School of Social and Political Sciences

The Application of Universal Jurisdiction to End Impunity for Major Human Rights Violations: conflict between accountability and sovereignty

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Abstract

Universal jurisdiction is a tool of international criminal law with patchwork application, unclear foundations, and an unsolidified scope. Despite this, its importance is acknowledged by most states and it is flaunted as a favorite tool of human rights advocates and organization. With increased globalization and awareness of major human rights atrocities, the application of universal jurisdiction to end impunities has become more frequent. This increased application increases the need to question whether universal jurisdiction is an effective way of ending impunity for major human rights violations. This work considers the coherence of the principle, first by considering its objectives, evaluating how it is used in state practice, and culminating in consideration of the main impediment in its application: the current understanding of the norms of state sovereignty. Through considering of the rules of immunity and their tangible interactions with universal jurisdiction, this work concludes that under current international practice, the principle meets political opposition rendering it ineffective in completing its objectives. However, trends in the understandings of responsible sovereignty and hierarchies of legal rules provide hope that with increased practice and legal consideration universal jurisdiction has the potential to providing a meaningful tool for ending impunity for major human rights violations.

Chapter 1 – Introduction

The arrest of Augusto Pinochet in London for crimes committed during his time as President of Chile pushed the concept of universal jurisdiction beyond the domain of international law and legal scholarship to mainstream attention. The increased need for international criminal accountability stemming from globalization, combined with recent successes in its application have resulted in many human rights activists and non-governmental organizations claiming that universal jurisdiction is "an essential tool of international justice."[1] This determination has merits. As has been pointed out, "it can no longer be maintained that individual rights and responsibilities should remain the exclusive concern of sovereign states, particularly when the actions of individuals have an impact on world order and other interests of the world community."[2] As a result, the use of universal jurisdiction for heinous crimes since *Pinochet* has become more prevalent.[3] Yet, this increase in use also deepens the need to question whether universal jurisdiction is an effective way of ending impunity for major human rights violations. Despite increased application, the principle is still applied in a patchwork fashion.[4] Further, there are several elements in the current use of universal jurisdiction that are problematic from the standpoint of both equal application of the law[5] and the full expression

[1] 'Universal Jurisdiction a Preliminary Survey of Legislation Around the World – 2012 Update' (Amnesty International 9 Oct 2012) <https://www.amnesty.org/en/documents/ior53/019/2012/en/> accessed 27 March 2017.

[2] M. Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice' in Voharah, L., Pocar, F., Featherstone, Y., Fourmy, O., Graham, C., Hocking, J., and Robson, N. (eds) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) p 76.

[3] Maximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'no Safe Haven' Universal Jurisdiction' (2015) 13/2 *Journal of International Criminal Justice* p 245.

[4] 'Universal Jurisdiction Annual Review 2016; make way for justice #2' (TRIAL International 2016) <https://trialinternational.org/wp-content/uploads/2016/06/Universal-jurisdiction-annual-review-2016-publication.pdf> accessed 7 April 2017.

[5] Richard Dicker, 'A few reflections on the current status and future direction of universal jurisdiction practice' in *Proceedings of the Annual Meeting (ASIL): international law in a multipolar world* (ASIL vol 107 2013) p 233-7.

of international law ideals.[6] The manner with which universal jurisdiction is used, and international criminal law in general, has far reaching implications for the structure of domestic and international legal interactions going forward and must be critically evaluated.[7]

The focus of this research is the ability for universal jurisdiction to properly bring perpetrators of major human rights violations to trial. It does so through consideration of the coherence of universal jurisdiction in light of the international rules of immunity, which often hinders its application. It will not address questions of whether and when it is prudent to exercise the principle. There is a sizable body of work questioning the practicality of universal jurisdiction in the stage of global politics. Notably, Henry Kissinger categorizing universal jurisdiction as a pathway to the "tyranny of judges."[8] Additionally, many legal scholars contend that its use is idealistic and minimizes the importance of political determinations and diplomatic relations on the world stage.[9] In this debate, it is easy for the legal concept to get lost in political perspectives. As Bassiouni points out, there is a disconnect between how proponents expect or believe universal jurisdiction is to be used, and how well it has developed in international law and is embedded in state practice.[10] Additionally, opponents dismiss the principle on political ground with little legal consideration all together. It has often been noted that: "the gap between the symbolic recognition that a crime has been committed and the ignition of prosecutorial action demands critical consideration."[11] In this work, I will critically

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[6] Devika Hovell, 'The 'Mistrial' of Kumar Lama: Problematizing Universal Jurisdiction' (*EJIL: Talk!*, 6 April 2017) <https://www.ejiltalk.org/the-mistrial-of-kumar-lama-problematizing-universal-jurisdiction/#comment-250861> accessed 7 April 2017.

[7] Diane Orentlicher, 'The future of universal jurisdiction in the new architecture of transnational justice' in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania 2006) p 215.

[8] Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80/4 *Foreign Affairs* p 86.

[9] Jack Goldsmith and Stephen D. Krasner, 'The Limits of Idealism' (2003) 132/1 *Daedalus* p 47; Eugene Kontorovich, "The Inefficiency of Universal Jurisdiction" (2008) 2008/1 *University of Illinois Law Review* p 389.

[10] M. Cherif Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania 2006) p 39.

[11] Itamar Mann, 'The dual foundation of universal jurisdiction: towards a jurisprudence for the 'court of critique'' (2010) 1/4 *Transnational Legal Theory* p 485.

consider that gap between the legal foundations of universal jurisdiction and its use as a means to end impunity.

This work is divided into three sections. Chapter 2 will review universal jurisdiction and how it is supposed to function. It considers the principle's definition, scope, necessity, and the reasons for its development. The objective of this chapter is to portray what universal jurisdiction is supposed to accomplish, providing a foundation for the subsequent consideration of its effectiveness. Chapter 3 will consider how states apply the principle of universal jurisdiction. It will focus on dissimilar trends in state practice and identify those trends which are successful in bringing individuals to trial. Chapter 4 will consider the disconnect between the objectives of the principle and how it is applied. This chapter focuses on the incoherence between universal jurisdiction and ideas of sovereign equality and non-interference which manifest as hurdles to its application. It will specifically consider the interaction between the rules of immunity and universal jurisdiction to give concrete consideration of the broader issues present in the use of the principle. Through such considerations, it is concluded that concern for traditional ideas of sovereign equality and non-interference principles greatly hinder the effectiveness of universal jurisdiction as a means to end impunity for major human rights violations. However, this deference is not justified through legal incoherence. There is legal support in the transcendence of universal jurisdiction over such ideas of sovereignty, giving it the potential to be and effective tool to end impunity thought it currently it is not.

Chapter 2 – Universal Jurisdiction

2.1 – Criminal Jurisdiction under International Law

Though international jurisdiction—as with domestic jurisdiction—can be both civil and criminal, this work focuses on universal criminal jurisdiction. Jurisdiction is split into two distinct elements. Legislative, or prescriptive, jurisdiction denotes the entitlement of a state to "assert the applicability of its criminal law."[12] This is the authority of a state to determine the scope in which the enforcement and judicial organs of that state can function[13] or, put simply, to criminalize a certain conduct.[14] The logical complement of a State's legislative jurisdiction is enforcement jurisdiction. This denotes the ability of a State to apply laws.[15] Occasionally, a distinction is made between adjudicative jurisdiction, the ability for a State to subject entities to their judicial process, and executive jurisdiction, the ability for a state to "compel compliance and redress noncompliance."[16] Though for all intents and purposes, adjudicative and executive jurisdiction are the act of applying a state's laws conceived under prescriptive jurisdiction. The split between prescriptive and enforcement jurisdiction also means that a sovereign entity "can enforce the prescription of another state, or of international law."[17] Universal jurisdiction is a form of prescriptive jurisdiction.[18]

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[12] Roger O'Keefe, 'Universal Jurisdiction: clarifying the basic concept' (2004) 2/3 *Journal of International Criminal Justice* p 735.
[13] Antonio Cassese, Gaeta, P., Baig, L., Fan, M., Gosnell. C., & Whiting, A., (revs) *Cassese's International Criminal Law* (3rd edn Oxford University Press 2013) p 281.
[14] n12.
[15] ibid.
[16] American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States* (St. Paul, MN 3rd edn American Law Institute Publishers 1987) §431 p 321; Michael Scharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53/2 *Harvard International Law Journal* p 357.
[17] n10 p 40.
[18] n12.

There are five generally accepted principles of jurisdiction possessed by states under international law: territory, nationality, protective, passive personality, and universal; which provide varying bases that legitimize the exercise of a state's authority.[19] Such principles were "established to foster cooperative foreign relations by avoiding and resolving conflicting assertions of domestic penal authority."[20] Of these principles territorial, denoting legal authority to regulate actions wholly or substantially within their territory, is the most common and least controversial due to its purely domestic reach.[21] The other loci of jurisdictional authority have extraterritorial application, however; the principle of universality is the only one which lacks any territorial connection with the prescribing state. Universal jurisdiction gains its legitimacy solely from the nature of the crime.

2.2 – Problems of Definition

Most states agree that universal jurisdiction is an important and well-established principle of criminal jurisdiction.[22] However, despite widespread acknowledgement of its existence and its long history on the international law stage, agreement on the principle breaks down when discussion pushes beyond its abstract ideas. *The Princeton Principles on Universal Jurisdiction*, a restatement of the law that governs and established the use of universal jurisdiction,[23] attempts a definition of:

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[19] James Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012) p 456.
[20] Kenneth Randall, 'Universal Jurisdiction under International Law' (1988) 66/4 *Texas Law Review* p 785.
[21] Restatement (n16) § 402 p 239; Luc Reydams, *In-Depth Analysis: The application of universal jurisdiction in the fight to end impunity* (European Parliament Subcommittee on Human Rights (DROI), Think Tank 2016) p 21.
[22] Reydams (n21) p 6.
[23] 'Princeton Principles of Universal Jurisdiction: Commentary', in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania 2006) p 26.

> "…criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[24]

The upshot is that universal jurisdiction is justified because of the nature of the act, without any of the other connection that would have allocated the competence of the state to complete its function.[25] This structure of definition, a list of elements describing the principle that differentiates it from the other principles of jurisdiction, is common. However, while the absence of a nexus, some form of which is necessary in other principles of international criminal jurisdiction, is a fundamental component of universal jurisdiction it does not constitute a sufficient definition.

The heinousness of the crimes that universal jurisdiction may be applied to is integral to its definition. As Hannah Arendt described: "it speaks with an authority whose very weight depends upon its limitation."[26] With the other principles of jurisdiction, the expansion of competency to extraterritorial situations is due to inherent ability for a state to protect its sole interests. For universal jurisdiction, the crimes which it covers must be such that all states in the international community have the interest to take actions against such offenses.[27] This should not be construed as covering common crimes merely because they are universally penalized. Murder being an example of a crime that is illegal in all legal systems yet does not fall under universal jurisdiction.[28] The authority of universal jurisdiction "derives from a State's *shared* entitlement – with all other States in the international legal system – to apply and

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[24] ibid art 1(1).
[25] Rosalyn Higgins, *Problems & Process: international law and how to use it* (Oxford University Press 2000) p 56.
[26] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, Penguin Books 2006) p 254.
[27] n20.
[28] Anne-Marie Slaughter, 'Defining the limits: universal jurisdiction in national courts' in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania 2006) p 169.

enforce the international law."[29] This shared entitlement is only found in a specific, though contested, subset of crimes that would threaten world order if impunity were allowed.[30]

2.3 – Scope of Universal Jurisdiction

As the specific crimes are pivotal in the definition and legitimacy of universal jurisdiction, contemplation of applicable crimes and their basis for being considered a threat to world order is important in solidifying the place of universal jurisdiction in international law. As Davide points out: "the acceptability of the exercise of universal jurisdiction depends in a large measure on the correctness of the premises on which its exercise is claimed to rest."[31] As such, the crimes that universal jurisdiction covers must be international in the sense that conventional or customary law have recognized them as criminal and of universal concern. Conventional law, on its own, cannot bestow universal jurisdiction. Many scholars agree with Davide's explanation that: "A multilateral treaty that vests jurisdiction on State-parties does not confer universal jurisdiction because the latter is enjoyed by all States regardless of accession or non-accession to a treaty."[32] However, O'Keefe takes issue with this, calling the "characterization of universal jurisdiction as the authority under international law of 'all' states or 'any' or 'every' state to criminalize" misleading. From O'Keefe's perspective, universal jurisdiction as authorized under customary international law may allow any and all states to prescribe jurisdiction without a connecting nexus, yet universal jurisdiction is equally vested

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[29] Anthony Colangelo, 'Universal Jurisdiction as an International 'False Conflict' of Laws' (2009) 30/3 *Michigan Journal of International Law* p 881.
[30] Richard Falk, "Assessing the Pinochet Litigation: whiter universal jurisdiction?" in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania 2006) p 117.
[31] Hilario G. Davide, Jr., '*Hostes Humani Generis:* Piracy, Territory and the Concept of Universal Jurisdiction' in St. John Macdonald, R., and Johnston, D., (eds) *Towards World Constitutionalism: issues in the legal ordering of the world community* (Martinus Nijhoff Leiden 2005) p 734.
[32] ibid p 732.

by conventional law even if only "against nationals of other states parties."[33] This view is not shared by all, notably Higgins, writing: "Universal jurisdiction, properly called, allows *any* state to assert jurisdiction over an offence."[34] This is the perspective of universal jurisdiction that this work takes.

Debate over the scope of the principle, though challenging from a practical perspective, highlights the legal weight which universal jurisdiction carries. The 70st session of the United Nation's Legal – Sixth Committee admitted that a consensus on the crimes covered was not easy to achieve. Yet, this consensus is important, as states acting under universal jurisdiction are acting on behalf of the international community and a state cannot unilaterally determine that a crime is subject to universal jurisdiction.[35] Though conventional laws that have not shifted into the customary sphere cannot truly bestow universal jurisdiction, it is necessary to consider both customary and conventional law in consideration of its scope. According to Bassiouni, the explicit nature of conventional law "is more apt to satisfy the basic principles of legality, namely, no crime without law, no punishment without law."[36] However, customary law, which has prohibitions on the crimes generally accepted to be subject to universal jurisdiction, is universal. As O'Keefe mentions: "even when their breach is punished through the medium of municipal law, have their ultimate source in customary international law".[37] As a result, the foundation of universal jurisdiction in international law cannot be determined without consideration of both.[38] Though "consensus on what was the *ratione materiae* of the crimes subject to the principle of universal jurisdiction had yet to emerge,"[39] it is supported by

[33] Roger O'Keefe, *International Criminal Law* (Oxford University Press 2015) p 324-5.
[34] n25 p 64.
[35] n29.
[36] n10 p 45.
[37] n33 p 25.
[38] n10 p 45-6.
[39] UNGA Legal Sixth Committee (70th Session) 'The scope and application of the principle of universal jurisdiction (Agenda item 86)' (16 November 2015) <http://www.un.org/en/ga/sixth/70/universal_jurisdiction.shtml> accessed 15 March 2017.

custom that the principle covers piracy, war crimes, crimes against humanity, genocide, and torture.[40]

2.3.1 – Piracy

Piracy is the original crime attributed to universal jurisdiction, yet gives it a shaky foundation when considering the subsequent crimes to which the principle has been applied. On one hand, pirates were undoubtedly considered a scourge to society,[41] classified as *hostis humani generis*, enemy of mankind.[42] Yet, while some acts of piracy would certainly be categorized as heinous, not every act realistically could when considering its subsequent equivalence to acts such as genocide or crimes against humanity that are "inherently heinous."[43] Further, piracy, not heinous acts pirates partake, is the crime. Murder on the high seas, according to the Supreme Court of the United States, would not be covered by universal jurisdiction merely because of the location.[44] Further, protective and passive personality principles could conceivably be applied to piracy as ships, through the principle of the flag, are extensions of sovereign nations.[45] Which these considerations, some have characterized the application of universal jurisdiction "only because piratical acts trigger an exception to that state's exclusive sovereignty," and the principle permits "any state to seize the vessel and punish the offenders."[46] The location of the crime, the high seas, makes it easier for pirates to evade the other principles of jurisdiction and as such makes the principle necessary.[47]

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[40] Robert Cryer, Friman, H., Robinson, D., & Wilmshurst, E. (eds) *An Introduction to International Criminal Law and Procedure* (3rd edn Cambridge University Press 2014) p 57.
[41] Ilias Banteskas, *International Criminal Law* (4th edn Hart Publishing 2010) p 345.
[42] Antonio Cassese, *International Law* (Oxford University Press 2001) p 245.
[43] Malcolm Evans, *International Law* (4th edn Oxford University Press 2014) p 322-6.
[44] *United States* v *Furlong* 18 US 184 (1820) p 197-8.
[45] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003) p 21.
[46] n20.
[47] n43 p 322.

Regardless, piracy is the crime "widely recognized in customary international law as the international crime *par excellence* to which universality applies."[48] Piracy is undoubtedly considered a crime *ius gentium*,[49] as it is "an offense against the law of nations."[50] The United Nations Charter on the Laws of the Sea makes clear the application of universal jurisdiction over piracy, stating: "*All* States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state."[51] In his opinion for the International Court of Justice *Arrest Warrant* case, President Guillaume, arguing against an expansion of the scope of the principle, pointed to piracy being the only "true case of universal jurisdiction."[52] Further, in 2011 the Security Council passed resolution 1976 that stated piracy was covered by the principle despite broader contentious debate.[53]

2.3.2 – Slavery

Along with piracy, the slave trade has long been considered to fall under universal jurisdiction. The first instance of implied application was in the Declaration of the Congress of Vienna in 1815. This is predominantly due to the categorization of the transport of slaves as a form of piracy. However, the heinousness of slavery as a crime has also contributed to the acceptance of the application of universal jurisdiction in such cases.[54] Though this is now largely uncontested, the UNCOLS possesses less forceful language on the prohibition of the slave trade than it does referring to piracy, charging "every state" to take preventative measure

[48] M. Cherif Bassiouni, *International extradition: United States law and practice* (4th edn Oceana Publications 2002) p 430.
[49] ibid p 428.
[50] n16 §404 p 259.
[51] Emphasis added. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCOLS) Art 100.
[52] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (Separate Opinion of President Guillaume) [2002] ICJ Rep 2 p 43.
[53] UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976.
[54] Randall Lesaffer, 'Vienna and the Abolition of the Slave Trade' (OUPblog 8 June 2015) <https://blog.oup.com/2015/06/vienna-abolition-slave-trade/> accessed 27 June 2017.

rather than "all states."[55] This could be read as providing jurisdiction for the 167 signing states rather than universally.[56]

There are additional contexts that must be considered in the application of universal jurisdiction over slavery. First: "whatever slavery or slave-related practices are committed within the context of an armed conflict, it is subject to international humanitarian law and becomes a war crime."[57] The application of universal jurisdiction to war crimes will be considering in the subsequent section. Additionally, acceptance of universal jurisdiction over both piracy and the slave trade was probably more readily assumed due to the perpetrators of such crimes being individuals rather than the governments of other sovereign nations.[58] This removes many of the issues apparent in universal jurisdiction and its confliction with state sovereignty. Additionally, the slave trade is no longer openly practiced by the nations of the world, making them more likely to accepted universal prohibition and jurisdiction over the practice.

2.3.3 – War Crimes

Beyond piracy, and to an extent slavery, there is greater contention over the existence of additional crimes being subject to universal jurisdiction. As prior noted, in *Arrest Warrant* President Guillaume and Judge Rezek of the ICJ supported the proposition that the principle should not be applied to any other crimes.[59] However, this extremely restricted view was not shared by the other judges.[60] O'Keefe asserts that "state practice and *opinion juris* indicate

[55] n51 art 99.
[56] n41 p 346.
[57] n48 p 432.
[58] William Schabas, *Genocide in International Law: the crime of crimes* (2nd edn Cambridge University Press 2009) p 2.
[59] n33 p 22-3.
[60] n52 see (Joint Separate Opinion of Judges Higgins, Kooijmans, & Buergenthal), (Dissenting Opinion of Judge ad hoc Van den Wyngeart), (Separate Opinion of Judge Koroma).

sufficiently clearly that states are indeed permitted to assert universal prescriptive jurisdiction" beyond piracy.[61] Proponents of universal jurisdiction have cited its application to heinous crimes since the Nuremberg trials.[62]

War crimes have perhaps the most extensive codifications of any international crime, found in the Geneva Conventions of 1949. Many interpreted the text of the Conventions as providing universal jurisdiction over violations categorized as "severe" or "grave breaches" of the Conventions and Protocol I.[63] Article 49 of the Geneva Conventions states that:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[64]

Though for the Geneva Conventions to provide for universal jurisdiction, the ability to prosecute must be provided, not only signing parties and states involved in such conflicts, but every state. Both state practice in applying the Geneva Conventions and its *travaux préparatoires* support that this is so.[65] It should additionally be noted that the Geneva Conventions have generally been accepted into the corpus of international customary law, binding on all states. Additionally, war crimes, though originally applicable to interstate conflicts are now agreed to apply in intrastate conflicts and can be perpetrated by civilians, slightly expanding the range of acts subject to universal jurisdiction under the designation of war crimes.[66]

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[61] n33 p 23.
[62] n16 §404 p 256.
[63] n23 p 30.
[64] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Conventions) ch IX Art 49.
[65] n45 p 55.
[66] n33 p 134.

2.3.4 – Crimes Against Humanity

As with war crimes, the application of universal jurisdiction over crimes against humanity finds its inception in the legal developments post-WWII. While war crimes have been understood as a criminal offense for most of modern history, crimes against humanity first appeared as positive international law in the Nuremberg Charter.[67] There is currently no international convention for crimes against humanity. Despite this, the creators of the *Princeton Principles of Universal Jurisdiction* included crimes against humanity "without objection,"[68] and crimes against humanity is now considered a universal crime under customary international law whether committed in times of war or peace.[69] The most authoritative definition of crimes against humanity is found in Article 7 of the Rome Statute. Though the International Criminal Court does not possess universal jurisdiction, some states have expressed an understanding that universal jurisdiction is applicable for the crimes in its Statute.[70] This includes crimes against humanity. Additionally, the International Criminal Tribunal for the Former Yugoslavia[71] and the International Criminal Tribunal for Rwanda[72] permit the subsidiary application of universal jurisdiction the crimes under their regional jurisdiction.[73] Though limited, this supports the broader acceptance of universal jurisdiction regarding crimes against humanity.

[67] Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279 (Nuremberg Charter).
[68] n23 p 30.
[69] n42 p 251.
[70] n33 p 24.
[71] UNSC, 'Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (1993) UN Doc S/RES/827 in Evans, M., *Blackstone's International Law Documents* (12th edn Oxford University Press 2015) amended as of 29 June 2010 (ICTY) Art 5.
[72] UNSC, 'Statute of the International Criminal Tribunal for Rwanda' (1994) UN Doc S/RES/955 (ICTR) Art 3.
[73] n33 p 24.

2.3.5 – Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide signed after World War II was the first international convention criminalizing a specific act. Though, the Genocide Convention itself fails to stipulate the universal principle as a jurisdictional basis, saying rather that:

> "Persons charged with genocide…shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[74]

As written, the jurisdiction provided in the Genocide Convention is only territorial or by international penal tribunal, which at the time had not been formed. In drafting, the prospect of universal jurisdiction applicable to genocide received contentions, particularly from the United States and Soviet Union. The principle was present in the first draft of the Convention, providing jurisdiction "irrespective of the nationality of the offender or of the place where the offence has been committed," but was removed in the final.[75]

Despite the lack of universal jurisdiction in the Genocide Convention being what Schabas calls "one of its historic defects," he makes the claim that it "is now resolved by the evolution of customary international law."[76] As is the case with crimes against humanity, the Statute of the ICTY provides for the concurrent jurisdiction for genocide, in addition to war crimes, to national courts, with no conditions placed on those national courts. In this way, the ICTY statute provides for universal jurisdiction for "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."[77] This broad reading of article 9(1) of the ICTY statute was upheld by the European Court of

[74] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) Art 6.
[75] Draft convention on the crime of genocide prepared by the Secretary-General in pursuance of the Economic and Social Council resolution 47 (IV) (1947) UN Doc E/447 Art 7.
[76] n58 p 647.
[77] n71 Art 9(1).

Human Rights in *Jorgic* v *Germany*.[78] The ECtHR further noted that establishment of jurisdiction over genocide through universal jurisdiction is supported by the case-law of many European states in addition to the ICTY.[79] Perhaps most decisively, the International Court of Justice in advising whether reservations were allowed to the Convention determined that a "universal character" was required to prevent and end impunity for genocide and as such "[t]he Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope."[80] As stated in both the Darfur and Gaza United Nations reports, universal jurisdiction covering genocide, crimes against humanity and war crimes is largely accepted[81] and there is little debate on the principle's applicability to genocide.[82]

2.3.6 – Torture

The jurisdiction provided in the Torture Convention is explicitly territorial, nationality, and passive personality based.[83] However, the Torture Convention charges the state to establish jurisdiction "over offences in cases where the alleged offender is present in any territory under its jurisdiction…"[84], and clearly states that no form of legitimate international criminal jurisdiction is prohibited.[85] While the preference set out in the Torture Convention is to extradite rather than exercise universal jurisdiction, it affirms the principle when necessary.[86]

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[78] *Jorgic v Germany* ECHR 2007-III paras 69-70.
[79] ibid para 69.
[80] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.
[81] UNSC, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (2005) UN Doc S/2005/60 para 613; UNCHR, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) UN Doc A/HRC/12/48 para 1850.
[82] n58 p 648.
[83] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention) Art (4).
[84] ibid Art 5(2).
[85] ibid Art 5(3).
[86] Brian Man-ho Chok, 'The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity' (2014) 20/2 *UC Davis Journal of International Law & Policy* p 233.

In state practice, torture has been accepted as a crime subject to universal jurisdiction. The Torture Convention was pivotal in the *Pinochet* litigations in the United Kingdom.[87] Futher, the US 2nd Court of Appeals expressed such characterization with the oft-cited quote: "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[88] Today many cases and investigations into torture have been brought under the authority of universal jurisdiction.

2.3.7 – Other

The scope of universal jurisdiction, in some places, has been expanded beyond the generally agreed prohibitions laid out above. The *Foreign Relations Law of the United States, 3rd Restatement* includes the hijacking of aircraft and certain acts of terrorism under the principle.[89] However, as Higgins points out, the *3rd Restatement* does not provide support or authority for this preposition and is probably a mischaracterization due to the *aut dedere aut judicare* form of international conventions pertaining to such crimes.[90] The *Madrid-Buenos Aires Principles of Universal Jurisdiction* include in their list of crimes covered human trafficking and enforced disappearances,[91] though some scholars connect these crimes to slavery.[92] Additionally, the *Madrid-Buenos Aires Principles* includes a principle on economic and environmental crimes, so long as they occur to "the extent and scale of which seriously affect group or collective human rights or cause the irreversible destruction of ecosystems."[93]

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[87] *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte (no. 3),* 38 ILM 581 (1999).
[88] *Filartiga v Pena-Irala* 577 Federal Supplement 876 (US 2d Cir 1984) p 863, the court was referring to civil universal jurisdiction.
[89] n16 §404 p 254.
[90] n25 p 64.
[91] 'Madrid-Buenos Aires Principles of Universal Jurisdiction' (Madrid, FIBGAR 2015) <http://en.fibgar.org/upload/proyectos/35/en/principles-of-universal-jurisdiction.pdf> accessed 7 May 2017 prin 2.
[92] John Reynolds, 'Universal Jurisdiction to Prosecute Human Trafficking: Analyzing the Practical Impact of a Jurisdictional Change in Federal Law' (2011) 34/2 *Hastings International and Comparative Law Review* p 387.
[93] n91 prin 3.

However, state practice does not support the application of universal jurisdiction beyond the core international crimes.

2.4 – Restrictions in Application of Universal Jurisdiction

2.4.1 – Pure v Plus

It is important to note that though universal jurisdiction lacks a territorial, nationality, or other nexus in the form of individual state interest, a direct link to the enforcing state can be present in cases where universal jurisdiction is or is one of the bases of jurisdiction. As Bassiouni points out: "the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state."[94] So long as there is present the necessary "policy of enhancing international criminal accountability, whereby the enforcing state acts on behalf of the international community in fulfillment of its international obligations"[95] universal jurisdiction can provide the bases of prescriptive authority. The action on behalf of the international community is essential, not the lack of nexus. However, in practice states have been less than excited to apply universal jurisdiction without some connection.

The exercise of the principle with an additional connection to the acting state has come to be known as "universal jurisdiction plus." Universal jurisdiction plus is appealing, as the exercise of the principle in its pure form leads to both internal and external problems. Internally, there are questions of the legitimacy of a state using its full judicial power against a defendant "who, by definition, cannot be said to have authorized the exercise of that power through nationality or conduct within that states territory."[96] This manifests in a fear of lack of

[94] n48 p 360-1.
[95] ibid p 424.
[96] n28 p 172.

accountability in the application of the principle due to the great spatial disconnect between the population most affected by the trial and the acting court.[97] From an external perspective, pure universal jurisdiction poses the overarching concern of interference with the affairs of another sovereign nation providing space for the political debate that often clouds the principle. Part of the draw of universal jurisdiction "plus" is the ability for states to make a sounder assertion of jurisdiction that cannot be as easily questioned. Though, despite the preference for universal jurisdiction plus, it is not required.[98]

2.4.2 – Subsidiary v Primary

The desire by states to have some connection to the crime in addition to the authority of universal jurisdiction stems from the understanding that the territory principle for jurisdiction is the most forceful.[99] This view additionally has led to the promotion of universal jurisdiction as a subsidiary to an exercise of jurisdiction by the territorial state.[100] Particularly in situations where there is an *aut dedere aut judicare* obligation, it has been suggested that extradition should be the main objective and the state is only bound to proceed with their own actions if the extradition for some reason failed or was impossible.[101] This view is promoted by many states.[102] Cassese, in the UN Darfur report, conditions the exercise of universal jurisdiction on two factors: the presences of the accused on the territory of the acting country and assurance that a state with territorial or nationality jurisdiction has clearly shown inability or unwillingness to take the case.[103]

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[97] Diane Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92/6 *Georgetown Law Journal* p 1057.
[98] Overview of universal jurisdiction in domestic statutes from n45.
[99] European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (Council of Europe Legal Affairs, Strasbourg 1990) p 21.
[100] n45 p 30.
[101] ibid p 50.
[102] n39.
[103] Darfur (n81) para 614.

Legally however, there is no hierarchy of jurisdictional principles. As Goldestone expressed in the UN Gaza report, the universal principle "is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them."[104] This perspective is further supported by Higgins, describing universal jurisdiction as: "[A] well-established norm, which stands alongside other norms of jurisdiction and is not to be seen as an exception from any one of them."[105] Further, state practice, particularly in Europe with examples such as *Pinochet* and Rwandan trials in France, shows that states are willing to use universal jurisdiction, even when the territorial state has shown desire to prosecute by their territorial or nationality authority.[106] As such, the desire by many states for subsidiary universal jurisdiction over primary is a political rather than legal choice. This has political benefits and allows for guides when multiple states express jurisdictional authority over a situation, but does not reduce the authority of universal jurisdiction as a primary means of a state's criminal authority on behalf of the international community.

2.5 – Differentiating Universal Jurisdiction from other Legal Concepts

2.5.1 – aut dedere aut judicare

Most treaties relevant to universal jurisdiction contain the concept *aut dedere aut judicare,* the principle of extradite or prosecute. However, not all treaties and conventions pertinent to universal jurisdiction contain the concept, and similarly not all treaties containing *aut dedere aut judicare* provide for the application of universal jurisdiction. Though treaties containing *aut dedere aut judicare* may be far reaching with many signatories, it cannot be

[104] Gaza (n81) para 1849.
[105] n25 p 58.
[106] Helen Trouille, "France, Universal Jurisdiction and Rwandan Génocidaires: The Simbikangwa Trial" (2016) 14/1 *Journal of International Criminal Justice* p 195.

categorized as a component, source, or expression of universal jurisdiction for the universal requirement on the parties is limited to a specific circumstance with a limited basis of jurisdiction.[107] As Reydams points out: "*aut dedere aut judicare* jurisdiction is thus 'universal' in the sense that the custodial State is competent wherever the crime was committed, not in the sense that whoever may prosecute."[108] The applicable states must still be signatories of the providing treaty. *Aut dedere aut judicare* obligates the signing states' cooperation in prosecution of the crime(s) indicated in the treaty but is distinct from jurisdiction.[109] Indeed, O'Keefe asserts that *aut dedere aut judicare* can be founded out of any of the other bases of jurisdiction and is not inherent to universal.[110] The ILC considered the aspects involved in *aut dedere aut judicare* in their 66th session and makes the point that establishing jurisdiction is a required precursor "to the implementation of an obligation to extradite or prosecute an alleged offender…"[111] Utilizing the principle of universal jurisdiction may be required yet, as the ILC points out in line with O'Keefe, jurisdiction can be established by principles other than universality.[112]

2.5.2 – jus cogens

When considering the crimes covered by universal jurisdiction, many scholars point to *jus cogens* as an indication that the crime is subject to the principle.[113] Bassiouni subscribes to a view and cites their connection as "indispensable…in order to avoid jurisdictional conflicts, disruptions of world order, abuse and denial of justice and to enhance predictability."[114]

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[107] n25 p 64.
[108] n45 p 80.
[109] n52 (Dissenting Opinion of Judge ad hoc Van den Wyngeart) para 60.
[110] n33 p 336.
[111] ILC, 'Final Report on The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (66th session 5 May–6 June and 7 July–8 August 2014) UN Doc A/CN.4/L.844 para 18.
[112] ibid para 18.
[113] n48 p 424.
[114] ibid p 425.

Further, regional courts, notably the ICTY, suggest that "universal jurisdiction would apply to any violation of *jus cogens*."[115] It is true that there are significant issues which arise when crimes that are delineated under universal jurisdiction through conventions and the uncertainty of when and what crimes are considered customary. Treaties codifying the prevention and punishment of *jus cogens* crimes could truly be stated as providing for universal jurisdiction, regardless of universal signatories. However, this does not provide an answer the question of when a crime has reached such status. As was highlighted in the European Parliament assessment of universal jurisdiction, aligning the crimes covered by universal jurisdiction with *jus cogens* norms is not clarifying, as both areas of international law are agreed in the abstract and contested in practice.[116] Additionally, some contend that equating universal jurisdiction crimes to *jus cogens* norms would unduly restrict the former. Despite "many uncertainties about both processes, it is clear that a much more restrictive standard applies to qualify a norm as *jus cogens*" than would, or should, apply to universal jurisdiction crimes.[117]

2.6 – Necessity of Universal Jurisdiction

The problem which arises following academic consideration of universal jurisdiction is why it is necessary, peculiarly considering its patchy application, general but not solidified scope, and the political animosity expressed towards it by many people in power.[118] Consideration of effectiveness must also consider whether it would be more effective for the other loci of jurisdiction or international courts to be utilized in the attempt to combat impunity.

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[115] n92 p 387.
[116] n21.
[117] Lori Damrosch, "Comment: Connected the Threads in the Fabric of International Law" in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (2006 University of Pennsylvania Press) p 95.
[118] See n8.

Clearly, as was seen in the Genocide Convention, the possibility of an international criminal court at some point was hoped for and expected. That being the case it is true that the creation of the International Criminal Court has not lessened the use of domestic courts, in fact a "decentralized administration of justice" recognized by the Rome statute and indirect enforcement in domestic courts in general has been called "the backbone of the international criminal justice system."[119] Additionally, international and regional courts have specific jurisdictions which may not cover the specific situations or the locations of the act.[120] Leaving a number of situations not easily covered by their jurisdiction.

It has been asserted that the objective of international criminal law is for its enforcement in domestic courts.[121] Such reasons can be inferred from the different bases of jurisdiction; a concern with protecting national interests and nationals, notably. This interest must be reconciled with non-interference with the dealings of other sovereign states, a central tenet of international law, which limits the application of a state's authority beyond its own borders. The distinction between enforcement and prescriptive jurisdiction allows for the extension of a states reach, allowing states to assert their interests, but preventing them from taking actions such as sending police forces into another sovereign state. Indeed, the *3rd Restatement* only lists unreasonableness as a limitation on a state's jurisdiction to prescribe, with its solution for the enviable conflicts a lack of limitations produces being evaluation of each state's legitimate interest and deference to the state whose interest is greater.[122] Yet, this extraterritorial application of a state's authority is necessary to insure protections of their interests. Universal

[119] Gerhard Werle and Florian Jessberger, 'International Criminal Justice is Coming Home: the new German code of crimes against international law' (2002) *Criminal Law Forum* p 191.
[120] Dapo Akande and Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts (2011) 21/4 *European Journal of International Law* p 815.
[121] n6.
[122] n21 §403 p 245.

jurisdiction falls under the umbrella of extraterritorial jurisdiction, however is necessitated not to ensure one states interests, but the interests of the international community as a whole.

There are two distinct viewpoints which emerge when considering potential justifications for the necessity of these actions, categorized as international morality or procedural convenience.[123] This dichotomy is important in the consideration of the effectiveness of universal jurisdiction, as the underlying objectives of each perspective differs. However, despite implications from the distinctions in these two theories, the main idea of universal jurisdiction as a means to prevent impunity for crimes that threaten world order remains the same. The traditional perspective of universal jurisdiction aligns with the idea of a universal morality; a belief that the crimes it covers "strike at the whole of mankind"[124] and thus provide states with the prerogative on behalf of the international community to act. This can be seen in justifications for its use on crimes "that warrant universal prosecution and repression."[125] The more pragmatic approach focuses on the necessity of interstate cooperation rather than the prerogative to persecute.

2.6.1 – Universal Morality

Universal morality asserts the existence of internationally shared core values which are significant enough for any state to exercise of jurisdiction over them. In this way, universal jurisdiction transcends territorial sovereignty.[126] This view takes notes from a natural law viewpoint; that there is a supranational source of law that governs the world "irrespective of any limitations in space or time." Often this is denoted in religious concepts of law.[127] Natural law notions aside, universal morality merely works to expand the theory behind domestic

[123] n28 p 169.
[124] ibid
[125] n42 p 262.
[126] n48 p 42-3.
[127] ibid.

criminal law into an international scale. In criminal law, prosecution occurs on behalf of the community which determined the existence of the norms that were violated, not by the specific person or people hurt by the action.[128] From a universal morality perspective, the community is international rather than domestic. This is a constitutive understanding of international criminal law, where the character of the offence is the only criterion that allows courts to take up the case. [129] States have determined through customary or conventional law that a certain act is universally criminal to an extent that it threats world order.

However, Luban vests the authority of domestic courts in rightfully asserting jurisdiction over crimes that offend our very humanity not on the "political authority" of the state, but on personal authority of every individual. From his perspective: "To say that humanity has an interest in suppressing crimes against humanity is to say that human individuals share that interest, not that some collective entity called 'humanity' has it."[130] The result is that domestic courts have authority because individuals created them, and individuals have the right to see such things brought to trial.[131] Whatever the entity that possesses the authority, individuals or sovereign states, a perspective of universal morality removes the question of necessity. Every state has the authority to bring such trials and as such it is necessary for them to take actions as they see fit. In this way, universal jurisdiction is not reaching the jurisdictional arms of a sovereign country beyond its territories, it is transcending sovereignty, not only of any receiving states but the acting state as well.

[128] David Luban, 'A Theory on Crimes Against Humanity' (2004) 29/1 *The Yale Journal of International Law* p 85.
[129] n45 p 38.
[130] n128.
[131] ibid.

2.6.2 – Procedural Convenience

While the theory behind universal morality aligns with justifications for extraterritorial application of jurisdiction sans a nexus with the acting state, in practice the idea of the "court of last resort" has found more support.[132] From the perspective of procedural convenience, while the crimes are still those that offend humanity, the use of universal jurisdiction is viewed in a more passive light. Largely, that there are certain situations where it is necessary to have "enforcement mechanisms not limited to national sovereignty" as a matter of practicality.[133] In this way universal jurisdiction legitimizes actions which prevent states from becoming safe-havens rather than granting states the authority to pursue any individual who commits a universal crime. Like universal morality, this more pragmatic understanding of universal jurisdiction recognizes that there are certain values or interests that are universally shared. However, the necessity of the principle does not transcend sovereignty, rather works in greater partnership with it. Reydams categorizes these situations as "co-operative," arising out of necessity, such as inability to extradite resulting in "a form of bilateral co-operation in penal criminal matters" that occurs because the other option would be to allow impunity.[134]

The logic behind procedural convenience is a short step away from the original universal jurisdiction crime of piracy. The idea that universal jurisdiction only covered crimes because of a lacking territorial state as supported by President Guillaume. While his point, strictly speaking, was made to be understood in a way that limits the scope of universal jurisdiction, the rationale used does not necessarily require a reduction of universal jurisdiction to crimes which occur in *terra nullius*. Scholars such as Cassese et al, point to such rationale as supporting the expansion of universal jurisdiction to other crimes, such as genocide, crimes

[132] n11; UNGA Legal Sixth Committee (66th Session), 'The scope and application of the principle of universal jurisdiction (Agenda item 84): summary of work' (2011) <https://www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml> accessed 6 May 2017.
[133] n10 p 42.
[134] n45 p 29.

against humanity, and war crimes for: "while these crimes do not typically occur outside of a state jurisdiction, they often occur in a context in which the territorial state is unable to enforce the law, and therefore there may be an equivalent absence of law justifying universal jurisdiction."[135] Indeed, the majority of cases where universal jurisdiction has had the greatest success and least political resistance are those where the territorial state was unable to act.

2.7 – Conclusion: Objective of Universal Jurisdiction

Universal jurisdiction developed to prevent the impunity for major international crimes in a world of sovereign states. As Judge Van Den Wyngaert stated in *Arrest Warrant:* "Despite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes" with a purpose of fighting impunity by reducing the ability for culprits from escaping prosecution.[136] Both theories as to the necessity of the existence of universal jurisdiction are based on this understanding. As such, they provide, albeit from divergent perspectives, ways to work around the traditional rules of sovereignty to prevent impunity. Though the scope of universal jurisdiction is unsolidified, it is agreed by most states that the crimes covered by universal jurisdiction are those so egregious in nature that, as a matter of international order, they must be prosecuted. Support for universal jurisdiction over piracy and slavery, war crimes, crimes against humanity, genocide, and torture is found in the language of international conventions and in the statutes of many international tribunals. Domestic courts rightly have the authority to hear cases over crimes prescribed by universal jurisdiction, as states created the customary and conventional law that gives universal

[135] Antonio Cassese, Acquaviva, G., Fan, M., & Whiting, A., *International Criminal Law: cases and commentary* (2011 Oxford University Press) p 313.
[136] n52 (Dissenting Opinion of Judge ad hoc Van den Wyngeart) para 46.

jurisdiction its foundations and thus constitutions the community whose norms must be protected.

Chapter 3 – State Practice and Trends in Implementation

The dichotomy which manifests when justifying the need for universal jurisdiction can be translated to state practice, resulting in an ebb and flow of contrasting ways that states use their authority. Maximo Langer classifies these contrasting practices into "Global Enforcer" and "No Safe-Haven" approaches.[137] Luc Reydams uses the same vocabulary in his analysis of the application of universal jurisdiction by request of the European Parliament.[138] When states act as Global Enforcers, they seek to actively prosecute individuals who allegedly committed crimes with no connection to the acting state. Such actions seek a justification that aligns with the theory of international morality.[139] This perspective takes a step towards more of a 'global community' and highlights the constitutive nature of international law,[140] but it also has the result of conflicting with ideas of sovereign equality and non-interference. Conversely, a pragmatic perspective of universal jurisdiction can be construed easily into Langer's other categorization of "No Safe-Haven," diminishing some of the problem with state interference that universal jurisdiction creates while still allowing states to work together on objectives that would be impossible for one state.[141]

While the actions of states are on a spectrum,[142] there are trends in state practice that suggest drifts in preference of one theoretical theory of universal jurisdiction over the other. This section will survey these trends and consider how states have varied in their approaches to the use of universal jurisdiction after the *Pinochet* litigation. These trends are not chronological, as cases categorized with the "No Safe-Haven" approach continue to occur

[137] n3.
[138] See n21.
[139] n3.
[140] n97.
[141] n3.
[142] ibid.

during times of more assertive "Global Enforcer" cases. Yet, such classification aids in consideration of the effectiveness of universal jurisdiction by highlighting situations where the principle succeeds at bringing cases to trial. By identifying times when universal jurisdiction consistently fails, areas of incoherence can subsequently be identified. The objective of this section is to distinguish such trends. While presenting the divergent ways that universal jurisdiction can be used and with an awareness of space constraints, this is not a comprehensive survey of universal jurisdiction cases since *Eichmann*. Rather it is a presentation of notable cases present in the literature of international criminal law. I conclude that, with exception of the Eichmann, Pinochet, and Habré cases, "Global Enforcer" situations are less likely to proceed to trials and ultimately less successful from a criminal law standpoint. Pragmatic cases are much more likely to be accepted and completed.

3.1 – Global Enforcer

3.1.1 – Eichmann to Pinochet

It is commonly agreed that the trial of Adolf Eichmann was the first exercise of universal jurisdiction for gross human rights violations beyond piracy.[143] Generally, the legitimacy of Israel using the universality principle as legal justification for their competency to try Eichmann is not seriously questioned.[144] What has been questioned in *Eichmann*—and the prior Nuremburg trials—is the legality of their proceedings, mostly due to the undertones of 'victor's justice' present in both. Issues with *Eichmann* began with his arrest, rather kidnapping, in Argentina by Israeli authorities without the consent of Argentina.[145]

[143] William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26/3 *Leiden Journal of International Law* p 667.
[144] n25 p 59.
[145] Nicholas Kittire, 'A Post Mortem of the *Eichmann* Case: the lessons for international law' (1964) 55/1 *The Journal of Criminal Law, Criminology, and Political Science* p 16.

Additionally, the shaky legality of the Eichmann trial, the sensationalism present throughout the proceeds pushes many to view the case as a poor precedent for universal jurisdiction.[146]

Many of the difficulties that must be evaluated for effective universal jurisdiction trials were absent in Eichmann. The problem of interference within the political matters of other states, as the Nazi regime had been destroyed, was not present. Further, World War II was complete with no peace process to be disturbed by prosecution and Eichmann was not a sitting, or even former, leader.[147] Perhaps most problematically, the role of the domestic court in *Eichmann* was contradictory to the usual invocation of *any* forum being proper in universal jurisdiction cases. As Lawrence Douglas pointed out in a forum discussing the 50th anniversary of the case, the Eichmann trial seemed to suggest,

> "…that in order for a trial of a perpetrator of international crimes to succeed in all its dimensions—as an exercise in retributive justice, as a tool of establishing a baseline historical account, and as a means of conferring dignity on the lived experience of survivors—there must be an organic link between proceeding, people and place."[148]

This proposition is directly at odds with fundamental ideals that any domestic court may hear universal jurisdiction cases.

Beyond Eichmann, the arrest of Augusto Pinochet has been touted as the "most well-known contemporary example of an assertion of universal jurisdiction."[149] Though universal jurisdiction has a long history, the *Pinochet* case thrusted the concept into mainstream discussions. *Pinochet* was the first case of a former president being arrested under the authority of universal jurisdiction.[150] It was also exceptional in that Pinochet had willingly given up power in Chile and had friendly connections with many Western governments, including the

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[146] Gary Bass, 'The Adolf Eichmann Case: universal and national jurisdiction' in Macedo, S., (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania 2006) p 75.
[147] n10 p 78-9.
[148] 'Forum: The Eichmann Trial Fifty Years On' (2011) 29/2 *German History* p 265.
[149] n3.
[150] n4.

United States and United Kingdom.[151] While several countries in the European Union started legal proceedings against the former President, it was Spain's extradition request and the United Kingdom's subsequent arrest that dominates discussion.[152] Despite this, the proceeds in other countries are important to consider. The determinations of the *Aguilar Diaz* et al. *v Pinochet* in Belgium provided case law in support of the issuance of arrest warrants *in absentia.*[153] In the Netherlands, *Chili Komitee Netherland v Pinochet* is one of the first instances of NGOs taking active interest in pushing universal jurisdiction trials.[154] The eventual determination of the United Kingdom was that Pinochet was not protected by immunity, however he was too sick to be tried and ultimately returned to Chile.[155] Despite the lack of formal proceedings, many proponents of universal jurisdiction cite *Pinochet* as a legal success.

3.1.2 – Expansion of 'Global Enforcer' in Europe

Following *Pinochet*, European states greatly expanded their application of universal jurisdiction, pursuing prosecutions beyond their territories. This occurred in some cases due to increased aggressiveness on behalf of prosecutors and investigative judges, an example being Spanish Judge Baltasar Garzón, "the world's foremost practitioner of universal jurisdiction,"[156] who issued the arrest warrant for Pinochet. In other situations, the Pinochet precedent provided leverage for NGOs and other activist groups to lobby for investigations and prosecutions. This was the situation of the Lama case in the United Kingdom, where NGOs and victims provided pressure and evidence that forced the country's hand in pursuing a prosecution where the

[151] n30 p 98.
[152] ibid p 99.
[153] 45 p 113.
[154] ibid p 169.
[155] Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106/4 *American Journal of International Law* p 731.
[156] Lisa Abend, "Sentencing Spain's 'Superjudge': why Baltasar Garzón is being punished" (*TIME Magazine* 10 Feb 2012) <http://content.time.com/time/world/article/0,8599,2106537,00.html> accessed 28 June 2017.

victims claimed no other option.[157] Despite such no safe-haven rhetoric presented in such situations, I categorize all cases into "Global Enforcer" where there is a lack of concrete international condemnation of a situation, usually in the form of the creation of an international tribunal. For as expressed by Chadwick, the formation of *ad hoc* tribunals often has a catalyzing effect and provides a foundation for domestic proceedings.[158]

Belgium was perhaps the most active state in pursuing prosecutions of major human rights violations internationally, particularly cases involving both former and sitting politicians from other states. A case was opened against Israeli sitting Prime Minister Ariel Sharon, though it was dropped when the Court of Appeals determined cases could not be tried *in absentia.*[159] Similar cases were opened in Belgium against Fidel Castro, the Prime Minister of Cuba, and Jiang Zemin, former General Secretary of the Chinese Communist Party.[160] Following the Gulf War, cases against United States officials were opened in Belgium, including President George H. W. Bush, Vice-President Dick Cheney (then Secretary of Defense) and Colin Powell. Additionally, United States General Tommy Franks has been charged with war crimes committed in Iraq.[161]

Cases against United States citizens and officials occurred in several other jurisdictions beyond Belgium. Two cases were brought in Germany against US officials following the use of torture by the Bush, 43 Administration including Secretary of Defense David Rumsfeld and other high ranking officials such as the former CIA director and the Attorney General. The first of these cases was dismissed after the prosecutor determined there was a lack of obligation for

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[157] n6.

[158] Mark Chadwick, 'Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and Beyond' (2009) 9/2 *International Criminal Law Review* p 359.

[159] Wolfgang Kaleck, 'From Pinochet to Rumsfeld: universal jurisdiction in Europe 1998 – 2008' (2009) 30/3 *Michigan Journal of International Law* p 927.

[160] Kai Ambos, 'Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" be Held Criminally Responsible on the Basis of Universal Jurisdiction?' (2009) 42/1 *Case Western Reserve Journal of International Law* p 405.

[161] n159.

Germany to proceed with the trial as the US had not definitively shown an unwillingness to proceed themselves. The second, more broadly supported case was also dismissed because of an absent link to German interests.[162] France similarly opened a case against David Rumsfeld, though it was dismissed on grounds of immunity.[163] Spain opened investigations into six Bush, 43 Administration officials for the development of the torture program. This investigation was stayed in 2011.[164]

In addition to Chile, Spain took an active role in pursuing human rights violators in Argentina, issuing nearly 50 arrest warrants in Argentinian cases.[165] At the request of Nobel Peace Prize winner Rigoberta Menchú Tum, Spain pursued cases of human rights violations in Guatemala, in addition to China and Israel.[166] Trends in France followed suit via the opening similar cases into political prosecution in China, though these cases were dismissed. Additionally, France convicted Tunisian police chief Khaled Ben Saïd *in absentia*.[167]

3.1.3 – Western Retreat

A retreat beginning in the early 2000s of the "Global Enforcer" actions in many European countries was the result of political pressures from states whose citizens had been subject to universal jurisdiction proceedings. Belgium restricted their domestic statutes that provided for expansive application of universal jurisdiction in 2003, after suggestion by the United States that the NATO headquarters be removed from Brussels.[168] Domestic political

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[162] Katherine Gallagher, 'Universal Jurisdiction in Practice' (2009) 7/5 *Journal of International Criminal Justice* p 1087.
[163] n159.
[164] 'Spain ends investigations into US Torture Program' (European Center for Constitutional and Human Rights 2017) <https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/spain.html> accessed 8 May 2017.
[165] Maximo Langer, 'the Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105/1 *American Journal of International Law* p 1.
[166] ibid.
[167] ibid.
[168] Roozbeh Rudy Baker, 'Universal Jurisdiction and the Case of Belgium: a critical assessment' (2009) 16/1 *ILSA Journal of International & Comparative Law* p 141.

pressure has also played a role in limiting the use of universal jurisdiction as a global enforcer mechanism, notability seen in the United Kingdom and Spain.[169] Most recently in 2011, the United Kingdom passed legislation requiring "state-centric, politically guided assessments" prior to the issuance of arrest warrants for international crimes, the result of the attempted arrest of two Israeli military officers that momentarily halted strategic relations with Israel.[170]

Domestic criticism as to the use of resources for greatly displaced situations was also a factor in limiting the principles application.[171] As seen in discussion of France and Belgium, states with an interest in actively enforcing human rights norms through a 'Global Enforcer" perspective of universal jurisdiction utilize either trials or arrest warrants *in absentia*. Rejection of this practice by states limiting their own domestic statutes to either require presences on their territory or a meaningful link to the state has drastically limited states actions involving the use of universal jurisdiction.[172] The determination in the Sharon case, that trials could not be held *in absentia*, resulted in many of the investigations in Belgium to be futile. Additionally, the ICJ determined that an arrest warrant issued by Belgium for the Foreign Minister of the Democratic Republic of the Congo, Yerodia Abdoulaye Ndombasi, was illegal due to Ndombasi's immunity as a state official.[173]

3.2 – No Safe-Haven

Cases that fall under the "No Safe-Haven" categorization generally are more successful and meet fewer political barriers than "Global Enforcer" cases when it comes to states

[169] n165.
[170] Recent Legislation, 'International Law – Universal Jurisdiction – United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes. – Police Reform and Social Responsibility Act, 2011, c. 13 (U.K.)' (2012) 125/6 *Harvard Law Review* p 1554.
[171] n97.
[172] See n45.
[173] n52.

willingness to attempt a prosecution. There are several reasons for this. Langer points out that public opinion played a significant role in changing trends in the use of universal jurisdiction. Particularly, increased awareness and sympathy for atrocities in Africa, acute awareness of events in the former Yugoslavia and the realization of Nazis living in impunity.[174] "No Safe-Haven" cases also tend to succeed because they correspond more closely with a pragmatic approach to universal jurisdiction that aids rather than conflicts with ideas of sovereignty. Additionally, the Nazi regime ceased to exist after WWII as did the Yugoslavian government after its break-up. Rwanda did not have the capacity to see all justice done domestically. Thus, many cases that suggest "No Safe-Haven" motivations also exhibit themselves as courts of last resort. If they do not pursue these cases, who will?

3.2.1 – Nazis

Many countries developed specific domestic legislation following WWII allowing them to try individuals based off the principle of universal jurisdiction for crimes committed during the specific period of the war.[175] Eichmann was prosecuted under Israel's Nazi and Nazi Collaborators (Punishment) Law of 1950,[176] which is one such statute.[177] Israel subsequently tried many individuals, even sought extraditions, through this law.[178] The aggressive pursuit of Nazis through universal jurisdiction, according to the French case against Klaus Barbie, stems from the assertion at Nuremburg that states should actively seek to prevent Nazi impunity.[179] Such trials have subsequently been supported by public pressure against Nazis, particularly

[174] n165.
[175] n40 p 60.
[176] n10 p 85.
[177] Reydams provides a summary of domestic legislation incorporating universal jurisdiction in fourteen countries in Part II (n45).
[178] Eli Rosenbaum, 'Nazi War Crimes Trials: Prosecuting Nazi War Criminals' (Address given in Melbourne on 6 March 2000, *Jewish Virtual Library* April 2000) <http://www.jewishvirtuallibrary.org/prosecution-of-nazi-war-criminals> accessed 29 June 2017.
[179] 'The Prosecutor v Klaus Barbie' (International Crimes Database project, Asser Institute 2013) <http://www.internationalcrimesdatabase.org/Case/183/Barbie/> accessed 5 March 2017.

those who immigrated to other parts of the world.[180] States have been aggressive in their assertion of universal jurisdiction over Nazis, if not its actual application. Langer cites trials for Nazis compose roughly fifteen percent of all universal jurisdiction trials though there have been many more criminal complaints made against Nazis than any other nationals.[181]

3.2.2 – Former Yugoslavia

Following the collapse of Yugoslavia, several trials took place or were attempted under universal jurisdiction. Germany took an active role in charging the Serbs with atrocities that occurred in the Balkan states.[182] According to Langer's compilations of universal jurisdiction trials from around the world, in Germany "[t]he federal prosecutor initiated 127 investigations against 177 defendants for atrocities in the former Yugoslavia."[183] More trials would have been likely in Germany, one example being Dusko Tadić, however the ICTY took primary jurisdiction over the situation.[184] Part of Germany's interest in such prosecutions, as noted in *Public Prosecutor v Djajic*, was a desire not to be perceived as a safe haven for perpetrators of major human rights violations.[185] Additionally, cases on the basis of universal jurisdiction were brought in Austria, Denmark and France.[186]

3.2.3 – Rwanda

The domestic trials of Rwandans following the genocide in 1994 are familiar examples of the use of universal jurisdiction. International condemnation for the acts committed relieved much of the diplomatic tensions in opening such trials and they were initially welcomed by

[180] n158.
[181] n165.
[182] n148.
[183] n165.
[184] n71.
[185] *Public Prosecutor* v *Djajic* (Judgment) No 20/96 (Higher Regional Court of Bavaria 1997) quoted in (n158).
[186] n58 p 436.

Rwanda, which did not have the capacity in their domestic legal system to individually see justice done. Further, limited capacity of the ICTR and lack of ICC jurisdiction increased the likelihood of impunity without that help of universal jurisdiction. Belgium's first application of universal jurisdiction was in the "Butare Four" case[187] and subsequently, many Rwandans were tried in Belgium under the authority of universal jurisdiction. Though, the interest of Belgium in the actions of Rwanda are probably due to the historical colonial connections.[188] At the time, Belgian laws covered universal jurisdiction for all breaches of the Geneva Conventions and both optional Protocols without any connecting link.[189] Finland and Sweden additionally have completed trials for Rwandans.[190] The global condemnation and regret from not preventing the Rwandan atrocities have led many state to confidently take an active role in criminal prosecutions.

3.3 – Recent Developments

The conflict in Syria is the most recent backdrop for the use of universal jurisdiction. The principle would be a beneficial component in the process of bringing justice to Syria particularly because of the limited options available. Syria is not a signatory of the ICC, and any resolution by the UNSC to submit the case or establish a regional tribunal, at least in the foreseeable future, is likely to be rejected by Russia and possibly China.[191] Notably Germany, with domestic statutes providing for liberal application of universal jurisdiction, has opened

[187] Luc Reydams, 'Belgium's First Application of Universal Jurisdiction: the Butare Four Case' (2003) 1/2 *Journal of International Criminal Justice* p 428.
[188] n160.
[189] Luc Reydams, 'Universal Jurisdiction Over Atrocities in Rwanda: Theory and Practice' (1996) 4/1 *European Journal of Crime, Criminal Law, and Criminal Justice* p 18.
[190] *Public Prosecutor v Mbanenande* (Judgement) No B-18271-11 (Stockholm District Court 2014).
[191] Sam Jones, 'Spanish court to investigate Syrian 'state terrorism' by Assad regime' (*The Guardian* 27 March 2017) <https://www.theguardian.com/world/2017/mar/27/spanish-court-syria-state-terrorism-assad-regime-mrs-ah> accessed 1 April 2017.

trials for instances of torture that have occurred during the civil war.[192] France and Spain are opening similar investigations,[193] as are Austria, and Scandinavian countries.[194] Scandinavian countries have also completed investigations into Iraqi individuals for atrocities committed during the Iraq War.[195]

The United Kingdom recently acquitted Kumar Lama who was charged for torture during the Nepalese civil war. This was one such trial that did not fit neatly into either "Global Enforcer" or "No Safe-Haven" boxes. As Devika Hovell, an observer of the trial noted the UK yielded to pressure from NGOs, "bargaining relatively low diplomatic cost for diplomatic credit in fulfilling its obligation under the Torture Convention to prosecute those suspected of torture found on its territory."[196] Though the Nepalese government was not happy with the action, it was unlikely to take any itself. Most recently, Agnes Taylor, the ex-wife of former Liberian President Charles Taylor who was convicted by the Special Court of Sierra Leone,[197] will be tried in the United Kingdom for torture.[198] Belgium is also in the process of bringing judicial remedies for occurrences in Liberia, with the indictment and ongoing investigations.[199]

Perhaps most positively, recent progresses and successes in universal jurisdiction cases have been beneficial in working towards solutions for the persistent problem in universal jurisdiction, and international criminal law in general, of bias away from Western states.

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[192] Pauline Brosch, 'Here's how German courts are planning to prosecute Syrian war crimes' (*The Washington Post* 4 April 2017) <https://www.washingtonpost.com/news/democracy-post/wp/2017/04/04/heres-how-german-courts-are-planning-to-prosecute-syrian-war-crimes/?utm_term=.41e72b5c6e36> accessed: 22 June 2017.

[193] Anthony Faiola and Rick Noack, 'For Syrian Victims, the path to justice runs through Europe' (*The Washington Post* 2 March 2017) <https://www.washingtonpost.com/world/europe/for-syrian-victims-the-path-to-justice-runs-through-europe/2017/03/01/1b947f4c-fe8e-11e6-9b78-824ccab94435_story.html?utm_term=.604111bc4e38> accessed 7 April 2017.

[194] n4.

[195] ibid.

[196] n6.

[197] 'Background: The Prosecutor vs. Charles Ghankay Taylor' (The Residual Special Court of Sierra Leone, Freetown and The Hague) <http://www.rscsl.org/Taylor.html> accessed 22 June 2017.

[198] 'Charles Taylor: Liberia's former leader's ex-wife charged with torture' (*BBC News* 3 June 2017) <http://www.bbc.co.uk/news/uk-40140923> accessed 4 June 2017.

[199] n4.

Argentina has open investigations into the Spanish Franco regime that have made notable progress.[200] Additionally, Hissène Habré was convicted in Senegal of crimes against humanity, war crimes, and torture perpetrated during his tenure as President of Chad.[201] The Habré case was fortuitous in many ways, with numerous providential occurrences that allowed it to ultimately succeed. There was pressure from Belgium, the case grandfathered in despite restrictions in domestic law, willing to take up prosecution if trial in Senegal ultimately proved fruitless. After the ICJ upheld personal immunity for former state leaders in *Arrest Warrant*, leaders in Chad, responding to NGO pressures, waived Habré's immunity allowing the trial to proceed. The Senegal was reluctant to continue until after the UN Committee Against Torture determined that the state was obligated to act as Habré was present on the territory. Finally, and most notably, the African Union endorsed and took partial responsibility for the trial.[202]

3.4 – Conclusion: Assessment of Trends

Since Pinochet was tried in the late 1990s, many cases under the authority of universal jurisdiction occurred, primarily across Europe with recent expansion into other areas of the world. However, despite increased numbers of cases, domestic legislation in most countries has become increasingly restricted in when and how states can assert their jurisdictional authority,[203] often requiring a domestic connection in order to pursue international criminal prosecutions.[204] As a result, many individuals charged reside within the territory of the acting

[200] n4.
[201] Reed Brody, 'Victims Bring a Dictator to Justice: The Case of Hissène Habré' (Bread for the World 2017) <https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf> accessed 7 March 2017.
[202] See ibid.
[203] n3.
[204] n170.

state, either as refugees or asylum seekers, or immigrants.[205] These trends have resulted in many more "No Safe-Haven" investigations and cases than "Global Enforcer" cases.

However, universal jurisdiction that is conditioned to concrete global condemnation or a meaningful connection to the acting state allows impunity to continue for a large number of situations, notably perpetrators "who remain at large in their own country" because of immunity or amnesties "or in third states with no interest in initiating investigations."[206] When considering the effectiveness of universal jurisdiction meeting its desired objectives, allowing impunity for major human rights violations in other parts of the world negates the foundational understanding that such crimes threaten world order. As such, the distinction between these two trends highlights areas of issue in the principle itself, particularly with its application by individuals with a state-centric perspective.[207] There is sufficient political push back from states when investigations and trials are perused in "Global Enforcer" ways, whether those states have the leverage to make a difference or not as seen in the United States' reaction to Belgium compared to Tunisia's reaction to France. The same legal issues are present in all universal jurisdiction cases, but fail to receive the negative reactions when in pursuit of cases that are universally condemned.

[205] n158.
[206] ibid.
[207] n170.

Chapter 4 – Problems in Application

For universal jurisdiction to be effective, it must result in predictable trials that fulfil the objectives it was developed to meet. Though there is no universally agreed upon scope for the principle, it was shown in Chapter 1 that it is generally accepted to cover piracy and slavery, war crimes, crimes against humanity, genocide, and torture. Further, universal jurisdiction is necessary because these crimes are so heinous everyone has an interest in preventing their impunity as a matter of world order, for either pragmatic or moral reasons, or both. As highlighted in Chapter 2, state practice is uneven and falls into general trends of global enforcers or pragmatic helpers. While a pragmatic approach has resulted in more cases, there are problems present in both trends which hinder the effectiveness of universal jurisdiction in bringing accountability by legal means. The focus of this Chapter is to consider these hindrances on the principle of universality.

In both "Global Enforcer" and "No Safe-Haven" cases, many recurring issues involve the relationship between universal jurisdiction and ideas of sovereignty. States are reluctant to supersede the system of sovereignty that characterizes the current international system: specifically, ideas of sovereign equality and notions of non-interference. This is strikingly apparent when considering the backlash of 'Global Enforcer' mentalities, particularly when states attempt to interfere with more powerful states, seen with the prosecution of Bush et al. in Belgium. Yet, it is also present in "No Safe-Haven" situations in the assumption that states should only submit situations to their domestic legal systems if the territorial state in unable to sufficiently prosecute. The fact that cases occur after pressure from outside sources, whether NGOs or global condemnation, support the idea that this deference is political rather than legal. Further, incoherence due to political considerations is too subjective to provide any meaningful critique of the principles effectiveness.

For this reason, the remainder of this work will consider the struggle between universal jurisdiction and sovereignty through the concrete legal conflict of universal jurisdiction and immunities. As Akande points out, not only do heads of state symbolize sovereignty, but the act of trying such individuals is a significant form of interference in the affairs of a state that has the fundamental right to choose who will govern.[208] The interaction between immunity and the application of universal jurisdiction reveals an inherent conflict between the principle with foundational ideas of international law such as sovereign equality and non-interference. As such, evaluations of the effectiveness of universal jurisdiction in relation to immunities allows for critical evaluation of the principle of universality in general, its place in international law, and its ability to effectively fulfil its objectives. After a brief overview of immunities, this chapter will consider some of the legal decisions, both domestic and at the ICJ, regarding immunities and universal jurisdiction, then it will consider what would be necessary for this conflict to be resolved.

4.1 – Immunities

Immunity is an important idea in foreign relations that attempts to insure orderly interaction between states.[209] There are two types of immunities in international law. Functional immunity (*ratione materiae*), perpetually applies to state officials for acts completed in an official capacity and results in an "exemption from the *substantive* legislation of the receiving State".[210] Personal immunity (*ratione personae*) is distinct from *ratione materiae* in that it covers all acts committed by heads of state, and other high ranking officials in both official and personal capacities, but terminates when the individual loses their official

[208] n120.
[209] Xiaodong Yang, *State Immunity in International Law* (2012 Cambridge University Press) p 45.
[210] n42 p 260.

position.[211] Following the end of an individual's tenure as a head of state or other high ranking official, they retain functional immunity for any official acts. The two forms of immunity are legally distinct. Immunity *ratione personae* is "firmly established" in international law[212] and state practice and judicial decisions show that it is widely accepted and unquestioned. Immunity *ratione materiae* is more readily waived in certain situations. Cassese specifies that it is generally accepted as customary international law, and can be found in the charters of the IMT, ICTY, ICTR, and ICC, that immunity *ratione materiae* does not apply in the case of international crimes in international courts.[213]

The two types of immunity interaction differently with universal jurisdiction. The *Princeton Principles of Universal Jurisdiction* state: "the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[214] The commentary on the *Principles* makes clear that, though personal immunities for heads of state and diplomats are solidified in conventional and customary law, immunities provided to heads of state and other officials when their actions are completed in an official capacity are rejected.[215] As such, functional immunity should not be a hindrance for trials in domestic courts for such crimes. The *Madrid-Buenos Aries Principles of Universal Jurisdiction* take a similar stance, stating: "Immunity and special procedural guidelines pertaining to the official position of a person that are the subject of national law shall not limit the exercise of universal jurisdiction by the judges of the State applying it."[216] In both restatements, immunity *ratione materiae* should not prevent trials that fall under universal jurisdiction though immunity

[211] ibid.
[212] n52 para 51.
[213] n42 p 260.
[214] n23 p 22.
[215] ibid p 31.
[216] n91 prin 9(2).

ratione personae can. This has been supported by practice.[217] It should also be noted, however, that the existence of immunity does not remove jurisdiction, in fact it implies it. As Yang notes, the immunity "only means that the court has jurisdiction but cannot exercise it: immunity precludes the exercise of an otherwise exercisable jurisdiction."[218] Consequentially, immunity and jurisdiction are independent legal questions.

4.2 – Immunity and Universal Jurisdiction

The *Pinochet* cases in the United Kingdom were the first and still most well-known presentation of the problem of immunities in domestic courts. Though *ratione personae* immunity ends when an individual leaves office, sovereign acts committed by the individual when they held the official position are still covered. Yet, as Klabbers points out: "much depends, obviously, on how 'sovereign acts' is defined."[219] Lord Brown-Wilkinson's determination in *Pinochet* was that, as *ratione materiae* immunity is only applied to official acts, and as things such as torture could not be seen as official, Pinochet's immunity should be revoked.[220] The Torture Convention and universal jurisdiction were monumental in Lord Browne-Wilkinson's opinion, as: "Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime."[221] Following Browne-Wilkinson's logic, the position of torture as an international crime, defined by the Torture Convention made it incompatible with the rules of immunity[222] with the implicit understanding that international crimes cannot constitute official

[217] n120.
[218] n209 p 426.
[219] Jan Klabbers, *International Law* (Cambridge University Press 2013) p 201.
[220] n30 p 116.
[221] n87.
[222] n30 p 116.

acts.[223] Other scholars have expressed the result of *Pinochet (No. 3)* as the Torture Convention obligating Chile not to assert immunity for Pinochet due to the act of torture.[224]

Akande rejects this logic. On practical grounds, immunity is decided before legality so cannot be hinged upon it.[225] Indeed, there would be no purpose to immunity if it was contingent upon legality, even if those conditions were restricted to international crimes. For, "it has never been the case that immunity is only available for those acts which are internationally lawful"[226] as immunity is a procedural question, not a substantive one.[227] Akande subsequently points out that immunity is not granted depending on the international legality of the act, but whether the act was done in advancement of a governmental policy.[228] The reason there is such great conflict between immunity and universal jurisdiction is that the crimes it covers are often crimes committed in the advancement of a state policy. This is one of the same reasons universal jurisdiction is necessary. Though it is not unheard of, governments rarely prosecute their own officials or waive their immunity.[229]

There have been several other ways academics and courts have attempted to rectify the illogicality of immunity and universal jurisdiction. Reydams, referring to immunity *ratione personae*, asserts that the tensions created between immunities and universal jurisdiction does not diminish the latter. Under a constricted view, a "No Safe-Haven" approach where universal jurisdiction is reduced to preventing the impunity of fugitives, immunities will not be a hindrance as: "Any official fleeing his/her country and trying to enter and reside in another loses *ipso facto* his/her official status."[230] He also points out that any immunity an individual

[223] n120.
[224] n209 p 429.
[225] n120.
[226] ibid.
[227] n33 p 406.
[228] n120.
[229] ibid.
[230] n21.

possesses can be waived, as was the case of Hissène Habré.[231] On more expanded views of universal jurisdiction, Reydams asserts that the planning process of state visits would ensure that sitting heads of state would not be arrested, as they would not go where such a threat is present.[232] Equally, they could be tried at international tribunals.[233]

The most recent ICJ decision dealing with immunities took a similar stance. In April 2000, Belgium issued an arrest warrant *in absentia* for Abdulaye Yerodia Ndombasi, at the time the Minister of Foreign Affairs for the DRC, for war crimes and crimes against humanity. The ICJ, deciding with customary international law,[234] determined that there was no state practice in excepting immunity for officials, even for war crimes or crimes against humanity in national courts.[235] This determination was supported in subsequent state practice, as three years following the ICJ's decision the Brussel's pre-trial chamber came to a similar conclusion in a case against Israel's Ariel Sharon. The Court of Appeal determined that: "International custom does not allow heads of state or governments to be prosecuted before criminal courts of a foreign state, absent of international rules binding upon states concerned."[236] The perspective of the Judges in *Arrest Warrant,* though considering immunity *ratione personae,* have far reaching implications in the effectiveness of universal jurisdiction as a means to reduce impunity for major human rights violations in light of any immunity. The ICJ stressed in *Arrest Warrant* that this immunity did not equal impunity. While a current official could not be tried in a foreign state without their home state waiving their immunity, they could be tried after

[231] ibid.
[232] ibid.
[233] n42 p 260.
[234] n52 para 52.
[235] ibid para 58.
[236] *H S A* et al *v Ariel Sharon & Amos Yaron* (Judgement) Case No P.02.1139.F/1 (Cour de cassation Belgium 12 February 2003) excerpt in n135 p 92.

they leave office for crimes committed prior to them holding that position and crimes committed in a private capacity while they held the position.[237]

The ICJ failed, however, to give insight that would have been beneficial for future situations as to what acts constitute official or private as acts. Further, this reasoning falls under the same logic that Akande argued against in *Pinochet*: genocide "can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy" and as such would constitute official acts.[238] The most significant outcome of *Arrest Warrant* for the purposes of this work is the conceptual position it gives immunities in relation to universal jurisdiction. For, as Judge Van Den Wyngaert pointed out dissenting, such logic creates a hierarchy placing the rules of immunity above international accountability.[239] A distinction should be made, in Van Den Wyngaert's opinion, between international legal processes and "international courtesy" and is that distinction "political wisdom" should not be determinate of violations of international law.[240] Akande takes a more forceful approach, reversing the hierarchy of the ICJ, proposing that if honoring immunity would "deprive the subsequent jurisdictional rule of practically all meaning, then the only logical conclusion must be that the subsequent jurisdictional rule is to be regarded as a removal of the immunity."[241] Though this may sound like a radical position, similar sentiments have been reflected when considering the effectiveness of international criminal accountability. It was pointed out in reference to the Eichmann trial that: "In order to bring individual state-actors who implemented the policy of a criminal state to trial, the link between state sovereignty and criminal law had to be severed."[242] Thus, if the international community wants to use universal jurisdiction as a

[237] n52 (judgement) para 61.
[238] n52 (Dissenting Opinion of Judge ad hoc Van den Wyngeart) para 36.
[239] ibid para 28.
[240] ibid para 3.
[241] n120.
[242] n148 p 265-282.

tool to actively end impunity, which conventional and customary law supports, the current deference to immunity norms and laws are not compatible with the principle.

4.3 – Conclusion: Conflict Resolution

The conflict between immunity and universal jurisdiction is a symptom of the fundamental disconnect between the principle and engrained ideas of sovereign equality and non-interference. This disconnect results in a fundamental ineffectiveness of the principle to bring trials for heinous crimes. Lord Phillips, writing in the in *Pinochet* expressed disbelief that meaningful domestic processes for international criminal accountability could co-exist with immunity:

> "I do not believe that state immunity *ratione materiae* can co-exist with them. The exercise of extraterritorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity."[243]

Immunity, both *ratione personae* and *ratione materiae*, is an important rule of international order. Non-interference and sovereign equality are fundamental to current understanding of that international order.[244] However, states have made clear that there are some criminal enterprises that must not be allowed to end in impunity.

The perspective of many academics is that there should be no meaningful legal conflict between sovereignty and universal jurisdiction. As states through customary and conventional international law established the crimes subject to universal jurisdiction, they have conceded

[243] *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte (no. 3),* 38 ILM 581 (1999) (Opinion Lord Phillips of Worth Matravers).
[244] Charter of the United Nations (24 October 1945) 1 UNTS XVI Art 2(1).

to the enforcement of such crimes. Put another way: "exercise of universal jurisdiction should not be viewed as interference in another state's affairs given the international nature of the crimes as affronts to all humanity."[245] This hints towards recent understandings that "State sovereignty implies responsibility."[246] Further, immunity stems from sovereignty and is a far older legal rule that international criminal accountability, as such Akande suggests that the best course of action where such an inherent conflict is present that "it is the older rule of immunity which must yield."[247] Most critically when considering the coherence of the principle of universal jurisdiction is that it erases the very foundations which give universal jurisdiction legitimacy to place immunity, a tool of individual sovereign states, definitively above it.

[245] n158.

[246] International Commission on Intervention and State Sovereignty, and International Development Research Centre (Canada), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre 2001) Prin 1(A) p XI.

[247] n120.

Chapter 5 – Conclusion

Universal criminal jurisdiction is a well-established principle of prescriptive jurisdiction that bestows states the authority to prosecute heinous crimes regardless of any connection to the acting state. While the scope of the principle is still largely debated, conventional and customary law support the application of universal jurisdiction for piracy and the slave trade, war crimes, crimes against humanity, genocide, and torture. These are "crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole."[248] There are two theories justifying the principle: universal morality, which supports its used because every state has a fundamental interest in pursuing such cases; and procedural convenience, expressing the acknowledgement that there are some situations where jurisdictional authority sans a nexus to the crime is necessary for prevention of impunity. Both perspectives of universal jurisdiction align with the understanding the ending impunity for major human rights violations is of international concern and warrants measures beyond the usual state-centric understanding of a state's actions. Universal jurisdiction, in theory, is meant to provide a means for ending impunity with justification that stems from the heinousness of the crimes it opposes.

In practice, universal jurisdiction falls into two trends of "Global Enforcer" and "No Safe-Havens." The situations that are most readily investigated and result in a trial are those that have received global condemnations, typically through the creation of an *ad hoc* international tribunal. The Nazi regime, the territories of the former Yugoslavia, and Rwanda can be understood as the situations where universal jurisdiction has been most effectively applied. Other situations require a more assertive enforcement of the norms of the international community. These other situations are less likely to be taken to trial, typically due to

[248] n23 p 18.

international and domestic political opposition. The disconnect between "Global Enforcer" cases and those classified as "No Safe-Haven" hints at the reluctance of states to apply universal jurisdiction without assurance that there will not be conflict stemming from ideas of sovereign equality and non-interference.

There are many political justifications for such reluctance. However, when considering the legal consistency of universal jurisdiction political answers offer little insight. Immunities, being derived from and representing sovereignty,[249] provide a framework to assess the principle from a fundamental perspective. The conflict between these two legal ideas is indicative of great incoherence found in the fundamental understandings of universal jurisdiction in the current international framework. Universal jurisdiction claims to gain its legitimacy in transcending sovereignty because of the heinousness of the crimes it covers yet in practice deference to sovereignty is a major factor that prevents universal jurisdiction from being an effective means of combating impunity. The application of universal jurisdiction in *Pinochet* was seen as a tool "piercing the veil of sovereignty that had insulated dictators and tyrants" that removed the use of immunities as a tool of sovereign protection.[250] While a shakeup of this magnitude is hard to imagine in the current international community, it would be necessary to remove the deep dissonance in the current regime of universal jurisdiction.

The current application of universal jurisdiction shows that it is ineffective as a means for ending impunity for major human rights violations, as exhibited in the principles inability to consistently establish the acting states' authority over such cases. This does not mean progress has not been made on the front of international criminal accountability. Reuters has cited that across Europe in 2016 there were well over a thousand ongoing international cases

[249] n120.
[250] n30 p 97.

into global atrocities in domestic courts.[251] While not all such cases fall under the authority of universal jurisdiction, the numbers suggest increased acceptance and advancement of international accountability. Additionally, resolution of the conflicts between sovereignty and universal jurisdiction will not resolve all the issues preventing the principle from being effective at ending impunity. There are philosophical and practical issues in "the trial of extraordinary crimes through ordinary means"[252] that will must subsequently be addressed for universal jurisdiction to fulfill its objectives. Further, the rules of immunity are important and should not be ignored.

Despite this pessimistic assessment, universal jurisdiction has provided a means for NGOs, victims, and globally-minded prosecutors to put pressure on states to end global impunity. With increased globalization and international interactions, the ability for states to be disengaged in international criminal accountability is diminished, and it is this disengagement that results in "the risk of becoming complicit bystanders."[253] Though currently ineffective, the principle of universal jurisdiction should not be discounted as a tool of international accountability. Incoherence of the principle is due to the political landscape, not necessarily its legal foundations.

[251] Thomas Escritt, "Middle East Refugees Help Europe Prosecute War Crimes" (*Reuters* 27 May 2016) <http://www.reuters.com/article/us-mideast-crisis-warcrimes-idUSKCN0YI0WW> accessed 22 June 2017.
[252] n6.
[253] n246 p 5.

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