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SYMPOSIUM

UNIVERSAL JURISDICTION

Universal Jurisdiction over International Crimes and the *Institut de droit international*

Claus Kreß*

Abstract

The 2005 IDI Resolution on universal jurisdiction lends support to the idea that states may exercise universal jurisdiction over crimes under international law. It subjects such exercise to a set of limitations including, in particular, the principle of subsidiarity and the observance of human rights. Regarding the controversial issue of so-called universal jurisdiction in absentia, the Resolution steers a middle course by allowing investigative measures while excluding trials in absentia. The author agrees with these notions. At the same time, he is of the view that the Resolution suffers from a number of weaknesses and that several of its propositions may bear refinement. Conceptually, the Resolution adopts an unduly modest approach. It deals with the jurisdiction element of universal jurisdiction in an unspecified manner. Universality requires a distinction between universal jurisdiction by representation of one or more states directly connected with the crime and true universal jurisdiction to be exercised in the interest of the international community as a whole. True universal jurisdiction is confined to crimes under international law (as distinct from trans-national crimes) and its adjudicative exercise is subject to a special regime. Regrettably, the Resolution remains inconclusive as to what extent crimes against humanity and war crimes are subject to universal jurisdiction. The Resolution suggests that states may exercise adjudicative universal jurisdiction in the form of investigative measures in the absence of the suspect and that they may, where the investigation so justifies, request the suspect's extradition. According to this author, the correct explanation for this proposition is the fact that to the extent that a customary title to true prescriptive universal jurisdiction has been proven to exist, states may exercise adjudicative universal jurisdiction by investigating alleged

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Journal of International Criminal Justice (2006), 1 of 25 doi:10.1093/jicj/mql037
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crimes in absentia, because of the absence of a prohibitive customary rule. The author argues that the adjudicative exercise of true universal jurisdiction has become subject to a legal limitation of subsidiarity vis-à-vis one or more states directly concerned. Such limitation applies as from the end of the investigation stage and is, in turn, conditioned by the genuine will and ability of the state(s) of primary jurisdiction to investigate and, where appropriate, prosecute. The article concludes with an appeal to the states to face the challenge to work out an international convention on true universal jurisdiction.

1. Introduction

At its 2005 Kraków Session, the 17th Commission of the Institute of International Law,[1] under the guidance of its *Rapporteur* Christian Tomuschat, adopted the Resolution on *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes* (hereinafter: *Resolution*).[2] The Institute deserves to be commended for this choice of topic: since the early 1990s the judicial and legislative practice of states on universal criminal jurisdiction over the crimes in question has become a matter of considerable importance. At the same time, this practice has proven highly politically sensitive. It is, therefore, with good reason that the *Resolution*'s seventh preambular paragraph points out, that 'the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty'. As the states have not yet reached agreement upon a set of written standards (ideally in the form of a treaty[3]) and as the ICJ has failed to clarify the applicable law in the *Arrest Warrant* case,[4] it is not surprising that 'much confusion and uncertainty reigns over'[5] universal criminal jurisdiction. The attempt by a group of eminent scholars to pinpoint the *lex lata* on universal criminal jurisdiction is to be welcomed. The *Resolution* will no doubt serve as an essential reference for future legislative and judicial practice as well as scholarly debate. Apart from the *Resolution*, other key references will be Articles 8 and 9 of the 1996 ILC

1 The Members of the Commission were Professors Ando, Barberis, Bennouna, Caflish, Cassese, Conforti, Crawford, Dinstein, Lee, Momtaz, Orrego Vicuna, Rozakis, Salmon, Tomuschat, Torrés Bernárdez, Vinuesa and Yusuf.

2 http://www.idi-iil.org/idiE/resolutionsE/2005.kra.03.en.pdf (visited 15 May 2005).

3 This possibility has been alluded to by A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003), at 595.

4 Judgment of 14 February 2002, online at: http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe.ijudgment_20020214.PDF (visited 15 May 2006). It remains to be seen whether the ICJ will provide an authoritative statement of the *lex lata* in the pending case *Certain Criminal Proceedings in France (Republic of the Congo v. France)*; the Court dismissed the request of the Applicant for provisional measures on 17 June 2003 without touching upon the substance of the case: § 36 *et seq.*

5 Cassese, *supra* note 3, at 590.

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Draft Code of Crimes against the Peace and Security of Mankind,[6] the 2001 *Princeton Principles on Universal Jurisdiction*,[7] the *Separate Opinion* of Judge Guillaume in the *Arrest Warrant* case,[8] as well as the *Joint Separate Opinion* of Judges Higgins, Kooijmans and Buergenthal[9] and the dissenting opinion of Judge van den Wyngaert in the same case.[10]

2. The Concept of Universal Criminal Jurisdiction

In her dissenting opinion in the *Arrest Warrant* case, Judge ad hoc van den Wyngaert stated:

> There is no generally accepted definition of universal jurisdiction in conventional or customary international law . . . Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning and its legal status under international law.[11]

Almost at the same time David J. Scheffer went a step further in asserting that

> [a]ny effort to identify a universally acceptable definition of universal jurisdiction [. . .] remains a largely futile exercise.[12]

Although the *Resolution* has not completely shied away from defining universal jurisdiction, the approach chosen is so modest as to suggest that the drafters were largely dissuaded by the potential difficulties alluded to in these statements.

A. The Jurisdiction Element

The *Resolution*'s restraint concerning conceptual questions is apparent, first of all, from its silence regarding the question whether universal criminal jurisdiction is a form of jurisdiction to *prescribe*, to *adjudicate* or to *enforce*.

6 *See* G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law. Volume II. Part 1. Documents and Cases* (The Hague–London–Boston: Kluwer Law International, 2000), 355, 361.

7 *The Princeton Principles on Universal Jurisdiction* have recently been reprinted in S. Macedo (ed.), *Universal Jurisdiction* (Philadelphia: University of Pennsylvania Press, 2004), 21 *et seq.*

8 http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe.ijudgment_20020214.guillaume.PDF (visited 15 May 2006).

9 http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe.ijudgment_20020214_higgins-kooijmans-buergenthal.PDF (visited 15 May 2006).

10 http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe.ijudgment_20020214.vdwyngaert.PDF (visited 15 May 2006).

11 Paragraph 44 *et seq.* of the *Dissenting Opinion*; *supra* note 10.

12 D.J. Scheffer, 'The Future of Atrocity Law', *Suffolk Transnational Law Review* (2002), at 422.

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As Roger O'Keefe[13] recently noted in this *Journal*, the debate over universal criminal jurisdiction is one over an entitlement to *prescriptive* and *adjudicative* jurisdiction; a *universal* jurisdiction to *enforce* is *not* in issue.[14] This characterization is not disturbed by the fact that, in the cases of crimes under international law, the respective prescriptions, by definition, already exist in the international legal order.[15] For there is still a need for a prescriptive act of the state concerned which consists of penalizing the relevant type of human conduct within *its* legal order, if only by way of adoption of the applicable international legal rule into the domestic legal order. Only a truly *monistic* approach to the interplay between international and national (criminal) law — which exists more in theory than in practice — would dispense with the requirement of *any* national prescriptive act.

Jurisdiction to prescribe and jurisdiction to adjudicate[16] in criminal matters are generally congruent in scope because the 'application of a state's criminal law by its criminal courts is simply the exercise or actualization of prescription'.[17] Paragraph 423 of the American Law Institute's *Third Restatement* aptly translates that congruence into the field of universal criminal jurisdiction:

> A State may exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes [. . .] within the State's jurisdiction to prescribe.[18]

To have these fundamental conceptual points clearly spelled out is by no means 'a purely theoretical exercise' as *Rapporteur* Tomuschat somewhat surprisingly suggests in his *Final Report*.[19] Instead, it helps to rationalize the

[13] R. O'Keefe, 'Universal Jurisdiction. Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004), at 737; for an earlier similar statement, see C. Kreß, 'Völkerstrafrecht und Weltrechtspflegeprinzip vor dem Internationalen Gerichtshof', 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2002), at 828 *et seq.*; *Rapporteur* Tomuschat expressed the same view in his *Preliminary Exposition and Provisional Report*: 'What is in issue here is jurisdiction to prescribe, i.e. the authority to enact legal rules making certain conduct a punishable offence under domestic law, and jurisdiction to adjudicate, i.e. the authority to implement the applicable law in a given case': *Annuaire de l'Institut de Droit International* 2005-I, at 219, § 7.

[14] See § 49 *et seq.* of the dissenting opinion of Judge van den Wyngaert in the *Arrest Warrant* Case, *supra* note 10; O'Keefe, *supra* note 13, 740; Kreß, *supra* note 13, 830 *et seq.*

[15] For a view to the contrary, see Y. Dinstein, *Annuaire de l'Institut de Droit International* 2005-I, 267.

[16] Despite its literal meaning, 'adjudicative' jurisdiction is not 'confined to the activity of courts but extends to that of the prosecutorial authorities of a given state; for the same extension of the term 'judicare' within the context of the international duty *'aut dedere aut judicare'*, see C. Maierhöfer, "*Aud dedere – aut judicare. Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung* (Berlin: Duncker & Humblot, 2006), 424. Operative §1 of the IDI *Resolution* alludes to the adjudicative component of universal jurisdiction when it speaks of the 'competence of a State to prosecute [. . .] and to punish [. . .]'.

[17] O'Keefe, *supra* note 13, 737.

[18] American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States* (vol. 1, 1987).

[19] *Annuaire de l'Institut de Droit International*, 2005-I, 379. The suggestion is also strangely at odds with the following correct assessment of the *Rapporteur* in his *Preliminary Exposition and Provisional Report, and Questionnaire*: 'To the extent that jurisdiction to prescribe exists for offences classified as crimes against humanity, jurisdiction to adjudicate must also be deemed to exist': *Annuaire de l'Institut de Droit International* 2005-I, 219, § 7, footnotes omitted.

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appraisal of the relevant international practice and, by the same token, to determine the 'burden of proof' in the search for the applicable customary international law. The resulting principle is as follows: to the extent that a title to *prescriptive* universal criminal jurisdiction exists under customary international law, a state that has exercised *this* title must be presumed to have the jurisdiction title to *adjudicate* the matter by way of investigation and, where applicable, prosecution and trial, unless *this* title is restricted by an applicable international rule stating the contrary. The application of this principle is important for the controversy on the so-called universal criminal jurisdiction *in absentia*, as will be shown subsequently.[20]

B. The Universality Element

The universality of universal jurisdiction is defined in operative paragraph 1 of the *Resolution* by reference to the absence of another ground of jurisdiction recognized by international law:

> Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.

The residual clause 'or other grounds of jurisdiction' is probably intended to refer to the so-called protective principle ('*principe de la protection*', '*Schutzprinzip*')[21] and could also capture the more controversial 'effects doctrine' ('*principe de la territorialité au second degré*', '*Wirkungsprinzip*').[22] The clause also leaves room for the inclusion of prescriptive and adjudicative criminal jurisdiction by representation ('*principe de la compétence déleguée*', '*stellvertretende Strafrechtspflege*').[23] But the distinction between jurisdiction by representation and universal jurisdiction is traditionally unclear[24] and the *Resolution* does not make an attempt to clarify the matter.

The negative definition of universality as contained in operative paragraph 1 of the *Resolution* is adhered to so widely that it 'would seem sufficiently well agreed'.[25] Yet, the negative definition is so broad that it implies the need to draw a number of further distinctions. Whether or not it is the soundest

[20] *Infra sub* 4.

[21] On this ground of jurisdiction, see I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot, England; Brookfield, VT, 1994), *passim*, and O'Keefe, *supra* note 13, 739.

[22] On the effects doctrine, see recently O'Keefe, *supra* note 13, 739 (text accompanying and in note 16).

[23] For a monograph on this jurisdiction title, see C. Pappas, *Stellvertretende Strafrechtspflege* (Freiburg i. Br.: Edition Iuscrim, 1996), *passim*.

[24] See L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003), 32 *et seq.*; M. Henzelin, *Le Principe de l'Universalité en Droit Pénal International* (Bâle/Genève/Munich/Bruxelles: Helbing & Lichtenhahn/Bruylant, 2000), 9, 30 *et seq.*, 239 *et seq.*; Maierhöfer, *supra* note 16, 45 *et seq.*, 342 *et seq.*

[25] O'Keefe, *supra* note 13, 745, with many references in footnote 17, *et seq.*

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possible approach to define the concept of universal jurisdiction broadly in the negative and then to distinguish between several — partly overlapping — forms of this jurisdiction, is eventually a secondary matter of terminology. What matters is conceptual clarity as regards the relevant sub-categories.

The first such distinction is between *treaty-based* universal jurisdiction and universal jurisdiction based on *general customary* international law. This distinction is reflected in the operative paragraph 2 of the *Resolution*:

> Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person.

This formulation reveals why it is slightly misleading to include a treaty-based extra-territorial jurisdiction in the concept of universal jurisdiction. As a treaty-based jurisdiction regime can, by definition, only apply *inter partes*, such regime cannot *stricto sensu* be considered universal in nature apart from the theoretical scenario of truly universal adherence to the treaty concerned. It is perhaps already for this reason that the first sentence of the second operative paragraph states that universal jurisdiction is *primarily* based on customary international law.

Another explanation of the emphasis placed upon customary general law could be the difficulty in connecting the majority of the treaty-based extra-territorial jurisdiction regimes to the 'protection of fundamental values of the international community' to which the *Resolution* alludes in its first preambular consideration — whereas customary universal jurisdiction might be more easily so connected. With the sole exception of the grave breaches clauses on war crimes committed in international armed conflicts,[26] the *conventional* regimes of *aut dedere aut judicare*[27] do not pertain to genocide, crimes against humanity and war crimes but to crimes such as counterfeiting of currency, trade of narcotics, terrorism and the hijacking of aircraft.[28] Whether or not

[26] Article 49 § 2, Geneva Convention I; Art. 50 § 2, Geneva Convention II; Art. 129 § 2, Geneva Convention III, Art. 146, § 2, Geneva Convention IV, reprinted in A. Roberts and R. Guelff (eds), *Documents on the Laws of War* (3rd edn, Oxford: Oxford University Press, 2000), 215, 238, 295 and 352.

[27] Strictly speaking, those regimes are exclusively concerned with *adjudicative* criminal jurisdiction; yet, the *duty* to exercise this adjudicative title (in the absence of extradition) *implies* the recognition of a corresponding title to *prescriptive* criminal jurisdiction.

[28] The *aut dedere aut judicare* regimes, which govern those crimes as a result of a multilateral treaty practice starting as early as 1929 (the International Convention for the Suppression of Counterfeiting Currency of 20 April 1929 being the starting point) were the object of earlier work of the Institute of International Law; most recently, the Draft Resolution on 'The extra-territorial jurisdiction of States' submitted by the 19th Commission of the Institute at its Milan Session in 1993 listed precisely those *aut dedere aut judicare* crimes as the subject matter of universal jurisdiction (Ann. IDI 1994-II, 135). The *Resolution*'s approach thus follows a tradition of the Institute which is in turn embedded in a long line of doctrinal writing as succinctly summarized by L. Reydams, *supra* note 26, 28 *et seq.*

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those *aut dedere aut judicare* regimes 'protect fundamental values of the international community' is open to question and precisely for this reason[29] it is a matter of controversy whether or not they should be brought within the concept of universal jurisdiction. While it is true that many of the treaties concerned speak of 'crimes of international concern' in preambular considerations, this language proves somewhat loose on a close reading of the operative provisions.[30] In the case of the multilateral treaties up to 1970, those provisions clearly evidence a concept of reciprocal protection of parallel state interests rather than the protection of fundamental values of the international community. For the obligation of the *forum deprehensionis* to prosecute is dependent on the receipt and denial of a request for extradition from a state directly connected with the crime. If such form of extraterritorial jurisdiction is included within a wide negative definition of *universal* jurisdiction,[31] its distinct purpose and nature should be made clear by recognizing a sub-category that could be called the 'representative universal jurisdiction principle' or, as has been suggested by Luc Reydams, the 'co-operative universality principle'.[32] The *Resolution*'s special subject matter, i.e. genocide, crimes against humanity and war crimes, would form the object of a different subcategory of universal jurisdiction which is characterized by the fact that the competent state does not adjudicate the crime 'in representation of' any other state, but in a capacity that may best be described as that of a trustee of the fundamental values of the international community.[33] Terms such as 'absolute universality', 'true universality', 'universality properly so-called', 'pure universality', etc., should be used to denote *that* sub-category instead of the so-called universal jurisdiction *in absentia*.

The difficulty remains as to how to qualify those *aut dedere aut judicare* regimes that follow the so-called 'Hague Model' as articulated in Article 7 of the 1970 Hague Convention for the Suppression of Unlawful

[29] Enough has been said by O'Keefe, *supra* note 13, 755, on the strikingly flawed categorization of the *aut dedere aut judicare* regimes as 'obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere' in paragraph 41 of the *Joint Separate Opinion* of Judges Higgins, Kooijmans and Buergenthal in the Arrest Warrant Case, *supra* note 9.

[30] Cf. the meticulous analysis in Maierhöfer, *supra* note 16, at 131.

[31] Instead, this type of jurisdiction is often treated as a category distinct from universal jurisdiction and called criminal jurisdiction by representation (*principe de la compétence déleguée*, *stellvertretende Strafrechtspflege*). This tradition persists, for example, in Germany: Maierhöfer, *supra* note 16, at 40.

[32] *Supra* note 26, 28 *et seq.* Reydams draws a further distinction between 'general' and 'limited' cooperative universal jurisdiction depending on whether the concept is meant to apply to (serious) ordinary crimes or only to 'international crimes'.

[33] It should be noted in passing that, contrary to the assumption of the drafters of the *Resolution*, it would not cause any conceptual problem to equally consider a world-wide jurisdiction of a genuinely international criminal court as a form of universal jurisdiction; in fact, it is rather odd to exclude the protection of fundamental international community values by an organ of that community from the concept of universal jurisdiction.

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Seizure of Aircraft.[34] Here, the obligation of the state of apprehension to prosecute is no longer made dependent on a prior extradition request and its denial, but applies in all cases of non-extradition. While some commentators regard such jurisdiction as a modern form of (universal) jurisdiction by representation,[35] others hold the view that the Hague model constitutes the decisive move towards *true* universality.[36] It must be conceded that the Hague Convention model makes it more difficult to base the exercise of extra-territorial jurisdiction by the *judex deprehensionis* on the consent of the state(s) directly connected with the crime. Yet, the very conclusion of treaties following the Hague Convention model may be seen as the expression of such consent in a generalized and anticipated manner. This leads to the question whether or not the conclusion of a treaty that follows the Hague Convention model implies the recognition of a genuine international community value. If one remains sceptical — as the present writer does — about the possibility of deriving the answer to that question directly from considerations of legal philosophy,[37] one can only turn to a close examination of the *opinio juris* of states. In that respect, the preambular consideration, which can be found since 1973 in most (in particular, anti-terrorist) conventions that 'the occurrence of such acts is a matter of grave concern to the international community as a whole' certainly constitutes an indication, but cannot be conclusive. Instead, the true test would seem to be whether states agree to the *internationalization* of the criminal law rule and create a crime under international law.[38] For the time being, it would seem that, with the exception of the grave breaches of the Geneva Conventions, the 'Hague Convention model crimes' have not yet passed that threshold and should, therefore, be referred to as *transnational* crimes for reasons of conceptual clarity.

[34] Article 7, Hague Convention reads: 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State'.

[35] D. Oehler, 'Neuer Wandel in den Bestimmungen über den strafrechtlichen Geltungsbereich in den völkerrechtlichen Verträgen', in B. Börner, H. Jahrreiß and K. Stern (eds), *Einigkeit und Recht und Freiheit, Festschrift für Karl Carstens* (Köln, etc.: Heymanns, 1984), 444 *et seq.*

[36] Maierhöfer, *supra* note 16, 344 *et seq.*

[37] For a challenging attempt to define the legitimate scope of international criminal law *stricto sensu* by reference to Kantian philosophy see M. Köhler, 'Zum Begriff des Völkerstrafrechts', 11 *Jahrbuch für Recht und Ethik* (2003), at 435; for a sceptical response similar to that expressed in the above text, see T. Weigend, 'Grund und Grenzen universaler Gerichtsbarkeit', in J. Arnold *et al.* (eds), *Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag* (München: Verlag C.H. Beck, 2005), 968.

[38] For the sake of completeness it should be mentioned that a number of states may form a regional community and agree on the recognition of regional community values protected by criminal law rules of *regional* international law: the current debate about the creation of genuine European criminal law rules to protect the financial interests of the European Communities is just one example.

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A final word is necessary about piracy in light of the suggested conceptual distinctions. In their *Joint Separate Opinion* in the *Arrest Warrant* case Judges Higgins, Kooijmans and Buergenthal regarded that crime as the 'classical example' of a crime regarded 'as the most heinous by the international community'.[39] In his *Separate Opinion* in the same case, Judge Guillaume went so far to assert that 'international law knows only one true case of universal jurisdiction: piracy'.[40] These statements provoke a measure of astonishment. It should go without saying that piracy does not even come close to match the 'heinousness' of genocide or crimes against humanity, the former crime, in terms of gravity, being comparable rather to ordinary robbery. It also remains open to doubt whether piracy constitutes a crime under international law. This commentator tends to think that Georg Schwarzenberger's classical categorization of piracy *jure gentium* as a species of 'internationally authorized municipal law'[41] continues to hold true. On that premise, the undeniably customary title to universal jurisdiction in the case of piracy can be explained only on the basis of *special* considerations. The *sui generis* characterization of piracy on the high seas as a crime of customary universal jurisdiction would seem to rest upon a combination of the absence of a territorial sovereign and the typical difficulty of establishing one of the traditional bases for alternative forms of jurisdiction such as, in particular, the nationality of the alleged offender.[42]

3. Universal Criminal Jurisdiction over International Crimes and Customary International Law

In 1988, Kenneth C. Randall presented a detailed argument in favour of the legality of universal criminal jurisdiction over crimes under international law.[43] The publication of Randall's study may be seen as the starting point of an increasingly intensive scholarly debate on the matter. Since 1988, the position advocated by Randall has met with much scholarly support,[44] including the formulation of the 2001 *Princeton Principles on Universal Jurisdiction* and the

[39] *Supra* note 9, § 61.

[40] *Supra* note 8, § 12 *in fine*.

[41] *See* G. Schwarzenberger, 'The Problem of an International Criminal Law', 3 *Current Legal Problems* (1950), at 268 *et seq*.

[42] Weigend, *supra* note 37, at 972; Reydams, *supra* note 26, at 58 correctly says that its *sui generis* nature makes 'piracy inappropriate for analogies'.

[43] K. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988), at 785.

[44] See William J. Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Towards a Universal System of Transnational Law Litigation', 41 *Harvard International Law Journal* (2000), 129, at 135; M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes, Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* (2001), at 1; L. Benvenides, 'The Universal Jurisdiction Principle. Nature and Scope', 1 *Annuario Mexicano de Derecho Internacional* (2001), at 58.

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2001/2002 *Cairo–Arusha Principles of Universal Jurisdiction in Respect of Gross Human Rights Offences*.[45]

Yet, this line of reasoning has not remained unchallenged. On the basis of a careful analysis of the relevant international practice, Marc Henzelin concluded in 2000 that '*L'application unilatérale du principe de l'universalité doit dès lors être présumée illégale*.'[46] In 2003, Reydams published his important study on the subject[47] in which he reached similarly sceptical conclusions, notably on the adjudicative exercise of universal jurisdiction *in absentia*. To these thorough *legal* appraisals, George P. Fletcher, again in 2003, added his voice with a powerful *policy* argument against universal jurisdiction.[48] In light of this new scepticism in international legal scholarship, in light of the *Arrest Warrant* case's failure to settle the issues, and, eventually, the retrogressive legislation in Belgium, which had for some years been the forerunner in the matter,[49] Antonio Cassese asked whether 'the bell is tolling for universality'.[50]

However, even in 2003, an affirmative answer to this question would have been premature. After all, a majority of those ICJ judges who had expressed an opinion on the matter in the *Arrest Warrant* case had supported the existence of universal jurisdiction over crimes under international law,[51] and Belgium's decision by no means stood for a general retrogressive

[45] See the reference to this document by *Rapporteur* Tomuschat in his *Final Report and Draft Resolution*, *Annuaire de l'Institut de Droit International* 2005-I, at 35.

[46] *Supra* note 26, 235.

[47] *Supra* note 26.

[48] G.P. Fletcher, 'Against Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003), at 580.

[49] For the recent (retrogressive) evolution of Belgian legislative practice on the universality principle, see T. Ongena and I. Van Daele, 'Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium', 15 *Leiden Journal of International Law* (2002), at 687; S.R. Ratner, 'Belgium's War Crimes Statute: A Postmortem', 97 *American Journal of International Law* (2003), at 888; for the decision of the *Cour d'Assises de Bruxelles* of 8 June 2001, see http://www.asf.be/AssisesRwanda2/fr/fr.Verdict.htm (visited 15 May 2006); on the Belgian practice leading to the most recent legislative turns, see L. Reydams, 'Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium', in H. Fischer, C. Kreß, S.R. Lüder, *International and National Prosecution of Crimes Under International Law* (Berlin: Berliner Wissenschaftsverlag, 2001), 799.

[50] See *supra* note 3.

[51] In favour: Judges Koroma (*Separate Opinion*, § 9); Higgins, Kooijmans, Buergenthal (*Joint Separate Opinion*, § 59 *et seq.*); van den Wyngaert (*Dissenting Opinion*, § 67). Against: Judges Guillaume (*Separate Opinion*, § 16); and Rezek (*Separate Opinion*, § 10), Ranjeva (*Separate Opinion*, § 12) and Bula-Bula (*Separate Opinion*, § 79), who do not express an opinion on the universality principle as such but oppose only to its adjudicative exercise *in absentia* (although § 79 of Judge Bula-Bula's opinion comes close to Judge Guillaume's generally negative conclusion). Judge Oda refrains from expressing any conclusive opinion; instead he notes a 'tendency' supporting the universality principle that he considers not yet sufficiently developed (*Dissenting Opinion*, § 12). Although Judge Al-Khasawneh does not opine explicitly on the universality principle, the general thrust of his *Separate Opinion* (note, in particular, his view that the duty to effectively prosecute crimes under international law trumps the immunity even of acting Heads of State; §§ 7 and 8 (b) strongly indicate a supporting view.

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legislative trend on the matter.[52] More recently, new scholarly contributions have been published lending weighty support to the existence of universal criminal jurisdiction over crimes under international law.[53]

The *Resolution*'s position on the issue is expressed in operative paragraph 3(a) and reads as follows:

> Universal jurisdiction may be exercised over crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict.

This formulation does not follow the sceptical trend referred to earlier, in which it confirms *the idea* of universal jurisdiction over crimes under international law including, most importantly, war crimes committed in *non*-international armed conflict. However, the above cited paragraph does not unambiguously support the existence of a *lex lata* allowing the exercise of universal jurisdiction over *all* the crimes under international law either. Instead, the formulation 'crimes identified by international law as falling within that jurisdiction in matters such as' is relatively indeterminate and certainly much less precise than the formulation contained in paragraphs 61–63 of the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in support of universal jurisdiction over genocide, crimes against humanity and war crimes.

The *Resolution*'s inconclusiveness reflects disagreement amongst the members of the 17th Commission[54] regarding many conclusions *in concreto* and at the same time agreement as to the two following guiding principles *in abstracto*. First, the classic *Lotus* presumption in favour of states' jurisdiction title in the absence of a rule to the contrary[55] no longer applies or does, at least, not apply to universal jurisdiction.[56] Second, the criminalization of certain conduct under *international* law does not necessarily coincide with the existence of a right of states to universal jurisdiction; the latter must still be proven with respect to each crime under international law concerned.[57]

[52] The different approaches taken in different national laws towards adjudication *in absentia* do not matter at this point of the analysis.

[53] Specific reference is due to Weigend, *supra* note 37; A.-M. Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts', in Macedo, *supra* note 7, 168; G. Abi-Saab, 'The Proper Role of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003), at 596; Cassese, *supra* note 3; O'Keefe, *supra* note 13. Again, the differences of opinion amongst those authors as regards the proper scope of the adjudicative component do not matter at this point.

[54] See the *Rapporteur's* summary of the comments received, *Final Report and Draft Resolution*, *supra* note 47, §§ 32, 34, 36, 37.

[55] *France v. Turkey*, PCIJ, Ser. A, No. 10, (1927), 19 *et seq.*

[56] Cf. § 8 of the *Preliminary Exposition and the Provisional Report* of the *Rapporteur*; *Annuaire de l'Institut de Droit International* 2005-II, 219 *et seq.*

[57] Cf. § 22 *et seq.* of the *Preliminary Exposition and the Provisional Report* of the *Rapporteur*; *supra* note 56, 230 *et seq.*

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The first premise is essentially correct. It was both unfortunate and unnecessary for Judges Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion in the *Arrest Warrant* case, to base their support for a permissive international rule on universal jurisdiction on an alleged 'continuing potential' of the *Lotus* principle.[58] In that regard, it is not necessary to undertake an inquiry into the precise status of the *Lotus* principle in general. Rather, it suffices to recognize that the *raison d'être* of true universal jurisdiction renders this principle inapplicable *in that regard*.[59] For it is impossible for a state to unilaterally declare the existence of fundamental international community values to be protected by them through the exercise of universal jurisdiction.

In principle, there is nothing wrong with the second premise either. It is not necessarily inconsistent for states, on the one hand, to pronounce themselves in favour of the *international* criminalization of certain conduct because such conduct is of 'concern to the international community as a whole'[60] and, on the other hand, to deny a state's competence to exercise universal jurisdiction over such a crime. States may be driven towards such a negative position because they fear that the exercise of such jurisdiction at the national level lends itself to politically motivated abuses, and they consider that the safeguard of the community interest should be exclusively entrusted to a genuine community organ, i.e. a genuine international criminal court[61] or a court specifically legitimized as a trustee of the international community by an international organ such as the Security Council of the United Nations.[62] A similar logic applies in the context of state responsibility for breaches of an international obligation *erga omnes*. The recognition by states that an international obligation applies *erga omnes* 'for the purpose of maintaining the fundamental values of the international community'[63] does not necessarily imply the existence of a right of all states to unilaterally take non-forcible counter-measures. The International Law Commission has explicitly refrained

[58] *Joint Separate Opinion*, *supra* note 9, § 50; Judge van den Wyngaert went even further and asserted the validity of the *Lotus*-principle regarding universal criminal jurisdiction; *Dissenting Opinion*, *supra* note 10, § 48 *et seq.*

[59] The point is forcefully made by Maierhöfer, *supra* note 16, 41 *et seq.*

[60] See e.g. the fourth preambular consideration of the Rome Statute of the ICC.

[61] It follows that states have not acted on the basis of sound principles when they shied away from vesting the ICC with universal jurisdiction due to the pressure of a minority of reluctant states. For a more detailed critique and the 'story' behind the flawed jurisdiction compromise in the ICC Statute, see H.-P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court', 2 *Yearbook on International Humanitarian Law* (1999), at 145 *et seq.*

[62] On the example of the Special Court of Sierra Leone, see C. Kreß, 'Comment' on Decision on Immunity from Jurisdiction, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals. Vol. IX: The Special Court for Sierra Leone 2003–2004* (Antwerp–Oxford: Intersentia, 2006), 202.

[63] First preambular consideration of the 2005 Resolution of the Institute of International Law '*Obligations and rights* erga omnes *in international law*'; http://www.idi-iil.org/idiE/resolutionsE/2005.kra.01.en.pdf (visited 15 May 2006).

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from endorsing such right in its Articles on State Responsibility[64] and the *Institut de droit international* has recognized such a right only subject to an important qualification in its 2005 Resolution '*Obligations and rights* erga omnes *in international law*'.[65]

If it is, therefore, possible to conceive of crimes under international law, which are *not* covered by the universality principle, one has to look more closely into the relevant, actual international practice. That the 17th Commission has not done so in a comprehensive manner is somewhat regrettable because it would have been useful to take full stock of the rapidly evolving practice in support of the existence of true universal jurisdiction over *all* the crimes under international law. In that respect, the case of war crimes committed in *non*-international armed conflicts is particularly illustrative. While *Rapporteur* Tomuschat bases his sceptical statement regarding a customary state power to exercise universal jurisdiction on such crimes on a rather fragmentary survey of the practice,[66] Christian Maierhöfer, in his impressive new study on *aut dedere aut judicare* concludes on the basis of a very thorough analysis of the relevant material — including the practice of the United States of America — that a customary *aut dedere aut judicare* rule has recently come into existence with respect to war crimes committed in *non*-international armed conflicts.[67]

Apart from the question whether or not there is sufficient 'hard' state practice of the exercise of universal jurisdiction over crimes under international law to meet the most stringent test for the development of a rule of customary law (such as that espoused in the *North Sea Continental Shelf* case[68]), it is questionable whether this test is applicable to the issue in question. While this is clearly the premise underlying the Separate Opinion of Judge Guillaume in the *Arrest Warrant* case, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the same case rather reflects what Bruno Simma and Andreas Paulus have called a *modern positivist*[69] understanding of the process of international law making. Looking back to the developments since the 1990s there is ample evidence for the fact that customary international criminal law has rather evolved along the lines of the latter approach that includes the attribution of significant weight also to 'verbal' state practice

[64] See § 6 of the commentary on Art. 54 as reprinted in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 305.

[65] See Art. 5(c) of the Resolution, *supra* note 63, which confines the right in question to cases of a 'widely acknowledged grave breach of an *erga omnes* obligation'.

[66] For the sceptical conclusion, see § 34 of the *Final Report and Draft Resolution*, *supra* note 47; for the rather cursory analysis of the practice, see §§ 58–62 of the *Preliminary Exposition, Preliminary Report and Questionnaire*; *supra* note 57.

[67] *Supra* note 16, 217 *et seq.*

[68] *Federal Republic of Germany v. Denmark, Netherlands*, 1969 ICJ Rep 3, 44, § 74.

[69] B. Simma and A. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *American Journal of International Law* (1999), at 302 *et seq.*

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and the deduction of detailed rules from general principles[70] as they emerge from the development of the law in general or, at least, in related areas of the law.[71] On a closer look, the ICJ Judgment in the *Arrest Warrant* case itself constitutes a striking example of exclusively deductive reasoning based on principles: the judges extended customary immunity *ratione personae* to acting Foreign Ministers not through the identification of an 'extensive and virtually uniform' judicial or legislative state practice but by having regard to the special status of Foreign Ministers under the Vienna Convention on the Law of Treaties and to the needs resulting from the Foreign Ministers' diplomatic function.[72] It is not easy to understand how Judge Guillaume could subscribe to this 'principled extension' of the customary immunity protection *ratione personae* by the ICJ majority, and at the same time insist on the application of an orthodox approach regarding the determination of the customary law on universal jurisdiction.

Apart from the legislative or adjudicative assertion of a power of universal jurisdiction and the absence of protests of such assertions by other states, the relevant principles have emerged from 'verbal' state practice, and are evident if a modern positive law approach is adopted. States have not only elevated genocide, crimes against humanity and war crimes to the level of crimes under international law, but also solemnly declared that such crimes 'must not go unpunished' and that 'their effective prosecution must be ensured by taking measures at the national level'.[73] States have thus expressed their wish to see international criminal law regularly enforced. In that respect, the reference to the *national* level is fully consistent with what is now a clear tendency to focus *international* criminal proceedings on those persons who are allegedly most responsible for the macro-criminality in the situation concerned.[74]

[70] Paragraph 19 of the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* note 9, could be read to suggest that the power to exercise universal jurisdiction is seen rather as a 'general principle of international law' than as a rule under customary international law (for an important scholarly view in that direction, see B. Simma, 'International Human Rights and General International Law: a Comparative Analysis', 4 *Collected Courses of the Academy of European Law* (1995), at 224 *et seq.*). This secondary question shall not be pursued here any further: this writer's preference is to integrate the method in question into the concept of custom. For interesting considerations in that respect, see A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation', 95 *American Journal of International Law* (2001), at 781 *et seq.*

[71] The recent process of the international criminalization of war crimes committed in non-international armed conflicts is a particularly illustrative example: see C. Kress, 'War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice', 30 *Israel Yearbook on Human Rights* (2000), at 103, 104 *et seq.*

[72] *Supra* note 4, § 53 *et seq.*

[73] All citations are from the fourth preambular paragraph of the ICC Statute.

[74] For a comprehensive summary of the international practice supporting that trend, see *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor's Application for a warrant of arrest, Art. 58, § 42 *et seq.*

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At the *national* level, the state of territoriality and active nationality are often unwilling and sometimes unable to play their part in the enforcement of international criminal law. This fact was referred to in our context as early as 1948 when a US Military Tribunal, in *US v. List and others*, described an 'international crime' as an:

> act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left to the exclusive jurisdiction of the state that would have control over it under ordinary circumstances [emphasis added].[75]

It is thus fair to conclude — as the *Resolution* does in its fifth and sixth preambular considerations — that the universal jurisdiction, despite the 'importance of international judicial bodies entrusted with the suppression of international crimes', is widely seen by states as 'an additional effective means to prevent impunity for international crimes'. This conclusion mirrors closely the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case that

> the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.[76]

It is also in line with Bruce Broomhall's succinct statement that:

> if regular enforcement is (as it should be) a goal of the emerging system of international criminal justice, then universal jurisdiction will be an essential part of that system.[77]

Against this background, the categorization by states of conduct as a crime under customary international law must, for reasons of principles and consistency, be seen as a strong indication in favour of a customary state competence to exercise universal jurisdiction. Accordingly, the precise and 'hard' state practice demanded by the *Continental Shelf* test may not be necessary to affirm the existence of a permissive international legal rule in this case. Interestingly, *Rapporteur* Tomuschat applies precisely such method when he argues in favour of universality regarding genocide.[78] It is respectfully submitted that he should have applied this method consistently to all crimes under international law. He would then have safely arrived at the overall conclusion in

[75] *U.S. v. List and others, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. 11 (1950), 1241.

[76] *Supra* note 9, § 51.

[77] B. Broomhall, *International Justice and the International Criminal Court* (Oxford, Oxford University Press, 2003), 105.

[78] See paragraph 26 of the *Preliminary Exposition and Provisional Report, and Questionnaire, supra* note 57, where Tomuschat holds that '[t]he list of relevant judgments may not be long', but correctly holds that this fact does not constitute an unsurmountable obstacle to the affirmation of a customary rule in light of the absence of international protest against the judgments in question (*ibid.*), the 'system of international criminal justice as envisaged by the drafters of the Rome Statute' (*ibid.*, § 27), the support voiced for the universality principle in the American Restatement of the Law (*ibid.*, § 29) and the particular heinousness of the crime (*ibid.*, § 30).

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the Joint Separate Opinion by Judges Higgins, Kooijmans and Buergenthal that, general customary international law empowers States to exercise universal (prescriptive and adjudicative) jurisdiction over genocide, crimes against humanity and war crimes to the extent that such crimes have acquired the status of general customary international law.[79]

4. The Adjudicative Exercise of (True) Universal Jurisdiction *in Absentia*

Paragraph 3 (b) of the IDI *Resolution* reads:

> Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful form of control over the alleged offender.

For all practical purposes, the opening part of this statement is of the greatest importance. It contains the drafter's view that the power of states to exercise universal jurisdiction includes investigative acts *in absentia*. The criminal investigation may lead to an extradition request vis-à-vis the state where the suspect is present. If this is the correct view of *lex lata*, then those national laws on universal jurisdiction, such as the German Code of Crimes Under International Law, which provide a basis for a criminal investigation *in absentia*, while requiring the presence of the accused for any trial, are in harmony with the international law.

In light of the heated controversy about the legality of 'universal jurisdiction *in absentia*', it would have been interesting to learn more about the *Rapporteur*'s and the Commission's reasoning underlying the nuanced wording of paragraph 3(b). One possible explanation for the distinction drawn would be to confine the concept of an exercise of adjudicative jurisdiction to the procedural stage of the arrest of the suspect or a summons directed to the latter to appear before the court. Such a narrow concept of an exercise of adjudicative jurisdiction would appear to reflect the traditional position in the common law about the commencement of criminal proceedings.[80] Perhaps the statement of Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in the *Arrest Warrant* case, that the commencement of an *investigation* would not *per se* infringe the immunity *ratione personae* of a suspect, can be explained on the same basis. In many continental legal systems, however, the commencement of an investigation against a suspect constitutes the start of the criminal

[79] The ICC Statute is certainly an excellent yardstick to what extent such customary status has been acquired. The extent to which customary international law is incongruent with the definitions of crimes against humanity and war crimes as contained in the ICC Statute is a matter that falls outside the present study.

[80] See Weigend *supra* note 37, at 970 (footnote 77).

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proceedings against the person concerned. From the perspective of this procedural tradition, any act taken as part of an investigation against a certain suspect would appear to constitute an exercise of adjudicative jurisdiction. For this reason, it remains open to doubt whether the distinction suggested by the *Resolution* can be based on a narrow definition of the very concept of adjudicative jurisdiction.

This brings us back to the evaluation of the pertinent state practice. If the question is posed whether or not there exist legislative and judicial practice in support of the exercise of adjudicative universal jurisdiction *in absentia* a 'dispassionate analysis'[81] would still seem to yield the result that states such as Belgium, Germany, Israel, New Zealand and Spain — which have explicitly provided[82] for such an exercise of jurisdiction — form a minority, insufficient to assert the creation of a new rule of customary international law.[83] At the same time, there is, certainly, also insufficient state practice to assert the creation of a rule that would specifically *prohibit* any investigative act in the absence of a suspect based (only) on universal jurisdiction.[84] In particular, Judges Higgins, Kooijmans and Buergenthal have convincingly argued in their Joint Separate Opinion in the *Arrest Warrant* case[85] that it would be fallacious to derive such a prohibitive rule from the *aut dedere aut judicare* scheme of the Geneva Conventions. This scheme is concerned with an *obligation* to search for an alleged offender or to *extradite* him or her. While a presence requirement is imperative within such an obligatory scheme, the same is not true as regards a *permissive* rule concerning the commencement of investigations, a request for extradition and even a trial *in absentia*.

The result is that the decisive question is that of 'burden of proof'. In that respect, it is sufficient to reiterate the view expressed above[86] that the existence of a competence to exercise prescriptive universal jurisdiction entails the presumption in favour of a congruent competence to adjudicate the matter. The statement in paragraph 3 (b) of the *Resolution* that *investigative acts* and *requests for extradition* are permissible as a form of universal jurisdiction over

[81] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* note 9, § 44.

[82] Belgium remains in the list because the retrogression of the legislative practice in that state has not been explained on the basis of a change of the latter state's *opinio juris*.

[83] This point has been established by Reydams in his thorough monograph, *supra* note 26, and the conclusion would not (yet) seem to have be superseded by more recent developments.

[84] For references, see this writer's study, *supra* note 14, 840 *et seq.*, arguing that those national laws confining the exercise of adjudicative universal jurisdiction to cases where the suspect is present cannot be interpreted as evidence for an *opinio juris* that the adjudication *in absentia* is contrary to international law. Cf. also Sluiter, 'Implementation of the ICC Statute in the Dutch Legal Order', 2 *Journal of International Criminal Justice* (2004), at 177, who notes that the Explanatory Memorandum to the Dutch *International Crimes Act* explains the restriction of the adjudicative exercise of universal jurisdiction to alleged offenders present in the Netherlands by the *absence of an international obligation* to go further. Sluiter also correctly notes as 'unique for the Dutch context' the pronouncement in the *Bouterse* case that the adjudicative exercise of universal jurisdiction *in absentia* conflicts with international law.

[85] *Supra* note 9, § 57.

[86] *Supra sub* 2 A. *in fine*.

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crimes under international law is thus correct even on the basis of a wide conception of adjudicative criminal jurisdiction.

In light of the many voices that have echoed Judge Guillaume's fear that the adjudicative exercise *in absentia* of universal jurisdiction would 'risk, creating total judicial chaos'[87], and the use of alarming language such as that warning of the 'wild exercise of extraterritorial judicial authority',[88] it should be noted that those policy concerns are unwarranted in the case of investigative acts *in absentia*. The purpose of such acts can be threefold.

First, in exceptional cases such as *Pinochet*, the goal may be to collect evidence with a view to preparing an extradition request to the state on whose territory the suspect is residing or, at any rate, is present. Such cases will be exceptional, because a state whose investigations are predicated upon an exercise of universal jurisdiction will only rarely be in possession of sufficient evidence to successfully conduct a trial. Furthermore, the state where the suspect is present may often be unwilling to extradite, either because the regime responsible for the macro-criminal situation (connected with the conduct for which extradition is sought) continues to hold power and shields 'its' perpetrators from criminal proceedings, or because a new regime has established itself and wishes to deal itself with the matter.

Second, in most cases, the state seeking to exercise universal jurisdiction will, in fact, wish to take a specific investigative action as a form of anticipated legal assistance benefiting the *forum conveniens*. The state of universal jurisdiction will preserve the evidence secured through the investigation awaiting a regime change in the *forum conveniens*, which will allow a trial there. There is nothing 'chaotic' or 'wild' in such an approach; rather, it adds a sensible component to a 'flexible international system' to enforce the international criminal law. A German author may be forgiven for recalling the German experience: the Central Investigative Agency set up in 1958 to conduct comprehensive investigations into the worst acts of genocide and crimes against humanity committed under the Nazi regime benefited decisively from the results of investigations conducted earlier by other states' investigative organs.[89]

The third possible purpose of investigative measures *in absentia* is the preparation of a trial *in absentia*. This leads to the question whether there exists a customary rule prohibiting this specific form of adjudicative universal jurisdiction as paragraph 3(b) of the *Resolution* suggests. It should be duly noted at the outset that the practical relevance of this question has become extremely limited after the recent change of legislation in Belgium, because most of the states that allow investigative measures *in absentia* reject trials *in absentia*. As a matter of general customary law, the question is not easy to answer if one follows the correct standard for the burden of proof. For, there is hardly sufficient state practice in direct support of a customary rule specifically

[87] *Separate Opinion* in the *Arrest Warrant case*, *supra* note 8, § 15.

[88] Cassese, *supra* note 3, at 595.

[89] A. Rückerl, *NS-Verbrechen vor Gericht* (Heidelberg: C.F. Müller Juristischer Verlag, 1982), 289 *et seq.*

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prohibiting trials *in absentia* based solely on universal jurisdiction. Yet, it is submitted that a case can be made in support of the prohibitive rule contained in paragraph 3(b) of the *Resolution* if the jurisdictional question is placed into a human rights context. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case contains a paragraph[90] that points in that direction but stops short of making the argument. The *Resolution* deals more explicitly with human rights standards but does not establish the link with our jurisdictional question. This will be discussed subsequently in Part 6.

5. The Adjudicative Exercise of (True) Universal Jurisdiction and the Principle of Subsidiarity

Paragraphs 3(c) and (d) of the *Resolution* support the subsidiary exercise of adjudicative universal jurisdiction in the following terms:

> Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.
>
> Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.

There does not appear to be much disagreement that the exercise of adjudicative universal jurisdiction should follow the principle of subsidiarity as a matter of good judicial policy. The question whether the principle can be elevated to the realm of international *law* is a more difficult one and the paragraphs cited, in light of their carefully softened language, do not provide an unambiguous answer to it. In the *Eichmann* case, the Supreme Court of Israel treated the subsidiarity principle as a 'purely practical' test to identify the *forum conveniens*.[91] Very much in the same vein, the ILC considered the question of a priority *right* to adjudication for the territorial state as being 'not ripe for codification' in its commentary on Article 9 of its 1996 Draft Code of Crimes Against the Peace and Security of Mankind.[92]

Later developments may, however, have led to the crystallization of the subsidiarity principle as a *legal* rule. In that respect, one cannot fail to note that Judges Higgins, Kooijmans and Buergenthal characterized the subsidiarity

[90] *Supra* note 9, § 56.

[91] *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court of Israel, 29 May 1962, 36 ILM (1968), 302 *et seq.* (§12).

[92] *Supra* note 6, at 363, § 6.

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principle in *legal* terms in their Joint Separate Opinion.[93] This reasoning is in line with the practice and *opinio juris* of Spain[94] and Germany,[95] which are both in support of the universality principle and which are thus the states particularly interested in the matter. In both cases, the *opinio juris* is based not only on considerations of procedural economy but also on the recognition of a legitimate primary interest of those states that are directly connected with the crime, giving them an interest beyond that of mere trustees of the international community when they exercise their jurisdiction. Applying a modern positivist approach not only to the universality principle but, as a necessary corollary, to the limitations placed upon its adjudicative exercise also, it would now seem to be possible, despite the relative scarcity of practice to argue, that the subsidiarity principle has grown into a principle of customary international law supplementing the principle of universal jurisdiction over crimes under international law.

However, the details of the subsidiarity principle remain to be clarified as the state practice evolves. Contrary to what appears to be the view underlying the decision of the German Federal Prosecutor not to act upon a complaint brought by the New York Center of Constitutional Rights against *Rumsfeld et al.*,[96] it is difficult to assert that the principle of subsidiarity already applies at the initial investigative stage. A more solid case for the application of the principle in line with the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal and the wording of paragraphs 3(c) and (d) of the *Resolution* can be made in favour of the principle's application after the conclusion of the investigation. It is equally impossible to identify — as a matter of customary international law — a certain standard of proof required in determining whether or not the holder of the primary right to adjudication is unwilling or unable to prosecute the case. Arguably, future practice operationalizing the complementarity principle of the International Criminal Court (ICC) Statute may shed more light upon this question.

[93] *Supra* note 9, § 59: 'A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned'. The statement of the subsidiarity principle is incomplete, however, in that it refers only to the State of active nationality.

[94] For a discussion of the recent decision of the Spanish Constitutional Court in the *Guatemalan Generals* case, see H. Ascensio's article in this Symposium; for the relevance of the subsidiarity principle in the recent *Scilingo* case, see G. Pinzauti, 'An Instance of Reasonable Universality: The *Scilingo* Case', 3 *Journal of International Criminal Justice* (2003) 1092, at 1096.

[95] For the pertinent passages in the *travaux préparatoires* of the Code of Crimes Under International Law, see S.R. Lüder and T. Vormbaum (eds), *Materialien zum Völkerstrafgesetzbuch* (Münster–Hamburg–London: LIT Verlag, 2002), 60; for the same view of the Federal Prosecutor, see *Juristen Zeitung* 2005, 311 *et seq.*

[96] *Juristen Zeitung* 2005, 311 *et seq.*; the Federal Prosecutor also holds the view that he is precluded from taking investigative steps as long as the relevant *situation* within the meaning of the ICC Statute forms the object of investigations in a state, which is directly linked with the crime; whether or not this is a sensible construction of the subsidiarity principle under German law falls outside the scope of this study. In any event, it is hard to argue that such an extension of the subsidiarity principle reflects customary international law.

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Finally, it is important to note that the principle of universality does not apply as a matter of customary law in the relations between a state exercising universal jurisdiction and a competent international court. The drafters of the ICC Statute failed to lend their support to the crystallization of such a customary rule by differentiating the complementarity principle with respect to those states that wish to act *solely* on the basis of universal jurisdiction.[97] Under the terms of the ICC Statute, the decision taken by Germany and Spain in favour of *double* subsidiarity, i.e. the acceptance of a priority right to prosecute not only by a directly connected state but also by the ICC,[98] can be seen as a no more than a (wise) *policy* choice.

6. The Adjudicative Exercise of (True) Universal Jurisdiction and Internationally Recognized Fair Trial Standards

Paragraph 4 of the *Resolution* reads as follows:

> Any State prosecuting an alleged offender on the basis of universal jurisdiction is bound to comply with the generally recognized standards of human rights and international humanitarian law.

This paragraph looks innocent at the first glance because it appears to simply restate the obligation of states to respect the general international law on human rights in the conduct of criminal proceedings. Yet, the paragraph is not simply a statement of the obvious. Instead, it gives reason to reflect about the possibility of a *more* prominent role for human rights standards in criminal proceedings, if those proceedings are based solely on true universal jurisdiction. A more prominent role would exist where an international duty obliged the state exercising universal jurisdiction to adhere to a human rights standard exceeding the minimal requirements that may exist under customary international law.[99] As in the case of the principle of subsidiarity, such a duty cannot be derived from an empirical analysis of the relevant state practice.

[97] The contrary suggestion by P. Benvenuti, in 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', in F. Lattanzi and W. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court I* (Ripa di Fagnano Alto: Editrice il Sirente, 2000), 48 is politically attractive (see the considerations in the following text), but unsupported by the wording of Art. 17 ICCSt. *et seq.*

[98] For Germany, see C. Kreß and J. MacLean, 'Germany', in C. Kreß, F. Lattanzi, B. Broomhall and V. Santori, (eds), *The Rome Statute and Domestic Legal Orders. Volume II: Constitutional Issues, Cooperation and Enforcement* (Baden-Baden-Ripa I Fagnano Alto: Nomos Verlagsgesellschaft/ Editrice il Sirente, 2005), 133; for Spain, see H. Olásolo, *ibid.*, 348 *et seq.*

[99] On the difficulty in determining the customary minimum standard of human rights and on the need to depart from the 'orthodox rules on the formation of customary rules', see C. Tomuschat, *Human Rights. Between Idealism and Realism* (Oxford: Oxford University Press, 2003), 34 *et seq.*

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A case may, however, be made on the basis of a *principled* approach to refining the conditions for the exercise of adjudicative universal jurisdiction.

The basic principle to start from is that a state seeking to exercise *true* universal jurisdiction does not act in its own interest, but as a trustee of a fundamental value of the international community.[100] It is, therefore, reasonable to assume that such a state must adhere to the same human rights limitations in conducting its proceedings as an international criminal court, which has been created as an organ of the international community to preserve the fundamental value in question. As far as international criminal justice is concerned Articles 55, 67 and, above all, 21(3) of the ICC Statute should be seen as the expression of the view of the overwhelming majority of States that a judicial organ of the international community should respect 'internationally recognized human rights' during its proceedings. In light of what has just been said, the same standard should apply under customary international law to a state that exercises (solely) true universal jurisdiction over a crime under international law.

The reasoning must be taken one step further, however, to apply it to question of trials *in absentia* as alluded to previous text.[101] For, it cannot be argued that conducting a national trial *in absentia* violates internationally recognized human rights.[102] There is strong evidence, however, that the international community has opted *against* trials *in absentia* as far as international criminal proceedings are concerned.[103] The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber has stated in *Blaškić* that 'generally speaking it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal'.[104] And due to the persistent objection of a majority of delegations it has proven impossible to provide for genuine trials *in absentia* before the ICC.[105] Hence the

[100] It is perhaps worth mentioning that this is not a lofty idea born and nourished in the world of academia, but that it has been clearly spelt out in *Attorney-General of the Government of Israel v. Adolf Eichmann*, *supra* note 91, at 204 (§ 13): 'The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and *in the capacity of a guardian of international law and an agent for its enforcement*, to try the appellant [emphasis added]'.

[101] *Supra sub* 4. *in fine*.

[102] For a summary of the practice under Art. 14(3)(d) of the International Covenant, see S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights. Cases Materials and Commentary* (2nd edn., Oxford: Oxford University Press, 2005), 436 *et seq.*. The case law under the European Convention on Human Rights is very similar: see S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), 254.

[103] We are concerned here only with trials *in absentia stricto sensu* and not with removals of the accused as referred to, for example, in Art. 63(2) ICCSt.

[104] Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaskić* (IT-95-14-AR 108 *bis*), Trial Chamber, 29 October 1997, § 59.

[105] The principle contained in Art. 63(1) ICCSt. and Art. 61(2) ICCSt. goes some way in the direction of the ICTY Rule 61-proceedings; for a comprehensive account of the debate in Rome, see H. Friman, 'Rights of Persons Suspected or Accused of a Crime', in R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (The Hague–London–Boston: Kluwer Law International, 1999), 255 *et seq.*

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following argument can be made: if trials *in absentia* are considered as inappropriate in *international* criminal proceedings,[106] the same should apply to those national proceedings that are based solely on the exercise of true universal jurisdiction.

If the above reasoning is correct, it must be applied *throughout*. While the consequences cannot be spelled out comprehensively in this study, two conclusions resulting from that logic should be mentioned. The first relates to the death penalty, which has been rejected as an appropriate penalty to be imposed by an international criminal court although its application in national criminal proceedings does not per se violate internationally recognized human rights. In the special case of the death penalty, it may be objected, however, that Article 80 of the ICC Statute explicitly preserves the right to impose the death penalty in national proceedings. While it is well-known that that provision of the ICC Statute was drafted with the problem of the death penalty in mind, it would seem reasonable and not inconsistent with the thrust behind the provision if its scope were confined to national criminal proceedings, which are not solely based on the competence of true universal jurisdiction.

The second point that deserves special mention is the application of the *ne bis in idem* principle to the final decisions taken by a national criminal court on the sole basis of universal jurisdiction.[107] In that respect — and subject to any necessary refinements in detail — the principle enshrined in Article 20(3) of the ICC Statute should be applied *mutatis mutandis* irrespective of the legal status of the *ne bis in idem* principle under customary international law or under the international human rights instruments.[108] As a result, the person tried by a state exercising universal jurisdiction would be protected against a retrial in another forum subject to the exceptions listed in sub-articles 20(3)(a) and (b) of the ICC Statute. Such protection constitutes a reasonable corollary of the multiplication of possible *fora* in which the alleged perpetrator of a crime under international law may be tried.

We are, thus, left with the particularly difficult question of whether one can also draw from the line of reasoning developed and applied above the legal requirement of providing for the complete independence of the competent prosecutor or *juge d'instruction* vis-à-vis the government of the state of universal jurisdiction, as suggested in the Joint Separate Opinion of Judges Higgins,

[106] The inappropriateness of trials *in absentia* is mostly derived from fair trial standards and for this reason the argument about trials *in absentia* is made in that context. It should be noted, though, that S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), 126 has made a strong argument that the acceptance of trials *in absentia* 'has more to do with the general objectives of international criminal justice'. Assuming, *arguendo*, that Zappalà is correct, the basic argument made in the above text would apply *mutatis mutandis*.

[107] G.P. Fletcher has focused on the problems surrounding this principle in his vigorous policy critique of the universality principle: *supra* note 48; Weigend, *supra* note 37, was correct to observe that Fletcher has probably overstated the relevance of the problem in practice.

[108] For similar views, see the Ninth Princeton Principle on Universal Jurisdiction, Macedo, *supra* note 7, at 23 *et seq.*; Weigend, *supra* note 37, at 946, footnote 46.

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Kooijmans and Buergenthal. It cannot be denied that the inevitable risk of a politically motivated selectivity in the exercise of true universal jurisdiction is reinforced where the national organ charged with the opening of an investigation lacks such independence. For this reason, the choice made, for example, in Germany to entrust the Federal Prosecutor with the decision as to whether or not an investigation under the Code of Crimes under International Law is to be opened, is problematic because the Prosecutor is not independent from the Federal Government. Doubts persist, however, whether this choice of the competent organ would in fact render any application of Germany's legislation on universal jurisdiction internationally unlawful, on the basis of disregard of internationally recognized fair trial standards.[109]

7. Looking Ahead: Creation of Institutional Safeguards for the Exercise of Universal Jurisdiction

The *Resolution* may suffer from a number of weaknesses, but it certainly lends welcome support to the idea that states have a customary law entitlement to exercise true universal jurisdiction over a narrowly defined list of crimes under international law, while the adjudicative exercise of such competence is subject to a set of limitations including, in particular, the principle of subsidiarity and the exclusion of trials *in absentia*. In doing so, the *Resolution* enriches further the already existing body of thoughtful suggestions for the formulation of an international regime governing the scope and modalities of true universal jurisdiction over international crimes.

It is submitted that the time has now come for states to incorporate both the basic competence and the reasonable limitations on its exercise into an international convention on universal jurisdiction. Such an international convention should also provide for institutional safeguards against abuses. As has been recently suggested by Susanne Walther, an international system of accreditation could be established allowing for a preventive screening of any state willing to exercise true universal jurisdiction with a view to fulfilling the necessary prerequisites.[110] At the same time, an international judicial organ[111] rather than the state concerned, should be entrusted with the power to make the decision as to whether another state was or is unwilling or unable to

[109] But see R. Keller, 'Grenzen, Unabhängigkeit und Subsidiarität der Weltrechtspflege', 153 *Goltdammer's Archiv für Strafrecht* (2006) 25, 33 *et seq.*

[110] In 'Terra Incognita. Wird staatliche internationale Strafgewalt den Menschen gerecht?', in J. Arnold *et al.* (eds), *Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag* (München: Verlag C.H. Beck, 2005), 953.

[111] Those functions could very well be assumed by the ICC; on the potential of the ICC with respect to national proceedings, albeit not within the universal jurisdiction context, see J.I. Turner, 'Nationalizing International Criminal Law', 41 *Stanford Journal of International Law* (2005), at 29 *et seq.*

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conduct the criminal proceedings in a given case where such a decision is necessary to apply the *subsidiarity* or the *ne bis in idem* principle. The formulation of such a convention would no doubt be a complex matter. It would, however, constitute a worthwhile contribution to a highly desirable refinement of the emerging system of international criminal justice.

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