> As Professor Kobrick has stated “The distinction between these two categories of international crimes [crimes established by customary international law and crimes established by conventional agreement to which universal jurisdiction is or may be applied] is often not well defined”.<sup>85</sup> This, of course, does not mean that both institutions, universal jurisdiction and *aut dedere aut judicare*, are the same.

The following table illustrates this distinction.

82 “...il n’y a aucune raison de en pas admettre, en matière de compétence universelle, [...] que puissent coexister des règles conventionnelles et coutumières en matière d’attribution de compétence (universelle) aux États”, Stern, Brigitte, “La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda”, *GYIL*, vol. 40, 1997, p. 286. See also Akehurst, Michael, *Akehurst’s Modern Introduction to International Law*, *op. cit.*, p. 113.

83 For instance, Sunga, Lyal S., *Individual Responsibility in International Law for Serious Human Rights Violations*, The Netherlands, Martinus Nijhoff, 1992, p. 102. Anne-Marie La Rosa holds, “...la plupart des conventions internationales instituant des infractions internationales prévoient un système de compétence universelle (*sic*): pour les infractions graves, les quatre conv., ...[etc.]”, in La Rosa, Anne-Marie, *op. cit.*, pp. 11-12. Harris, D. J., *Cases and Materials on International Law*, 5a. ed., UK, Sweet & Maxwell, 1998, p. 290. Even in the Rapport du Comité Européen pour les problèmes criminels, Conseil de l’Europe, Compétence Extraterritoriale en Matière Pénale, 1990, it was stated that, “[quelques] conventions envisagent ou exigent clairement l’institution d’une compétence universelle: les traités relatifs au faux-monnayage, à la piraterie, au détournement d’aéronefs et aux activités mettant en danger la sécurité de l’aviation civile en offrent des exemples”, p. 16. *Cfr.* Stern, Brigitte, *op. cit.*, pp. 283-285.

84 Article 20 “Crimes within the jurisdiction of the Court” of the Draft Statute for an International Criminal Court establishes in sub-paragraph e) what it is called treaty crimes, the list of which is contained in the Annex of the Statute. The criteria for the inclusion of the Annex were two. One is that crimes are themselves defined by the treaty so the Court could apply it. The second is that “the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* (*sic*)...” *Cfr.*, Report of the ILC on the work of its forty-sixth session UN Doc. (A/49/10) 1994, p. 78.

85 Kobrick, Eric S., *op. cit.*, p. 1524.

## DISTINCTION BETWEEN UNIVERSAL JURISDICTION AND THE AUT DEDERE AUT JUDICARE PRINCIPLES

Universal Jurisdiction	Aut dedere aut judicare
Universal Jurisdiction is a right.	Aut dedere aut judicare is an alternative obligation.
Universal Jurisdiction is a principle based in customary international law.	Aut dedere aut judicare is usually inserted as a clause in international conventions providing for judicial cooperation. Its customary status is doubtful.
Universal Jurisdiction is applied to a limited number of international crimes: piracy, slavery, war crimes, grave breaches, crimes against humanity and genocide.	The <i>Aut dedere aut judicare</i> principle is contemplated in a large number of multilateral conventions, which codify some international crimes. There are more than 20 international crimes regulated by such conventions. <sup>86</sup>
Universal Jurisdiction is an exceptional jurisdiction which can be exercised, under certain circumstances, by all the States.	Aut dedere aut judicare, as a clause, within multilateral treaties is only binding among the parties to such treaties.

In order to continue with this analysis it is important to ask to which crimes —besides piracy— could the principle of universal jurisdiction be applied?<sup>87</sup> Clearly, in order to answer this question it is necessary to provide an adequate definition of an international crime.<sup>88</sup> An expansive

<sup>86</sup> For instance in Bassiouni's opinion there are 24 international crimes, in Bassiouni, Cherif and Wise, Edward, *Aut dedere aut judicare, the duty to extradite or to prosecute in International Law*, *op. cit.*, pp. 7, 70-287.

<sup>87</sup> "...while general agreement exists as to this offence [piracy *jure gentium*] the question of the scope of its application [of the principle of universal jurisdiction] is in dispute", Eichmann case, p. 298. "...there seems to be little or no basis for common agreement as to which offences should fall within the class of *delicta juris gentium* which are to be prosecuted and punished on the same basis as piracy", Harvard Law School's Research On International Law, "Draft Convention on Jurisdiction with Respect to Crime", *op. cit.*, p. 569. See also Art. 10 universality —other crimes, *ibidem.*, pp. 573-591—. Bassiouni argues that not all the crimes under international law are equal, therefore it is necessary a hierarchy among international crimes; see Bassiouni, Cherif M., *A draft International Criminal Code and draft Statute for an International Criminal Tribunal*, The Netherlands, Martinus Nijhoff, 1987, pp. 46-48.

<sup>88</sup> "Certainly the two questions —whether a crime exists and the scope of jurisdiction to prosecute— are inextricably linked", Judge Toohey (as part of the majority opinion) in *Polyukhovich v. Commonwealth of Australia and Another*, High Court of Australia, 1991, *ILR*, vol. 91, 1993 (hereinafter *Polyukhovich case*), p. 120. We are aware of the distinction made by the ILC regarding inter-

analysis of those acts which maybe considered to be international crimes would be beyond the scope of this paper<sup>89</sup> hence, a working definition will be used. The mere “fact that an act is a violation of international law does not of itself give rise to universal jurisdiction”.<sup>90</sup> Therefore, our intention is just to try to identify the common characteristics of those international crimes to which it is possible to apply the principle of universal jurisdiction.<sup>91</sup>

One of the most useful analyses of the constitutive elements of an international crime, of the nature that is of our interest, was done by the Israeli Supreme Court which held the following:

...the features which identify crimes that have long been recognized by customary international law ... include, among others, [that] these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations [in the absence of an international criminal machinery] international law [authorizes] the countries of the world to mete out punishment for the violations of its provisions which is effected by putting these provisions into operation either directly or by virtue of municipal legislation... the classic example of a customary international crime... is that of piracy *jure gentium*.<sup>92</sup>

national crimes and crimes under international law. The ILC held, in its commentary regarding article 19 of the Draft Statute on State Responsibility, UN Doc. (A/51/10) 1996, “It is known that today international law imposes upon States the obligation to punish crimes known as “crimes under international law” ...this single category includes ‘crimes against peace’, ‘crimes against humanity’ and ‘war crimes’ in the strict sense ...in adopting the designation ‘international crime’ the Commission intends only to refer to ‘crimes’ of the State, to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression ‘international crime’ as used in this article and similar expressions, such as ‘crime under international law’, ‘war crime’, ...which are used in a number of conventions and international instruments for which those instruments require States to punish the guilty persons adequately”. *Cfr. YILC*, vol. II, part two, 1976, pp. 103 and 119. Nevertheless, for the purposes of the present work we use the term international crime to refer to what the ILC called crime under international law, without prejudice of the meaning given by the ILC.

<sup>89</sup> The ILC, for instance, has been working on this subject for a long time and we still have only a draft on it. *Cfr. Draft Code of Crimes against the Peace and Security of Mankind UN Doc. (A/51/10) 1996.*

<sup>90</sup> Higgins, Rosalyn, *op. cit.*, p. 96. *Cfr. Carnegie, op. cit.*, p. 421.

<sup>91</sup> See for instance the analysis done by professor Randall in Randall, Kenneth, C. *op. cit.*, pp. 803-820. See the elements of internationalization of international crimes according to Bassiouni, in Bassiouni, Cherif M., *A draft International Criminal Code and draft Statute for an International Criminal Tribunal, op. cit.*, p. 36.

<sup>92</sup> Eichmann case, pp. 290-291.

The High Court of Australia defined an international crime in the following manner:

An international crime is constituted, precisely, where conduct is identified which offends all humanity, not only those in a particular locality, the nature of the conduct creates the need for international accountability. Where conduct, because of its magnitude affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail... This is particularly true of crimes against humanity since they comprise by definition, conduct abhorrent to all the world.<sup>93</sup>

As we can see, crimes under international law are committed against the most important international values such as “security of the international community”, “humanitarian principles”, etc.<sup>94</sup> The nature of the conduct should be such that it affects not only a particular community but international society as a whole.<sup>95</sup> It is, however, not only the labeling of a crime as ‘international’ that makes it subject to universal jurisdiction, there are many crimes that are considered international, but not all of them are subject to such exceptional jurisdiction. What is needed is that international crimes be considered as subject to universal jurisdiction by way of customary law.<sup>96</sup> It is argued here that this constitutes a kind of double *opinio juris* requirement. The first *opinio juris* is necessary in order to recognize an unlawful act under international law as an international crime. The second *opinio juris* is required in order to consider such a crime as a crime of a particular nature and one for which universal jurisdiction can be exercised.

International crimes entail individual criminal responsibility.<sup>97</sup> This means that all the persons who commit an international crime are respon-

93 Judge Toohey (as part of the majority opinion) in Polyukhovich case, p. 121.

94 Stern holds: “...un intérêt peut être commun, car il représente une *somme d'intérêts propres identiques des États*, ou au contraire parce qu’il constitue véritablement un *intérêt unique partagé par tous*”, Stern, Brigitte, *op. cit.*, p. 281. Emphasis in original. See also each one of the crimes analyzed *infra*.

95 “It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction”. Judge Cory of the Canada’ Supreme Court in the case R v. Finta p. 811, which was the first judgment under the Canadian war crimes law in Cotler, Irwin, “International Decisions”, *AJIL*, 90, núm. 3, 1996, p. 467.

96 See *supra* commentaries regarding difference between universal jurisdiction and *aut dedere aut judicare* and the analysis of each one of the crimes *infra*.

97 “Pour que la responsabilité pénale internationale de l’individu soit effective, il faut que le droit international détermine lui-même des faits individuels illicites considérés comme des infractions au sens du droit pénal” Nguyen, Quoc Dinh, Pellet, Alain and Daillier, Patrick, *op. cit.*, p. 621. See also Article 25, individual criminal responsibility, of the Rome Statute of the ICC, *op. cit.*

sible for their acts regardless of their rank within the Government.<sup>98</sup> Individual criminal responsibility is established by international law.<sup>99</sup> Meron holds that, “Whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community. Those factors are all relevant for determining the criminality of various acts”.<sup>100</sup> The International Military Tribunal of Nuremberg consolidated the concept of individual criminal responsibility when it held that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who committed such crimes can the provisions of international law be enforced”.<sup>101</sup>

98 “The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these rights cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings”, in Judgment of the International Military Tribunal of Nuremberg, October 1, 1946. Reprinted in *AJIL*, vol. 41, núm. 1, 1947, p. 221.

99 “La responsabilité pénale internationale requiert que le droit international détermine l’incrimination et que celle-ci s’applique directement dans l’ordre juridique interne sous réserve des dispositions concernant l’application du droit international dans l’ordre interne. D’aucuns soutiennent qu’il y a responsabilité pénale internationale dès que l’incrimination existe; d’autres estiment qu’il est nécessaire que l’incrimination soit assortie d’une sanction pénale”, in La Rosa, Anne-Marie, *op. cit.*, p. 94. “The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability”, in *The Prosecutor v. Dusko Tadic*, Trial Chamber, Case núm. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995. (hereinafter *Tadic*, Trial Chamber case), para. 70. In a very peculiar conclusion the Trial Chamber of the Tribunal for Rwanda held, “The Security Council explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law. In doing so, the Security Council provided an important innovation of international law”, *The Prosecutor v. Kanyabashi*, Trial Chamber 2, Case núm. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, June 18, 1997, para. 35.

100 Meron, Theodor, “Is International Law Moving towards Criminalization?”, *EJIL*, vol. 9, núm. 1, 1998, p. 24.

101 Judgment of the International Military Tribunal of Nuremberg, October 1, 1946. Reprinted in *AJIL*, vol. 41, núm. 1, 1947, p. 221. Also the Tribunal held, “...the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state”, *idem*. It is interesting to note that Professor Lauterpacht held, “The rules of warfare, like any other rules of international law, are binding not upon impersonal entities, but upon human beings. The rules of war are binding not upon an abstract notion of Germany, but upon members of the German Government, upon German individuals exercising governmental functions in occupied territory, upon German officers, upon German soldiers.” Lauterpacht, Hersch, “The Law of the Nations and the Punishment of War Crimes”, *BYIL*, vol. XXI, 1944, p. 64.

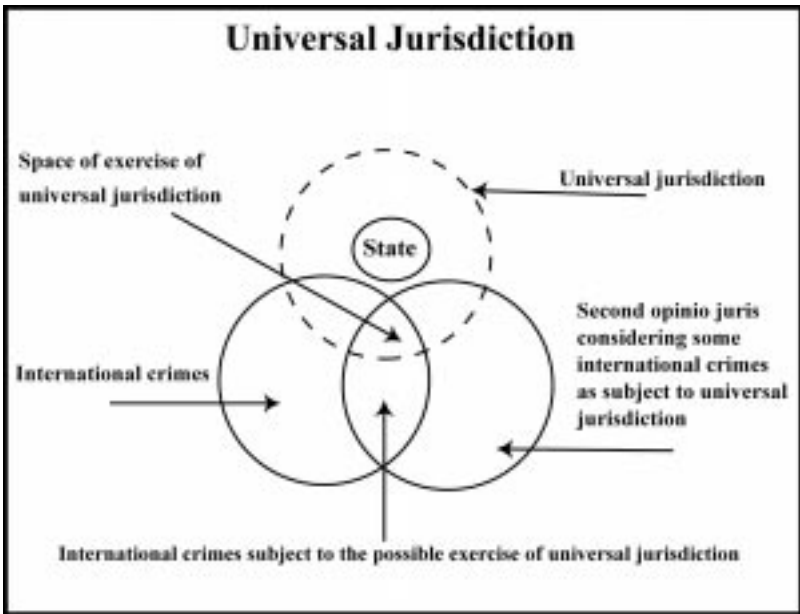
Furthermore, these crimes are not subject to statutory limitations, and no amnesty or pardon may be granted.<sup>102</sup>

In the absence of a centralized international criminal judiciary each State is entitled to ensure respect for the international rule of law. It is thus, for those exceptional crimes that each one of the States of the international community may exercise an exceptional universal jurisdiction.

In sum, an international crime subject to universal jurisdiction should have the following elements:

1. The criminal act should damage the most valued interests of international society.
2. The effects of these kinds of crimes are felt by the whole international community regardless of the territory in which they were committed or the nationality of the victims.
3. The criminal act gives rise to individual criminal responsibility.
4. These are crimes for which it is not possible to apply statutory limitations, amnesty or any kind of pardon;
5. Most importantly, these crimes should be considered by the international community as subject to universal jurisdiction by way of customary international law (the double *opinio juris* criteria). See figure *infra*.

102 See for instance the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (núm. 18) at 40, U.N.Doc A/7218 (1968). Any of these acts can create a sort of impunity which it is inadmissible if we really want to create an international rule of law. But see the case M. Sobansky Wladyslav et association nationale des anciens prisonniers internés d'Indochine, núm. 92-82.273, in Alland, Denis, "Jurisprudence Française en matière de Droit International Public", *RGDIP*, vol. 2, 1994, pp. 471-481. See also David, Eric, *Principes de Droit des Conflits Armés*, Belgium, Bruylant Bruxelles, 1994, pp. 652-655.



### Application of the “double *opinio juris* criteria”

Nevertheless, a number of States and scholars still consider the exercise of universal jurisdiction as an intervention within State sovereignty,<sup>103</sup> a danger to international standards for a fair trial<sup>104</sup> or incompatible with the existence of an international criminal court.<sup>105</sup>

<sup>103</sup> “To date, the industrially strong Western powers have decisively opposed universal criminal jurisdiction in the context of a code of offences against the peace and security of mankind... Fundamentally [they] based their position on the principle of sovereignty”. Graefrath, Bernhard, “Universal Criminal Jurisdiction and an International Criminal Court”, *EJIL*, vol. 1, núms. 1-2, 1990, p. 73. This position has been changing in the most recent years for instance, in the Djajic case, Safferling holds that the German Court concluded that “public international law far from barring prosecution corroborated and supported the conclusion that the arguments in favor of prosecuting war criminals in Germany prevail over the limiting principle of non interference”, Safferling, J. Christoph, “Public Prosecutor v. Djajic. núm. 20/96. Supreme Court of Bavaria. May 23, 1997”, *AJIL*, vol. 92, núm. 3, 1998, p. 531.

<sup>104</sup> Arangio-Ruiz holds: “An international Criminal Court would not undermine the sovereignty of States any more than the system of universal jurisdiction, which in practice, subjected the nationals of a State to the jurisdiction of another State without an acceptable guarantee of a fair trial (*sic*)”, *YILC* vol. I, 1992, p. 5.

<sup>105</sup> *Cfr.* Graefrath, Bernhard, *op. cit.*, p. 81. It is important to point out that this scholar holds that universal criminal jurisdiction and an international criminal court are not mutually exclusive, see *ibidem*,



It seems to us that none of these arguments are truly convincing enough. The preservation of the international rule of law over any individual interest is without doubt one of the best reasons for the exercise of universal jurisdiction. Moreover, in the absence of a centralized juridical organization having an international character it rests with each State to apply exceptionally, on behalf of the entire community, international norms in order to punish those who are qualified as *hostis humanis generis*. Clearly, any exercise of this jurisdiction must be in accordance with international law.

### III. CRIMES

This section of the study consists of a case by case analysis whereby the characteristics of universal jurisdiction are matched with the elements of certain international crimes.<sup>106</sup> Clearly, it is beyond the scope of the present study to do a deep analysis of each one of the following crimes, the intention is simply to draw out the elements which make them subject to such jurisdiction.

#### 1. Piracy<sup>107</sup>

Piracy is the oldest offense to which universal jurisdiction has been applied and this practice has a firm basis in customary international law.<sup>108</sup> In the case of piracy therefore, what is punishable is the notion of piracy *jure*

pp. 82-88. Meron holds: "there is, of course, a synergistic relationship among the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by states, and their readiness to prosecute offenders under the principle of universality of jurisdiction" in Meron, Theodor, "War Crimes Law comes of Age", *AJIL*, vol. 92, núm. 3, 1998, p. 464. Also the ICRC is of the opinion that universal jurisdiction is not incompatible with an international court. *Cfr.* ICRC, International Criminal Court: State Consent Regime vs. Universal Jurisdiction. Document submitted at the ICC Rome Conference, 1998, *passim*.

<sup>106</sup> The author is aware of the work of the ILC in the Draft Statute for an International Criminal Court, *op. cit.*, and in the Draft Code of Crimes against the Peace and Security of Mankind, *op. cit.*, and of the efforts of the international community in the recently approved Rome Statute of the ICC, but a decision has been made to focus on those crimes that have been considered traditionally by doctrine as subject to universal jurisdiction. Nevertheless, mention of those works is made throughout the present analysis.

<sup>107</sup> For a general overview of piracy, although a little bit old, see Pella, V., "La Répression de la Piraterie", *RCADI*, tome 15, vol. V, 1926, pp. 149-270.

<sup>108</sup> Randall, Kenneth, C., *op. cit.*, p. 791. For history of the crime see Pella, V., *op. cit.*, pp. 149-164.

*gentium*<sup>109</sup> and not the definition established by one State in its internal legislation covering such a crime.<sup>110</sup> Thus, for instance, Judge Moore, in the Lotus case defined piracy as an “offence against the law of the nations; ...the scene of the pirate’s operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humanis generis*—whom any nation may in the interest of all capture and punish”.<sup>111</sup> Under the notion of *hostis humanis generis*<sup>112</sup> the pirate was held

109 The Court of Anvers held that the characteristics of the piracy *jure gentium* are the following: a) act of violence, or an act of detention or depredation committed in the high seas; b) those acts should be committed by the crew or passengers of the ship; c) such acts should be committed against the persons or goods of other ship and d) the motivation of the acts are by private ends, in Starkle, Guido, “*Piraterie en Haute Mer et Compétence Pénale Internationale. A propos de l’arrêt de la Cour d’ appel d’Anvers du 19 juillet 1985*”, *RDPC*, soixante-septième année (1987), núm. 8-9-10, Août-Septembre-Octobre 1987, pp. 738-741. See also Lotus Case, p. 70. Randall, Kenneth, *C. op. cit.*, pp. 795-798.

110 Jennings, Robert and Watts, Arthur, *Oppenheim’s International Law, op. cit.*, p. 754. See also Harvard Law School’s Research on International Law, “Draft Convention on Jurisdiction with Respect to Crime”, *op. cit.*, p. 566. Pella, V., *op. cit.*, pp. 171-172. Of course the penalty imposed by the State is only a matter of its concern. In this sense Kelsen argues: “In determining the penalty of piracy by its criminal law and inflicting a penalty upon the pirate through its own court the State executes international law; it acts as organ of the international community constituted by general international law, just as the individual committing piracy violates an obligation directed imposed upon him and not upon his State or any other State, by international law, which makes this individual an not a State, responsible for the delict”. Kelsen, Hans, *Principles of International Law*, 2a. ed., United States, Holt, Rinehart and Winston 1966, p. 205.

111 Dissenting opinion of Judge Moore in the Lotus Case, p. 70. *Cfr.* art. 3 of the Harvard “Draft Convention on Piracy” which states, “Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state: 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with the intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character. 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship. 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article”, Harvard Law School’s Research on International Law, “Draft Convention on Piracy”, *AJIL*, vol. 26, núm. 4, 1932, pp. 768-822. This Convention also states that there is no authoritative definition on this crime, *ibidem*, p. 769. See also art. 9 and comment of the Harvard Law School’s Research on International Law, “Draft Convention on Jurisdiction with Respect to Crime”, *op. cit.*, pp. 563-572. See also “In re Piracy Jure Gentium”, *ILR*, vol. 7, 1933-34, p. 215. Polyukhovich case, pp. 41-42.

112 Grotius holds, “Therefore we must thrust Cicero aside when he says that there is no perjury if the ransom for life, which have been agreed upon even under oath, is not paid over to pirates, for the reason that a pirate is not entitled to the rights of war, but *is the common enemy of mankind*, with whom neither good faith nor a common oath should kept” at Book II, chapter XIII, section XV, para. 1. Grotius, Hugo, *De Jure Belli ac Pacis Libri Tres*, English tr. by Francis W. Kelsey, Classics of International Law, vol. 2, Oxford at the Clarendon Press, 1925, reprinted 1995, p. 373. Emphasis added.

individually liable for his actions under international law.<sup>113</sup> Individual criminal responsibility is thus an element of the crime of piracy.

It is important to note that the definition of piracy in Article 101 of the Convention on the Law of the Sea 1982,<sup>114</sup> —which was taken directly from Art. 15 of the Convention on the High Seas of 1958,—<sup>115</sup> clearly establishes that acts of piracy are committed for “private ends”. Therefore, any activity similar to piracy but with political aims does not fall within this definition.<sup>116</sup> This article also covers acts committed on board aircrafts which has developed into the concept of hijacking.<sup>117</sup>

Piracy constitutes a crime against the security of commerce on the high seas,<sup>118</sup> against the principle of maritime communication<sup>119</sup> and the principle of the freedom of the high seas.<sup>120</sup> These are vital interests common to the whole international community and are therefore, of universal scope.<sup>121</sup>

It is important to note that the principle of universal jurisdiction was established in reaction to pirates because, the activities of pirates posed a threat to the main interests of the international community,<sup>122</sup> and secondly, the crime was usually committed on the high seas where no sin-

113 Kobrick, Eric S., *op. cit.*, p. 1520. Rousseau, Charles, *Droit international public*, neuvième édition, Paris, Dalloz, 1979, pp. 235-236. Sundberg, Jacob W. F., “The Crime of Piracy”, in Bassiouni, Cherif (ed.), *International Criminal Law*, vol. I, Crimes, United States, Transnational Publishers, Inc., 1986, pp. 441-453.

114 United Nations Convention on the Law of the Sea, 10 December 1982, A/CONF.62/121 and Corr. 1 to 8.

115 Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 11.

116 *Cfr.* Touret, Corinne, *op. cit.*, pp. 35-37. Shaw, M. N., *op. cit.*, p. 369. “*L’animus furandi*, l’esprit de lucre est en effet un élément essentiel de ce crime [piracy]”, Pella, V., *op. cit.*, p. 212. Within these private ends can be considered the *animus furandi* of the pirates, but not all the scholars agree, for instance *cfr.* La Rosa, Anne-Marie, *op. cit.*, p. 87.

117 Some writers are of the opinion that due to the fact that there is a connection between both crimes it is also possible to apply to them universal jurisdiction, see Shubber, Sami, *Jurisdiction over Crimes on board Aircraft*, The Netherlands, Martinus Nijhoff, 1973, pp. 186-189. On the contrary see Paenson, Issac, *Manual of Terminology of the Law of Armed Conflict*, The Netherlands, Martinus Nijhoff and Bruylant, 1989, p. 539. International Law Association, *Report on Piracy: Sea and Air, Report of the Fifty-fourth Conference held at The Hague, 1971*, pp. 706-707.

118 See Starkle, Guido, *op. cit.* 1987, p. 744.

119 “[There are] certain general and well recognized principles, namely... the principle of the freedom of maritime communication”, in *The Corfu Channel Case*, ICJ Reports, 1949, p. 22.

120 Randall, Kenneth C., *op. cit.*, p. 792. Kelsen holds: “the rule authorizing the state to seize and punish pirates on the high seas is a restriction of the rule concerning the freedom of the seas and as the latter is a rule of general international law, the former must likewise be a rule of general international law”, Kelsen, *op. cit.*, p. 205.

121 Starkle, Guido, *op. cit.* 1987, p. 747.

122 Randall, Kenneth C., *op. cit.*, p. 795.

gle State could claim jurisdiction.<sup>123</sup> It is precisely the latter criteria which was the origin of the idea of universal jurisdiction. The fact that the crime was committed in a place *sans maître*,<sup>124</sup> without sovereign, made it easier to apply the concept of universal jurisdiction. The spirit of the freedom of the high seas is that no State may acquire sovereignty over parts of it. In fact, the advantage of the high seas is that it does not belong to any one, but to all States. It is interesting to note that this does not mean that other types of jurisdiction, i.e., the passive or active personality, etc., are not applicable, but that in the absence of any other basis for jurisdiction, any State can exercise, exceptionally, a universal jurisdiction to protect the interests of the international community.

It is thus, this double criteria —the nature of the crime and the place where it is committed— that explains why piracy is subject to universal jurisdiction. Nevertheless, the criteria of a place *sans maître* would not appear to limit the application of this exceptional jurisdiction to other crimes.<sup>125</sup> The reason for this is twofold: On one hand, the evolution in the international community of a more coherent system of international law in which the rule of law plays a very important role and, on the other hand, the expansion and progressive consolidation of international humanitarian law which provides for the application of such kinds of jurisdiction. This evolution is ongoing and probably in the future this jurisdiction might be applied to other crimes, including grave violations of human rights.<sup>126</sup>

123 “Cette universalité est justifiée non pas par le caractère maritime du crime, mais par le lieu d’exécution du crime, lieu qui doit se trouver en dehors de la juridiction exclusive d’un Etat déterminé”. Pella, V., *op. cit.*, p. 167. The Harvard Law School holds, “...piracy is important as a topic for international agreement mainly because it furnishes an extraordinary basis of *common* jurisdiction—a especial basis consistent of the nature and locality of the offense— which cannot be enlarge by a separate action of a state on its own behalf”, in Harvard Law School’s Research on International Law, “Draft Convention on Piracy”, *op. cit.*, p. 782. See also Randall, Kenneth, C. *op. cit.*, p. 793. Jennings, Robert and Watts, Arthur, *Oppenheim’s International Law, op. cit.*, pp. 752-753.

124 Pella holds, “Dans ces lieux, [sans maître] tous les Etats ont un droit *virtuel* de répression [que] devient *effectif* au moment où le malfaiteur ...est *appréhendé*”. Pella, V., *op. cit.*, p. 222. *Cfr.* Touret, Corinne, *op. cit.*, p. 35.

125 “Whereas universal jurisdiction applies to slave trading and piracy primarily because these crimes are committed typically in *res communis*, universal jurisdiction in respect of war crimes and certain others crimes relate to recognition by the international community of the particular gravity of the crime”, in Sunga, Lyal S., *Individual Responsibility in International Law for Serious Human Rights Violations, op. cit.* p. 103. Stern holds: “Aujourd’hui, la compétence universelle s’est élargie des espaces communs —*res communis*— aux intérêts communs fondamentaux de l’humanité, c’est-à-dire à certains intérêts perçus comme étant essentiels à la survie de l’humanité”, Stern, Brigitte, *op. cit.*, p. 281.

126 See *infra* the discussion in part 2.5 Other Crimes.

## 2. Slavery

The international campaign to abolish slavery commenced with the Declaration against Slave Trade of 1815.<sup>127</sup> Since that time the crime of slave trading has been recognized as an international crime<sup>128</sup> and this is now a clearly established norm of customary international law as well as being enshrined in conventional law.<sup>129</sup>

Slavery is subject to universal jurisdiction<sup>130</sup> along with piracy because pirates and slave traders are considered enemies of all humanity.<sup>131</sup> It is also a crime subject to individual criminal responsibility.<sup>132</sup>

Although slave trading did not affect the same interests as those which were jeopardized by piracy, this crime is considered as one of the most heinous in nature because it attacks human dignity and integrity.

## 3. War Crimes<sup>133</sup>

International humanitarian law confers rights and obligations upon States and individuals.<sup>134</sup> Its main objective is to regulate or “humanize”, what by nature is inhuman-war.

Breaches of the laws and customs of war constitute war crimes. It is important to emphasize that those violations are not limited to written

127 For a genesis of the proscription of the slavery crime, see O’Connell, Daniel Patrick, *op. cit.*, pp. 753-755. See also Jennings, Robert and Watts, Arthur, *Oppenheim’s International Law, op. cit.*, p. 978.

128 For the genesis of the crime see Randall, Kenneth, C., *op. cit.*, pp. 798-800. In the same sense Higgins, Rosalyn, *op. cit.*, p. 92.

129 See for instance: Convention to Suppress the Slave Trade and Slavery of 1926, 60 LNTS 253; Protocol Amending the Slavery Convention of 1953, 182 UNTS 51; Supplementary Convention of the abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, 266 UNTS 51. See also commentaries in Jennings, Robert and Watts, Arthur, *Oppenheim’s International Law, op. cit.*, pp. 981-982.

130 Kobrick, Eric S., *op. cit.*, p. 1521. See also *Prinz v. Federal Republic of Germany*, *ILR*, vol. 103, 1996, p. 617.

131 Randall, Kenneth C., *op. cit.*, p. 788. In a doubtful position see Wolfrum, Rüdiger, *op. cit.*, p. 237.

132 Sunga, Lyal S., *Individual Resp...*, *op. cit.*, pp. 90-91.

133 *Cfr.* La Rosa, Anne-Marie, *op. cit.*, pp. 27-32.

134 “Le droit international humanitaire présent à ce sujet deux caractéristiques notoires. D’une part, il crée une compétence universelle, l’État sur le territoire duquel se trouve un étranger qui a commis à l’étranger un crime de guerre contre un étranger étant compétent, en vertu du [droit international humanitaire], pour poursuivre le coupable. D’autre part, l’exercice de la compétence de poursuivre et de juger est obligatoire, [see Articles 49, 50, 129 and 146 of Geneva Conventions I, II, III and IV respectively]”, in Plattner, Denise, “La Répression pénale des violations du droit international humanitaire applicable aux conflits armés non internationaux”, *RICR*, núm. 785, 1990, p. 447.

instruments but also cover customary law,<sup>135</sup> due to the fact that war is an activity that has been regulated in different periods of time and places<sup>136</sup> and that the concept of war crimes is in constant evolution.<sup>137</sup>

At the end of W.W.I the Allied Powers decided that all persons who had been guilty of offenses against the laws and customs of war were responsible and liable to criminal prosecution. This included the establishment of individual criminal responsibility even in the case of Heads of State<sup>138</sup> which was in fact, one of the major areas of progress in international criminal law.<sup>139</sup> Heads of State and some top ranking officials have traditionally been immune from prosecution and therefore not subject to the jurisdiction of any State because they were not acting in their personal capacity but on behalf of the State and thus derived protection from the doctrine of sovereignty of State. Nevertheless, that immunity cannot be maintained in relation to violations of humanitarian law. The idea behind the establishment of individual criminal responsibility, re-

135 In this sense it is important to mention the Martens Preamble —also known as “Martens clause” — to the Hague Convention núm. IV respecting the Laws and Customs of War on Land of 1907, “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 belligerents remain under the protection and the rule of law of nations, as they result from the usages establish among civilized peoples, from the laws of humanity and the dictates of public conscience”, Convention Respecting the Laws and Customs of War on the Land (Hague, IV), October 18, 1907, 3 Martens Nouveau Recueil (3d) 461. The concept of war crimes is an open concept. The Secretary-General in his Report held, “The part of conventional international humanitarian law which has beyond any doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims, the Hague Convention (IV) Respecting the laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907, the Convention on the Punishment of the Crimes of Genocide of 9 December 1948 and the Charter of the International Military Tribunal of 8 August 1945”, in Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 and Annex., para. 35.

136 Armed conflicts have been regulated as early as 500 B.C. with the Chinese treatise by Sun Tzu “the Art of War”. Cfr. Sunga, Lyal S., *Individual Responsibility in International Law for Serious Human Rights Violations*, *op. cit.*, pp. 17-21.

137 “The law of war is to be found not only on treaties, but in the custom and practices of states which gradually obtained universal jurisdiction, and from the general principles of justice... This law is not static, but by continual adaptation follows the needs of a changing world.” In Judgment of the International Military Tribunal of Nuremberg, October 1, 1946. Reprinted in *AJIL*, vol. 41, núm. 1, 1947, p. 219.

138 The intention was, according to Art. 227 of the Treaty of Versailles to try William II former Emperor of Germany, but the Kaiser escaped to the Netherlands where his extradition was not granted. Cfr. Sunga, Lyal S., *Individual Responsibility in International Law for Serious Human Rights Violations*, *op. cit.*, p. 22. Cfr. also articles 228 and 229 of the Treaty of Versailles.

139 Cfr. analysis of individual criminal responsibility for war crimes in Malekian, Farhad, *op. cit.*, vol. I, pp. 143-146.

ardless of the rank of a person within the State, is to avoid any kind of subterfuge that would allow impunity.

At the end of W.W.II the Allies established the IMT for the prosecution of the Axis Powers-criminals.<sup>140</sup> The IMT was the corner-stone in the definition of acts considered to be criminal under international law. These crimes were war crimes, crimes against peace and crimes against humanity.<sup>141</sup> Later on, the UN General Assembly, acknowledging the importance of the Nuremberg decision, ordered the ILC to formulate the principles of international law recognized in the Charter of the Nuremberg tribunal and in the judgment of the Tribunal.<sup>142</sup> There is no doubt that those crimes were crimes under international law during W.W.II.<sup>143</sup>

War crimes have also been considered not subject to statutory limitations, amnesty or pardon.<sup>144</sup>

The definition of a war crime was given in Article 6 of the Charter of the Nuremberg Tribunal,<sup>145</sup>

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a)...

b) War Crimes: namely, violations of the laws or customs of war. Such violations include, but (sic) not be limited to, murder, ill-treatment or deportation to slave labor or of any other purpose of civilian population of or in any occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>146</sup>

140 "Charter of the International Military Tribunal (IMT)", in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, 82 U.N.T.S. 280.

141 Sunga holds "The Nuremberg Charter rather than the Hague Conventions or the 1928 Kellogg-Briand Pact, is the true legal source of individual criminal responsibility for war crimes, crimes against peace and crimes against humanity", in Sunga, Lyal S., *Individual Responsi...*, *op. cit.*, p. 36.

142 *Cfr.* UN GA Res. 95(I), 1946 and YILC, part II, 1950, p. 195.

143 *Cfr.* Judg Toohey (as part of the majority opinion) in Polyukhovich case, p. 122. For the genesis of the war crimes see Cowles, Williard B., *op. cit.*, pp. 181-216. Bierzanek, Remigiusz, "War Crimes: History and Definition", in Bassiouni, Cherif (ed.), *International Criminal Law*, vol. III, Enforcement, United States, Transnational Publishers, 1987, pp. 31-49.

144 Domb, Fania, "Treatment of War Crimes in Peace Settlements-Prosecution or Amnesty?", *IYHR*, vol. 24, 1994, p. 259. Even more, Domb holds that all the States have an obligation under general international law to punish war crimes, *ibidem*, pp. 260-264.

145 The principles established by the Charter of Nuremberg have been adopted by the General Assembly as Principles of International Law. GA Res. 96/1 1946.

146 "Charter of the International Military Tribunal", in Agreement for the Prosecution and Pu-

It is interesting to note that the ILC in Article 20 “war crimes”, of the Draft Code of Crimes against the Peace and Security of Mankind holds that such crimes must have been committed in a systematic manner or on a large scale . The ILC explains: “A crime is systematic when it is committed accordingly (*sic*) to a preconceived plan or policy. A crime is committed on a large scale when it is directed against a multiplicity of victims, either as a result of a series of attacks or of a single massive attack against a large number of victims”.<sup>147</sup> Hence, “not every war crime is thus a crime against the security and peace of mankind”<sup>148</sup> only those of which have both characteristics and this constitutes an important evolution in the concept. In this context, it is important to mention the large Article 8, war crimes, of the Rome Statute of the ICC which includes, inter alia: grave breaches of the Geneva Conventions, other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, for instance, the use of poisonous weapons, the conscription of children under the age of fifteen into the national armed forces, or using them to participate actively in hostilities, etc. It also includes, in the case of non-international armed conflicts, serious violations of Article 3 common to the four Geneva Conventions of 1949 as well as other serious violations of the laws and customs applicable to non-international armed conflicts. These violations are clearly enumerated in the article but should not be regarded as a “closed list” and this is made clear in Article 10 which states: “nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.<sup>149</sup>

Hence, it is the nature of war crimes which makes universal jurisdiction applicable.<sup>150</sup> In this respect Sunga has hold the following:

nishment of the War Criminals of the European Axis (London Agreement), August 8, 1945, 82 UNTS 280.

<sup>147</sup> Report of the ILC on the work of its forty-eighth session UN Doc. (A/51/10) 1996, p. 114.

<sup>148</sup> *Idem*.

<sup>149</sup> *Cfr.* articles 8 and 10 of the Rome Statute of the ICC, *op. cit.*

<sup>150</sup> Baxter, R., Richard, “The Municipal and International Law Basis of Jurisdiction over War Crimes”, *BYIL*, XVIII, 1951, p. 390. See also Greenspan, Morris, *The Modern Law of Land Warfare*, University of California Press, 1959, p. 14. “The jurisdiction exercise over war crimes, has been of the same nature as that exercised in the case of the pirate, and this broad jurisdiction has been assumed for the same fundamental reasons”, Cowles, Williard B., *op. cit.*, p. 217. “The universal jurisdiction to try war criminals is a jurisdiction to try those alleged to have committed war crimes as defined by international law”, in Polyukhovich case, p. 42. See also Randall, Kenneth, C. *op. cit.*, p. 804. McDougal, Myres S. and Feliciano, Florentino P., *The International Law of War Transnational*



It was the nature of the crime being an offense against the honour of a particular code widely recognized within the military profession, rather than the locus delicti which constituted the essential element justifying universal jurisdiction in the case of war crimes. The concept of universal jurisdiction for breaches of the laws of war originated on grounds that the nature of the crime is so odious as to be the concern of the international community to ensure that offenders are caught and punished according to international law.<sup>151</sup>

### *Grave Breaches of the Geneva Conventions*<sup>152</sup>

In an effort to more comprehensively regulate the rules applicable to armed conflict, the ICRC was the sponsor of the creation of the Geneva Conventions of 1949.<sup>153</sup>

The four Geneva Conventions and the First Additional Protocol<sup>154</sup> contain what is considered as “grave breaches”.<sup>155</sup> These grave breaches

*Coercion and World Public Order*, The Netherlands, Martinus Nijhoff, 1994, pp. 716-717. When UK enacted in 1957 the Geneva Conventions Act demonstrated a belief that “war crimes were offences over which it was suitable for the British Courts to exercise jurisdiction, regardless of the nationalities of the perpetrator and the victim, and of the country where alleged offence took place”, Report of the War Crimes Inquiry, Her Majesty’s Stationery Office, by Hetherington, Thomas and William Chalmers, UK, 1989, p. 96. *Cfr.* Carnegie, *op. cit.*, pp. 406-424.

151 Sunga, Lyal S., *Individual Respons...*, *op. cit.*, p. 104. It is interesting to mention that some scholars make the analogy between piracy and war crimes and give the same reasons for establishing universal jurisdiction over the latter crimes, *cfr.* Cowles, Williard B., *op. cit.*, pp. 190-215 and 217. Dinstein, Yoram, “The Distinction between War Crimes and Crimes against Peace” *IYHR*, vol. 24, 1994, p. 15.

152 *Cfr.* La Rosa, Anne-Marie, *op. cit.*, pp. 53-56.

153 The Report of the Secretary-General states, “The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflict”, Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 and Annex., para. 37.

154 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. (Geneva I). Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 1 August, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85. (Geneva II). Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. (Geneva III). Geneva Convention Relative to the Protection of Civilian Persons in time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. (Geneva IV). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1125 U.N.T.S. 3. (Protocol I).

155 These violations, against persons and property protected by the Conventions include, among others, wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. *Cfr.* art. 50 Geneva I, art. 51 Geneva II, art. 130 Geneva III, art. 147 Geneva IV and art. 85.2-5 and art. 86. 1 Protocol I.

are widely understood to be committed only in armed conflicts of an international character. The qualification of the conflict, whether internal or international, therefore, is a necessary process for the application of the grave breaches system. In fact, this was one of the major problems that the ICTFY faced in its analysis regarding the nature and application, as a substantive law, of Article 2 of the Statute of the Tribunal for the former Yugoslavia<sup>156</sup> (grave breaches of the Geneva Conventions). The Appeals Chamber of the Tribunal held that, “a change in customary international law concerning the scope of the ‘grave breaches’ system might gradually materialize.” This evolution being the application of grave breaches to situations of internal conflict, -however, the Chamber concluded that “in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflict”.<sup>157</sup> Fortunately, Article 3 of the ICTFY’ Statute provides that the Tribunal is competent to adjudicate violations of the laws or customs of war. The advantage of the drafting of this provision is that the violations contained in it do not represent any kind of limitation regarding the nature of the conflict. The Appeals Chamber held that, “Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5”.<sup>158</sup> And the Chamber concluded that, “Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed”.<sup>159</sup> Hence, it seems that a certain opinion is forming within the international community that what is important is the violation of the laws and customs of war, rather than the type of conflict in which they occur.<sup>160</sup>

156 *Cfr.* Statute of the International Criminal Tribunal for the former Yugoslavia. Annex to Security Council Resolution 827 (1993), 32 ILM 1203.

157 *The Prosecutor v. Dusko Tadic*, Appeals Chamber, Case núm. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereinafter *Tadic*, Appeals Chamber case), para. 83 and 84 respectively. But see separate opinion of Judge Abi-Saab in the same decision. As we can see the question is still open for discussion. See also *The Prosecutor v. Dusko Tadic*, Trial Chamber, Case núm. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 588, but see criticism in Meron, Theodor, “Classification of Armed Conflict in the former Yugoslavia: Nicaragua’s fallout”, *AJIL*, vol. 92, núm. 2, 1998, pp. 236-242.

158 *Ibidem*, para. 91. Emphasis in original.

159 *Ibidem*, para. 92. Emphasis added. On the contrary see Judge Li’ separate opinion of the same decision, para. 10-13.

160 *Ibidem*, para. 78-79 and 96-99. *Cfr.* Andries, A.; David, E., *et al.*, “Commentaire de la loi du 16 juin 1993 Relative à la Répression des Infractions Graves au Droit International Humanitaire”,

These grave breaches have been considered by some scholars as subject to individual criminal responsibility<sup>161</sup> and to universal jurisdiction<sup>162</sup> therefore, even external parties to the Conventions and neutral States could prosecute war criminals.<sup>163</sup> Nevertheless, the Appeals Chamber in the Tadic case held in a peculiar worded paragraph:

Each of the four Geneva Conventions of 1949 contains a 'grave breaches' provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal manda-

*RDP*C, 74 Année, Novembre, núm. 11, 1994, p. 1174. *Cfr.* also commentary to article 20 War Crimes of the Draft Code of Crimes against the Peace and Security of Mankind, in which the ILC held, "the provisions of the present subparagraph [those regarding to grave breaches] should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Conventions. This provision closely resembles the corresponding provision contained in the Statute of the International Criminal Tribunal for the former Yugoslavia", Report of the ILC on the work of its forty-eighth session UN Doc. (A/51/10) 1996, p. 115. The question here is, should we apply the same criteria for that article as the Appeals Chamber did in Tadic?

161 Sunga, Lyal S., *Individual Respons...*, *op. cit.*, pp. 51-54. Graditzky, Thomas, "La responsabilité pénale individuelle pour violation du droit international humanitaire applicable en situation de conflit armé non international", *RICR*, núm. 829, Mars 1998, pp. 55-57. See also Tadic, Appeals Chamber case, para. 134.

162 Randall, Kenneth C., *op. cit.*, pp. 817-818. Bassiouni, Cherif, *Crimes Against Hu...*, *op. cit.*, pp. 516-517. Higgins, Rosalyn, *op. cit.*, p. 92. Bothe, Michael, "War Crimes in Non-international Armed Conflict", *IYHR*, vol. 24, 1994, p. 247. On the contrary Meron holds, "Violations of common Article 3 of the Geneva Conventions, which concern internal wars, do not constitute grave breaches giving rise to universal criminal jurisdiction". Meron, Theodor, "War Criminals in Yugoslavia and the Development of International Law", *AJIL*, vol. 88, núm. 3, 1994, p. 80. But in a more recent article Meron holds, "In my view, any third state has the right, although probably no the duty, to prosecute serious violations of the Geneva Conventions, including those of common Article 3, even when it has no special nexus with either the offender or the victim." Meron, Theodor, "Is International Law Moving towards Criminalization?", *op. cit.*, p. 23. Röling argues, "The Conventions do not contain the principle of universality [of jurisdiction] but only the principle of extended protection", Röling, Bernard, V. A., "The Law of War and the National Jurisdiction since 1945", *RCADI*, vol. II, tome 100, 1960, p. 362. Reidams, Luc, *op. cit.*, p. 25. It is interesting to point out that the Final Report of 27 May 1994 of the Commission of Experts establish pursuant to Security Council resolution 780 (1992) holds, "...the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide for which it applies irrespective of the conflict's classification" (S/1994/674, p.13, para. 42.).

163 *Cfr.* Eichmann case, p. 38. McDougal, Myres S. and Feliciano, Florentino P., *op. cit.*, p. 719. On the contrary professor Baxter argues, "It is in accordance with the principle of universality in dealing with war crimes and with the international interest in the suppression of such offences, from which that jurisdiction is derived, that neutral States should not be in position to thwart the prosecution of violators of international law without themselves become chargeable with an abuse of right". Baxter, R., Richard, *op. cit.*, p. 392. In the same sense Röling says, "...neutrals do not have the obligation to search for alleged war criminals, and that they do not have the obligation to try war criminals, in cases where extradition did not take place". Röling, Bernard V. A., *op. cit.*, p. 362.

tory criminal jurisdiction (*sic*) among contracting States... The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory (*sic*) universal jurisdiction represents. States parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of humanitarian law committed in their internal armed conflict -at least no the mandatory (*sic*) jurisdiction involved in the grave breaches system.<sup>164</sup>

In our opinion the Chamber is referring to the *aut dedere aut judicare* principle which is an alternative obligation contained as a provision in the Geneva Conventions and therefore only binding among the contracting States.

The obligation to apply the principle of *aut dedere aut judicare* resides within the common redaction of the four Geneva Conventions which reads as follows:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, any of the grave breaches of the present as defined in the following Article and shall bring such persons regardless of their nationality, before its own courts. It may also if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prime facie*.<sup>165</sup>

This excerpt is considered by some scholars as an example of classic international repressive cooperation<sup>166</sup> on the basis also of common Article 1 of the Conventions, which requires that the Parties undertake to respect and to ensure respect of the Geneva Conventions.<sup>167</sup> Moreover, com-

164 Tadic, Appeals Chamber case, para. 79-80. Underlined added.

165 Art. 49, Geneva I, art. 50 Geneva II, art. 129 Geneva III, art. 146 Geneva IV, art. 85.1 and 86.1 Protocol I.

166 This cooperation should be also with the United Nations thus, Article 89 of Protocol I states, "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter." See also Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. res. 3074 (XXVIII), 28 U.N. GAOR Supp. (30A) at 78, U.N. Doc. a/9030/Add.1 (1973).

167 This is not only a conventional obligation but an obligation derived from humanitarian principles, the ICJ held, "The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to

mon Article 3 of the Geneva Conventions has already reached the status of a customary rule.<sup>168</sup>

#### 4. *Crimes Against Humanity*<sup>169</sup>

Crimes against humanity first come into being as a legal category in 1945 as the solution to the problem of penal qualification.<sup>170</sup> Thus, the original definition of these crimes is to be found in Article 6. c) of the Charter of the Nuremberg Tribunal:

Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in connections with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated...<sup>171</sup>

The paragraph above establishes the requirements for these crimes: first, they should be committed against a civilian population; and secondly, they should be committed in execution of, or in connection, with any crime within the jurisdiction of the tribunal, that is, crimes against peace and war crimes.<sup>172</sup> These crimes no longer need to be connected to any other crime<sup>173</sup> nor do they need to be committed in an armed conflict. In its more recent codification of crimes against humanity the ILC adds

ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression" Case concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). ICJ Reports, 1986 (Merits), para. 220.

168 "In the case of what are commonly referred to as 'grave breaches', this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions", Tadic, Trial Chamber case, para. 52.

169 *Cfr.* La Rosa, Anne-Marie, *op. cit.*, pp. 17-26.

170 Grynfogel, Catherine, "Le Concept de Crime contre l'humanité; hier, aujourd'hui et demain", *RDPC*, 74 Année, janvier, núm. 1, 1994, p. 15.

171 "Charter of the International Military Tribunal", in *Agreement for the Prosecution and Punishment of the War Criminals of the European Axis* (London Agreement), August 8, 1945, 58 Stat. 1544, E.A.S núm. 472, 82 UNTS 280.

172 *Cfr.* Judgment of the International Military Tribunal of Nuremberg, October 1, 1946. Reprinted in *AJIL*, vol. 41, núm. 1, 1947, pp. 248-249.

173 These crimes have gained full independence *cfr.* La Rosa, Anne-Marie, *op. cit.*, p. 21. See also Tadic, Appeals Chamber case, para. 141.

two conditions:<sup>174</sup> the first is that “the act should be committed in a systematic manner or on a large scale” and the second is that the act should be “instigated or directed by a Government or by any organization or group”. The reason for these two requirements is that the commission of these kind of acts should not be done in a sporadic way or by isolated individuals. Crimes against humanity are crimes of a massive or systematic character,<sup>175</sup> and they necessarily entail some sort of organization and planning, usually the kind that can be undertaken or provided by a Government, although not necessarily limited to it. It is clearly also possible for a group of private individuals to commit a crime against humanity.<sup>176</sup>

It seems important to note that Article 7 of the Rome Statute of the ICC extends by far the scope of crimes against humanity to include, among others: torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, apartheid, etc. Moreover, the second part of this Article provides definitions for several acts which have already been mentioned, for instance: extermination, attack directed against any civilian population, torture, enslavement, etc.<sup>177</sup>

Historically, crimes against humanity were created as a separate category from war crimes because war crimes, as juridically defined, did not cover the acts perpetrated by the German Government against its own population the idea of war crimes at that moment, was that they were com-

174 Article 18 “Crimes against humanity” of the Draft Code of Crimes against the Peace and Security of Mankind reads as follows, “A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: a) murder; b) extermination; c) torture; d) enslavement; e) persecution on political racial, religious or ethnic grounds; f) institutional discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; g) arbitrary deportation or forcible transfer of population; h) arbitrary imprisonment; i) forced disappearance of persons; j) rape, enforced prostitution and other forms of sexual abuse; k) other inhuman acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”, Report of the ILC on the work of its forty-eighth session UN Doc. (A/51/10) 1996, pp. 93-94.

175 *Cfr.* La Rosa, Anne-Marie, *op. cit.*, pp. 22-23.

176 *Cfr.* Commentary to Article 18 Crimes against Humanity of the Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC on the work of its forty-eighth session UN Doc. (A/51/10) 1996, pp. 93-95. The Trial Chamber in the Tadic’s Opinion and Judgment case held that: “the evolution in the law regarding crimes against humanity nowadays considers that these crimes can also be committed by forces which, although not those of the legitimate government have the facto control over or are able to move freely within defined territory [that would include] terrorist group or organizations”, *op. cit.*, para. 654. See also Meron, Theodor, “War Crimes Law comes of Age”, *op. cit.*, p. 465.

177 *Cfr.* art. 7 of the Rome Statute of the ICC.

mitted against the other belligerent population. This is the reason why paragraph c) ends with, “whether or not in violation of the domestic law of the country where perpetrated”.

“Other inhuman acts” could be understood, for example, acts of forced expulsion of a civilian population,<sup>178</sup> and, as happened during the Nazi regime, kidnapping of children for “Germanization”<sup>179</sup> and more recently, the so-called “ethnic cleansing”.<sup>180</sup>

Crimes against humanity whenever and wherever they are committed are violations of international law<sup>181</sup> and entail individual criminal responsibility.<sup>182</sup> “There is no question that crimes against humanity form part of customary international law”.<sup>183</sup>

It is important to point out that war crimes and crimes against humanity are considered as crimes not subject to statutory limitations<sup>184</sup> or to amnesty. According to all these elements these are also crimes subject to universal jurisdiction.<sup>185</sup>

### *Genocide*<sup>186</sup>

The international crime of genocide, as such, appears after W.W.II.<sup>187</sup> In 1946 the UN General Assembly adopted resolution 96(I) which emp-

178 Eichmann case, p. 248.

179 *Ibidem*, p. 250.

180 Lerner, Natan, “Ethnic Cleansing”, *IYHR*, vol. 24, 1994, pp. 103-117. Anne-Marie La Rosa considers an extension of the notion of genocide to that of ethnic cleansing, in La Rosa, Anne-Marie, *op. cit.*, p. 49.

181 Eichmann case, p. 40.

182 Sunga, Lyal S., *Individual Res...*, *op. cit.*, p. 36. *Cfr.* also Eichmann case, p. 297. See also Goldstone, Richard, “Prosecuting War Criminals”, David Davies Memorial Institute, Occasional Paper núm. 10, August 1996, p. 2. See also Grynfoegel, Catherine, *op. cit.*, p. 51. Malekian, Farhad, *op. cit.*, vol. I, pp. 281-282.

183 Tadic, Trial Chamber case, para. 76.

184 See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (núm. 18) at 40, U.N. Doc A/7218 (1968). See also Grynfoegel, Catherine, *op. cit.*, p. 23.

185 Brownlie, Ian, *op. cit.*, p. 305. Jennings, Robert and Watts, Arthur, *Oppenheim's International Law*, *op. cit.*, pp. 998-999. Schwarzenberger, George, *International Law and Order*, UK, Stevens & Sons, 1971, p. 248. Barbier Christian, “La Répression des Crimes de Guerre et des Crimes contre l’humanité”, *ARES Défense et Sécurité*, Paris, vol. V, 1982, pp. 13-18. Meron, Theodor, “Is International Law Moving towards Criminalization?”, *op. cit.*, p. 29.

186 *Cfr.* Commentary to Article 17 Crime of Genocide of the Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC on the work of its forty-eighth session UN Doc. (A/51/10) 1996, pp. 85- 93. See also La Rosa, Anne-Marie, *op. cit.*, pp. 46-49.

187 The term “genocide” was created by Lemkin see Lemkin, Raphaël, *Axis Rule in Occupied Europe*, United States, Carnegie Endowment for International Peace, Division of International Law,

hasized that genocide was a denial of the right to existence of entire groups of human beings and that it was an international crime entailing legal responsibility. Later, the international community decided to create an international treaty to regulate it.<sup>188</sup>

The Convention for the Prevention and Punishment of the Crime of Genocide<sup>189</sup> establishes that the crime of genocide is an international crime that could be committed both in times of peace and war. It also states that genocide is committed with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group by acts such as: 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.<sup>190</sup> Thus, it is a crime of special nature which the ICJ reaffirms in its Advisory Opinion as follows:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and result in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this

1944, p. 79. “The crime of genocide, ...as the prima illustration” of a crime against humanity attracting punishment, did not acquire the status of an international crime until after the Second WW, Dissenting opinion Judge Brennan in Polyukhovich case, p. 60. The UK War Crimes Inquiry states, “Genocide was not defined as an offence in international law until 1948. Any attempt to legislate to provide for prosecutions with respect to acts of genocide allegedly committed during the Second World War would be retrospective. For this reason we recommend that genocide be not included in any legislation that may be presented to Parliament.” In Report of the War Crimes Inquiry, *op. cit.*, p. 96.

188 Shaw, M. N., “Genocide and International Law”, in Yoram Dinstein and Mala Tabory (eds.), *International Law at the time of perplexity. Essays in honour of Shabtai Rosenne*, Martinus Nijhoff, The Netherlands, 1989, pp. 797-799.

189 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (hereinafter Genocide Convention).

190 Art. 1 and 2 of the Genocide Convention. Article 6 of the Rome Statute of the ICC has the same redaction as Article 2 of the Genocide Convention. The ILC holds in its commentary to Article 17, Crime of Genocide, of the Draft Code of Crimes against the Peace and Security of Mankind, “It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide”, Report of the ILC on the work of its forty-eighth session UN Doc. (A/51/10) 1996, p. 88. The other element of the crime is the intention of destroying a group.



conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble of the Convention), The Genocide Convention was ...by the contracting parties to be definitely in scope.<sup>191</sup>

From this passage we can conclude that the characteristics of the crime of genocide which make it subject to universal jurisdiction are: a) it is a crime under international law; b) the perpetrator(s) should be acting with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; c) it shocks the conscience of mankind; d) it is contrary to the spirit and aims of the United Nations; e) the principles of the Convention are binding even to non party States and; f) it has a universal character. It is also well established that genocide entails individual criminal responsibility.<sup>192</sup>

Regarding the exercise of jurisdiction in relation to genocide, it is important to point out that Article 6 of the Genocide Convention does not establish a universal jurisdiction for the punishment of the criminals. On the contrary, the Article states that any person charged with any of the acts enumerated in the Convention should be tried by a competent tribunal in the State in which the crime was committed or by an international tribunal. In our opinion the provision of these two possibilities does not, in essence, go against the application of universal jurisdiction. If the nature of the crime of genocide would have been limited to the provision of Article 6 the very object of the Convention—which is to prevent and punish genocide criminals— would have failed.<sup>193</sup> *Also the evolution of humanitarian law over the last fifty years must be taken into account as it has been shown that particularly for this crime, the universal jurisdiction principle is applicable.*<sup>194</sup> *Ge-*

191 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, 1951 (Advisory Opinion), p. 23.

192 *Cfr.* Sunga, Lyal S., *Individual Respon...*, *op. cit.*, pp. 65-73. Malekian, Farhad, *op. cit.*, vol. I, pp. 315-316.

193 *Cfr.* O'Connell, Daniel Patrick, *op. cit.*, p. 746.

194 As the Israel's District Court states, "there is nothing... to lead to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question [genocide]", Eichmann case, p. 39. See also, Stern, Brigitte, *op. cit.*, p. 286. Randall, Kenneth, C., *op. cit.*, pp. 834-835. R. Higgins is of the opinion that the Genocide Convention provides for a "potential universal jurisdiction", in Higgins, Rosalyn, *op. cit.*, p. 96. Emphasis in original. Of course, in the absence of an international tribunal each State has the right to exercise universal jurisdiction.

*nocide has been considered as subject to universal jurisdiction by way of customary international law.*<sup>195</sup>

Finally, we must point out the importance of the ICTFY which, at the moment of affirming the precedence of the International Tribunal over municipal courts, corroborates the evolution and the nature of the serious violations of International Humanitarian Law (war crimes —grave breaches of the Geneva Conventions of 1949, violations of the customs of war— genocide, crimes against humanity). The Trial Chamber held the following:

...the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any State. The Trial Chamber agree that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.<sup>196</sup>

In our opinion these are the most common crimes<sup>197</sup> on which there is a general consensus concerning the applicability of universal jurisdiction. “Beyond this, there is controversy as to what other offences allow universal jurisdiction”.<sup>198</sup>

### 5. Other Crimes

To try to apply the principle of universal jurisdiction to crimes other than those already analyzed seems to be, at the present state of international law, a dubious endeavor as both doctrine and State practice are divided. Most of the international crimes are considered as such by conventional law;

195 Meron, Theodor, “Is International Law Moving towards Criminalization?”, *op. cit.*, p. 29. Shaw affirms that nowadays genocide constitutes a principle of *jus cogens*, *cf.* Shaw, M. N., “Genocide and International Law”, *op. cit.*, p. 800.

196 Tadic, Trial Chamber case, para. 42. See also commentaries on Lattanzi, Flavia, “La primazia del tribunale Pénale internazionale per la ex-yugoslavia sulle giurisdizioni interne”, *RDI*, Italy, vol. LXXIX, fasc. 3, 1996, p. 606.

197 “The fact that only four crimes are currently included in the former category —piracy, slave trading, genocide and war crimes— suggests that the widespread consensus required to classify an act in this way is difficult to achieve”, in Kobrick, Eric S., *op. cit.*, p. 1529.

198 Higgins, Rosalyn, *op. cit.*, p. 95.

therefore, the obligation to punish them remains only *inter se*. Hence, it is difficult to see that such obligations are binding on non-party States.<sup>199</sup> Thus, for instance, Bowett holds, “It would, indeed, be surprising if hijacking were truly a case of universal jurisdiction, for many States have declined to treat it as a crime, or to adhere to the ICAO Convention; it thus lacks the endorsement of universal consent which one would expect to find in a crime for which international public policy concedes universal jurisdiction”.<sup>200</sup> *It is interesting to point out that when Bowett refers to that “lack of endorsement of universal consent” he seems to be referring to the idea of a double opinio juris criteria, thus confirming the importance of this element.*

Nevertheless, some scholars are of the opinion that terrorism,<sup>201</sup> aircraft piracy—hijacking—<sup>202</sup> and hostage taking<sup>203</sup> “are condemned by

199 Randall, Kenneth, *C. op. cit.*, p. 824.

200 Bowett, Derek William, *op. cit.*, p. 13.

201 “Le problème des compétences juridictionnelles en matière de terrorisme est l’un des plus difficiles auquel le droit pénal international ait du faire face”, Guillaume, Gilbert, “Terrorisme et Droit Pénal International”, *op. cit.*, 1989, p. 338. *Cfr.* Wegner, Adam, “Extraterritorial Jurisdiction under International Law: the Yunis Decision as a Model for the prosecution of Terrorists in USA Court,” in *LP Int’l B*, vol. 22, núm. 2, 1991, pp. 409-440. Blakesley, Christopher, “Jurisdictional Issues and Conflicts of Jurisdiction”, in Bassiouni, Cherif M., *Legal Responses to International Terrorism. U.S. Procedural Aspects*, The Netherlands, Martinus Nijhoff Publishers, 1988, p. 141. In Goldie’s opinion it is possible to make a comparison between piracy and terrorism *cfr.* Goldie, L. Frederick E., “Terrorism, Piracy and the Nyon Agreements”, in Yoram Dinstein (edits.), *International Law at the time of perplexity. Essays in honour of Shabtai Rosenne*, The Netherlands, Martinus Nijhoff, 1989, pp. 225-247. The treaties more important are: International Convention against the Taking of Hostages, of 1979, reprinted in *ILM* 1456 (1979); Convention in the Repression and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 1973, 1035 UNTS 167.

202 *Cfr.* The comparative analysis between classic piracy and aircraft piracy in Touret, Corinne, *op. cit.*, pp. 57-70 and 163-181. But see La Rosa, Anne-Marie, *op. cit.*, pp. 88-89. On the contrary see Malekian, Farhad, *op. cit.*, vol. I, pp. 542-543. 1963 Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, 704 UNTS 219, 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, 860 UNTS 105; 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; 974 UNTS 177. Professor Guillaume holds: “Le développement de la lutte contre le terrorisme va cependant entraîner la mise sur pied d’un nouveau dispositif en ce qui le concerne, celui de la compétence universelle obligatoire, mais subsidiaire”, Guillaume, Gilbert, “Terrorisme et Droit Pénal International”, *op. cit.*, p. 350. Douglas, Joyner Nancy, *Aerial Hijacking as an International Crime*, United States, Oceana, 1974, pp. 182-190. See commentaries to the Conventions in Guillaume, Gilbert and Levasseur, Georges, *Terrorisme international*, France, Editions A. Pedone, 1977, pp. 25-100. Cheng, Bin, “Aviation Criminal Jurisdiction and Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports”, in Cheng, Bin and Brown, E. D. (edits.), *Contemporary Problems of International Law Essays in Honour of George Schwarzenberger on his Eightieth Birthday*, UK, Stevens & Sons Limited, 1988, pp. 25-33. See also Restatement of the Law Third, 404, in American Law Institute, *Restatement of the Law Third*, *op. cit.*, pp. 254-257.

203 Malekian, Farhad, *op. cit.*, vol. II, pp. 1-20. Among the documents which establish this crime are the 1977 European Convention on the Suppression of Terrorism and the 1979 International Convention against the Taking of Hostages UN Doc. A/34/46.

the world community and subject to prosecution under the universal principle [of jurisdiction]”.<sup>204</sup> This would probably include torture.<sup>205</sup>

The practice regarding these crimes is not homogenous, thus for instance, the Court of Appeal of Sri Lanka has held that although the unlawful control or seizing of an aircraft “is not an international crime as in the case of genocide, there was an obligation in the part of Sri Lanka as a contracting party to make such an act a crime according to our law”.<sup>206</sup>

Some scholars argue that universal jurisdiction applies to crimes which are part of international agreements by the mere fact that within such treaties the principle of *aut dedere aut judicare* is contemplated.<sup>207</sup> For others, such crimes represent simply the possibility of being subject to universal jurisdiction.<sup>208</sup>

It is important to note that some of these crimes were included in Article 20 (e) —those called treaty crimes— in the Annex of the Draft Statute for an International Criminal Court.<sup>209</sup> This Article establishes the crimes that are within the jurisdiction of the Court. The fact that such crimes are included in the Annex does not necessarily mean, that they are *ipso iure* subject to universal jurisdiction. However, it is possible that in the future those crimes, or some of them, could be considered subject to that jurisdiction. Nevertheless, the current Statute of the ICC does not include such crimes.

204 Yunis, District Court case, pp. 348-349. See also Sucharitkul, Sompong, *op. cit.*, pp.141-181. But see Shaw, M. N., *op. cit.*, pp. 414-417.

205 Meron holds, “Universal jurisdiction has been thus recognized with regard to such crimes as attacks on the safety of civil aviation and maritime navigation, and also in case of... torture under the 1984 United Nations Convention”, Meron, Theodor, “Is International Law Moving towards Criminalization?”, *op. cit.*, p. 22. Sunga holds that, “it seems that individual responsibility for torture would probably become part of the emerging rule for two reasons: first the categories of ‘war crimes’, ‘crimes against humanity’ and ‘grave breaches’ already provide for individual responsibility for torture... and second, the entry into force of the UN Torture Convention signals an important step by ...establishing individual responsibility for torture in peace time”. Sunga, Lyal S., *Individual Respon.... op. cit.*, p. 160. See also *infra* commentaries regarding the Filartiga case.

206 Ekanayake v. Attorney General, *ILR*, vol. 87, 1992, p. 301. Emphasis added. But see *infra* United States’ practice.

207 See Kobrick, Eric S., *op. cit.*, pp. 1521 and 1536. Randall, Kenneth C., *op. cit.*, p. 819. Friedlander, Robert A., “The Crime of Hijacking”, in Bassiouni, Cherif (ed.), *International Criminal Law*, vol. I, Crimes, United States, Transnational Publishers, Inc., 1986, pp. 456-460.

208 See commentary in Randall, Kenneth, C. *op. cit.*, pp. 826-827. Brownlie even add traffic of narcotics in Brownlie, Ian, *op. cit.*, p. 305. Buergenthal, Thomas and Maier, Harold G., *op. cit.*, p. 173. Jennings, Robert and Watts, Arthur, *Oppenheim’s International Law*, *op. cit.*, p. 470. Guillaume, Gilbert, “La compétence universelle formes anciennes et nouvelles”, *op. cit.*, p. 36. Sorensen, Max, *op. cit.*, pp. 365-366.

209 *Cf.* Draft Statute for an International Criminal Court, *op. cit.*

#### IV. IMPLEMENTATION OF THE UNIVERSAL JURISDICTION PRINCIPLE

In this part, emphasis is placed on State practice which deals with the universal jurisdiction principle either in an implicit or in an explicit way. The analysis above has already considered the theory behind universal jurisdiction, here, however, the stress is placed on an analysis of the most relevant cases or legislation of States currently available on this subject.

##### 1. *Australia*

In 1991 Polyukhovich, —a man who had not been an Australian citizen during W.W.II— was tried in Australia for war crimes he was alleged committed during W.W.II. In this case the High Court of Australia did not base its jurisdiction upon the principle of universality, the analysis of the principle by some judges is nevertheless, very useful for the present research.

Polyukhovich —who became an Australian citizen after W.W.II—, was charged with war crimes committed while serving in the German Army in Ukraine between 1942 and 1943. The charges were brought under the War Crimes Act of 1945, as amended in 1988, which provided for the trial and punishment of persons who had committed serious crimes in Europe during W.W.II and who had entered Australia and become Australian citizens or residents after 1945.<sup>210</sup> *The issue was whether Section 9 of the Act was valid, even if it involved a retroactive application of the criminal legislation. The plaintiff challenged the constitutionality of the Act, arguing it could not be applied retroactively.*

The High Court decided that the Act was valid.<sup>211</sup>

Justice Toohey, as part of the majority, held that although in his opinion there was no rule of international law requiring States to search out and punish war criminals, the scope of the Act was in conformity with what inter-

210 Simpson holds that “the Australian War Crimes legislation under which Polyukhovich was tried, was enacted as an exercise of universal jurisdiction... However, the legislation included temporal limitations in order that it not be universal in its application”. Simpson, Gerry, “War Crimes: A critical Introduction”, in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *Achieving the Promise of Nuremberg: A New International Criminal Law Regime in the Law of War Crimes, National and International Approaches*, The Netherlands, Kluwer Law, 1997, p. 9.

211 It is important to point out that the decision of the Court reproduced in *ILR*, is not a single judgment but a group of individual opinions of all the judges. Thus, the citation of the decision of a judge should be read in relation as being part of the majority or dissenting opinions. *Cfr.* Polyukhovich case, pp. 1-168.

national law defines as war crimes and crimes against humanity and therefore, it could be considered as an exercise of universal jurisdiction.<sup>212</sup>

In his dissenting opinion Justice Brennan held that,

...a law which vested in an Australian Court a jurisdiction recognized by international law as an universal jurisdiction is a law with respect to Australia's external affairs. Australia's international responsibility would be incomplete if it were unable to exercise a jurisdiction to try and punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order... The universal jurisdiction to try war criminals is a jurisdiction to try those alleged to have committed war crimes as defined by international law.<sup>213</sup>

Nevertheless, Brennan J. concluded that, in this particular case, the Act did not confer a universal jurisdiction over war crimes because the Act's definition of war crimes did not correspond with the definition of such crimes in international law.<sup>214</sup>

## 2. *Belgium*

In 1993 Belgium enacted the Loi relative à la répression des infractions graves aux Conventions Internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions<sup>215</sup> (hereinafter 1993 Repression of Grave Breaches Law). This legislation provides a unique model of complete and specific incrimination for violations of humanitarian law.<sup>216</sup> The relevant provision for the present analysis is Article 7 which states,

Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi indépendamment du lieu où celles-ci auront été commises. Pour les infractions commises à l'étranger par un Belge contre un étranger, la plainte de l'étranger ou de sa famille ou l'avis officiel de l'autorité du pays où l'infraction a été commises n'est pas requis.

212 *Cfr.* Polyukhovich case, pp. 130-137.

213 Dissenting opinion of Judge Brennan in Polyukhovich case, pp. 39 and 42, respectively.

214 *Ibidem*, pp. 60-64.

215 *Moniteur Belge*. Law of 16 June 1993. For a complete genesis and analysis of the law see Andries, A.; David, E., *et al.*, *op. cit.*, pp. 1114-1184.

216 *Ibidem*, p. 1117.

This article establishes the principle of universal jurisdiction. The provision asserts that the Belgian authorities may punish any person who has committed any breach of the present law in Belgium or abroad regardless of the nationality of the criminal or of the victim, whether the crime is committed in an international or in a non-international conflict.<sup>217</sup> The provisions are also applicable whether Belgium is a party to the conflict or not.<sup>218</sup> Moreover, the Belgian jurisdiction is competent even when the alleged criminal is not present in Belgium.<sup>219</sup> It is important to point out that these conclusions are not inferred from the wording of the law, but are clearly apparent in the discussions on the legislation which took place in the Belgian Senate.<sup>220</sup>

It is interesting to note that the commentaries on the law state that universal jurisdiction is based on the provisions of the four Geneva Conventions and of Protocol I that establish the *aut dedere aut judicare* principle,<sup>221</sup> which is, as it has been argued here, a misunderstanding of the basis of universal jurisdiction. At the same time, the Belgian commentary suggests that the universal jurisdiction of article 7 extends the field of application of the active and passive personal jurisdiction.<sup>222</sup>

The 1993 Repression of Grave Breaches Law<sup>223</sup> was first applied in the case of four Rwandan citizens who were charged in 1995 with having committed war crimes in Rwanda against the Rwandan people. Interestingly, the victims who filed the criminal complaints not only filed it against persons who were in Belgium at that time, but also against per-

217 It is interesting to point out that that this law contemplates the application of grave breaches to non international armed conflicts. The commentators to the law hold, "la loi belge va plus loin que ces textes internationaux, dans la mesure où elle est applicable, non seulement aux infractions commises dans le cadre d'un conflit international, mais également dans un conflit non international... La question se pose dès lors si une compétence universelle qui va au-delà des exigences posées par le droit international humanitaire peut se justifier". Then, following the reasoning of the PCIJ in the Lotus case the commentators hold that because there is no rule of international law prohibiting the application of jurisdiction regarding grave breaches to non international conflict, Belgium can do it. *Cfr.* Andries, A.; David, E., *et al.*, *op. cit.*, p. 1174. See also David, Eric, *Principes de Droit des Conflits Armés, op. cit.*, pp. 646, 648-649.

218 *Cfr.* also articles 1 and 9 of the same law.

219 *Cfr.* David, Eric, "La Loi Belge sur les Crimes de Guerre", *RBDI*, vol. XXVIII, núm. 2, 1995, p. 677.

220 *Ibidem*, pp. 668-680.

221 Andries, A.; David, E., *op. cit.*, p. 1171.

222 *Ibidem*, pp. 1117-1119.

223 Kamminga, Menno T., "Universal Jurisdiction in respect of Gross Human Rights Offences: Putting the principle into Practice", *Mensenrechten en Beleid*, forthcoming, p. 488. See commentaries Reydamas, Luc, *op. cit.*, p. 37.

sons who were not present in Belgium. They, in fact, made requests to the Belgian Government for international warrants to be issued for the arrest of those alleged war criminals not present in Belgium. The judge d'instruction sent five rogatory letters to Rwanda, Ghana and Togo, ordered the arrest of the four persons in Belgium, and issued three international arrest warrants.<sup>224</sup> In the opinion of some writers this constitutes "the widest possible interpretation and application of the universal principle and might very well be unique in international law".<sup>225</sup>

On January 11, 1996 however, the International Criminal Tribunal for Rwanda made a request to Belgium for the deferral of three of the suspects,<sup>226</sup> as well as for the forwarding of the results of its investigations and a copy of the records of its national courts.<sup>227</sup> In the end, only one of the suspects was tried in Belgium under the Law of 1993.<sup>228</sup>

### 3. Denmark

On November 25, 1994, the High Court of Denmark held that Refik Saric had committed war crimes during July and August 1993 in the Croat detention camp of Dretelj in Bosnia-Herzegovina and he was sentenced for these crimes.<sup>229</sup> Refik Saric was in Denmark as a refugee when he was identified by other asylum seekers as an alleged war criminal.<sup>230</sup>

The legal foundations of the Court's decision were Articles 245-246 of the Danish Penal Code and Articles 129 and 130 of the III Geneva Convention and Articles 146-147 of the IV Geneva Convention.<sup>231</sup>

<sup>224</sup> *Cfr.* Reydams, Luc, *op. cit.*, p. 37.

<sup>225</sup> *Idem.*

<sup>226</sup> The suspects were ElieNdayambaje, Alphonse Higaniro and Joseph Kanyabashi. In fact the latter has already presented a defence motion on jurisdiction which was rejected. *Cfr.* The Prosecutor v. Kanyabashi, Trial Chamber 2, Case núm. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, June 18, 1997.

<sup>227</sup> *Cfr.* Reydams, Luc, *op. cit.*, p. 38.

<sup>228</sup> Cour d'appel de Bruxelles, chambre de mise en accusation, arrêt du 17 mai 1995 en l'affaire V. Nt; Cour de Cassation, deuxième chambre, F., arrêt du 31 mai 1995 (même affaire); Tribunal de première instance de l'arrondissement de Bruxelles, chambre du Conseil, ordonnance du 22 juillet 1996 (même affaire), in Graditzky, Thomas, *op. cit.*, p. 47, fn. 66.

<sup>229</sup> *Cfr.* The Prosecution v. Refik Saric, Eastern Division of the Danish High Court. Abstract of the sentence translated. Document available from the ICRC.

<sup>230</sup> Kamminga, Menno T., *op. cit.*, p. 488.

<sup>231</sup> *Cfr.* Maison, Rafaëlle, *op. cit.*, pp. 261-262. Holdgaard holds that Art. 8 para. 1 sections 5 and 6 of the Danish Penal Code provide for jurisdiction in cases of violations of human rights and humanitarian law regardless of the place where the crime was committed as well as of the nationality of the perpetrator. The act must be either covered by an international convention to which Denmark has the duty to carry out legal proceedings or in the event that extradition of the criminal is



The High Court sentenced Saric to eight years' imprisonment and "permanent extradited" (sic) from Denmark. The light sentence given to the offender has been widely criticized.<sup>232</sup>

It was argued that Danish Law authorizes, according to the Geneva Conventions, the Judge to declare himself competent on the basis of the "exceptional principle of universal jurisdiction".<sup>233</sup>

#### 4. France

Recent modifications to the Code Pénal and Code de Procedure Pénale allow the French courts to exercise jurisdiction in cases of certain international crimes,<sup>234</sup> however, the practice in this domain remains inconclusive. For instance, in 1993 a group of citizens from Bosnia presented a civil claim before the French courts on the grounds of torture, war crimes, crimes against humanity and genocide. They held that had been victims of

refused by the Danish Minister of Justice under certain conditions. *Cfr.* Holdgaard, Bukh Marianne, "Prosecution before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law", *ERPL*, vol. 6, núm. 2, 1994, pp. 339-350.

232 The High Court documented at least 24 cases in which Refik Saric committed violations of the laws and customs of war.

233 *Cfr.* Maison, Rafaëlle, *op. cit.*, p. 262.

234 *Cfr.* Articles 222 (222-18 to 222-19) of the Penal Code and Articles 689 (689-1 to 689-2) of the Penal Code of Procedure. In particular the Articles of the Penal Code of Procedure provide: Art. 689 "Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du livre 1er du code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître de l'infraction." Art. 689-1. "En application des conventions internationales visées aux articles suivants peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions chaque fois que celle-ci est punissable." Article 689-2 provides specifically for the application of the Convention against Torture (Convention against Torture and other Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, annex, 39 UN GAOR Supp. núm. 51 at 197, UN Doc. A/39/51). Nevertheless, some scholars have a particular position regarding the application of universal jurisdiction in France for instance, Patrick Daillier holds, "le droit interne français —code pénal et code de procédure pénale— ne permet pas de reconnaître aux juridictions françaises une compétence 'universelle' face aux 'crimes internationaux', but later the same scholar holds, in contradistinction". "Certes, la ratification de la Convention contre la torture de 1984 par la France et les dispositions des articles 689-2 et puis 689 1&2 du Code de procédure penale permettent d'exercer cette compétence universelle pour certains crimes" Daillier, Patrick, "La répression pénale en France des 'crimes de guerre' et des crimes contre l'humanité' en ex-Yugoslavie", in Lattanzi, Flavia et Sciso, Elena, *Dai Tribunale Penali Internazionali ad-hoc a una Corte Permanente*, Italy, Editoriale Scientifica, 1996, pp. 225 and 229 respectively.

crimes committed by Serbian forces during the occupation of the city of Kozarac and environs.

Clearly, this could be considered a case for the application of universal jurisdiction because the *delicta juris gentium* were committed outside French territory and neither the victims nor the criminals were French. Nevertheless, the French courts considered that they were not competent.

On May 6, 1994 the magistrat instructeur pronounced an ordonnance of *incompétence partielle*, but accepted *la constitution de partie civile*. The magistrat considered that he was not competent on the grounds of the Convention on the non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and the Charter of the IMT, 1945, but declared himself to be competent on the grounds of the 1949 Geneva Conventions and the Convention against Torture. The reasons for which the magistrat did not accept these conventions were as follows: The Convention on the non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity has not been ratified by France; the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, does not establish any rule of universal competence; and finally, the Charter of the IMT, 1945, is limited to the acts committed during W.W.II by the Axis nations.

The Procureur de la République of Paris appealed the decision holding that the magistrat should have declared himself to be without jurisdiction at all.

The civil parties argued that the crimes being discussed were, according to general principles of law, recognized by the nations as subject to universal jurisdiction and held that that was the sense of the GA Resolution 3074 on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity of 1973.

On November 24, 1994 la Cour d'Appel initially, reaffirmed the decision of the *magistrat instructeur* that it was not competent according to the three conventions already mentioned above. Secondly, it rejected the application of the GA Resolution 3074 because, according to the Court, it did not have a binding character and did not contain any rule of universal jurisdiction. Thirdly, it rejected the argument that French Tribunals are competent due to the application of the Convention against Torture. The Appeals Court held that, according to Article 689-2 of *Code*

*de Procédure*, French Tribunals are competent only if the criminal is on French territory, and due to the fact that there was no evidence of the presence of the alleged criminals it was not possible to exercise jurisdiction.<sup>235</sup> Finally, the Court rejected the application of the Geneva Conventions, arguing that,

la rédaction de ces textes permet de déduire que les obligations [of searching and trying the criminals]<sup>236</sup> ne pèsent que sur les Etats parties et qu'elles ne sont pas directement applicables en droit interne. Ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extraterritoriale de manière détaillée et précise... Il s'ensuit qu'en l'absence d'effet direct des dispositions précitées des quatre Conventions de Genève et à défaut d'un texte de droit interne, les juridictions françaises sont incompétentes pour connaître des infractions prévues par les quatre Conventions de Genève lorsqu'elles sont commises à l'étranger, par des auteurs étrangers, sur des victimes étrangers.<sup>237</sup>

The argument asserting the lack of internal legislation for implementing the Geneva Conventions in France appears to be an overly narrow interpretation.<sup>238</sup> There was not any consideration of the customary status of such crimes. Nevertheless, it is important to highlight that the Court

235 This rule was also applied in the case MC Ruby, "... l'article 689-2 du Code de procédure pénale... donne compétence à la juridiction française pour poursuivre et juger, s'il est trouvé en France, quiconque, hors du territoire de la République, s'est rendu coupable de faits qualifiés crime ou délit qui constituent des tortures et autres peines ou traitements cruels inhumains ou dégradants au sens de l'article 1er. De la Convention de New York du 10 décembre 1984." *Cfr.* Koering-Joulin, Renée, "L'affaire du MCRuby et la compétence internationale des juridictions répressives françaises", in *Procédure Pénale, Droit Pénal International, Entraide Pénal, Etudes en l'honneur de Dominique Poncet*, Suisse, Librairie de l'Université, 1997, p. 154. The fact that Art. 689 establishes a requirement sine quanon of the presence of the criminal in French territory does not exclude the obligation according also to the Geneva Conventions, of searching otherwise as Lattanzi holds "Ma perché siano trovati è necessario che siano cercati!", in Lattanzi, Flavia, "La competenza delle giurisdizioni di stati 'terzi' a ricercare e processare i responsabili dei crimini nell'ex-Iugoslavia e nel Ruanda", *RDI*, Italy, vol. LXXVIII, fasc. 3, 1995, p. 712, fn. 8. Maison holds that the obligation of research is not of the judiciary power but the executive, Maison, Rafaëlle, *op. cit.*, p. 266.

236 Art. 49, Geneva I, art. 50 Geneva II, Art. 129 Geneva III, art. 146 Geneva IV, art. 85.1 and 86.1 Protocol I.

237 *Cfr.* Javor *et al. v. X*, Cour d'Appel de Paris, November 24, 1994. Reprinted in *RDI*, Italy, vol. LXXVIII, fasc. 3., 1995, p. 829. Patrick Daillier holds, "ces dispositions [Article 689 du Code de Procédure Pénale] revêtent un caractère trop général pour créer directement des règles de compétence extraterritoriale en matière pénale, lesquelles doivent nécessairement être rédigées de manière détaillée et précise", in Daillier, Patrick, *op. cit.*, p. 229, fn. 28.

238 *Cfr.* Stern, Brigitte, *op. cit.*, pp. 290-294. See also commentaries regarding the case of Rwandan/French citizens in France, *idem*, pp. 294-296. See also commentaries regarding the interpretation of the Geneva Conventions in Maison, Rafaëlle, *op. cit.*, pp. 271-273.

left the door open for the application of universal jurisdiction in the future, once the necessary legislation has been enacted for the implementation of the Geneva Conventions.

### 5. *Germany*

On May 23, 1997 the Supreme Court of Bavaria (Munich) sentenced the former Yugoslav citizen Djajic, to five years imprisonment for abetting murder in fourteen cases and attempted murder in another case.<sup>239</sup> Although Djajic is not the first person arrested in Germany for crimes committed in the former Yugoslavia; (probably the best known case is that of Tadic who before the first hearing in German courts was transferred to the ICTFY), he is the first person to have been convicted by a German tribunal.

On June 22, 1992, after the death of ten Serbian soldiers in an attack on a minibus near the village of Trnovaca in Bosnia Herzegovina, the Serbian command in the region decided, in retaliation, to kill fifteen Muslim men from the village.

Djajic was among the group of soldiers who took the fifteen Muslims prisoner. The Serbians lined the Muslims up on the edge of a bridge over a river. One soldier shot dead the first Muslim and encouraged the others to do the same. All the Muslims were killed except one who jumped into the river and appeared at the trial as the main witness for the prosecution.

There was no evidence that Djajic himself killed any of the Muslims but his participation appeared from the facts to amount to abetting the murder. There was no indictment for genocide, due to the fact that the defendant lacked the necessary means *rea* for the commission of the crime.

The jurisdictional basis for the action of the German court was Article 6.9, “conduct outside Germany affecting internationally protected interests”, of the Penal Code which states, “Regardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany:... 9. Acts committed abroad which are made punishable by the terms of an international treaty binding on the Federal Republic of Germany”.<sup>240</sup>

239 Public Prosecutor v. Djajic, núm. 20/96. Supreme Court of Bavaria, May 23, 1997. Abstract of the sentence translated. Document available from the ICRC.

240 The Penal Code of the Federal Republic of Germany, *op. cit.*

This article has been considered by some scholars as containing the principle of universal jurisdiction.<sup>241</sup> The international treaties on which the Court based its jurisdiction were the Fourth Geneva Convention of 1949 and the First Additional Protocol. The court held that Germany's duty to prosecute was contained in Articles 146 and 147 of the Fourth Geneva Convention that is, the grave breaches section.

In Safferling's opinion, the court concluded that the "aim of prosecution was seen as international in nature. The international community is attempting to deter crimes against civilians during armed conflict".<sup>242</sup>

In a different case the Higher Court of Dusseldorf found Jorgic, a Bosnian Serb guilty of the crime of genocide.<sup>243</sup> It is interesting to note that in conjunction to genocide he was found guilty of murder in three of the eleven cases and in the eight other cases of having inflicted bodily harm, deprivation of liberty "with the intention to destroy the members of the group".<sup>244</sup> Despite the common denominator of genocide in the eleven cases, the Court ruled that "the eleven cases should be considered as separated cases, as all of them implied separate determinations of intention and could be clearly distinguished from one another".<sup>245</sup> Jorgic was sentenced to life imprisonment.

The jurisdictional basis for the Court of Dusseldorf is the same as in the case of Djajic. The Court applied besides Article 6.1 of the German Penal Code which includes the crime of genocide, the Genocide Convention and Article 9.1 of the Statute of the ICTFY.<sup>246</sup> The German Court concluded that "no prohibition to prosecute is to be derived from international law".<sup>247</sup>

These two cases provide good examples of the application of the principle of universal jurisdiction. However, it must be said that in the case of Jorgic he had his residence in Germany until 1992 and he was still registered at Bochum when he was arrested. In the case of Djajic no link existed with Germany besides the fact that he was within German territory at the

241 Safferling, Christoph J. M., *op. cit.*, pp. 529-530.

242 *Ibidem*, p. 532.

243 Public Prosecutor v. Jorgic, núm. 26/96. Higher Regional Court of Dusseldorf, September 26, 1997. Abstract of the sentence translated. Document available from the ICRC.

244 *Idem*.

245 *Idem*.

246 Article 9 establishes concurrent jurisdiction for the ICTFY and national courts to prosecute persons for serious violations committed in the territory of the former Yugoslavia, *op. cit.*

247 Public Prosecutor v. Jorgic, *op. cit.*

moment of his arrest, this being, the condition for the exercise of this exceptional jurisdiction.

## 6. *Israel*

The leading case is the well known Attorney-General of the Government of Israel v. Adolf Eichmann.<sup>248</sup> This case represents a very interesting piece of study but we will focus only on the relevant issues dealing with the subject matter of this paper.

Eichmann was the head of the Gestapo Department in Berlin, responsible for the “Final Solution of the Jewish Problem”. In 1960 Adolf Eichmann was abducted from Argentina and tried in Israel. He was found guilty and condemned to death by the District Court of Jerusalem in 1961 and the Supreme Court of Israel, acting as Appeal Chamber, confirmed the sentence in 1962. Eichmann was charged with offenses under the Nazis and Nazi Collaborators (Punishment) Law of Israel.<sup>249</sup>

One of the arguments used by Eichmann in order to avoid the jurisdiction of the Israeli courts was that the Nazis and Nazi Collaborators (Punishment) Law could not, by rule of international law, be applied to a foreigner.

The District Court affirmed that the jurisdiction to try the case was based on the above mentioned Law and also upon the international principle of universal jurisdiction:

...Israel's rights to punish is based, with respect to the offenses in question, on a dual foundation: the universal character of crimes in question and their specific character as intended to exterminate the Jewish people... The abhorrent crimes defined in this Law [Nazis and Nazi collaborators] are not crimes under Israel law alone. These crimes which struck at the whole of mankind and shocked the conscience of nations, are grave offenses against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect of such crimes, international law is, in the absence of an International

248 *ILR*, vol. 36, 1968. See also Woetzel, Robert K., *The Nuremberg Trials in International Law with a Postlude on the Eichmann case*, UK, Stevens & Sons Limited, 1962, pp. 245-250.

249 Section I (a) of that law provides, “A person who has committed one of the following offenses: 1. Done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people; 2. Done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity; 3. Done, during the period of the Second World War, in an enemy country, an act constituting a war crime; is liable to the death penalty.” Section I (b) defines each one of above-mentioned classes of crimes. Eichmann case, p. 20.

Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.<sup>250</sup>

The District Court also based its jurisdiction in the protective principle, that is, jurisdiction in order to protect the vital interests of the State.

The Supreme Court of Israel affirmed the decision of the District Court and held the following:

Not only all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.<sup>251</sup>

This is probably one of the few cases in which the principle of universality is so clearly expressed as one of the bases of jurisdiction.

### 7. *The Netherlands*

In a recent case, the Netherlands Supreme Court acknowledged universal criminal jurisdiction regarding the war crimes committed by a non-Dutch citizen in the former Yugoslavia.

The Supreme Court held that the Dutch Criminal Law in Wartime Act establishes the basis for which the Dutch courts are competent “to try war crimes, independent of where or by whom these crimes are committed, therefore also in those cases in which the crime is committed by non-Dutch national outside the Netherlands during a war in which the Netherlands are not a party”.<sup>252</sup>

Finally, the Supreme Court held that in these cases the military courts rather than the ordinary ones are the competent courts. This is because of the nature of the crime, which in turn determines the nature of the sentence to be applied.<sup>253</sup> Unfortunately, to our knowledge, there is no further information available regarding this case.

250 *Ibidem*, p. 26. Emphasis in original.

251 *Ibidem*, p. 304.

252 Supreme Court (Hoge Raad der Nederlanden), Criminal Division, Decision 3717, November 11, 1997. Abstract of the sentence translated. Document available from the ICRC.

253 *Idem*.

## 8. Spain

On October 1998 Augusto Pinochet, former president of Chile, was detained in London due to international warrants of arrest issued by Spanish Courts. Pinochet was accused of terrorism, genocide and torture committed not only against Spanish citizens but mainly against the Chilean population.

This case presents many interesting legal problems, from immunity of a former Head of State<sup>254</sup> to the particular interpretation given to some of the crimes, but we will limit our analyze to those issues regarding universal jurisdiction.

Spain recognizes in Article 23.4 of the Ley Orgánica del Poder Judicial (LOPJ)<sup>255</sup> that it has jurisdiction over the acts committed by Spanish citizens or foreigners, outside the national territory, that could be considered, according to the Spanish penal law, as any of the following crimes: genocide, terrorism, piracy and the illegal control of aircraft, counterfeiting of foreign currency, prostitution, drug trafficking, and any other crime that according to the treaties [in which Spain is a party] should be prosecuted in Spain.<sup>256</sup>

<sup>254</sup> See some commentaries on this issue in Dominici, Christian, “Quelques observations sur l’immunité de juridiction pénale de l’ancien chef d’Etat”, *RGDIP*, tome 103, 1999, pp. 297-308. See also Cosnard, Michel, “Quelques observations sur le dJcisions de la chambre des Lords du 25 Novembre 1998 et du 24 Mars 1999 dans l’affaire Pinochet”, *RGDIP*, tome 103, 1999, pp. 308-328.

<sup>255</sup> Ley Orgánica 6/1985, del 1 de Julio, del Poder Judicial. [Act of the Judicial Power] —translation made by the author—. Although this Act was not in force at the moment of the coup d’état in Chile, it substitutes, among many other acts, the Ley Provisional sobre organización del Poder Judicial de 1870 [Provisional Act on the Organization of the Judiciary of 1870]; which in opinion of Judge Garzón already contemplated the principle of universality in crimes against the security of the State and from 1971 it included also the crime of genocide. See, Juzgado Central de Instrucción Número Cinco, Audiencia Nacional, Sumario 19/97-J, Auto de solicitud de Extradición de Pinochet, November 3, 1998. In <<http://www.elpais.es/p/d/especial/auto/auto26.htm>> [hereinafter Pinochet case, November 3, 1998].

<sup>256</sup> The original Article reads as follows: “Art. 23. En el orden penal corresponderá a la jurisdicción española el conocimiento de las causas por delito y faltas cometidos en territorio español o cometidos a bordo de buques o aeronaves españoles, sin perjuicio de los previsto en los tratados internacionales en los que España sea parte.

4. Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:

- a) Genocidio.
- b) Terrorismo.
- c) Piratería y apoderamiento ilícito de aeronaves.
- d) Falsificación de moneda extranjera.
- e) Los relativos a la prostitución.



Although we can agree that some of the crimes mentioned in the said law are subject to universal jurisdiction, like genocide, some others such as drug trafficking and counterfeiting of foreign currency rise serious doubts about the applicability of the principle of universality.<sup>257</sup> What it is also peculiar is the legal reasoning of Judge Garzon regarding for instance the crime of genocide. In his opinion, General Pinochet committed genocide because of the partial destruction of the group of Chilean who were ideologically contrary to him.<sup>258</sup> It is clear from the Genocide Convention that the destruction of a group for political reasons was not envisaged in the said Convention.<sup>259</sup> This was in fact, one of the effects of the Cold War.<sup>260</sup>

There have been many decisions of the Spanish tribunals regarding the crimes committed during the military government of Chile,<sup>261</sup> before arriving to the request of extradition of the Spanish Judge Garzón dated November 3, 1998,<sup>262</sup> but it is in this decision that Judge Garzón clearly states that the Spanish legislation recognizes universal jurisdiction over

f) Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.

g) Y cualquier otro que, según los tratados y convenios internacionales, deba ser perseguido en España.”

<sup>257</sup> It is important just to recall the difference made between *aut dedere aut judicare* and universal jurisdiction at the beginning of this study.

<sup>258</sup> Judge Garzón held: “...los objetivos de los conspiradores [being Pinochet the leader] son, por una parte, la destrucción parcial del propio grupo nacional de Chile integrado por todos aquellos que se le oponen ideológicamente, a través de la eliminación selectiva de los líderes de cada sector que integra el grupo, a través del secuestro seguido de la desaparición, las torturas y la muerte de las personas del grupo...” in Juzgado Central de Instrucción Número Cinco, Audiencia Nacional. Sumario 19/97-J, Pieza separada III, 30 abril 1999, in <<http://www.elpais.es/p/d/temas/pinochet/auto15/auto1.htm>>. [hereinafter Pinochet case, Apr. 30, 1999]. Emphasis added.

<sup>259</sup> Even Judge Garzón accepts the absence of a political criteria in the Genocide Convention. He holds: “...del análisis de las actas y trabajos sobre la Convención se deduce claramente que la Sexta Comisión encargada de su elaboración excluyó conscientemente, y después de un amplio debate, los grupos políticos como objeto del delito de genocidio debido, fundamentalmente, a la oposición de la Unión Soviética.” Pinochet case, Nov. 3, 1998. Emphasis added. But after the above paragraph Judge Garzon argues: “Esto no significa que quedara al margen del genocidio la destrucción de grupos por motivos ideológicos. Mucho más precisamente (*sic*) lo que esto significa es que esos motivos políticos tienen que concretarse en un grupo nacional, étnico, racial o religioso, para que la conducta de su destrucción total o parcial pueda ser constitutiva de genocidio” (*sic*). *Ibidem*. Such a peculiar reasoning has no basis on the Genocide Convention itself not even in its travaux préparatoires. Although could be argued that the evolution of the crime of genocide contemplates, nowadays, the political criteria, this has to be proven.

<sup>260</sup> See Shaw, M. N., *op. cit.*, p. 198.

<sup>261</sup> For a good compilation of sentences see <http://www.derechos.org/nizkor/chile/juicio/>.

<sup>262</sup> Pinochet case, Nov. 3, 1998.

the crime of genocide,<sup>263</sup> as well as for the rest of the counts. This decision was confirmed by the Penal Chamber of the Audiencia Nacional<sup>264</sup> which held that the fact that the contracting parties in the Genocide Convention had not agreed on universal prosecution does not impede any contracting State to establish this kind of jurisdiction<sup>265</sup> and concluded that:

España tiene jurisdicción para conocer de los hechos, derivada del principio de persecución universal de determinados delitos —categoría de Derecho Internacional— acogida por nuestra legislación interna. Tiene también un interés legítimo en el ejercicio de esa jurisdicción, al ser más de cincuenta los españoles muertos o desaparecidos en Chile, víctimas de la represión denunciada en los autos.<sup>266</sup>

After the request of extradition of the Spanish authorities in a 3-2 vote decision the House of Lords held on November 25, 1998 that General Pinochet did not enjoy immunity and that the extradition process could continue.

The defense lawyers of Pinochet appealed the decision arguing that Lord Hoffmann, one of the Lords who vote against Pinochet, should have disclosed his ties with Amnesty International, one of the human rights NGOs which have advocated for the prosecution of Pinochet, and because of that, there were grounds to believe that there was a bias and thus, the necessity to void the decision.

263 “Puede concluirse que la jurisdicción universal es indiscutible como único medio de evitar las grandes dificultades que supone la extradición en estos casos. Si esto es así en función del Derecho Internacional, cuanto más ha de serlo en el caso de España, en el que su legislación interna reconoce su jurisdicción universal sobre los delitos de genocidio desde el primer momento en el año 1971.” Pinochet case, Nov. 3, 1998.

264 Juzgado Central de Instrucción Número Seis, Audiencia Nacional, Rollo de Apelación 173/98, Sección Primera, Sumario 1/98. Auto del Pleno de la Sala de lo Penal de la Audiencia Nacional sobre la competencia de la justicia española para perseguir delitos de Genocidio, November 5, 1998. In <<http://www.elpais.es/p/d/especial/auto/chile.htm>>. [hereinafter Pinochet case, Nov. 5, 1998.].

265 “Que las Partes contratantes no hayan acordado la persecución universal del delito por cada una de sus jurisdicciones nacionales no impide el establecimiento, por un Estado parte, de esa clase de jurisdicción para un delito de trascendencia en todo el mundo y que afecta a la comunidad internacional directamente, a la humanidad toda, como el propio Convenio lo entiende” Pinochet case, Nov. 5, 1998.

266 Spain has jurisdiction to investigate the facts, deriving from the principle of universal prosecution for certain crimes of the category —of International Law— which have been included in our legislation. It has also a legitimate interest in the exercise of such jurisdiction, because of the more of fifty Spanish citizens death or disappeared in Chile, victims of the repression denounced in the case. Pinochet case, Nov. 5, 1998. Translation made by the author.

In the appeal, the House of Lords held that due to the circumstances in which the integrity of one of the Lords was challenged it was necessary to void its own decision and restart the procedure.<sup>267</sup>

In the meantime Judge Garzón renders a decision called “Auto de Procesamiento” in which explains the participation of Augusto Pinochet in the so called “Operación Condor”.<sup>268</sup> In this decision Garzón holds that Spain’s interest in the prosecution of terrorism is not because there were Spanish victims, but because terrorism can be considered as part of the concept of crime against humanity and therefore, all countries have a common interest in its prosecution. In this sense, the action of Spain is not only to protect the institutional Spanish order but the international one.<sup>269</sup> He also holds that torture is a crime subject to universal jurisdiction.<sup>270</sup>

In the new departure of the process, the House of Lords ruled on March 1999<sup>271</sup> that the extradition process against Pinochet could continue but only for the crime of torture committed after December 8th, 1988<sup>272</sup> date on which UK ratified the Convention against Torture. The

267 In re Pinochet, Oral Judgment 17 December 1998. Reasons 15 January 1999, House of Lords, (Opinions of the Lords of Appeal for judgment in the cause In re Pinochet) In <<http://www.parliament.the-stationery-off...pa/1d199899/1judgment/jd990115/pino01.htm>>.

268 Juzgado Central de Instrucción, Número Cinco, Audiencia Nacional, Sumario 19/97, Auto de Procesamiento del 10.12.98 contra Augusto Pinochet Ugarte. Terrorismo y Genocidio. “Operación Condor”. In <<http://www.elpais.es/p/d/especial/procesa/portada.htm>>. [hereinafter Pinochet case, “Operación Cóndor”, Oct., 12, 1998].

269 “El interés de España, como miembro de aquella comunidad [internacional] no radica en el hecho de que haya o no víctimas españolas, sino en el hecho de que el terrorismo participa del concepto de crimen contra la humanidad y existe el interés común de los países en perseguirlo al constituir un caso claro de responsabilidad penal internacional cuando el terrorismo tiene este carácter... [en] la conceptualización (*sic*) del terrorismo como crimen internacional... lo importante es el principio de persecución universal que impone la intervención supranacional y la competencia extraterritorial... se protege tanto el orden institucional español como el orden institucional de otros países cuando se ve atacado por alguno de los medios comisivos típicos contra las personas y los derechos humanos. Es decir se protegen bienes jurídicos internacionales y no sólo intereses nacionales.” Pinochet case, “Operación Cóndor”, Oct., 12, 1998.

270 “Los hechos también pueden integrar el delito de tortura... en esta materia también ha de tenerse en cuenta —a efectos de la consideración de la tortura como delito de persecución universal— el artículo 7o. del [ICCPR]...” *Idem*.

271 Regina v. Bartle and the Commissioner of Police for the Metropolis and others (Appellants) ex Parte Pinochet (Respondent), Evans and another and the Commissioner of Police for the Metropolis and others (Appellants) ex Parte Pinochet (Respondent), 24 March 1999, House of Lords, (on appeal from a Divisional Court of the Queens Bench Division). In <<http://www.parliament.the-station...99899/1judgment/jd990324/pino1.htm>>. [hereinafter Pinochet case House of Lords, Appeal, Mar. 24, 1999].

272 The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was incorporated into the law of UK by section 134 of the Criminal Justice Act 1988 on September 29 1988. The 8 December 1988 the United Kingdom ratified the said Convention.

same date was also considered as the date from which Pinochet lost his immunity regarding British courts.<sup>273</sup>

One of the most interesting arguments regarding universal jurisdiction is the one of Lord Millet —one of the Lords who intervened in the case— who held that:

...Crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. Firstly, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order... Every State has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria.<sup>274</sup>

He stressed that whether the courts have extraterritorial jurisdiction under their internal domestic law depends on their constitutional arrangements and the relationship between customary international law and the jurisdiction of their criminal courts. He pointed out that the jurisdiction of the English criminal courts is usually statutory, but supplemented by the common law. Customary international law is part of the common law, and accordingly he considered that English courts have had always extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law. In his opinion, the systematic use of torture on a large scale and as an instrument of State policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. He considered that it had done so by 1973. Finally, he held:

For my own part, therefore, I would hold that the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy of torture on the scale of the charges in the present case and did not required the authority of statute to exercise it. I understand, however, that your Lordships take a different view, and consider that statutory authority is required before our courts can exercise extra-territorial criminal jurisdiction even in respect of crimes of universal jurisdiction. Such authority was conferred for the first time by section 134 of the Criminal Justice Act

273 Officially, Pinochet ceased to be head of State on 11 March 1990.

274 Pinochet case House of Lords, Appeal, Mar. 24, 1999.

1988, but the section was not retrospective. I shall accordingly proceed to consider the case on the footing that Senator Pinochet cannot be extradited for any acts of torture committed prior to the coming into force of the section.<sup>275</sup>

The Home Secretary Jack Straw in his decision, Authority to Proceed,<sup>276</sup> held that even though the case had been dramatically reduced by the House of Lords, the remaining allegations, conspiracy to torture and torture, were serious enough to go forward. He also held that Pinochet was fit to stand trial and that the Spain's attempts to prosecute the general were not a threat to Chile's sovereign or its future democracy.

Judge Garzon immediately reinforced his case adding more information of cases of torture committed after 1988.<sup>277</sup> Among the cases included were those of enforced disappearances. The characteristic of this crime is that it is a continuous one.<sup>278</sup>

On early 2000 new medical examinations on Pinochet's health showed that he was too ill to undergo a trial. Despite the lack of transparency on the said examinations and protests of human rights organizations Pinochet was released and returned to Chile on March 2, 2000.

It is now up to the Chilean authorities to decide on Pinochet's future.

Despite the outcome on Pinochet's extradition to Spain, the decisions already taken represent a landmark in the fight against impunity and a confirmation of the principle of universal jurisdiction.

<sup>275</sup> *Ibidem*.

<sup>276</sup> In the 24 March 1999 ruling of the Appellate Committee of the House of Lords six of the seven Lords argued that the Home Secretary should reconsider his decision of 9 December 1998 in the light of the very considerable reduction in the number of extraditable charges from those pointed out by their ruling on 25 November. Mr. Straw issue a new decision on April 14, 1999.

<sup>277</sup> See for instance *Juzgado Central de Instrucción Número Cinco, Audiencia Nacional. Sumario 19/97-J, Pieza separada III, 26 marzo 1999*, in <<http://www.elpais.es/p/d/temas/pinochet/auto26/auto1.htm>>. See also Pinochet case, Apr. 30, 1999.

<sup>278</sup> "El texto de la Convención contra la Tortura que procede ahora aplicar sólo puede ser interpretado en el sentido expuesto de considerar comprendidos dentro del mismo, y por lo tanto sometidos al principio de jurisdicción forzosa y universal, no sólo los casos de tortura individual cometidos después del 8 de diciembre de 1988 sino también todos los casos de detención-desaparición que, producida la privación de la libertad antes o después de aquella fecha, se hayan mantenido con posterioridad a la misma, en tanto no se produzca la liberación de las personas secuestradas o los imputados den razón de su paradero o destinúm". Pinochet case, Apr. 30, 1999.

## 9. Switzerland

According to Article 2.9 of the Code Pénal Militaire (CPM) of Switzerland,<sup>279</sup> among the persons subject to the CPM are, “*Les civils qui, à l’occasion d’un conflit armé, se rendent coupables d’infractions contre le droit des gens (art.108 à 114)*”.

Article 108.1 establishes that in order to apply Chapter VI of the CPM, *Infractions commises contre le droit des gens en cas de conflit armé*, the existence of an international armed conflict between two or more States is necessary. However, section 2 of Art. 108 states that, “la violation d’accords internationaux est aussi punissable si les accords prévoient un champ d’application plus étendu”. In this context, the Federal Council in its Message regarding this Article held that, “A l’article 108, 1er. Alinéa, le champ d’application des dispositions de ce chapitre est étendu à tous les «conflits armés»<sup>280</sup> thus, this could be considered as applicable even to non-international armed conflicts.

Article 109 of the CPM provides,

Celui qui aura contrevenu aux prescriptions des conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens, celui qui aura violé d’autres lois et coutumes de la guerre reconnues, sera, sauf si des dispositions plus sévères sont applicables, puni de l’emprisonnement. Dans les cas graves, la peine sera la réclusion.

L’infraction sera punie disciplinairement si elle est de peu gravité.

According to some scholars, the CPM establishes a universal jurisdiction for violations of the Law of War. Although, it must be said, it seems that this was not the intention of the Swiss legislator and that it can only be implicitly understood from the wording of the CPM<sup>281</sup> and not at all from the Message of the Federal Council.<sup>282</sup> Nevertheless, the practice clearly proves that the principle of universality of jurisdiction is being applied.

<sup>279</sup> Code Pénal Militaire. Loi fédérale du 13 juin 1927 (État le 29 juillet 1997). For a genesis of this law and of its amendments see Ziegler, Andreas, “Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The case of Switzerland”, *op. cit.*, pp. 568- 572.

<sup>280</sup> *Cfr.* Message du Conseil fédéral à l’Assemblée fédérale concernant une révision partielle du code pénal militaire du 6 mars 1967 in Feuille Fédérale (FF), núm. 12, vol. 1, 1967, p. 610.

<sup>281</sup> “Without stating it explicitly, the law provides for universal jurisdiction”, Reydams, Luc, *op. cit.*, p. 45.

<sup>282</sup> Of course, from the wording of the provisions we cannot affirm the implementation of universal jurisdiction. Ziegler holds that not only provisions 108-114 of the CPM implement universal

The application of the CPM does not require that the armed conflict has taken place in Switzerland, or even that a Swiss national is involved in the conflict whether as a criminal or as a victim. It could be argued that the provisions are general and applicable to any armed conflict whether international or not.

These provisions have been recently applied in the *In re G.* case<sup>283</sup> before the Swiss Military Tribunal.

In 1997 the Swiss Military Prosecutor indicted Mr. G. G., born in Bosnia Herzegovina, for violations of the laws and customs of war, which according to the CPM, he had committed in the prisoner-of-war camps of Omarska and Keraterm in Bosnia Herzegovina during the period of May 30 to August 15, 1992. None of the victims were Swiss. Mr. G. G. was living in Switzerland and had applied for asylum when he was arrested.

During the hearings, all the witnesses identified the accused as G. K. and not as G. G. as he himself maintained was his real name. Mr. G. G. also argued that during the time in which it was alleged that the crimes were committed he was living in Austria and Germany.

The Military Tribunal decided to acquit the accused on the grounds that there was not enough evidence to establish that he was at the camps during the time of the commission of the crimes.<sup>284</sup> There is not any mention of the exercise of universal jurisdiction in the judgment, although, it could be argued that the fact of having such a trial is the result of the application of universal jurisdiction.

It is important to note that the *acte d'accusation* made reference *inter alia*, to Additional Protocol II and to common Art. 3 of the Geneva Conventions. Nevertheless, the Military Tribunal considered that the conflict

jurisdiction over war crimes in Switzerland but that also that was underlined by the Message of the Federal Council, although he recognizes that the Conseil Fédéral preferred the extradition if it is available. Nevertheless, a close look into the Message of the Federal Council shows that there is not any mention not even implicit made by the Conseil Fédéral. *Cfr.* Message du Conseil fédéral à l'Assemblée fédérale concernant une révision partielle du code pénal militaire du 6 mars 1967 in Feuille Fédérale (FF), núm. 12, vol. 1, 1967, pp. 605-623. (Ziegler cites p. 589 but in fact the pages are those of 605-623). *Cfr.* Ziegler, Andreas, "Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The case of Switzerland", *op. cit.*, p. 569.

<sup>283</sup> *Cfr.* Grabez, Goran, Military Tribunal, Division 1, Lausanne, Switzerland, 1997. See also commentary of Ziegler, Andreas, "In re G." International decisions, in *AJIL*, vol. 92, núm. 1, 1998, pp. 78-82.

<sup>284</sup> In fact the accused was awarded with CHF 30'000 for material damages and CHF 70'000 for moral damages. Ziegler, Andreas, "In re G.", *op. cit.*, p. 80.

in the former Yugoslavia was one of international character. The Military Tribunal held that from the date of the declaration of independence of Croatia and Slovenia on October 1991 the armed conflict acquired an international character.<sup>285</sup> Consequently, Article 108 of the CPM was applicable to the present case, avoiding any possible controversy between the nature of the conflict and the CPM.<sup>286</sup> Regardless of the characterization of the conflict made by the Tribunal it is very important to emphasize that the Swiss jurisdiction, along with the Belgian law, show that States are considering the exercise of jurisdiction in cases of the alleged violation of the laws and customs of war despite the nature of the conflict.

In *re G.* is not the only case involving universal jurisdiction to have been heard in Swiss courts. In 1995, a Rwandan citizen was arrested in Switzerland on charges of war crimes committed in Rwanda.<sup>287</sup> Unfortunately, it seems that there was not enough evidence and the Swiss government eventually expelled the individual concerned.<sup>288</sup>

Thus, according to one scholar the *In re G.* case “is the first to be delivered by a Swiss tribunal in criminal proceedings pursuant to Switzerland’s exercise of universal jurisdiction over war crimes”.<sup>289</sup>

## 10. *United States*

Regarding the United States’ practice, there are not many decisions in which courts have declared the principle of universal jurisdiction to be applicable. There is also no mention of universal jurisdiction in the recent War Crimes Act<sup>290</sup> which covers only United States citizens. Nevertheless, a widespread practice exists regarding civil law actions, which in a

285 “Le Tribunal est d’avis que le conflit dans l’ex-Yugoslavie doit être approché de manière global et qualifié de conflit international”. Ziegler, Andreas, “*In re G.*”, *op. cit.*, p. 80, fn. 12.

286 *Ibidem*, p. 81.

287 It was held that Mr. Félicien Kabouga gave several speeches in the radio des mille collines, inciting to kill ‘tutsi’ population. *Cfr.* Ziegler, Andreas, “Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The case of Switzerland”, *op. cit.*, p. 577.

288 Ziegler, Andreas “Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The case of Switzerland”, *op. cit.*, pp. 577-578. Some other cases are still pending, *idem*. See also commentaries regarding another pending case of a Rwandan in Tribune de Genève, July 25-26, 1998, p. 9.

289 Ziegler, Andreas, “*In re G.*”, *op. cit.*, p. 80.

290 The Act provides “... b) Circumstances.- The circumstances referred to in subsection a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States (as defined in section 101 of the immigration and nationality Act)”, War Crimes Act 18 USC Sec. 2441.



way implements universal jurisdiction.<sup>291</sup> Clearly, these civil actions do not fall within the scope of the present work and thus we make only a brief mention.

One of the recent criminal cases to be heard in United States courts is the case of *United States v. Yunis*.<sup>292</sup>

The defendant, a Lebanese citizen, was indicted in the United States for his participation in the hijacking and destruction of a Jordanian aircraft at Beirut's International Airport in 1985. The accused was charged with offences committed according to the United States Hostage Taking Act, 18 USC section 1203, and the United States Destruction of Aircraft Act, 18 USC Section 32, also known as the Aircraft Piracy Act.

The District Court held the following:

The Universal [jurisdiction] principle recognizes that certain offenses are so heinous and so widely condemned that any State... may prosecute and punish that person... aircraft piracy and hostage taking... are condemned by the world community and subject to prosecution under the universal principle [of jurisdiction].<sup>293</sup>

The District Court also affirmed that these crimes have been widely condemned by States in a series of international treaties.<sup>294</sup> The charges, as well as the basis for jurisdiction were, affirmed by the Court of Appeals.<sup>295</sup>

Regarding tort actions, it is important to point out that within the United States it is possible for aliens to assert civil jurisdiction in Federal Courts under the Alien Tort Claim Act of 1789.<sup>296</sup> This Act provides that "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 the nations or

291 "The exercise of universal jurisdiction to adjudicate in respect of human rights offenders has occurred more frequently in civil cases than in criminal. Apparently, the former is considered a less intrusive type of jurisdiction than the latter". Kamminga, Menno T., *op. cit.*, pp. 487-488.

292 *Cfr.* Yunis, District Court case, pp. 343-357 and *United States of America v. Yunis*, Court of Appeals, January 29, 1991, in 30 ILM 403 (1991). (Hereinafter Yunis, Court of Appeals case), pp. 403-414. See also Wegner, Adam, "Extraterritorial Jurisdiction under International Law: the Yunis Decision as a Model for the prosecution of Terrorists in USA Court", in *LP Int'l B*, vol. 22, núm. 2, 1991, pp. 409-440.

293 Yunis, District Court case, pp. 348-349.

294 The most important are the Tokyo, the Hague and the Montreal's Conventions, see Part II, other crimes.

295 Yunis, Court of Appeals case, pp. 403-414.

296 28 USC Sec. 1350.

a treaty of the United States". The most important case in this respect is *Filartiga v. Peña*.<sup>297</sup> Of course, this civil jurisdiction is out of the scope of the present work.

The adoption of the Torture Victim Protection Act of 1991 gave new life to human rights litigation within the United States.<sup>298</sup> All of these decisions have, however, been highly controversial as they deal with sovereign immunity<sup>299</sup> and the results have not always been in favor of the victims. The decisions remain limited to civil responsibility.

## 11. *Other Cases*

In this part of our analysis, we study some State practice that implicitly refers to the application of universal jurisdiction. We have found several references in the wording of some legislation that seem to allude to the principle however, not all of this will be considered<sup>300</sup> because it is not always clear that the *ratio legis*<sup>301</sup> was precisely the application of this jurisdiction. As has already been established, one of the characteristics of the law (*loi*) is that most of the provisions are usually written in broad terms in order to avoid any precision that could make it inapplicable.

<sup>297</sup> *Cfr.* 630 F.s.d 876 (2d Cir. 198) reprinted in *ILR*, vol. 77, 1988. The Court said in this case "The torturer has become —like the pirate and the slave trader before him— *hostis humani generis*, an enemy of all mankind", cited in Randall, Kenneth, C., *op. cit.*, p. 789. For a review of *Filartiga v. Peña* see Steinhard, Ralph G., "Fulfilling the Promise of *Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos", *Yale J. Int'l. L.*, vol. 20, núm. 1, 1995, pp. 65-103. Also Newmann, Frank and Weissbrodt, David, *International Human Rights: Law, Policy and Process*, 2a. ed., United States, Anderson Publishing, 1996, pp. 449-552.

<sup>298</sup> O'Keefe, Roger, "Civil Actions in US Courts in Respect of Human Rights Abuses Committed abroad: Would the World's Oppressors be Wise to Stay at Home", *AJICL*, vol. 9, núm. 1, 1997, pp. 15-41. See also, See Posner, Theodore R., "Kadic v. Karadzic", *AJIL*, vol. 90, núm. 4, 1996, pp. 658-662. Shaw, M. N., *op. cit.*, pp. 420-422.

<sup>299</sup> For an excellent general review of all the decisions in this topic See Bederman, David J., "Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation", *Ga. J. Int'l & Comp. L.*, vol. 25, 1995/96, pp. 255-285. See also Christenson, Gordon A., "Customary International Human Rights Law in Domestic Court Decisions", *Ga. J. Int'l & Comp. L.*, vol. 25, 1995/96, pp. 225-253. There have been other decisions also based on crimes "universally condemned", see for instance *United States v. Noriega* and *United States v. Álvarez-Machain*, see commentaries in Vassalo, Peter, J., "The new Ivan the Terrible: problems in international criminal enforcement and the specter of the Russian Mafia", *Case W. Res. J. Int'l. L.*, vol. 28, núm. 1, 1996, pp. 182-185.

<sup>300</sup> Nevertheless Akehurst considers that universal jurisdiction is very well rooted in continental countries and included in many legislations. *Cfr.* Akehurst, Michael, "Jurisdiction in International Law", *op. cit.*, pp. 163-165.

<sup>301</sup> The *ratio legis* is "the reason or occasion of a law, the occasion of making a law", in *Black's Law Dictionary*, 6a. ed., United States, West Publishers, 1990, p. 1262.

cable.<sup>302</sup> Although it could be argued that such legislation may logically imply the exercise of universal jurisdiction we are of the opinion that unless the law has been applied in the same sense in which its wording directs we ought not to presume something that probably was not the real intention of the legislator.

For instance, the Penal Code of Mexico establishes in Article 149 bis the crime of Genocide. This Article provides that “Any person with the purpose of destroying total or partially one or more national groups or groups of an ethnic, racial or religious character, perpetrates, by any means, crimes against the life of the members of such groups or imposes massive sterilization with the end of impeding the reproduction of the group...”<sup>303</sup>

It can be argued that this article establishes the principle of universal jurisdiction because it does not require that the victims or the perpetrator be Mexicans nor that the crime be committed within Mexican territory. Nevertheless, there is no evidence in the project of amendment of the Code, by which this article was created or either in the discussion of such a project within the Legislature, to support the idea that the law was intended to apply to acts committed abroad, by foreigners against foreigners.<sup>304</sup> It would be imprudent to maintain that universal jurisdiction applies in relation to that provision. Moreover, there has been no case in which this provision has been applied.

Bearing in mind this need for caution, some cases of the potential application of universal jurisdiction will now be discussed.

According to one writer, Botswana establishes universal jurisdiction in section 65 of its Penal Code which punishes hijacking. Here neither the nationality of the criminal nor the nationality of the victim(s) are relevant. It makes no difference if the crime was committed in Botswana or not. The relevant part of section 65, for the present study is the following:

<sup>302</sup> Usually the main characteristics of the law (*loi*) are that it is: general, abstract, obligatory and coercitive. *Cfr.* Álvarez, Mario I., *Introducción al derecho*, Mexico, McGraw-Hill, 1995, pp. 133-135.

<sup>303</sup> Art. 149 bis.- “Comete el delito de genocidio el que con propósito de destruir, total o parcialmente a uno o más grupos nacionales o de carácter étnico, racial o religioso, perpetrare por cualquier medio, delitos contra la vida de miembros de aquellos, o impusiere la esterilización masiva con el fin de impedir la reproducción del grupo...”, Código Penal para el Distrito Federal en materia de fuero común y para toda la República en materia de fuero federal (Código Penal mexicano). Translation made by the author.

<sup>304</sup> *Cfr.* *Diario de Debates del Congreso de la Unión*, 14-18 de octubre de 1966.

(1) Any person commits an offence who, whether in or out of Botswana, unlawfully or intentionally:

(a) performs or threatens to perform an act of violence against a person on board an aircraft in flight...

(b) destroys an aircraft in service or causes damage to such an aircraft...<sup>305</sup>

Unfortunately, there is no further available practice which demonstrates exactly how this provision is applied or if, in fact, the ratio legis was the application of universal jurisdiction.

In the case of the United Kingdom it is held by one scholar that the British Manual of Military Law applies universal jurisdiction with respect to war crimes. The Manual reads: "War crimes are crimes *ex jure gentium* and thus triable by the courts of all States.... British military courts have jurisdiction outside the United Kingdom over war crimes committed... by... persons of any nationality... It is not necessary that the victim of the war crime should be a British subject".<sup>306</sup>

This also seems to be confirmed by the Report of the War Crimes Inquiry which held that "of particular interest is the fact that by enacting the Geneva Conventions Act 1957 Parliament demonstrated a belief that war crimes were offences over which it was suitable for the British Courts to exercise jurisdiction, regardless of the nationalities of the perpetrator and the victim, and of the country where the alleged offence took place."<sup>307</sup> As far as we know there have not been many decisions by British courts in which the universal jurisdiction has been applied.

In 1991 the United Kingdom enacted the War Crimes Act<sup>308</sup> which was, in a way, the outcome of the Report of the War Crimes Inquiry. This

305 Frimpong, Kwame, "Punishing Offenses Committed abroad: Practical (National) Relevance or theoretical claim", in Eser, Albin and Lagodny, Otto (eds.), *Principles and procedures for a new transnational Criminal Law. Documentation of an International workshop*, Society for the Reform of Criminal Law and Max Planck Institute for Foreign and International Criminal Law, 1992, p. 33. Emphasis added. See also the definition of money laundering of section 14 of the Proceeds of Serious Crime Act, p. 40.

306 Part III, 1958, para. 637 in Harris, D. J., *op. cit.*, p. 289. In the same sense see *Halsbury's Laws of England*, 4a. ed., vol. 18, Foreign Relations Law, Butterworths, 1977, p. 783, para. 1529.

307 *Cfr.* Report of the War Crimes Inquiry, Her Majesty's Stationery Office, by Hetherington, Thomas and William Chalmers, UK, 1989, pp. 95-96.

308 *Cfr.* *Halsbury's Statutes of England and Wales*, 4a. ed., vol. 12, Criminal Law, Butterworths, 1997, pp. 1270-1271. Nevertheless the Act was repealed *Cfr.* Wilford, Claire (editor), *Is it in force? 1998, A guide to the commencement of statutes passed since 1st January 1973*, UK, Butterworths, 1998, p. 531. For a genesis of the Act see Richardson, A. T., "War Crimes Act 1991", *MLR*, vol. 55, núm. 1, 1992, pp. 73-87. See also Ganz, Gabriele, "The War Crimes Act 1991 Why no Constitutional Crisis?" *MLR*, vol. 55, núm. 1, 1992, *passim*.

Act establishes jurisdiction with respect to the offences of murder, manslaughter or culpable homicide committed in violation of the laws and customs of war, and committed in German territory or German occupied territory between September 1, 1939 and June 5, 1945, irrespective of the nationality of the person at the moment of the commission of the crime. Nevertheless, the Act may only be invoked against a person who on 8 March 1990 or subsequently, became a citizen or resident of the United Kingdom. In our opinion this Act does not really provide for universal jurisdiction because it can only be applied against British citizens or residents.

Nevertheless, one writer reports that in April 1996 Szymon Serafinowicz was prosecuted in the United Kingdom on charges of having committed war crimes during W. W. II in Byelorussia. According to the same writer, this was the first case in which a person was prosecuted on the basis of the War Crimes Act 1991 and he considers that this case established universal jurisdiction.<sup>309</sup> The result of the case was that an old Bailey jury decided in January 1998 that Serafinowicz, an 86 years old man, was mentally unfit to face the case. The prosecution, Attorney General Sir Nicholas Lyell, abandoned the case and Mr. Serafinowicz subsequently died.<sup>310</sup>

## V. CONCLUSION

As we have shown, the rationale for universal jurisdiction is in accordance with the nature of the international crime committed. It is thus, a particular kind of crime; one which damages the highest interests and values of the international community regardless of the place and nationality of victims and criminals; which gives rise to individual criminal responsibility for the perpetrators; and to which it is not possible to apply statutory limitations or even amnesty or pardon. More important, however, is that this crime is subject to a double *opinio juris* criteria by which the international community as a whole must decide upon the application of universal jurisdiction.

309 *Cfr.* Kamminga, Menno T., *op. cit.*, p. 489. This is interesting particular when "by and large, English courts operate solely on the basis of territoriality, simple and qualified", in Gilbert, Geoff, *op. cit.*, p. 430.

310 *Cfr.* Msn News Today in <http://news.uk.msn.com/news/>.

From the preceding analysis, it is possible to conclude that the international crimes of piracy *jure gentium*, slavery, war crimes, including grave breaches, crimes against humanity and genocide, are all crimes for which universal jurisdiction may be exercised. Some of these crimes, like genocide, have had a relatively recent evolution within international criminal law; nevertheless, in actual practice, States have been shown to give these crimes the same treatment as the crime of piracy.

There are also other crimes under international law, such as terrorism, and hijacking, for which there is an ambiguity with respect to the application of the principle of universal jurisdiction. This uncertainty is reflected in doctrine as well as in State practice. Nevertheless, the principle of *aut dedere aut judicare*, usually contained in the international agreements in which such crimes are regulated, represents a good basis for their prosecution, but not necessarily for the application of universal jurisdiction.

Regarding State practice it must be concluded that relatively few judgments and laws explicitly refer to the universality principle. Prosecution by States of these types of criminals on the basis of the principle of universal jurisdiction is not frequent. The States assert jurisdiction under diverse bases. The most exceptional is universal jurisdiction.

Probably one of the reasons for which some States are reluctant to apply universal jurisdiction is because they consider that such jurisdiction represents an intervention in the internal affairs of a State. We suggest that this argument is groundless, due to the nature of the crime for which universal jurisdiction is exercised. These are crimes which although committed in a specific place, affect the entire international community and all States are therefore entitled to prosecute their perpetrators.

Another possible reason for the reluctance of some States to apply the principle of universality is that some do not agree with the idea that their nationals could be tried abroad. Again this argument is baseless. Universal jurisdiction represents an exceptional exercise of jurisdiction it is usually exercised when the State of which the criminal is a national or that where the crime was committed is either unwilling or unable to prosecute the suspect. Moreover, the State which wishes to exercise this jurisdiction only can do so if the criminal is arrested within its territory. Furthermore, the respect for the fundamental rules and principles concerning the right to a fair trial are binding upon all States and must be applied no matter how heinous the alleged crimes may be.

It is important to note that not even the creation of a permanent criminal court implies that universal jurisdiction will disappear. Thus, for instance, Article 1 of the Rome Statute of the ICC, -binding only among the State parties-, clearly provides that the court will be complementary to national criminal jurisdictions. Moreover, the crimes for which the court may exercise its jurisdiction are limited in number, while States may still apply their jurisdiction to all other crimes subject to universal jurisdiction -although, obviously some of this will be the same.

Furthermore, nowadays it seems that the number of States which are likely to apply universal jurisdiction is increasing.

The enforcement of humanitarian law depends in principle, on each member of the international community; otherwise it is the rule of law which is undermined.

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