

# Universal Jurisdiction between Unity and Fragmentation of International Criminal Law<sup>1</sup>

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## **Riassunto**

Nel mio lavoro si esamina se il tema della giurisdizione universale conduca all'unità o alla frammentazione del diritto penale internazionale.

Dopo alcuni cenni sulla letteratura in materia, verranno valutati gli elementi a favore e quelli contro l'implementazione del principio di giurisdizione universale. Successivamente, il principio della giurisdizione universale, inteso da taluni come controversa forma di giurisdizione, verrà esaminato relativamente a quei Paesi che hanno diversamente legiferato in materia, per focalizzare l'attenzione sulla sua efficacia e legittimità.

Nella prima sezione sarà fornita una panoramica degli Stati che, in ossequio alla ratificazione dello Statuto di Roma, hanno risolto il problema dell'universalità della giurisdizione in materia penale secondo forme e modalità differenti.

Nella seconda sezione, attraverso una panoramica dei casi giurisprudenziali, verrà tracciata una possibile linea di unificazione della tematica a partire dal rispetto del principio di legalità, anche da un punto di vista internazionalistico, e facendo riferimento alla identificazione formale e sostanziale delle fattispecie per cui potrebbe applicarsi il principio. Il legame più forte di unità è dato sicuramente dalla definizione dei crimini internazionali presenti nelle varie convenzioni e nello Statuto di Roma.

La conclusione richiama una personale interpretazione della giurisdizione universale in chiave di globalizzazione sociologica.

## **Résumé**

Dans cet article, la question que nous allons aborder est celle de la juridiction universelle, de manière à comprendre si elle conduira à l'unité ou à la fragmentation du droit pénal international.

Sur la base d'un bref aperçu de la littérature sur le sujet, on évaluera le pour et le contre de l'implémentation du principe de juridiction universelle. Après quoi, afin de porter notre attention sur l'efficacité et la légitimité du principe de juridiction universelle, défini aussi comme une forme de juridiction controversée, on l'examinera dans les pays qui ont légiféré différemment en la matière.

Dans la première partie du texte, on donnera un aperçu des Etats qui, par respect pour la ratification du Statut de Rome, ont résolu le problème de l'universalité de la juridiction en droit pénal selon différentes formes et modalités.

Dans la deuxième partie, à travers quelques cas de jurisprudence, on essaiera de répondre à la question suivante : les Etats, dans l'implémentation de leur propre législation et, par conséquent, leur tribunaux nationaux, utilisent-ils les mêmes définitions de crime employées par la Cour Pénale Internationale ? Ou, au contraire, adaptent-ils ces définitions aux circonstances nationales ?

Pour conclure, l'auteur développera des considerations sur l'utilité de la juridiction universelle d'un point de vue de mondialisation sociologique.

## **Abstract**

This paper represents the outcome of research fellowship Marie Curie at the Universiteit Leiden -Campud Den Haag Grotius, Centre for International Legal Studies (prof. C. Stahn and prof. Larissa van den Herik, supervisors) on the topic "The Fragmentation and the Diversification of International Criminal Law in a Global Society".

In my paper I will examine the question of whether Universal Jurisdiction (UJ) leads to unity or fragmentation within International Criminal Law (ICL). Given that there is already quite a lot of literature on UJ, it is important to focus the research on the issue of fragmentation and/or unity rather than to deal with the issue of UJ more generally. I will focus on this topic in sections 1 and 2, explaining some cursory remarks to these issues in my analysis on fragmentation.

In the introduction, I will briefly introduce UJ as a controversial form of jurisdiction, but still necessary given that territorial jurisdiction does not always function well in the case of international crime. I will demonstrate that many state parties to the International Criminal Court (ICC) Statute have vested or reconfirmed UJ for the core crimes when implementing the ICC Statute. The leading question of my research is whether this practice has led or has the potential

<sup>1</sup> Il presente articolo è il risultato di un momento di intensa ricerca svolto per il top research course Marie Curie presso l'Universiteit Leiden -Campud Den Haag Grotius, Centre for International Legal Studies sotto la supervisione dei prof. C. Stahn e Larissa van den Herik) in tema di "The Fragmentation and the Diversification of International Criminal Law in a Global Society".

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to lead to unity or rather to fragmentation within ICL. In the research I will approach this question from different perspectives.

In section 1 I will examine how State parties have may actually enacted universal jurisdiction for the core crimes, with a view to determining whether there is indeed some unity on this front or whether the practice on this matter is actually rather diverse (or fragmented). Subsequently, I will analyse which conditions States have formulated for the exercise of UJ, and whether this practice is consistent (unity) or again rather diverse (fragmentation). It might also be interesting to see whether States have different conditions for UJ over core crimes than over other international or transnational crimes, which would be a sign of real fragmentation between modern ICL (the core crimes) and transnational ICL (crimes such as terrorism, piracy, money counterfeiting, etc.).

In section 2, on the basis of a few selected case studies, I will ask whether the exercise of UJ has the tendency to lead to fragmented jurisprudence on substantive ICL. I will try to answer: Do States in their implementation of legislation and subsequently the national courts use the same crime definitions as the ICC, or are they generally different and tailored to domestic circumstances? And those questions arise even more strongly for modes of liability? If the latter is the case, to what extent is the jurisprudence fragmented – is it on minor points, or do we see great divergences in case law on crime definitions?

Finally, I will make some final observations on the utility of UJ and whether in general it will lead to further fragmentation within ICL, with my personal interpretation of ideal UJ.

## **1. Introduction. The historical foundations and the philosophical underpinnings of Universal Jurisdiction (UJ). Can and should the UJ be exercised for the prosecution of individuals responsible for gross and serious violations of human rights?**

The general concept of jurisdiction means a legal authority that enables the States to apply the penal law, in the area in which this power can be used. This area is represented by the territory of the States. Criminal jurisdiction is in fact a prerogative of sovereign States, giving them the power to judge the offences committed within their conventional borders.

Under this approach, States are authorized to exercise their jurisdiction, according to permissive principles such as territoriality, active and passive personality, protective and, finally, universality principles. In the case of universal jurisdiction what has become of the nexus between the case and the state? According to universal jurisdiction, there is nothing to connect the criminal factors, linking to the state's interests. Universal jurisdiction is 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 another connection to the State, exercising such jurisdiction"<sup>1</sup>.

What are the historical grounds for this jurisdiction? What is its logical basis? And, finally, can and should universal jurisdiction be exercised? First of all, tracing universal jurisdiction back to its real origins, the minority authoritative doctrine, with which I agree, locates the source of this principle in a few passages of the Old Testament<sup>2</sup>. Here, in some books, it is written that God does not only indict and punish the Jewish people, the inhabitants of the place called Israel, but also foreign people and foreign States, such as Damascus, Gaza, and Edon, once they have committed delicts offensive to all the

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<sup>1</sup> The definition is due to the first Princeton principle on universal jurisdiction, in Bassiouni M. C. et al., "The Princeton Principles on Universal Jurisdiction", in M. C. Bassiouni (edited by) (Eds), *Post- conflict Justice*, Transnational Publishers, N.Y., 2002, at 1003. See recently on topic Orakhelashvili A., "Between Impunity and Accountability for Serious International Crimes: Legal and Policy Approaches", in *Netherlands International Law Review*, LV(2008), 207.

<sup>2</sup> See Höffe O., *Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch*, Suhrkamp Verlaine, Frankfurt am Main, 1999, pp. 20-21.

mankind<sup>3</sup>. Of course, this is a theoretical approach which is not a legal source that can support research into universal patterns of criminal law<sup>4</sup>. In as much as the minority doctrine lacks any legal source, we are led to analyze the majority doctrine, which traces the origin of universal jurisdiction back to a passage of the sixth century Codex Iustiniani<sup>5</sup>. By regulating the competence of the different governors of the Roman Empire, the Code conferred jurisdiction on both the tribunal of the place where the crime was committed (*forum commissi delicti*, the territorial jurisdiction) and the place where the perpetrator was arrested (*forum deprehensionis*). This was indeed a typical form of universality rooted in the Roman conception of the Empire<sup>6</sup>: all crimes that take place in Roman territory, comprised of different countries, are subject to Roman criminal law. Considering Rome to be a global state, the Roman tribunals regarded themselves as competent to judge all criminal matters that occurred anywhere within the Roman Empire.

During the mediaeval age, according to the Statutes of the Northern Italian States, which followed the Roman conception of jurisdiction, offenders could be prosecuted anywhere they were found. The general rule was everybody's rule. It is clear that the rationale for universal jurisdiction was not uniformly understood during this period. Thereafter, in the modern age, Hugo Grotius theorized universal jurisdiction, applying

it to crimes violating natural law and upsetting the *societas generi humanis*<sup>7</sup>.

The universality principle for the first time laid the basis for exceeding territorial boundaries. The classical crime giving rise to universal jurisdiction without boundaries under customary international law is piracy<sup>8</sup>. Pirates are men without kingdom, law, or historical past; sometimes considered stateless, they lived sailing on the high seas outside the state's sovereignty. This is the political justification giving to all States jurisdiction to punish piracy offenders<sup>9</sup>. As an act of juridical transliteration, the transnational dimension of crimes such as piracy that concern the common interests of multiple states, is transformed into the international dimension of a crime affecting the interests of all States. Transnational crimes are fundamentally different from international crimes. A transnational crime, such as terrorism or counterfeiting, concerns a state's competence to exercise jurisdiction where state sovereignty is absent or is common to multiple states, whereas international crimes such as genocide affect the universal values of the global community<sup>10</sup>. The universal right to prosecute the crime wherever it was committed came into being for this reason, allowing every State to become the venue of an (in)ternational trial.

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<sup>7</sup> H. Grotius, *De iure belli ac pacis, Libri tres*, curavit B.J.A. De Kanter-Van Hettingatromps, Scientia Verlag Aalen, 1993, at 509.

<sup>8</sup> C. Schmitt, *Il nomos della terra: nel diritto internazionale dello «jus publicum europaeum»*, Adelphi, Milano, 1991, at 207.

<sup>9</sup> About the historical and philosophical implications see C. Schmitt, *Terra e Mare*, Giuffrè editore, Milano, 1986, 50-51. Recently Shy Kraytman Y., "Universal Jurisdiction-Historical Roots and Modern Implications", in *Journal of International Studies*, 2(2005), at 98-99.

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<sup>3</sup> See Amos, I: 3; 2:8; Isaiah 13-23; Jeremiah, 46-51, Ezekiel, 25-32; Jonas 1.1.

<sup>4</sup> See for cursory and legal justifications of universal jurisdiction C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press, N.Y. 2008, at 106.

<sup>5</sup> *Codex Iustinianus, recensuit Paulus Krueger*, Berolini, Weidmanno, 1877, at 252.

<sup>6</sup> T. Mommsen, *Le droit pénal romain*, Albert Fontemoing éditeur, Paris, 1907, at 121.

## 2. Researching legal frameworks: will universal jurisdiction advance the unity or the fragmentation of international criminal law?

The topic of universal jurisdiction is controversial, but nevertheless not uninteresting, from two different aspects of international law: first, the question of the legality of the principle and its recognition by states, and second, the question of how universal jurisdiction is exercised. The principle reason for this controversy is the lack of sources and positive law defining the limits and conditions of universal jurisdiction. One commentator, Antonio Cassese, has asserted that there is nothing about customary international law which authorizes states “to assert criminal jurisdiction over offences perpetrated abroad by foreigners against foreigners”<sup>11</sup>. Some theorists have deemed universal jurisdiction to be a form of national jurisdiction in the national territory, when a state with no other nexus to the crime exercises jurisdiction where a suspect is present. That is to be distinguished from international criminal jurisdiction exercised by international courts and tribunals<sup>12</sup>.

Universal jurisdiction also applies when a state fails to exercise territorial jurisdiction, either because it could not or would not. Each case implies the presence of international crimes. As William Schabas has commented, “it is the sheer scale and horror of the crime concerned, such as

genocide and crimes against Humanity that warrants universality”<sup>13</sup>. The inability, the impossibility or the unwillingness of a state genuinely to prosecute or to investigate an international offence wherever it is committed or in the time in which it is realized, is expressed in an important article of the Rome Statute.

In accordance with the well known principle of complementarity, embodied in the Preamble and in articles 1, 17 of the Rome Statute, the International Criminal Court (ICC) can be seen as the secondary means in the prosecution of perpetrators of international crimes. In the subtle balance of international justice, domestic tribunals have priority over the ICC. As it is known, ICC’s competence is limited by *ratione temporis*. The permanent tribunal may not take jurisdiction over crimes committed before July 2002. For this reason, universal jurisdiction continues to be salient.

Nevertheless the relationship between the two different typologies of jurisdiction is complex and overlapping. While the Rome Statute sanctions and legally defines the categories of most relevant international crimes<sup>14</sup>, many states parties have completely changed their legislation. Some provide for universal jurisdiction in respect to international crimes, and have introduced juridical definitions of these crimes in their criminal codes. This returns us to the starting point of this study: has universal jurisdiction the potential to unify or fragment international criminal law?<sup>15</sup>

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<sup>10</sup> See Schabas W., “Regions, Regionalism and International Criminal Law”, in *New Zealand Yearbook of International Law*, 4(2007), at 3.

<sup>11</sup> See Cassese A., “Is the Bell tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction”, *Journal of International Criminal Justice*, 1(2003), at 589.

<sup>12</sup> Inazumi M., *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for prosecuting Serious Crimes under International Law*, Intersentia, Antwerpen-Oxford, 2005, at 48.

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<sup>13</sup> Schabas, *op.cit.*, at 4.

<sup>14</sup> As the artt. 6,7,8, ICC

<sup>15</sup> On fragmentation generally see Worster W. T., “Competition and Comity in the Fragmentation of International Law”, in *Brooklyn Journal of International Law*, 34(2008), at 119; Hafner G., “Pros and Cons ensuing from Fragmentation of International Law”, in *Michigan Journal of International Law*,

### 3. A legal approach to unity: is there a plea for a uniform enacting of universal jurisdiction?

First of all, on finding a *minimum* form of unity, I will examine some states that have included the principle of universal jurisdiction in their criminal systems before and after the ICC Statute came into force. In the following section, I will inquire which crimes reflect global values justifying the use of universal jurisdiction.

Without unity of law, there is neither uniformity in the application of law nor predictability of judicial decisions. Within a national context, it is possible to frame the complex system of laws and jurisdictions; in the international system the unity is more difficult to achieve. Because there are many different sources of international law, for example customary law, international treaties and conventions, *jus cogens*, *obligatio et omnes*, positive law, it is difficult to achieve a coherent system of laws. Are there any guidelines for locating a certain degree of unity in the analysis and application of universal jurisdiction in this world of diversity? In this paper, I focus on identifying a sense of unity in universal jurisdiction. I furthermore consider the crimes to which universal jurisdiction can be applied and the common basis for its application.

In practice, it is not a simple task to incorporate universal jurisdiction by harmonizing domestic definitions of crime. States will have to make their internal laws compatible not only with the Rome Statute, but also with their domestic penal

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25(2004), pp. 849 ss.; Brownlie I., *Problems concerning the Unity of International Law in International Law at the Time of its Codification. Studies in Honour of Robert Ago*, Giuffrè, Milano, 1987, 153, 162; at least Martineau A. C., "The Rhetoric of Fragmentation: Fear and Faith in International Law", in *Leiden Journal of International Law*, (22)2009, at 1.

systems. Different States have taken different approaches. In relation to the universal nature of the crime and the claim of universal jurisdiction, one authority, George Fletcher, has offered the following schemata: <sup>16</sup>a universal approach focuses on the nature of the crime based on the character of the wrong, not the national personality of the victim or perpetrator. On the other hand a parochial approach is based on the nationality of the victim or criminal, as with treason or spying, or on the territorial link. Fletcher's theory leads to the conclusion that there are two forms of jurisdiction: the first is based on the universality principle, while the second is based on the territoriality or nationality principle.

On this view, the undisputed requisite for exercising jurisdiction over crimes concerning the international community as a whole is a legislative provision enacted before the commission of the offence. This is expressed in the principle *nullum crimen sine lege*, the principle which satisfies at the same time the supporters of universal jurisdiction and the skeptics on the topic. "Which law to apply?"<sup>17</sup>

In this context the aim at achieving unity in the interpretation and application of international criminal law on a global level implies a universal code of international crimes, or at least an effort to hypothesize if there is a form of unity *ratione materiae* for applying universal jurisdiction.

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<sup>16</sup> Fletcher G. P., "Parochial versus Universal Criminal Law", in *Journal of International Crime Justice*, 3(2005), at 24.

<sup>17</sup> See on the maximum *nullum crimen sine lege* Fletcher, *ibidem*, at 21; the quotation refers to Koskeniemi M., "The Fate of Public International Law: Constitutional Utopia or Fragmentation?", Chorley lecture 2006, London School of Economics, 7 June 2006. «This, again, will depend on how a matter will be described, which of its aspects are seen as central and which marginal» at 17.

This judicial unity would emerge from the crimes “of concern to the international community as a whole.” As observed above, universal jurisdiction focuses on the nature of the crimes. But is there unity in this field? Starting by general rules a basic form of unity is required to ascertain the presence of national or international laws that reflect universal jurisdiction.<sup>18</sup> Moving to specific rules, one must consider the universal crimes.

Legal scholars have identified a permissive and a mandatory form of universal jurisdiction. Permissive universal jurisdiction occurs when a State has an option to use universal jurisdiction for a violation of customary international law without any obligation to enact legislation on the matter. Mandatory universal jurisdiction occurs when a State must exercise universal jurisdiction under its conventional international law by conforming its criminal system to an international treaty or convention that it has ratified<sup>19</sup>. Here I inquire into the mandatory form of universal jurisdiction. I explore the laws of those countries that have enacted universal jurisdiction or modified it after the Rome Statute came into force.

### 3.1 States that have enacted a form of universal jurisdiction for the core crimes.

Before ratification of the Rome Statute certain

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<sup>18</sup> For a complete overview of countries that have enacted universal jurisdiction Reydams L., *Universal Jurisdiction. International and Municipal Legal Perspectives*, Oxford University Press, N.Y., 2003, 86 ss. For a synthetic global survey see Sabaudo S.P.R., “Universal Jurisdiction over CPP-NPA Action against Rejectionists: Barangay San Vincent in Focus, in *Philippine Law Journal*, 2006, pp. 500-501, sub 35 ss.

<sup>19</sup> Hale C. K., “Does the Evolution of International Criminal Law end with the ICC? The ‘roaming ICC’: a Model International Criminal Court for a State-centric World of International Law”, in *Denver Journal of International Law and Policy*, 35(2007), at 420.

states included in their criminal system an extraterritorial principle that differed from the principle of universal jurisdiction in its absolute or conditional form<sup>20</sup>.

Article 64 of the Austrian penal code, for example, addresses extraterritorial jurisdiction, extending to specific listed offences or “other punishable criminal acts which Austria is under an obligation to punish even when they have been committed abroad” including those crimes prohibited by the UN Convention Against Torture and the Geneva Conventions<sup>21</sup>. The provision of genocide is present in the penal criminal code ex art. 321, but not war crimes although Austria is a party to the Geneva Conventions.

Similarly, Danish law permits the criminal prosecution of international crimes committed abroad. This jurisdiction is established for the offences included in the Geneva Conventions and the Additional protocols I, II. Article 8.6 of the Danish penal code establishes jurisdiction over genocide, crimes against humanity and violations of the Hague Conventions. But Danish law is subordinate when another State has requested the extradition of the author of the crimes, or when the extradition has been refused and the alleged offences are sanctioned by Danish law. In the Danish criminal code it is possible to prosecute common crimes such as injury to the person, outside the territorial limits of Denmark, with a maximum sentence of eight years imprisonment.

According to Article 7 of the Italian criminal code, Italian judges may prosecute foreigners or

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<sup>20</sup> Reydams L., *Universal Jurisdiction. International and Municipal Legal Perspectives*, Oxford University Press, N.Y., 2003, 86 ss. The States are Australia, Austria, Belgium, Canada, Denmark, France, Germany, Netherlands, Israel, Senegal, Spain, Switzerland, United Kingdom, and United States.

Italian nationals for offences committed abroad in relation to specific laws and international conventions, like the Geneva Conventions, the UN Convention against Torture, or the Convention on the prevention and punishment of the crime of Genocide. This can be seen as an exercise of the universality principle. There is, however, no specific provision regarding universal jurisdiction<sup>22</sup>.

Article 689 of the French code of criminal procedure provides for universal jurisdiction before French courts for offences such as torture and terrorism,” committed outside the territory of the Republic,” when French law is applicable under the provisions of Book I of the criminal code or of any statute, or of an international convention, against the accused person regardless of their nationality if they are present in France. This does not constitute a pure form of universal jurisdiction, but is rather only a conditional form. The French law for extraterritorial jurisdiction does not apply to the Geneva Conventions, although France is a party<sup>23</sup>.

In Israeli Law on the prevention and punishment of genocide<sup>24</sup>, article 5 provides that “a person who has committed outside Israel an act which is an offence under this Law may be prosecuted and

punished in Israel as if he had committed the act in Israel”<sup>25</sup>.

In Switzerland, article 6 *bis* of its criminal code provides for the principle of universal jurisdiction for crimes committed abroad that violate international treaties, domestic law, when the perpetrator is in the territory and when there has been no request for extradition or when it has been denied. The Military penal code contains articles 108, 109 that penalize offenses committed in non-international as well as international armed conflicts, referring to international humanitarian law.

Although the United States has not enacted universal jurisdiction, the Restatement Third of the Foreign Relations Law of the United States (1987) includes two provisions on universal jurisdiction: the first § 404 *Universal jurisdiction to define and punish certain offences*, recognized by the community of nations as of universal concern, (such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and some acts of terrorism); the second § 423 *Jurisdiction to adjudicate in enforcement of universal and other non-territorial crimes*, a form of universal jurisdiction, established as a matter of treaty obligations thought the inclusion of the principle *aut dedere aut judicare* in the treaties

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<sup>21</sup> See art. 64.6 Austrian penal code.

<sup>22</sup> See Roscini M., “Great Expectations. The Implementation of the Rome Statute in Italy”, in *Journal of International Crime Justice*, 5(2007), pp. 493-511. On 19th June 2002 a draft law has been presented in Italy for the implementing of universal jurisdiction for the international crimes (the criminal acts listed in the ratified international conventions are the crime of genocide, crimes against humanity and war crimes, as well as described in the ICC Statute). The draft law did not come into force.

<sup>23</sup> Sulzer J., “Implementing the Principle of Universal Jurisdiction in France”, in W. Kaleck et al. (eds.), *International Prosecution of Human Rights Crimes*, Springer Berlin Heidelberg, 2007, pp. 125 ss.

<sup>24</sup> The law n. 5710-1950.

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<sup>25</sup> See Bass G. J., “The Adolf Eichmann Case: Universal and National Jurisdiction”, in S. Macedo (edited by), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2003. «Israel law in 1961 included a number of principles of universal jurisdiction. Some of these extraterritorial principles were not Zionist at all, inherited from legislation under the old British mandate: a standard 1936 provision for prosecuting international pirates as *hostis humni generis* and a 1936 law against dangerous drugs that evidently did not limit itself to the borders of Britain’ Palestine mandate» at 85.

addressing international crimes. Furthermore, there is a statute that authorizes the exercise of universal jurisdiction, over torture committed abroad<sup>26</sup>. In October 2008 the United States recognized the universal jurisdiction over child soldier cases, by enacting a statute empowering the American courts to prosecute anyone from any state for their role in the recruitment of child soldiers anywhere in the world<sup>27</sup>.

### 3.2 States that have re-drafted a form of universal jurisdiction for the core crimes.

The number of states that have enacted universal jurisdiction has increased after the Rome Statute came into force, with different consequences. The implementation by the states parties of the Rome Statute has, in fact, accelerated the evolution of universal jurisdiction. Even if States parties are not compelled by ICC Statute to adopt UJ for the crimes, several countries have chosen to enact or to amend universal jurisdiction in their domestic systems in order to prosecute the authors of crimes under the Rome Statute on the basis of universal jurisdiction<sup>28</sup>.

The principle of universal jurisdiction under Belgian law, as established by an enactment in 1993, is expressed in very broad terms. There is no requirement for any nexus between Belgium and the commission of crime, and it covers war crimes committed during the course of international armed conflicts as well as internal conflicts, and, as well, crimes against humanity. This has been characterized as absolute universal

jurisdiction<sup>29</sup>. When the ICC was established, the Belgian Parliament passed the 2003 Act, reaffirming the principle of universal jurisdiction and expanding it to cover the crimes within the jurisdiction of the *ad hoc* Tribunals, the ICC and other municipal jurisdictions. In relation to ICC's jurisdiction the Belgian Parliament has reversed the rule of complementarity; for acts falling under the jurisdiction of the ICC, when the ICC prosecutor commences an investigation, the Belgian Court of Cassation is obliged to declare that its courts lack jurisdiction<sup>30</sup>.

Germany has also adopted a pure form of universal jurisdiction. The German code, has established the principle of universality for all criminal offences against international law present in the code of international crimes even if the crime was committed abroad and bears no relationship to Germany.<sup>31</sup> In particular, to avoid impunity for serious human rights violations, the German code relies, first of all, on the territorial states; second, on the ICC and, if applicable, other on international tribunals; and finally, on the states acting in accordance with universal jurisdiction<sup>32</sup>.

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<sup>29</sup> Reydams L., "Prosecuting Crimes under International Law on the Basis of Universal Jurisdiction: the Experience of Belgium", in H. Fischer, C. Kreiß, S. Rolf Lüder (eds.), *International and National Prosecution of Crimes under International Law. Current Developments*, BWV, Berliner Wissenschafts-Verlag, II, 2006, p. 799.

<sup>30</sup> Vandermeersch D., "The ICC Statute and the Belgian Law", in *Journal of International Crime Justice*, 2(2004), pp. 133-144.

<sup>31</sup> See Section I CCML.

<sup>32</sup> So we have a pure form of UJ for the object, the serious violations of human rights; but a «conditional subsidiarity of the universal jurisdiction principle», subordinated by a prosecutor's discretion ex §153f CPC. See Ambos K., "International Core Crimes, Universal Jurisdiction and §153f of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the

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<sup>26</sup> The Torture Convention. See 18 U.S.C. § 234a (1984).

<sup>27</sup> See S. 2135 Child Soldiers Accountability Act of 3 October 2008.

<sup>28</sup> The articles 6, 7, 8 Rome Statute.

The Netherlands has also embraced universal jurisdiction. When the Dutch Government ratified the ICC Statute, it took into account the decision of the International Court of Justice in *Congo v. Belgium*<sup>33</sup>. Accordingly, with respect to the ICJ issues<sup>34</sup>, the Dutch legal order has opted for a regime of conditional universal jurisdiction. The Dutch Ratification Act, in consideration of the relevant provisions of the penal code and the code of military law, requires either the presence of the suspect in the Netherlands, or that the crime has been committed against a Dutch national. Moreover, for universal jurisdiction a nexus must be shown between the crime and the prosecuting State. The presence of the suspect in the domestic territory constitutes such a nexus. This provision follows the guidance of the dissenting opinion in the Yerodia case, to wit, there is no authority in international criminal law for states to establish universal jurisdiction in *absentia*<sup>35</sup>.

Under Spanish criminal law, Article 23.4 of the

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Stuttgart Higher Regional Courts in the Abu Ghraib/Rumsfeld Case”, in *Criminal Law Forum*, 18, 2007, at 43.

<sup>33</sup> See *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, ICJ, 14 February 2002, Website:

[www.icj-cij.org/icjwww/idocket/ICobe/icobejudgement/icobejudgement\\_20020214\\_giullaume.pdf](http://www.icj-cij.org/icjwww/idocket/ICobe/icobejudgement/icobejudgement_20020214_giullaume.pdf).

See for a discussion Bottini G., “Universal Jurisdiction after the Creation of International Criminal Court”, in *International Law and Politics*, 36(2004), p. 503; Cassese A., “When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case”, in *European Journal of International Law*, 13/4, 2002, at 853; Wirth S., “Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case”, in *European Journal of International Law*, 13/4(2002), at 877; O’Keefe R., “Universal Jurisdiction-Clarifying the Basic Concept”, *Journal of International Crime Justice*, 2(2004), at 734.

<sup>34</sup> See the dissenting opinions in Yerodia case.

<sup>35</sup> See Sluiter G., “Implementation of the ICC Statute in the Dutch Legal Order”, in *Journal of International Crime Justice*, 2(2004), at 159.

Ley Organica de poder judicial, the state has jurisdiction to proceed in respect to crimes and offences committed in (1) domestic territory; (2) on board of Spanish sailing vessels or aircraft, without affecting laws in international treaties to which Spain is party; (3) committed abroad by Spanish nationals, or foreigners whose Spanish nationality was granted before the crime was perpetrated. Under the Spanish regime, many crimes are included. The law covers typical subjects of universal jurisdiction such as genocide, terrorism, piracy, but it also includes crimes related to female genital mutilation and many other offenses<sup>36</sup>.

In the famous *Scilingo* case, the Spanish Audiencia Nacional made clear the principle of universality, asserting that conditional universal jurisdiction is based on the presence of the accused in Spain and on the Spanish victims of Scilingo’s wholesale criminality.

The laws of the United Kingdom provide that the state may apply vicarious jurisdiction for various international crimes linked to international treaties of which the state is a party, e.g. for torture and grave breaches of the Geneva Conventions and additional Protocol I. Because it is based on treaty obligations, the system reflects the flaws and weaknesses of the treaties themselves<sup>37</sup>.

There is no provision in the law of England and Wales for universal jurisdiction, However, section 68 (1-2) International Criminal Court Act 2001 sets forth that proceedings may be brought against an individual who commits a crime under the

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<sup>36</sup> See above on the difference between the crimes admitted.

<sup>37</sup> *Discussion group summary Universal jurisdiction for international crimes. A Summary of the Chatham House international group meeting held on 9 October 2008.*

Rome Statute outside of the United Kingdom and subsequently becomes a resident of the United Kingdom<sup>38</sup>.

The Australian International Criminal Court Act 2002 reflects the complementary regime of the Rome Statute with respect to the covered crimes - offences of genocide, crimes against humanity and war crimes. By implementing the Rome Statute, Section 15.4 of the Criminal Code Act provides for universal jurisdiction over ICC crimes committed in non-international armed conflict whether or not Australia has any independent treaty obligation with regard to those crimes<sup>39</sup>. Under this Act the mere presence of a foreigner in the national territory is a sufficient basis for jurisdiction over crimes committed abroad; residence is not required. The statute does not distinguish between universal jurisdiction in *absentia* or conditional universal jurisdiction that requires the presence of the perpetrator in the state.

In Senegal<sup>40</sup>, the Code de Procédure pénale authorizes Senegalese courts to exercise universal jurisdiction over genocide, crimes against humanity and war crimes, not only when a suspect is located in Senegal, but also when Senegal has obtained jurisdiction by extradition<sup>41</sup>. Under the

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<sup>38</sup> See R Cryer R., Bekou O., "International Crimes and ICC Cooperation in England and Wales", in *Journal of International Crime Justice*, 5(2007), at 440.

<sup>39</sup> See Boas G., "An Overview of Implementation by Australia of the Statute of International Criminal Court", in *Journal of International Crime Justice*, 2(2004), at 179.

<sup>40</sup> See article 2 l.n°2007/5 February 2007

<sup>41</sup> *Senegal. Commentary on implementing legislation for the Rome Statute*, AI Index AFR 49/002/2007. This is an important breakthrough in view of the decision of Senegalese Supreme Court, which dismissed the case against Hissène Habré in 2001, declaring the lack of jurisdiction over foreign nationals for extraterritorial crimes. See Cour de Cassation du Sénégal, première chambre statuant en matière pénale, on 20 March 2001,

amended Code provision, it is to expand the list of crimes the courts may exercise universal jurisdiction over its penal code<sup>42</sup>.

In contrast to other countries, which have extended the jurisdictional powers of the criminal law outside the national borders, many states, like Argentina, have consistently maintained that criminal law is to be applied exclusively to acts committed within their territory. In such states, the jurisdiction of the domestic courts is regulated by the principle of territoriality, with few exceptions<sup>43</sup>.

### 3.3. The outstanding answer of unity.

As demonstrated by this selective survey, the forms and conditions for the exercise of universal jurisdiction are various, and this, of course is a source of fragmentation in the criminal law. Some countries, in fact, have adopted an extraterritorial application of domestic criminal law, also known as vicarious administration of justice. They extend their jurisdiction to international and national offences, by means of active/passive personality and protective jurisdictional principles.

In some cases the state exercises its jurisdiction over its nationals, even when they are found

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Arrêt n.14, Guengueng et Autres, available in: [http://hrw.org/french/themes/habre-cour\\_de\\_cass.html](http://hrw.org/french/themes/habre-cour_de_cass.html).

<sup>42</sup> See, about the case Hissène Habré and the return to Senegal jurisdiction after the implementation of legislation giving it jurisdiction over grave violations of international law, such as genocide, war crimes, crimes against humanity and torture, Moghadam T., "Revitalizing Universal Jurisdiction: Lesson from Hybrid Tribunals applied to the Case of Hissène Habré", in *Columbia Human Rights Law Review*, 39(2008), at 505-6.

<sup>43</sup> See Gaeta P., "Il diritto internazionale e la competenza giurisdizionale degli Stati per i crimini internazionali", in A. Cassese, M. Chiavario, G. De Francesco (a cura di), *Problemi attuali della giustizia penale internazionale*, Giappichelli, Torino, 2005, pag. 497.

outside the territory, or over a perpetrator found inside the national boundaries, or over one who becomes a national after committing a crime. The status of the victim can also trigger jurisdiction. For example, if the victims are present in the country some states, such as Austria, Italy and Denmark exercise jurisdiction over crimes committed outside their territory. Only a few states, including Belgium, Spain and Germany, have introduced the principle of universal jurisdiction as positive law for certain international offences. The divergence in substance and appearance among these legislative provisions is remarkable. On first consideration one might conclude that codification of universal jurisdiction would advance uniformity in the interpretation and implementation of the law. However, on further examination it has become clear that codification has only led to a greater fragmentation of the principle.

Fragmentation affects the principle of universal jurisdiction because there is no single substantive norm, but only a complex interaction of juridical and practical objects and subjects reflecting the existence of multifarious sources of international criminal law, made up of hundreds of international treaties as well as customary rules. As with every legal innovation, the development of universal jurisdiction is a dynamic process with latent contradictions and idealistic aspirations. Our research about unity in universal jurisdiction exposes the challenges of seeking uniformity in norms that are in transition.

The Eichmann case provides a useful example of the central problem in universal jurisdiction. Eichmann argued that the Israeli court could not exercise universal jurisdiction over him because

there was no support for it in international law. Specifically, Article VI 1948 Genocide Conventions provides that "[a] person 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 tribunals" formed by the contracting Parties that have accepted its jurisdiction. The Jerusalem district court declared that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligations."<sup>44</sup> What then is the principle that legitimates the jurisdiction of the Israeli court over Eichmann? Hannah Arendt, in *The Banality of Evil*, addresses this question<sup>45</sup>. Israel could argue that Eichmann was indicted during the first trial in Nuremberg, but after the arrest warrant escaped to Argentina. On taking Eichmann prisoner, Israel captured a *hostis humanis generis*, finding him guilty of crimes against humanity. Genocide is, in fact, an offence against humanity as whole, and in this case, the Jewish people represent "humanity." This argument is at once a moral standard and a declaration of positive law. The State of Israel's "right to punish" derives from "a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish the crimes of this order in every State within the family of nations"<sup>46</sup>.

The concept of universal jurisdiction, and the

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<sup>44</sup> *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory opinion) 1951, *ICJ Report*, 16.

<sup>45</sup> See Arendt H., *Eichmann in Jerusalem: a Report on the Banality of Evil*, Penguin Books, N.Y., 1963, at p. 261.

<sup>46</sup> Attorney General of Israel v. Eichmann, 36 Int'L Rep.18, 50 (Ist.Dist.Ct.-Jerusalem 1961, aff.'d 36 Int'L Reo.277 (Ist.Sup.Ct. 1962).

underlying crimes, represents an ethical right that has been transformed into a legal right with juridical *status*, protected by international criminal law. The principle of universal jurisdiction must yet be defined in the positive law, even if many projects on uniform drafting are in progress. Here we search for unity. We will attempt to outline some possible concepts of unity.

#### **4. The possible concepts of universal offences in the modern legislations and in the state of jurisprudence. Is there unity in the application of universal jurisdiction within international criminal law?**

##### 4.1. A certain distinction: transnational crimes versus international/universal crimes.

We will now analyze whether universal jurisdiction is properly applied to specific crimes, namely to the core crimes in the different countries that are party to the ICC Statute. Secondly, this inquiry about unity considers the definition of crimes both under universal jurisdiction as adopted by the states, and under the ICC Statute. What is here the affect of *jus cogens*? Do states, in their implementing legislation, or national courts in their jurisprudence, use the same definitions of crimes as the ICC, or are they tailored to domestic circumstances and therefore diverse?

The Appeals Chambers of the ICTY, in the case of *Prosecutor v. Tadic*, has opined that “universal jurisdiction (is) nowadays acknowledged in the case of international crimes”<sup>47</sup>. Following the authority of *Tadic*, the Trial Chamber, in *Prosecutor v. Furundzija*, ruled that every State has the right to prosecute and punish the authors

of crimes that are universally condemned wherever they occur<sup>48</sup>.

These cases make clear that a state can apply universal jurisdiction to international crimes... But what are the so-called international crimes? Or even more challenging, what is the primary, essential typology of an international crime?

In general international law, universal jurisdiction is provided for in a number of multilateral treaties, as the 1973 Convention on the suppression and punishment of the crime of Apartheid<sup>49</sup>, the 1984 Convention against torture and other cruel, inhuman treatment or punishment<sup>50</sup>, the 1988 Montréal Convention on hijacking<sup>51</sup>, the 1988 Convention on the suppression of unlawful acts against the safety of maritime navigations<sup>52</sup>, the 1973 Conventions on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents<sup>53</sup>, the 1979 Convention against the taking of hostages<sup>54</sup>, the 1994 Convention on the Safety of the United Nations and associated personnel<sup>55</sup>, the 1971 Convention on psychotropic substances<sup>56</sup>, the 1961 Single Convention on narcotic drugs and more others<sup>57</sup>.

In sum, treaty law makes clear that universal jurisdiction is applicable to numerous crimes. However, is genocide similar to drug trafficking?

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<sup>47</sup> *Prosecutor v. Tadic*, IT-94-I, para. 62.

<sup>48</sup> *Prosecutor v. Furundzija*, IT-95-17-1, para.156, with referring to Eichmann Case and Demjanjuk Case. «It is the universal character of the crimes in questions which vests in every State the authority to try and punish those who participated in their commission».

<sup>49</sup> See articles 4,5.

<sup>50</sup> See article 5.2

<sup>51</sup> See article 3 in relation to article 5.2.

<sup>52</sup> See article 3.

<sup>53</sup> See article 3.

<sup>54</sup> See article 5.

<sup>55</sup> See article 10.

<sup>56</sup> See article 22.5.

Is extermination of civilian populations with intent to destroy them similar to counterfeit ring? Are Mafia organized associations like torture or the inhuman treatment of persons? The application in accordance with treaty does not seem to turn on the severity of the crime. The list of crimes is not explicable in relation to the object (whether more or less serious or dangerous), but rather to two different aspects of the nature of the crime. These two aspects are first of all, the manner in which the crime unfolds across borders, and second, the universal condemnation of certain grave offenses. In the first category, transnational crime turns on the operational capacity of criminal organisations across the borders of many countries: the crime is reflected in multiple states. Also known as cross-border crimes, these criminal acts are distinguished by their multiterritorial dimension, as, for example, the traditional markets of organised crime - drugs, arms and lately the trafficking in human beings. (These people may be refugees from war-torn regions, immigrants seeking employment, which they cannot find in their own country, or women and children trapped in the web of prostitution). While not my subject here, the definition of transnational crime remains unclear, and this too, contributes to fragmentation<sup>58</sup>. More often it is described stereotypically as “organized crimes” which cross national borders, while international crimes are those prescribed by international law and custom. On the other hand, these transnational offenses are sometimes defined as acts prohibited

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<sup>57</sup> See article 36.4.

<sup>58</sup> See Passas N., “Globalization, Criminogenetic Asymmetries and Economic Crime”, in *European Journal of Law Reform*, 1(1999), 399, at 400-01, with referring to Bassiouni, “The penal Characteristic of

by the penal law of more than one country. Recent developments, however, have completely altered these understandings of transnational offenses. Individuals can now bring actions against state actors and can be prosecuted for breaches of international criminal laws. In this new context, the distinction between transnational and international crimes is difficult to ascertain and not particularly helpful. The two expressions are often used interchangeably, although they apply in different situations, and, as well, have some points in common.

Moreover transnational crimes like international crimes are not clearly set forth in domestic legal regimes. This leaves open the possibility of adopting non –legal criteria for such crimes. As one commentator notes, “[t]ransnational crime is cross-border misconduct, which entails avoidable and unnecessary harm to society, which is serious enough to warrant State intervention and similar to other kinds of acts criminalized in the countries concerned or by international law.”

As for the term “international crime,” we refer here to offences which damage the global values of the international community. This is the fundamental underpinning of international crime. Indeed, within the meaning of the universal approach, a formal legal definition of crime is an act violating the human right of another, regardless of where the delict has been committed. The search for unity of universal jurisdiction is restricted and limited to a specific field, to wit, the violation of human rights, safeguarded by norms that reflect universal values.

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Conventional International Law”, in *Case Western Reserve Journal of International Law*, 15(1983), 27.

#### 4.2 Global crimes that could be subject to universal jurisdiction (a selected list).

The two criteria I propose here to determine if a specific crime should be subject to universal jurisdiction are whether (1) the act is contained in the Rome Statute; and (2) the act violates universally accepted values.

I will consider here the specific offences of genocide, war crimes, and crimes against humanity. These are crimes that offend humanity as a whole; hence the nature of the crime is the basic criterion to apply universal jurisdiction. Two exegetic directions can be discerned: the legal provisions in the text of the Rome Statute, as interpreted by case law, as long as they respect the central rule *nullum crimen sine lege*; or, more subtly, the basic ideological principles, which is the philosophic rationale underlying universal jurisdiction. One orientation does not preclude the other; rather the two are mutually reinforcing.

Prior to the Rome Statute, lacking an authoritative definition of crimes against humanity spoke to the fragmentation of universal jurisdiction. These crimes were found in Charter of the International Military Tribunal (IMT) of Nuremberg<sup>59</sup>. The IMT, for the first time, juridical codified crimes against humanity in two distinct categories: 1) murder, extermination, enslavement, and deportation of civilian populations, whatever their nationality; 2) persecution for political, racial, or religious grounds. As Cassese sums it up “[t]hese atrocities are so abhorrent that they shock our sense of human dignity.”<sup>60</sup> As legal meanings for

these crimes have evolved in positive law and jurisprudence, it is clear that such offences must be large-scale or systematic, and there must be a nexus to state action. Where states are not fully responsible for the crimes, it must be established that they have tolerated them.

Article 5 of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute departs from customary international law. It revives the nexus between the crimes and national or international conflicts, but abandons the requirement of widespread or systematic practice. In the *Erdemovic* case, crimes against humanity are defined as “serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. Crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.”<sup>61</sup> Here, the jurisprudence reflects an idealistic concept of humanity and considers it to be an objective element of the crime. Art. 3 of the International Criminal Tribunal for Rwanda (ICTR) Statute reflects another formulation, requiring as an element of the crime systematic attack against civilian populations for political, racial, ethnic, and/or religious reasons. Both the ICTY and the

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(armed conflict) gradually disappeared» for the effect of «article II(I) (c) of such ‘multinational’ legislation as Control Council Law n.10, passed by the four victorious Powers four months after the London Agreement by national legislations (Canadian and French penal codes), case law as well as international treaties. This evolution gradually led to the abandonment of nexus between crimes against humanity and war». 356, *passim*.

<sup>59</sup> See article 6(c).

<sup>60</sup> See Cassese A., “Crimes against Humanity”, in A. Cassese, P. Gaeta, J.H.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, vol. I, 2002, pp. 353 et ss. «After 1945 the link between crimes against humanity and war

ICTR statutes include three categories of offences that were absent from the Nuremberg Charter: torture, imprisonment, and rape.

The ICC statute differs from the other three. Article 7 ICC Statute requires a specific *mens rea*: “the offenses must be committed” with the knowledge of the attack,” which makes it more difficult to prove the crime. In the absence of an international convention on crimes against humanity, these offences can nevertheless be considered *jus cogens* in accordance with the Vienna Convention (*ex art. 53 of Vienna Convention of the law of treaties*)<sup>62</sup>.

Under the theory of crimes against humanity, one can prosecute a broad range of human rights abuses where there is a discriminatory attack on civilian populations. Such a crime is not generally a criminal act under domestic laws, for these laws do not require that the crime be part of a “discriminatory attack on a civilian population.” For example, no such crime can be found in the Italian penal code. Most delicts included in Article 7 of the Rome Statute are covered by national provisions: for example, murder by art. 575 Italian penal code; rape and other forms of sexual violence by articles 609 *bis et seq.*, the crime of enslavement *ex the art. 600*. However, the concept of widespread and systematic attack is absent from the domestic laws.

When in 1999 Belgium incorporated the ICC Statute into its domestic laws, it defined crimes against humanity (genocide) in line with the Rome Statute, making Belgium the first state to make its laws consistent with the Statute<sup>63</sup>.

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<sup>61</sup> Prosecutor v. Eredemovic, Sentencing Judgement, Case.no-IT-96-22-T§ 28, Trial Chambers I, 29 November 1996.

<sup>62</sup> See Bassiouni, *above*, p. 973.

<sup>63</sup> See the effect of 2003 amendment.

Neither the Nuremberg Military tribunal, nor the Tokyo Military tribunal, makes reference to the crime of genocide. Article 2 of the Convention on the prevention and punishment of genocide, adopted in 1948, and first codified the crime as follows:

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

The United Nations had occasion to address genocide in connection with the wars in the Balkans. In its resolution 47/121 of 18 December 1992, concerning the situation on Bosnia and Herzegovina in 1992, the General Assembly affirmed the “abhorrent policy of ‘ethnic cleansing’ as a form of genocide.” In the ICTY case of *Prosecutor v. Krstic* of 1 August 2001 the “intent to destroy” element diverges from the interpretation of the General Assembly resolution. The Court found there that “ethnic cleansing” or the intent to remove a group from a particular area did not constitute “intent to destroy” and therefore was not genocide. The Court reasoned that “customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group”<sup>64</sup>. The attack against the cultural and

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<sup>64</sup> See *Prosecutor v. Krstic*, IT-98-33-T, 1 August 2001, Trial Chambers, para. 577-580; *Prosecutor v. Krupreskic*, IT-95-16-T, 14 January 2000, para. 517.

sociological features of a human group “would not fall under the definition of genocide,” the Court held, reasoning that “where there is a physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well.” Similar is the ICJ judgement of 26 February 2007, in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*<sup>65</sup>. The Court reasoned as follows:

Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operation that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterised genocide is ‘destroy, in whole or in part’ a particular group.

Article 6 of the Genocide Convention does not establish universal jurisdiction but neither does it exclude it as a principle of customary international law. In Spain at the time *Scilingo* was decided, there was no authority to prosecute crimes against humanity as a domestic crime. In *Scilingo* the Spanish court resorts to genocide as a catchall for these criminal acts, even though the conduct did not constitute the separate legal category of “crimes against humanity” at the time when they were committed. In this respect, the decision violates the legality principle, relying upon the principle of universal jurisdiction as a default jurisdiction whenever the territorial or national state fails to act. How should the decision of the Audiencia Nacional be explained? A broad interpretation of genocide served to compensate for the absence of the more appropriate category

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<sup>65</sup> See *Bosnia and Herzegovina v. Serbia and Montenegro*, (Case concerning the application of the Convention on the prevention and punishment of the crime of Genocide), unreported, ICJ, 26 February 2007.

of ‘crimes against humanity’ in *Scilingo*<sup>66</sup>. Because the Genocide convention had no fixed content, the judges deployed it to locate a flexible and dynamic solution, but in doing so, the Court violated the principle of legality<sup>67</sup>.

The Geneva Conventions and the Convention against Torture place a legally binding obligation on the ratifying States to exercise jurisdiction over persons accused of grave breaches of the Geneva Conventions and of the Convention against Torture or to extradite them to a country that will accept the accused. The term “war crimes” is not present in the Geneva Conventions; the Conventions cover “grave breaches,” as serious violations of international humanitarian law during international or non international armed conflict, by including both offences defined under customary law (ex common article 3) of Geneva Conventions and the offences set forth in Article 85.5 I Protocol - the real war crimes. The first category of war crimes - represented by serious violations of common article 3 Geneva Conventions, and other serious violations of laws and customs applicable in armed conflicts of not international character - led the Dutch Supreme Court to consider the armed conflict in Afghanistan as non-international and to exercise universal jurisdiction *ratione materiae*<sup>68</sup>. The Court

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<sup>66</sup> See Van der Wilt H., “Equal Standards? On the Dialects between National jurisdictions and the International Criminal Court”, in *International Criminal Law Review*, 8(2008), at 236.

<sup>67</sup> On the flaws of Gratiela P de L and others v. Scilingo, Spanish High Court, 19 aprile 2005, see Tomuschat C., “Issues of Universal Jurisdiction in Scilingo Case”, in *Journal of International Crime Justice*, 3(2005), 1074; Pinzauti G., “An Instance of Reasonable Universality”, in *International Criminal Law Review*, 8(2008), p. 1092.

<sup>68</sup> See Dutch war crimes and torture case concerning Afghanistan, Hague District Court, 14 October 2005; H.v. Public prosecutor, 29 January 2007, ILDC, 636.

underscored the obligation to take measures to protect against other violations set forth in paragraph 3 common to articles 49/50/129/146, establishing universal jurisdiction for these crimes<sup>69</sup>.

As this survey of international crimes that apply universal jurisdiction establishes, there is apparently no uniformity, whether one considers the positive (evolutive/involutive) definitions of the most widely recognized crimes, or whether one applies interpretations and concepts found in the selected cases on universal jurisdiction. This appears to reflect more than fragmentation in the application of universal jurisdiction.

One must also acknowledge trends towards unity. Positive law on universal jurisdiction - its terms and conditions - exists in some States, whose number is increasing day by day. The legal definition of international crimes found in the Rome Statute provides a foundation for applying universal jurisdiction. The expanding jurisprudence on the subject will also have unifying consequences. This unity is not petrified, but rather subject to change, the demands of harmonization, and will be adapted to various juridical and political contexts<sup>70</sup>.

#### 4.3. An acceptable legal solution.

The multiplicities of offences in international conventions that can trigger universal jurisdiction

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*Contra*, for the applicability of u.j. to war crimes in an internal conflict, Case of prosecutor v. Darko L., Dutch Supreme Court, 11 November 1997.

<sup>69</sup> See Mettraux G., "Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 qua War Crimes", in *Journal of International Crime Justice*, 5(2006), at 366; Zegveld L., "Dutch Case on Torture committed in Afghanistan. The Relevance of the Distinction between Internal and International Armed Conflict", in *Journal of International Crime Justice*, 5(2006), 876.

<sup>70</sup> Van der Wilt, *above*, pp. 270-71.

reflect an evolving vision of human rights, one often not shared universally<sup>71</sup>.

The Rome Statute can provide a partial solution. The Statute for the first time provides unequivocal definitions of the terms genocide, crimes against Humanity and war crimes – terms that therefore did not exist in domestic regimes, or existed in various and often contradictory forms. Since Rome, these offences "take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law, and may thus become a model for national laws to be enforced under the principle of universal jurisdiction."<sup>72</sup> Many states, for example, even after becoming parties of the Rome Statute, have not included in their domestic regimes the juridical definitions of international crimes in the Statute. Other states have adopted formulations that in some cases completely conform with, or in others, significantly differ from the Statute<sup>73</sup>.

The states fall into these categories:

1. The States that have defined the ICC crimes in their criminal codes or laws in terms identical to the ICC Statute, e.g., the United Kingdom, Australia, South Africa. The advantage here is that there is at least unity of positive definitions of genocide, war crimes and crimes against humanity as between the Statute and the domestic regime. But of course, although the text is the same,

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<sup>71</sup> See Shabas, *above*, at 22, about some amplification of the use of universality on referring to international crimes.

<sup>72</sup> Meron T., "Crimes under the Jurisdiction of the International Criminal Court", in H.A.M. von Hebel, J.G. Lammers & J. Schukking (eds.), *Reflections on the International Criminal Court*, 1999, at 47-8, 181, at 185-6.

<sup>73</sup> See J.B.TERRACINO, *National Implementation of ICC Crimes. Impact on National Jurisdictions and the ICC*, in 5 (2007) *JICJ*, 412.

jurisprudence and practice could over time result in broader or more restrictive interpretations of the ICC crimes by domestic courts.

2. The States that use broader terms than the ICC definitions, e.g. Bosnia Herzegovina, and the Netherlands. In the new criminal code of the independent state deriving from the Former Yugoslavia, for example, contains a broader interpretation of war crime. The unlawful issuance of money and the forced conversion of persons to another nationality or religion are deemed to be a war crime. The Netherlands sanctions them as international criminal violations of the customary laws of war, which exceeds the definition of war crimes in the Rome Statute. This broader transliteration of ICC crimes in domestic regimes, such as the Netherlands, can mean that some acts not criminalized by the Statute are deemed to be criminal by the domestic regime. This exercise of extraterritorial jurisdiction can impose risks of two sorts: it may violate the legality principle and present high sovereignty costs.

3. The States that have adopted restricted definitions of ICC crimes, e.g. France and Equator<sup>74</sup>. The French State defines crimes against humanity under the art. 212-1 of its criminal code, which omits rape, sexual crimes, imprisonment, and severe deprivation of physical liberty. Similarly with genocide, French law employs a more restrictive definition. Hence the risk of fragmentation is represented by two related factors: (1) international crimes left out of domestic legislation will neither not be prosecuted at the domestic level; and (2) nor will they be prosecuted because it is not part of international

recognized definition of Rome Statute; the possibility to prosecute the wide apart crime as an ordinary crime, due to the forecast present in the national laws.

4. The States that have not adopted implementing legislation for the ICC, e.g., Italy. This presents the real risk that it will be impossible to prosecute a crime in the total absence of legal provisions.

In conclusion, this research into the basic unity of universal jurisdiction has identified many juridical systems that reflect different legal standards on the elements of offences and the general rules for implementing universal jurisdiction as a national law with international effects. Unity and diversification of law join together in an iterative process.

4.4. A potential risk of fragmentation in the application of universal jurisdiction: the vicarious administration of justice.

After all dissertations about the inclined unity in the study of universal jurisdiction, it is only right to devote some thoughts on vicarious or representational jurisdiction. As we have observed, some legislations and some court decisions show deviant options and diversified keynotes about definitions regarding the core crimes. The same thing could say in the disquisition on the concept of universal jurisdiction as vicarious administration of justice. Pursuant to this ground of jurisdiction, States can prosecute an offence as representatives of others States, even if the criminal conduct is an offence in the territorial state and the extradition are impossible. The possibility to prosecute an offence doesn't depend by the nature of crime. Although the Forum State represents the territorial

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<sup>74</sup> See Terracino, *above*, at 425.

State, the form State applies its own law, not the other law. The main difference, in fact, between universal jurisdiction and vicarious administration of justice lies in the aim of the two forms of jurisdiction: when the States exercise representational jurisdiction, they protect the interests of the territorial States; on the opposite, the States that exercise universal jurisdiction, protect the interests of international community or of humanity as a whole<sup>75</sup>.

Another difference regards the field and the requirement of application: the vicarious administrations of justice also apply to lesser crimes and its exercise is subject to the double criminality and the evidence of impossible extradition<sup>76</sup>.

When does this margin of national discretion to adapt those certain/general rules to the local/legal tradition change in fragmentation?

It depends upon how the domestic legal order cope the processes of internationalization or better globalization of international criminal law and how the States look at the problems confronted in terms of unity and coherence of their systems. The fragmentation in the implementation of universal jurisdiction would be increased: a substantial fragmentation with reference to the human rights selected as the crimes that concern the Humanity as whole; a procedural fragmentation with reference to the different tribunals (national and international) deputy to judge the core crimes; a geographical fragmentation, related to the relationship between the own national order and any other legal order, a growing asymmetry

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<sup>75</sup> See C. Ryngaert, *Jurisdiction in International Law*, at 102-3; Inazumi, *above* at 111-113.

<sup>76</sup> See the Dutch law referring to article 4 a paragraph 1 criminal code, article 552 hh Code on Criminal procedure, article 2 International crimes act 2003.

among democratic governments, states, territories, nationalities, sovereignties and legitimacy who concerns the rule of law. The unity as far as the different manifestations of jurisdiction also in this case concerns the dialectics between international and national systems, the reasoning between legality and power. The fragmentation in all these cases could have two effects: one negative, because of the dispersion of legal order, that pitfalls the credibility and the authority of international law, as far as the substantive criminal law is concerned (with reference to the elements of crimes we have faced different definitions or regimes of applications relating to the same issue), and one positive, as authoritative doctrine affirms, as far as the vitality of international law, because of the proliferations of rules, laws, decisions might strengthen the criminal law system. In front of a plurality of solutions we can choose the best plan.

## **5. Concluding remarks. Universal jurisdiction in translation.**

As I hope to have made clear herein, it is evident that the concept of unity in respect to universal jurisdiction cannot be assessed with the same measures as one would apply to a domestic civil law system.

As a project, universal jurisdiction is subject to mediation. It reflects the transformation of universal values into universal law; principles of normative behaviour come to acquire positive legal status. The primary tension affecting the global application of universal jurisdiction is represented by the conflict between the moral claims of human rights norms and the political reality of global justice. This has become evident

in the fact that international crimes occur daily and take place in every country.

Despite this contradiction, the idea of universal jurisdiction governing human rights has inspired the creation of many laws, norms, institutions, declarations, and the proliferation of ideas. The principle has entered an evolutionary phase” which is characterised by a transition from international to cosmopolitan norm of justice”<sup>77</sup>. As it evolves, universal jurisdiction could represent a “cosmopolitan” norm, a dynamic process through which the principles of human rights are progressively incorporated into the positive laws of democratic States<sup>78</sup>. In this paper we have analysed where and how universal jurisdiction has been applied, and we have demonstrated evidence of diversification of the concept from a legal point of view.

A new process of norm creation is emerging. Through repeated engagement with human rights norms barriers can be removed and boundaries can be redrawn within existing democracies. As one commentator has noted, in the global environment of universal jurisdiction, “the

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<sup>77</sup> See the philosophical approach that refers to Kant’s theory on perpetual peace, Benhabib S. et al., “The Philosophical Foundations of Cosmopolitan Norms” in R. Post (eds.), *Another Cosmopolitanism: Hospitality, Sovereignty and Democratic Interactions*, Oxford University Press, N.Y., 2006, at 16. Recently following this direction see Addis A., “Imagining the International Community: the Constitutive Dimension of Universal Jurisdiction”, in *Human Rights Quarterly*, 31, 2009, at 159.

<sup>78</sup> Benhabib S., *Ibidem*, argues the universalization of cosmopolitan norms, the dialogue between the universal and the particular, as well as the operationalization and broader expansion of Kant’s notion of hospitality in the actions of democratic states which uphold the norms of cosmopolitan human rights. In the same direction D.F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, in *International Law and International Relations: Bridging Theory and Practice*, above, at 207-8.

contradiction between the universalism of ethics and the particularity of law can never be fully transcended but only progressively ameliorated in time”<sup>79</sup>.

The process of (re)creating universal jurisdiction and of changing (non)existent laws in the project of supporting human rights norms and global justice requires constant (re)negotiation and redefinition between political governments and organisations and juridical guidelines and enactments. The concept of universal jurisdiction will naturally be segmented until it realises a coherent legal status. This could be happen though an iterative democratic process – a process of “linguistic, legal, cultural and political repetitions in-transformation which not only change established understandings but also transform what passes as valid”<sup>80</sup>. It is in this manner that progressive normative and legal change take place. Hence, through repeated engagement with and redefinition of certain norms new mores and social practices are created. We can advance the real implementation and application of universal jurisdiction, moving in the direction of a process of jurisgenerative politics, which “includes the augmentation of the meaning of rights claims and the growth of the political authorship by ordinary individuals” in order ultimately to lead to a politics of inclusion<sup>81</sup>. Cosmopolitan principle must inevitably collide with the boundaries required by democratic authority. Universal jurisdiction is neither merely moral nor just legal, nor is it framed in a global rather than domestic

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<sup>79</sup> Benhabib S., *above*.

<sup>80</sup> Benhabib S., *Ibidem*, at p. 48.

<sup>81</sup> Benhabib S., *Ibidem*, at p. 49. «In this process both the ‘outsiders’ and ‘insiders’ engage with rights values and meanings to create new norms and laws that move toward a more inclusionary political milieu».

context. Also on stigmatizing the crimes against humanity in a legal and political context, the State have 'created' unprecedented (legislative and practicing) act. Now it is only a matter of time. Governments will eventually recognise, through legalisation and juridification, the rights claims of human beings everywhere, regardless of their membership in bounded communities.

And we, as intended intellectuals, have the duty to ensure that, in the absence of a global criminal system of law, in the absence of international democratic global order, that the universal justice of human rights, while imperfect, fragmented, and not completely defined, is, perhaps, the one most readily realised at the moment.

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