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# Universal jurisdiction as procedural tool to institute prosecutions for international core crimes

## Abstract

The establishment of the International Criminal Court (ICC) with its intended purpose of ending the cycle of impunity that has notoriously attached to the perpetrators of gross human rights violations in the past hails a new chapter in international criminal law and justice. The structure of jurisdiction introduced by the ICC relies to a great extent on the co-operation of states to nationally prosecute perpetrators of gross violations of human rights. The ICC itself is intended to complement national jurisdiction and will only prosecute the most serious international crimes where the state that can exercise jurisdiction is either unwilling or unable to do so. This by necessity implies that states that are party to the ICC will be expected to establish and foster ways and means to enable themselves to investigate, prosecute, defend, adjudicate and to provide assistance to the ICC. One of the grounds upon which a state may exercise jurisdiction in terms of international criminal law is that of universal jurisdiction. This article explores aspects of the principle of universal jurisdiction and concludes that its application and development is of utmost importance in the quest of the international community to establish a credible international legal order.

## Opsomming

### Universele jurisdiksie as prosedurele meganisme om vervolging in te stel vir internasionale kernmisdade

Die daarstelling van die Internasionale Strafhof (ISH) met sy verklaarde bedoeling om 'n einde te maak aan die siklus van strafloosheid verbonde aan die plegers van growwende menseregteskendings, verteenwoordig 'n nuwe era in internasionale strafreg en geregtigheid. Die jurisdiksiestruktuur wat deur die ISH ingevoer is, maak sterk staat op die samewerking van state om plegers van menseregteskendings nasionaal te vervolg. Die ISH is bedoel om nasionale jurisdiksies aan te vul en sal self slegs die mees ernstige internasionale misdade vervolg in omstandighede waar die staat wat wel jurisdiksie mag uitoefen, nie in staat is, of onwillig is, om dit te doen. Dit het bygevolg die effek dat lidlande van die ISH strukture vir die suksesvolle vervolging van internasionale misdrywe sal moet daarstel. Dit geld ook ten opsigte van die vestiging van kapasiteit in lidlande om die ISH by te staan soos beoog in die Statuut van Rome wat die hof gevestig het. Een van die jurisdiksionele gronde waarop state nasionale vervolging mag instel in terme van internasionale strafreg is gegrond op die beginsel van universiële jurisdiksie. Hierdie artikel ondersoek aspekte van die beginsel en kom tot die gevolgtrekking dat die aanwending en verdere ontwikkeling daarvan van kardinale belang is in die soeke na 'n geloofwaardige internasionale regsorde.

## 1. Introduction

Jurisdiction of a state with reference to its sovereignty refers to that state's exclusive right to exercise legislative, executive, administrative and judicial authority within a particular territory. Sovereign equality of states and the prohibition on foreign intervention in the domestic affairs of a state is a feature and a founding principle of international law.<sup>1</sup> If a state wishes to exercise its jurisdiction in respect of a crime, it is generally required that a certain link of attachment between the state and the crime exists; this may exist either through territory, (the state exercises its jurisdiction because the crime was committed on its territory), nationality, (the state exercises its jurisdiction because the crime was committed by a national of the state or against a national of the state), and interest jurisdiction, (the state exercises its jurisdiction in respect of the crime because of its vested interest in the right(s) that have been violated by the crime). Primarily, however, the usual basis on which a state exercises its sovereign jurisdiction is either through territoriality or nationality.<sup>2</sup>

## 2. Features of universal jurisdiction: the absence of traditional jurisdictional links

In the case of certain crimes, the link establishing a state's jurisdiction may be absent when the crime by its nature is so heinous that it is viewed as a crime against mankind, a crime *contra omnes*. It is therefore the heinousness of certain international crimes that may be regarded as the dominant 'trigger' of universal jurisdiction. Universal jurisdiction has been defined as follows:

Simply put, universal jurisdiction is the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offence took place and irrespective of the nationality of the offender or the victim.<sup>3</sup>

The principle of universal jurisdiction, derives from international customary law and has been codified through certain international conventions, which have been adopted by almost all states. An example is the *Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>4</sup> The effect of these

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- 1 Dugard 2005:126. The author makes the following observations regarding "territory": "Territory occupies an important place in international law. A state will not qualify as a 'state' unless it has a defined territory. Moreover, the extent of a state's sovereignty or jurisdiction will in most instances be limited to the extent of its territory". Dugard further comments that the term "sovereignty" is avoided wherever possible. It has an elastic meaning, which varies according to the discipline and context in which it is used. He refers to the meaning of the term as described by the commentator Max Huber in the *Island of Palmas* case: "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is a right to exercise therein, to the exclusion of any other state, the function of a state". See also Mbaku and Mangu 2005:81 Bantekas and Nash 2003:143; and Erasmus and Kemp 2002:67.
  - 2 Bantekas and Nash 2003:143 and further. See also Wise and Podgor 2000:28.
  - 3 Brandon 2005:22.
  - 4 Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 U.N.T.S. 277. The Convention does not specifically provide

conventions is that perpetrators of certain crimes (such as genocide) may be punished by any state on behalf of the international community, regardless of the status of the offence and the nationalities of the offender and the offended. Particularly since World War II, there are certain crimes that are generally considered international crimes. Their violation is regarded as an offence in terms of international law and national or international courts/ tribunals may try such crimes. Examples of such international crimes under customary international law are war crimes, piracy, slave trading, genocide, crimes against humanity and torture.<sup>5</sup> The degree to which any particular state will invoke the principle of universal jurisdiction will depend on that state's constitutional and criminal justice system. Importantly, it will depend on a state's approach to international law, especially conventional international law, and whether this approach is monist or dualist. If the approach is monist, conventional international law will be self-executing or automatically incorporated into domestic law, prevailing over national legislation and enabling the courts of such a state to exercise universal jurisdiction without further ado. If however the state's approach is dualist, the exercise of universal jurisdiction will be subject to the particular state enacting national legislation to that effect.<sup>6</sup> These two different approaches manifest themselves in two different practices followed by states when they give effect to their international obligations in terms of conventions. The first is that national legislation will provide in general terms that crimes are subject to universal jurisdiction in which case the relevant penal provision will simply refer to the convention in question. Examples of such provisions may be found in Danish, German and Swiss legislation. The second practice followed by states is that national legislation itself defines in precise terms the crimes that will be subject to universal jurisdiction. Examples of this practice will often be found in the way, which commonwealth state members implemented the Geneva Conventions into their national legislation,<sup>7</sup> as well as with the implementation ICC Statute.<sup>8</sup>

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for the exercise of universal jurisdiction by national courts. It is however widely accepted that under customary international law that genocide is a crime that is subject to universal jurisdiction. State practice also supports the view. See Kamminga 2001: 945.

- 5 Erasmus and Kemp 2002:65, 66; Mbaku and Mangu 2005:81, a relatively early attempt by a state to exercise universal jurisdiction was that of the *Eichmann* case by the state of Israel. See also Cassese 2003:7, 284.
- 6 Mbaku and Mangu 2005:83, Van der Vyver 1999:116, Maluwa 1998:45, Duffy 2001:6 and Jessberger and Powell 2001:253.
- 7 Kamminga 2001:952. The author points to the advantages as well as disadvantages of both practices. Whilst the first is flexible, its effect may be that national courts will be reluctant to apply international legal principles with which they are unfamiliar. The second approach does not have this disadvantage in that it provides a clear framework within which a judgment may be given by a national court. The disadvantage of this approach is however that it may be too rigid so as to allow a court any scope for exercising its discretion. According to this author the expression 'universal jurisdiction' was first used by WB Cowles in an article in the *California Law Review* published in 1945.
- 8 See for example Du Plessis 2005:187 and further on the implementation by South Africa of the ICC Act. See also Werle and Jessberger 2002:191 and further on the implementation by Germany of the ICC Statute, through its German Code of Crimes Against International Law.

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Two examples of national legislation that incorporate universal jurisdiction are that of Germany and South Africa. Section 1, titled 'scope of application' of the German *Code of Crimes against International Law*,<sup>9</sup> stipulates as follows:

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.<sup>10</sup>

Section 4 of the South African *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*, under the heading 'Jurisdiction of South African courts in respect of crimes', determines as follows in subsection (3):

In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

Du Plessis,<sup>11</sup> points out that because there is no mention of the person's nationality or residency in subsection (c), and further given that subsections (a) and (b) already provide jurisdiction in cases where crimes were committed abroad by South African nationals and residents, that subsection (c) refers to individuals who commit an international core crime and do not have a substantial or close tie with South Africa at the time the crime was committed. This 'trigger' (of jurisdiction) according to Du Plessis,<sup>12</sup>

... is thus grounded in the idea of universal jurisdiction; that is, jurisdiction which exists for all states in respect of certain crimes which attract universal jurisdiction by their egregious nature, and consequently over the perpetrators of such crimes on the basis that they are common enemies of mankind.

It must be pointed out that universal jurisdiction under international law must not be confused with the validity of international law within a particular country, or the extra-territorial operation of a national criminal statute.<sup>13</sup>

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9 Accessed on [www.iuscrim.mpg.de/forsch/straf\\_2/28/2007](http://www.iuscrim.mpg.de/forsch/straf_2/28/2007).

10 See further an article on the German Code of Crimes against International law, Werle and Jessberger 2002:191-223.

11 2005:199.

12 2005:199.

13 Van der Vyver 1999:115. It does occur that the expression universal jurisdiction is sometimes used as a sub-kind of extra-territorial jurisdiction. See for example, Werle and Jessberger 2002:212.

### 3. Historical roots

The historical roots and need for the principle of universal jurisdiction originated from a need to bring pirates and brigands to justice.<sup>14</sup> Despite the fact that the pirate/brigand analogy for the historical justification for universal jurisdiction is a matter of controversy, the principle of universal jurisdiction is now established in international law.<sup>15</sup> The reasoning behind the piracy justification for the exercise of universal jurisdiction is that because pirates practised their trade on the high seas, which are beyond the territorial jurisdiction of any state, the high seas were, for purposes of jurisdiction, regarded as not *res nullius* but as *res omnium communes*. In a historical sense the basis for the existence of the principle is therefore partly sought in the fact that these crimes were committed on no man's land in the case of piracy, allowing states to exercise universal jurisdiction. Cowles,<sup>16</sup> in relation to war crimes points out that 'the old jurists assimilate the brigand with the pirate'. The common feature of piracy and brigandage may be assumed from his following statement:

The resulting association is a small, loose, degenerate society, the members having little or no sense of allegiance to any State.<sup>17</sup>

Scholars nowadays indicate that the emphasis has shifted from a purely formal justification for the exercise of universal jurisdiction, to a substantive legitimating of universal jurisdiction. This substantive legitimating refers to the reasoning that because certain crimes are so heinous by their nature, it is in the interest of all states to prosecute them. The justification for the application of the principle of universal jurisdiction is accordingly sought in the heinous nature of the crime and not so much in the absence of territorial jurisdiction of national states with regard to the locality of the crime.<sup>18</sup> To state that the formal/traditional justification of universal jurisdiction is found on the fact that crimes by pirates were committed on 'no-man's land' (the high seas) is not

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14 Van der Vyver 1999:116-117. See also De Than and Shorts 2003:257: "Such is the accepted abhorrence of piracy worldwide, that it is now recognized as one of the few international crimes having universal jurisdiction as well as coming under the umbrella of customary international law". Pirates put themselves outside the protection of all states, that is, they became what have been termed as *hostis humani generis*. See also Cassese 2003:284. The author describes the rationale behind the departure of the traditional principles of territoriality or nationality as 'the need to fight jointly against a form of criminality that affected all States'.

15 Van der Vyver 1999:116. See also Dubner 1980:1, 41 and further on sea piracy. The author quotes Professor Briery who stated that: "Any state may bring in pirates for trial by its own courts, on the ground they are '*hostes humani generis*' ... There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority".

16 1945:177 and further. This included jurists such as Ayala, Baldus, Javolenus, Livy, Paul, Pomponius and Ulpian. Later the classical writers did the same including Gentili, Grotius and Pupendorf.

17 1945:184.

18 Van der Vyver 1999:117. See also Cassese 2003:285 who describe the rationale for the exercise of universal jurisdiction as the joint safeguarding of "universal values".

entirely correct. This may have been one of the rationales for the exercise of universal jurisdiction. Sole reliance on this historical justification for universal jurisdiction does not, however, sufficiently account for the analogy between pirates and brigands, and secondly, if statements of jurists from the classical period are considered, the rationale for the exercise of universal jurisdiction seems to be very much the same as it is currently.<sup>19</sup> Rather, heinousness of crimes, non-allegiance to a particular state and the collective protection of the law of nature or law of the nations seem to have been the predominate justification for the exercise of universal jurisdiction.<sup>20</sup>

*Classical and conditional universal jurisdiction:* The principle of universal jurisdiction has been upheld in two different versions.<sup>21</sup> The more accepted version is a narrow one where at least the presence of the accused on the prosecuting state's territory is required to trigger universal jurisdiction.<sup>22</sup> In terms of the broad version of universal jurisdiction, it is advanced that a state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim and even whether or not the accused is in custody or present in the prosecuting state. For the reason that many legal systems do not allow for trials *in absentia* the presence of the accused on the territory of the prosecuting state is a prerequisite.<sup>23</sup>

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19 See Cowles who quotes Grotius who held the view that the power to punish brigands was derived from the law of nations: '... the fact must also be recognized that kings, and those who possess rights equal to those of kings, have the right to of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever'.

20 Cowles 1945:177 and further.

21 Cassese 2003:284 and further.

22 See Brandon 2005:27. The author refers to the assertion of 'classical universal jurisdiction' or, as Cassese refers to it, 'conditional universal jurisdiction' where at least the presence of the offender is required in the territory of the state that intends using universal jurisdiction.

23 Cassese 2003:286. Cassese points out that because the exercise of jurisdiction in terms of this notion is premised on the failure of the territorial or national state to prosecute; this jurisdiction should not be activated whenever one of the latter states do initiate proceedings. However it is notable that despite the fact that apparently the narrower version is more widespread amongst states, there are countries in which the broader version of universality is laid down in national legislation such as Spain and Belgium. See Cassese 2003:287, 289. Also notable is the position of Germany which has introduced national legislation to the effect that international customary law at present authorises universal jurisdiction over all major international crimes even when the criminal conduct occurs abroad and does not have any link with Germany, as was also pointed out in section 2. The author investigates the merits and the flaws of the assertion of absolute universal jurisdiction and mentions as flaws *inter alia* the possibility of so-called 'forum shopping' by victims of atrocities, the ineffectiveness of investigating huge numbers of atrocities by national courts where an accused never enters the country, the possibility of charges of a lack of due process, the lack of power by national judges to issue arrest warrants against foreign state officials, the risk of inconsistent rulings by different national courts and the confusion of roles exercised by national judges in the political arena. The merit on the other side of unqualified

The principle of universal jurisdiction pertaining to war crimes and crimes against humanity were concretised by the Nuremberg and Tokyo trials. It may be stated that while states were willing to sign general statements of principle until then, they resisted efforts to interfere with what they regarded as the sovereign jurisdiction of a state that implied an exclusion of the exercise of universal jurisdiction.<sup>24</sup> However, the atrocities committed during World War II would change this forever. The World War II prosecutions therefore served to pave the way towards the exercise by states of universal jurisdiction. In recent years, courts around the world have relied on universal jurisdiction with increasing frequency in order to justify proceedings against alleged perpetrators of human rights offences in foreign countries.<sup>25</sup> Because the victorious Allied powers after World War II wanted to prosecute Axis leaders for their unprecedented atrocities, and because it was recognised that not all of the crimes committed were committed against the Allied nations, it was unclear whether the Allies had, under traditional jurisdictional rules, a sufficient connection to prosecute all the Nazi crimes. Thus several of the Allied tribunals justified their proceedings through invocation of the principle of universal jurisdiction.<sup>26</sup> These tribunals cited piracy as legal precedent for exercising universal jurisdiction. Despite the charge often levelled at the Nuremberg and Tokyo Tribunals that it reflected so called victor's justice, its legacy, amongst other things, are that they promoted the development of universal jurisdiction as a recognised principle of international criminal law.<sup>27</sup>

#### 4. Ramifications for the exercise of universal jurisdiction: immunity vs *jus cogens* norms

There are various obstacles that typically arise in proceedings where a state seeks to institute prosecutions under universal jurisdiction against persons charged with gross violations of human rights. Amongst these are the lack of adequate implementing legislation at national level, lack of specialised institutions at national level for the investigation and prosecution of crimes that may trigger universal jurisdiction, amnesties, evidentiary problems and ineffective international supervision.<sup>28</sup>

One particular ramification for the exercise of universal jurisdiction by a national court is the question of immunity. Atrocities during which gross violations of human rights and humanitarian law occur, and which gives rise

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universal jurisdiction is the possibility of such a principle for the prosecution of minor defendants, low ranking military officials and even civilians for international crimes.

24 Cassese 2003:333. The author comments as follows on the impact of the IMT: "First, they broke the 'monopoly' over criminal jurisdiction concerning such international crimes as war crimes, until that moment firmly held by States. For the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope".

25 Kontorovich 2004:183.

26 Kontorovich 2004:195.

27 Charney 1999:464.

28 Kamminga 2001:951 and further.

to possible criminal prosecution, is often ordered, planned and condoned by the people in control of the particular state's national power, who are factually and legally, immune from criminal prosecution and punishment under their national legal systems.<sup>29</sup> Immunity generally, in context of this article, refers to the inability of a particular jurisdiction to exercise its jurisdiction over a particular person. One particular type of immunity is sovereign immunity. Sovereign immunity in its original form was absolute in that states 'were prepared to grant immunity to all the acts of foreign sovereigns and their governments, including those of their armed forces and state-owned vessels'.<sup>30</sup> The principle of sovereign immunity is based on the notion of the sovereign equality of states. This in turn has a few implications. The first is that one state cannot infringe on the jurisdiction of other states and secondly, since states are equal, one state cannot adjudicate disputes arising between them. In a similar vein, the internal organs of a state should refrain from interfering in another state's international relations.<sup>31</sup> This area of international law is currently witnessing attempts to limit immunity so that it does not include crimes against international law. One of the current debates is whether international peremptory norms, *jus cogens*,<sup>32</sup> should be able to override treaty or customary international law where gross violations of human rights occur.<sup>33</sup> Directly related to this is whether it is *jus cogens* that triggers the exercise of universal jurisdiction.<sup>34</sup> Although state or sovereign immunity has developed into an immunity that does not include commercial transactions by states, (in order to facilitate international trade and commerce) and only includes acts of government that are not commercial transactions, the distinction has not developed on the inter-state level regarding the violations of international law, even pertaining to the violation of the most serious violations, such as *jus cogens*.<sup>35</sup> O'Shea states:

There is virtually no State practice to examine in relation to the commission of international crimes by States, because of the real practical difficulty of understanding how a State can commit a crime or what the consequences are.<sup>36</sup>

There is however a degree of state practices regarding the commission of international crimes by heads of state and other state representatives (such as ministers of a state) and it is on these occasions that the question of sovereign

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29 Kittichaisaree 2001:13. See also Du Plessis 2005 accessed on <http://www.csvr.org.za/confpapsduplessis.htm> 11/10/2006.

30 Dugard 2005:239.

31 O'Shea 2005:111.

32 On *jus cogens* norms in international law see Danilenko 1991:42-61.

33 Cassese 2005:100. See also O'Shea 2005:112 for the development of the restriction on immunity based on the differentiation between purely commercial transactions by states (*jure gestionis*) not subject to immunity, and official acts of government. (*jure imperii*), subject to immunity.

34 It is respectfully submitted that if the rationale of *jus cogens* norms and that of universal jurisdiction are examined, they both rely on the heinousness of certain international crimes, and therefore that *jus cogens* may be described as the prime trigger of universal jurisdiction.

35 O'Shea 2005:112.

36 O'Shea 2005:112.



immunity becomes difficult and politically sensitive.<sup>37</sup> Cassese for one supports a development in terms of which the violation of *jus cogens* norms should not be subject to sovereign immunity for the reason that *jus cogens* is intended to protect inviolable values of the international community and is regarded as more imperative than the protection of sovereign immunity.

A second, more restrictive kind of immunity is that which is referred to as diplomatic immunity. As opposed to sovereign immunity, which applies to the sovereign state or the persons giving effect to the legal person of 'a state', diplomatic immunity is potentially more restrictive.<sup>38</sup> The applicable principles on this type of immunity are far from settled but as a minimum it is submitted that this type of immunity should not be applicable to crimes against international law for the same reasons enumerated in the previous paragraph.

Official status (giving rise to an immunity claim), in terms of the Charters of international criminal tribunals such as that of the ICTY, the ICTR, and recently the ICC, cannot be raised as a defence in relation to prosecutions of international crimes before these tribunals.<sup>39</sup> So although it is now established in international law that immunity in prosecutions before an international court/tribunal may never be raised as a defence, the position before national courts where prosecution is undertaken in terms of universal jurisdiction, is not as settled. States are however increasingly exercising universal jurisdiction for the prosecution of international core crimes under universal jurisdiction, which is welcomed in order to achieve a credible international legal order. In paragraph 5 below immunity *ratione personae* and immunity *ratione materiae* is further revisited due to the important role it plays when national jurisdictions do exercise universal jurisdiction over international crimes.

## 5. Examples of and the impact of states that exercised universal jurisdiction

When national and international courts exercise universal jurisdiction, the defence of immunity is usually raised. It is therefore important to distinguish between national and international courts when the defence of immunity is raised. The Nuremberg Charter,<sup>40</sup> the Statutes of the ICTY,<sup>41</sup> the ICTR,<sup>42</sup> and the Rome

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37 O'Shea 2005:112.

38 O'Shea 2005:113.

39 Article 27 of the Rome Statute of the International Criminal Court determines: 'Irrelevance of official capacity. (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person'.

40 Article 7.

41 Article 7(2).

42 Article 6(2).

Statute that established the ICC,<sup>43</sup> makes it quite clear that no immunity shall attach to heads of state or government or senior government officials in proceedings before these tribunals/court.<sup>44</sup> Dugard,<sup>45</sup> points out that one may have expected a similar rule of non-immunity to apply to national courts. (Some states, including South Africa, have indeed expressly excluded immunity for heads of state or government in their legislation that implements the Rome Statute of the International Court into their national legislation.)<sup>46</sup>

Before examples of national jurisdictions that exercised universal jurisdiction are discussed below, it will perhaps provide context to such discussion if the distinction between immunity *ratione personae* and immunity *ratione materiae* is briefly revisited. Immunity *ratione personae* attaches to a person due to the person's status or office and attaches to a person only as long as the person is in office. It is limited to a small group of senior state officials, particularly heads of state, heads of government and senior ministers.<sup>47</sup> This immunity applies even to international crimes as Dugard<sup>48</sup> indicates has been held by national courts in cases that involved Qaddafi, Castro, Sharon, Mofaz and Mugabe. Immunity *ratione personae* relates to acts that are performed in official capacity.<sup>49</sup> This kind of immunity stems from the recognition that the smooth conduct of international relations require that state agents be allowed to travel freely in order to conduct state affairs without fear of interference from other states.<sup>50</sup>

Immunity *ratione materiae* may attach to a state official even though such a person does not enjoy immunity *ratione personae* (because the official is not high ranking enough) for the reason that such an official was performing official acts on behalf of a state. The immunity therefore attaches to the particular act.<sup>51</sup> The policies that underlie the granting of immunity *ratione materiae* are firstly that the individual official cannot be legally held responsible for acts that are in effect that of the state on whose behalf the official was acting. Secondly, 'the immunity of state officials in foreign courts prevents circumvention of the immunity of state through proceedings brought against those acting on behalf of the state'.<sup>52</sup> It is against this backdrop that the discussion of the cases below will proceed.

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43 Article 27.

44 See Zappala 2001:595 and further. The author convincingly demonstrates that when these stipulations were embodied in the constituent statutes of the *ad hoc* tribunals and the ICC, it was not intended to apply international criminal or humanitarian law retroactively. The provisions in these statutes on the irrelevance of the position of the head of state or other senior officials did not amount to the creation of 'new' international law. There was in other words general agreement that these statutes confirmed the customary status of the rule whereby functional immunity (immunity *ratione materiae*), did not cover the international crimes enumerated in the statutes.

45 2005:250.

46 Dugard 2005:251. See also the examples quoted in section 2 above.

47 Akande 2004:409. See further Zappala 2001:597 and further.

48 2005 411.

49 Dugard 2005:252. See also Akande 2004:409 and further.

50 Akande 2004:410.

51 Akande 2004:412.

52 Akande 2004:413.

The *Eichmann* case is often upheld as the first case in which a person accused of crimes against humanity was tried in a state with which the accused had no formal links.<sup>53</sup> The attempted prosecution of Augusto Pinochet, and the subsequent case before the ICJ of *Congo v Belgium* are probably the best recorded and provide evidence that states are increasingly willing to exercise universal jurisdiction, especially relating to the extent that these attempts may be viewed as the development of restrictions on immunity for international crimes.<sup>54</sup>

The fundamental question in the case of Pinochet was the scope of immunity that a former head of state enjoyed for acts that were committed when he was still head of state. Related to this question was whether, if he was entitled to immunity with respect of official acts performed in the scope of his official function as head of state, which acts constituted official acts in the exercise of his functions as head of state. The Queen's Bench Division held that the acts of torture and hostage taking were performed whilst Pinochet was exercising his function as head of state because in terms of the wording of the arrest warrant issued by the Spanish Court, these acts were performed under the authority of the Chilean government at the time. In the light of the fact that Pinochet was not personally charged for the torture or the disappearance of victims, but with using the power of the Chilean state to commit acts of torture

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53 Cassese 2003:293. This is so, according to Cassese, because it could be argued that most of the surviving victims and relatives of the victims were in Israel. It is ironic, so Cassese points out, that no state concerned protested against that trial, that is, protested or challenged the principle enunciated in 1960 by the Supreme Court of Israel whereby 'the peculiarly universal character of these crimes [against humanity] vests in every state the authority to try and punish anyone who participated in their commission'. See also Kamminga 2001:942. He points out that in this case universal jurisdiction was merely one of several jurisdictional grounds relied upon. Reliance was also made of the protective principle of jurisdiction as well as the passive personality jurisdiction principle.

54 See Mendez 2000:65 and further on the "new relationships" in international law between international human rights law, international humanitarian law and international criminal law and procedure. Commenting on the Pinochet case, the author remarks: "For decades 'universal jurisdiction' was largely a theoretical possibility. Jurists proclaimed that certain violations of human rights were so severe and so shocking to the conscience of humanity that they could and should be punished by any and all civilized nations of the world. Dutifully, government representatives professed to uphold the notion of universal jurisdiction. In reality, however, domestic parliaments rarely enacted legislation to make universal jurisdiction effective, and domestic courts dismissed most such criminal claims, except in regard to the prosecution of former Nazi war criminals. The arrest warrant issued by Spanish judge Baltazar Garzon, and its serious treatment by British authorities changed all that". See also Cassese 2003:298 who concludes that in sum, national courts are still loath to bring to justice persons that are accused of international crimes. This in part is attributable to the fear of meddling in the domestic affairs of other states. Few national judges, according to Cassese, share the sense that it is imperative to vindicate and judicially enforce respect for fundamental values wherever they may have been breached. The tension between these two views of international law, namely the need to protect universal international values and on the other side the maintenance of strict state sovereignty was illustrated in the Pinochet judgments.

and disappearance of victims, the extradition request was dismissed.<sup>55</sup> The so-called 'leapfrog appeal' procedure was followed by the Crown to the House of Lords, who by a majority of three to two held that former heads of state have narrower immunity than incumbent heads of state; that former heads of state could never enjoy immunity against charges such as torture or hostage taking; that whilst Pinochet could never be charged with any act that constituted legitimate function of government, he could be held accountable for actions that are prohibited by international law. The reasoning of the majority in the first House of Lords judgment, is succinctly summarized by the statement of Lord Nicholls of Birkenhead,<sup>56</sup>

[T]orture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of State. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognizes, of course, that the functions of a head of State might include activities, which are wrongful, even illegal, by the law of his own State or by the laws of other States. But international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. That applies as much to heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law. That was made clear long before 1973 and the events that took place in Chile then and thereafter.

As a result of the ruling by the House of Lords, the Home Secretary authorised extradition, but then the House of Lords set aside its first decision because one of the judges, Lord Hoffman, had failed to disclose that he was a director of *Amnesty International*, which could infer bias or possibly a conflict of interest.<sup>57</sup> In the second House of Lords judgment, on 24 March 1999,<sup>58</sup> the appeal was partly upheld. The House narrowed down a large number of charges for which Pinochet could be extradited to stand trial in Spain. The court did so largely on the grounds of lack of jurisdiction, *ratione temporis* over the excluded charges with reference of the principle of legality. (*Nullum crimen sine lege*.) It held that extradition could proceed for the torture offences but only in relation to those alleged acts of torture committed after the UK signed the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>59</sup>

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55 Kittichaisaree 2001:58.

56 As quoted by Kittichaisaree 2001:58 and 59.

57 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2), 2 W.L.R. 272 (H.L.1999) See also de Than and Shorts 2003:57; Kittichaisaree 2001:60, Rothenberg 2002:943. Amnesty International was a party to the case.

58 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 W.L.R.827 (H.L. 1999). See further Byers 2000:433 and further.

59 De Than and Shorts 2003:57. The issue here was that of double criminality which is a fundamental necessity for extradition. It meant that all the other charges could not be pursued because they were not crimes under the English law at the time they were allegedly committed. See also Kittichaisaree 2001:60, and Dixon and McCorquodale 2003:150. Lord Browne Wilkinson pointed out that this convention, the Torture Convention in short, was agreed upon not in order to create an international crime which had not previously existed but to provide an international system under

Thus, all the crimes for which Pinochet's extradition was sought from Spain, except that of torture, were held not to be crimes under English law at the time the alleged offences were committed. Torture was an extraditable offence under the *Criminal Justice Act* of 1988, which implemented the Convention referred to in this paragraph above.<sup>60</sup>

The two key issues for the decision of the second House of Lords were: which of the offences Pinochet was charged with were extraditable, and whether Pinochet's claim to immunity *ratione temporis* as head of state, was valid. The problem the House encountered with the second question was that the United Kingdom's *State Immunity Act* 1978 grants a head of state absolute immunity from all actions or prosecutions, but as far as former heads of state are concerned, is silent.<sup>61</sup> To the second issue the majority of the House of Lords held:

... the immunity of a former Head of State persists only with respect to acts performed in the exercise of the functions of the Head of State that is official acts, whether at home or abroad. The determination of an official act must be made in accordance with international law. International crimes in the highest sense, such as torture, can never be deemed official acts of State.<sup>62</sup>

The *jus cogens* nature of the international crime of torture will justify states to exercise universal jurisdiction over the crime, wherever it was committed. The concept of universal jurisdiction allows a state to prosecute alleged perpetrators for crimes that are generally understood to be illegal everywhere in the world and are regarded as such to be contrary to the prescriptive norms of the international society.<sup>63</sup> Thus universal jurisdiction recognises the idea that certain crimes:

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which the criminal in terms of international law, the person accused of torture, could find no safe haven. Therefore in bare essence, the purpose was to ensure that the torturer does not escape the consequences of his acts by going to another country.

60 Kittichaisaree 2001:60. See also Bianci 1999:243 and further.

61 De Than and Shorts 2003:57.

62 As quoted by De Than and Shorts 2003:58. Should immunity to a serving head of state, which seems to be currently held as absolute, not for the same reason be qualified? Regarding torture as an international crime, see Dixon and McCorquodale 2003:148-149 where as per Lord Browne-Wilkinson, in the early development of international law, state torture was one of the elements of a war crime. Torture and various other crimes against humanity were linked to a war or to hostilities of some kind. However, in the course of time the linkage to war fell away and torture was divorced from war or hostilities and became an international crime on its own. Consequently it now seems recognised that torture has the character of *jus cogens* or a peremptory norm that is one of the rules of international law which has a particular status.

63 Dixon and McCorquodale 2003:149. See also the comments of De Wet 2004:115 and further. The author points out the separate opinion of Lord Millet. Lord Millet held that the statutory criminalisation of acts of torture was supplemented by the common law of which customary international law formed a part. In his reasoning, if the latter determined that a particular act constituted an international crime over which all states had jurisdiction, the English court would have the competence to try extra-territorial offences. Lord Millet further submitted that already in 1973 widespread and systematic acts of torture constituted an international crime to which universal jurisdiction was attached under customary international law as a result of which the English courts had the jurisdiction to try for such crimes where they were committed extraterritorially and even before the enactment of the English *Torture Act*.

... are so reprehensible that any state, if it captures the offender, may prosecute and punish that person on behalf of the world community regardless of the nationality of the offender or victim or where the crime was committed.<sup>64</sup>

There was however a notably large range of views and several important disagreements between the judges.<sup>65</sup>

Pinochet was allowed to return to Chile in March 2000 after the UK Home Secretary had determined that he was unfit to stand trial. The Supreme Court in Chile removed his immunity in August 2000, but imposed a temporary stay of proceedings so that no trials ever took place. Various countries still wanted him to stand trial at the time of his recent death, including some courts in Chile.<sup>66</sup>

Despite the fact that uniformity of approach in relation to jurisdiction and sovereign immunity would be a welcome development in international law, which currently is uncertain and unsettled,<sup>67</sup> several points can be made about the Pinochet case which translates to positive development of international criminal law and a general step in the right direction for the establishment of an international legal order. The first is that there is a growing trend by states to exercise universal jurisdiction. It cannot be denied that universal jurisdiction over crimes against international law is a growing trend and cannot be reversed.<sup>68</sup> This statement is made in consideration of the fact that none of the traditional grounds of

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64 Rothenberg 2002:933 the author justifiably points out the significance of the Spanish Court's affirmation of the principle of universal jurisdiction for certain crimes, including genocide, terrorism, or "any other [crime] which, according to international treaties or conventions must be prosecuted in Spain". The evocation of the principle of universal jurisdiction and its subsequent support by the Spanish judiciary opens up the possibility that victims from around the world could pursue cases in Spain, or any other nation with a similar legal commitment to universal jurisdiction. This would imply that if universal jurisdiction were to become widely accepted, the perpetrators of gross violations of fundamental human rights might increasingly find themselves facing prosecution in domestic courts throughout the world.

65 De Than and Shorts 2003:57. See also Bianci 1999:243. The author states that: "The second judgment of the House of Lords profoundly differs from the previous one on the treatment given to two issues: the qualification of extradition crimes and the role that some of the Law Lords attributed to the Torture Convention for the purpose of denying immunity to General Pinochet. On the one hand, the intertemporal law question of which critical date is relevant for the double criminality principle was solved by interpreting the applicable provisions of the *Extradition Act* to the effect of requiring that the alleged conduct constituted an offence in both the requesting and the requested state at the date of the actual conduct. While Lord Bingham for the Divisional Court and Lord Lloyd in the first ruling of the House of Lords, had held that the critical date was the date of the request of extradition, the large majority of the Law Lords sitting in the second Appellate Committee agreed that the critical date was that of the actual conduct". This had the effect of narrowing down the number of offences for which Pinochet could be extradited.

66 Kittichaisaree 2001:60; De Than and Shorts 2003:58.

67 De Than and Shorts 2003:60.

68 Kittichaisaree 2001:60. See also Akhavan 2001:27: Several states have prosecuted Yugoslav or Rwandese perpetrators, even when no international indictments had been issued.

jurisdiction upon which a national court would normally exercise jurisdiction over international crimes were present in the Pinochet case. The alleged perpetrator of the crimes was not a British citizen, none of the victims were British citizens, the alleged crimes were committed outside British territory and neither had the crimes any effects within the United Kingdom.<sup>69</sup> Pinochet's presence on British territory and the *jus cogens* nature of his alleged crimes therefore triggered the British courts to apply universal jurisdiction in deciding whether he should be extradited to Spain. Professor Ariel Dorfman describes the significance of the Pinochet case as follows:

The Pinochet case will remain a fundamental step in the search for a better humanity, a better mind for a different sort of mankind and womankind, the arduous construction of a universal consciousness.<sup>70</sup>

The Pinochet case has further instigated and propelled movement towards the end of impunity both at national and international levels.<sup>71</sup> This aspect of universal jurisdiction is usually dealt with under the 'deterrent value' that the exercise of universal jurisdiction by national courts may have. Although authority indicate that the effectiveness of deterrence at the international level is difficult to document, the general deterrent value is nevertheless important.<sup>72</sup> Another impact is that decisions of national courts do have an influence on the development

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69 On jurisdictional grounds see Bantekas and Nash 2003:143 and further and also Wise and Podgor 2000:28.

70 2000:50. See also Cassese 2003:7 on the *Eichmann* case where the Israeli response to the submission by Eichmann that the Israeli courts had no jurisdiction over him was: "Not only do all crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel was therefore entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent of its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed".

71 Kittichaisaree 2001: 60. The author states that in February 2000, following the Pinochet 'precedent' in Britain, the Dakar Regional Court in Senegal indicted Hissene Habre, former Head of State of Chad, who had been living in exile in Senegal since 1990. This person was charged with torture and murder of his own subjects during his rule from 1982 to 1990. This was the first time that a former African head of State had been charged with human rights violations by a court of another state. In the same month, Lieutenant Colonel Tharcisse Muvunyi, a former Rwandan army commander, was arrested in London on a warrant issued by the ICTR. This came just after the arrest in Belgium of the former Rwandan Chief of Staff of the Rwandan Military Police. See also Dorfman: 2000:50. The author makes the following observation in very lucid and convincing terms: "There are in the world today thousands of vile men who destroyed the lives of their fellow citizens, who raped and tortured their bodies, and who will not, solely because of the Pinochet extradition trial, be able to travel abroad, as they so cheerfully did in the past".

72 See for example the comprehensive report on universal jurisdiction and the duty of states to enact and enforce legislation by Amnesty International, accessed on their website: <http://web.amnesty.org/library/index 11/3/2006>. The report indicates that many government officials or former officials at all levels now inquire before they undertake foreign travel .

of the corpus of international legal precedent and this impact should not be underestimated.<sup>73</sup> Even if the Pinochet rulings do not establish as a matter of international law, the primacy of human rights law over principles of sovereign immunity, there exists no doubt that the judgments will be used as a source of principles when the issues raised in that case present themselves for decision in similar cases.<sup>74</sup> Rothenberg points out that while the British legal cases involved British law, they rested upon an acceptance of the “fundamental legitimacy of the Spanish extradition order and legal cases against former members of the Argentine and Chilean military regimes”.<sup>75</sup> The fact that the British government allowed that this matter be settled through the intervention of the British courts, instead of avoiding the matter through a possible diplomatic resolution, is highly significant. The author points out that this action by the British government expresses a basic respect for Spanish law and its legal processes, which signifies, together with the work of the Spanish judge Garzon particularly, the international community’s growing willingness to take concerted transactional legal action against human rights violators.<sup>76</sup>

Although the Pinochet case has therefore had a considerable impact on the development of international criminal law, (and by necessary implication as impetus for national courts to exercise universal jurisdiction) the case of *Democratic Republic of the Congo v Belgium*, has been considered as a setback for the development of universal jurisdiction and the accountability of members of governments for human right violations.<sup>77</sup> In this case, the International Court of Justice held that Belgium had violated international law by issuing a warrant for the arrest of the Democratic Republic of the Congo’s minister of foreign affairs (Mr. Yerodia) on charges of crimes against humanity and war crimes committed in the Democratic Republic of the Congo. The reasoning of the ICJ was that Belgium failed to respect the immunity against criminal prosecution that the minister enjoyed under international law before national courts.<sup>78</sup> The court affirmed that customary international law precluded national courts from trying a minister of foreign affairs, and by implication also other senior government officials, who are required to travel abroad in the performance of their official duties.<sup>79</sup> The ICJ could find no state practice to support its conclusion but insisted that the functions of a minister included travel abroad, and that this gave rise to the customary rule of immunity.<sup>80</sup> Even more surprising according to Dugard,<sup>81</sup> was the fact that the ICJ also found that the minister was immune from prosecution for international crimes (including crimes against humanity and war crimes)

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73 Dixon and McCorquodale 2003:48. See also Bianci 1999:249 and further. The author is of opinion that the interpretation of domestic statutes in the light of contemporary standards of international law may in principle remedy domestic legislation ambiguities and correctly implement the principles and rules of international law.

74 Dixon and McCorquodale 2003:48.

75 Rothenberg 2002:944.

76 Rothenberg 2002:945. See also Sands 2003:68 and further.

77 De Than and Shorts 2003:59. See also Cassese 2002:853 and further.

78 Dugard 2005:251.

79 Dugard 2005:251.

80 Dugard 2005:251.

81 2005:252.



before national courts. On a more positive note however, the ICJ did hold that the immunity would not be upheld when the person had ceased to hold office, or for crimes committed before the person assumed office, as well as for acts committed in private capacity while holding office. Further, the ICJ held that immunity would not be upheld for prosecution of international crimes before international criminal courts.<sup>82</sup>

Despite this setback, Cassese commends this judgment as “an important contribution to a clarification of the law of (what one ought to correctly term) personal immunities (including inviolability) of foreign ministers”. The decision is also lauded in an area where state practice and case law is lacking. The International Court of Justice inferred from the rationale behind the rules of personal immunities of senior state officials (and by necessity part of international law on sovereign immunity) that such immunities must prevent any prejudice to the effective performance of their official duties as representatives of their states. Thus the Court gave priority to the need for foreign relations to be conducted unimpaired and by implication, to the notion of equality of states and the non-interference in their domestic affairs.<sup>83</sup>

In a concurring minority decision however, the International Court of Justice led by Judge Higgins, came to their conclusion by quite different reasoning, citing various sources of customary international law, instances of state practice, and also but not limited to the Pinochet case. The minority agreed that serving state officials could not be served with arrest warrants relating to prosecution overseas. They may however, not have immunity if they were overseas on private visits. Furthermore, should it appear that a state was keeping a minister in office artificially in order to maintain his immunity from suit, that immunity would be void. Finally, and of great significance of the minority judgment, is that a former minister or former holder of other state office might not have immunity for serious international crimes committed while in office, regardless of whether the crimes were committed as part of official business or in private capacity.<sup>84</sup>

Wirth submits that the best “concretization of the existing state practice” would be a rule along the lines of the Pinochet decision, which is that immunity *ratione personae* would grant effective protection to the person concerned, even against prosecution for core crimes. However, because immunity *ratione personae* are available only to incumbent holders of office, it ceases to protect this person as soon as his or her term of office ends. After termination of the person’s term of office, these persons are protected only by immunity *ratione materiae*, which should be interpreted as providing no protection against core crimes. A rule fashioned in the way that Wirth proposes, would create balance between protection of a state’s ability to function and the protection of human rights.<sup>85</sup>

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82 Dugard 2005:252.

83 Cassese 2002:855. In contrast to this positive development, Cassese expresses misgivings on (i) the Court’s failure to rule on whether states are authorised by international law to exercise extraterritorial criminal jurisdiction, and (ii) the failure of the court to clearly distinguish between functional and personal immunities.

84 De Than and Short: 2003:59, 60. See also Spinedi 2002:896 and further.

85 Wirth 2002:892.

It would ensure that the highest state representatives could discharge their functions in an unfettered way, but at the same time, serve to forewarn that, once out of office, they must face responsibility for even their official conduct. As far as lower ranking state officials are concerned, no protection would be afforded, even when in office, against the prosecution of international core crimes, for the reason that lower ranking officials are not protected by immunity *ratione personae* but only by immunity *ratione materiae*.<sup>86</sup>

Many instances of national courts prosecuting persons under universal jurisdiction for the gross violation of human rights, and that do not involve immunity claims, (or at least as dominantly as in the Pinochet and *Congo v Belgium* cases) are not all that well known, at least not to the general international public.<sup>87</sup>

## 6. The International Criminal Court and universal jurisdiction

Because universal jurisdiction can have dangerous consequences for the comity between nations if acceptable parameters of its scope and application are not established, the question is what impact the establishment of the ICC has had on universal jurisdiction. The International Criminal Court is premised on the principle of complementing rather than substituting national criminal jurisdictions of member states.<sup>88</sup> The extent of the ICC's reliance on national prosecutions

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86 Wirth 2002:892.

87 See for example Kastenberg 2004:1 and further for a case analysis before a Swiss Military Tribunal against a Rwandan mayor and cited as only example of a Rwandan suspect being tried other than by the International Criminal Tribunal for Rwanda. (ICTR). See Kamminga 2001:965, who cites some of the following universal jurisdiction cases in the following countries for example: Australia: Nulyarimma and other v Thompson, Federal Court of Australia, Full Court, 1 Sept.1999,39 I.L.M.20 (2000); Belgium: On 8th June 2001, the case against Alphonso Higaniro, Vincent Ntezimana and two Catholic nuns, Consolata Mukangango and Julienne Mukabutera who were convicted by a Brussels court for their share in the Rwandan genocide and subsequently sentenced to long prison sentences. Denmark: on the 25th November 1994, Refik Saric, a Bosnian Serb that sought asylum in Denmark was sentenced to 8 years imprisonment for murder and torture of inmates in a Bosnian concentration camp. Quite a number of other universal jurisdiction cases are cited by the author.

88 Article 13 of the Statute of Rome determines that the ICC will exercise jurisdiction over the article 5 mentioned crimes of genocide, crimes against humanity, war crimes and aggression, (once the latter has been defined and the definition has been adopted in accordance with articles 121 and 123 of the Statute) in three instances. (1) In a situation where a state party refers the matter to the ICC, (2) where a situation is referred to it by the UN Security Council under Chapter VII of the Charter of the UN and (3) where the prosecutor has initiated an investigation in terms of Article 15. In the preamble of the ICC Statute, the equality and non-intervention in the domestic affairs of states are confirmed. It emphasises that the ICC is established as complementary to national criminal jurisdictions. The principle of complementarity is again confirmed in Article 1, which determines: 'An international Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and

to carry out prosecutions of international crimes further appears from the fact the ICC Statute nowhere places an obligation on member states to bring its national legislation in line with the ICC Statute.<sup>89</sup> But importantly as has been pointed out by Werle and Jessberger,<sup>90</sup> the lack of a legal obligation to implement national implementing legislation ( to bring national legislation in line with the ICC Statute), does not mean that the ICC Statute prohibits enactment; on the contrary, it encourages and relies on states to do so. Such legislation will among other things, enable member states to exercise universal jurisdiction over international core crimes when a situation requires it to do so. Where the ICC prosecutor in terms of Article 15 initiates investigations *proprio motu*, the seriousness of the information must be considered and if considered serious enough, the authorisation of the Pre-Trial Chamber must be obtained to proceed with the investigation. Article 17 of the ICC Statute proceeds to determine that the Court will determine a case inadmissible where (a) the case is being investigated or prosecuted by a state, which has jurisdiction over it, 'unless the state is unwilling or unable genuinely to carry out the investigation or prosecution'. (b) The particular case has been investigated by a state that has jurisdiction over it and the state has decided not to prosecute, 'unless the decision resulted from the unwillingness or inability of the State to genuinely to prosecute'. (c) The person concerned has already been tried for conduct that is subject of the complaint and (d) the case is not of sufficient gravity to justify further action by the court.

Considering the complementarity premise of the ICC, the fact that only the most serious international crimes will be subjected to its jurisdiction and the condition that cases before it will be inadmissible unless the state that has jurisdiction over the crime is unwilling or unable to genuinely carry out prosecutions, it is clear that the ICC has a rather conservative jurisdictional basis and that decentralised criminal justice is acknowledged by the Statute,<sup>91</sup> which makes

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shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of the Statute'. See also paragraph 4 of the Preamble of the ICC Statute that states: ' Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their collective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. In paragraph 6 of the Preamble the ICC Statute, it further 'recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. It is important to note article 12 of the ICC Statute it is important to note that the court can only exercise its jurisdiction in cases where the crime has been committed on the territory of a state party or the accused is national of a state party. See also further Ambos 1996:519-544 and Du Plessis 2005 on <http://www.csvr.org.za/confpaps/duplessis.htm> 11/10/2006.

89 Werle and Jessberger 2002:195. The authors point out that the ICC Statute in this regard differs from most other international treaties in respect of criminal law such as for example the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, where in article 146 state parties to that convention undertake to enact national legislation necessary to provide for effective penal sanctions. But importantly, so the authors point out, the lack of a legal obligation ( to implement national implementing legislation) does not mean that the ICC Statute prohibits state enactment; on the contrary encourages states to do so.

90 2002:195.

91 Werle and Jessberger 2002:193.

enabling legislation that includes the right to exercise universal jurisdiction, all the more important. Given the purpose of the ICC and the resolve of the international community to break the cycle of impunity attached to the perpetrators of international core crimes, the international criminal justice regime introduced by the Statute of Rome, relies substantially on the co-operation of member states.<sup>92</sup>

The foregoing observations inevitably lead to the following conclusions. The first is that the establishment of the ICC may prove to be the most important step yet in the expanded use of universal jurisdiction by national jurisdictions in international criminal law. This conclusion is made because firstly, the ICC has received the mandate of the majority of states to exercise jurisdiction over persons for the most serious crimes of international concern.<sup>93</sup> It has been illustrated in this article that universal jurisdiction is premised on the notion that because of the heinousness of particular international crimes, national courts are afforded jurisdiction to prosecute these crimes in the absence of traditional jurisdictional links. Secondly, it may be concluded from states' ratification of the ICC Statute that member states thereby signify their collective resolve to break the cycle of impunity that violators of gross human rights violations have enjoyed for too long.

Chayes and Slaughter raise an interesting point in that it may be concluded that with the creation of the ICC, there is the necessary implication that domestic jurisdiction is thereby reconstructed. It simply means that states, and especially member states of the ICC, must align themselves with international criminal law and ensure that their domestic legislation enables them to carry out the obligations they have taken upon themselves when the ICC Statute was ratified, as has been pointed out before.

This in itself represents a trend or development in international law. The authors suggest that:

... if international law establishes rights and duties of individuals, it implies a radical reconstruction of the concept of domestic jurisdiction. The international architecture of 1945 preserved an insulated and carefully protected spheres of domestic affairs. Article 2(7) of the U.N. Charter provides: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'.<sup>94</sup>

The authors point out that only three years after the adoption of the UN Charter, the Universal Declaration of Human Rights introduced "a contrary movement that has burgeoned in recent years". A consequence, which the establishment of the ICC has bolstered, is "that the existence of exclusive domestic jurisdiction is now increasingly conditional on conformity with international rules and principles, especially human rights norms". This trend has thus been confirmed with the establishment of the ICC and:

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92 See Articles 86, 87,89, 90,93 and 96 of the ICC Statute regarding obligations on state parties.

93 Kontorovich 2004:200. See also Mendez 2000:71 and further.

94 2000:240.

... the international community is no longer prepared to stand aside while a government commits gross violations of fundamental human rights under the rubric of internal affairs.<sup>95</sup>

The confirmation of the trend with the establishment of the ICC relating to the development of international criminal law, is further not limited to the protection of fundamental human rights but has now been expanded to a vast area of other international common concerns. Chayes and Slaughter point out that:

The contingent nature of domestic sovereignty is not confined to the field of human rights. It follows from the increasingly coextensive scope of domestic and international regulation. In the areas of economic integration, trade, environmental affairs, and internal conflict, international and domestic law now often regulate the same conduct. Laws drafted and implemented at both levels organize and constrain the behavior [sic] not only of states but also of the individuals and groups within them. National jurisdiction may be primary, but is no longer exclusive.<sup>96</sup>

The ICC Statute may be viewed as a natural product of this development in international affairs and law.<sup>97</sup>

## 7. Universal jurisdiction and the relationship between the ICC and the United Nations Security Council

There is, however, one exception to the conservative jurisdictional constraint in the ICC Statute. This occurs when the UN Security Council refers a case to the ICC.<sup>98</sup> When therefore the UN Security Council, instead a member state or the prosecutor, refers a case to the ICC, the usual territorial and nationality limitations do not apply. It would therefore appear that the ICC could have jurisdiction over crimes, which are committed in non-signatory states by and against nationals of non-signatory states if the Security Council refers the matter to the ICC. It is not yet clear whether the ICC will assert such jurisdiction and thereby risk resistance from non-signatories such as the United States who vehemently opposes the International Criminal Court.<sup>99</sup> Kontorovich points out that the ICC's jurisdiction in non-signatory cases that are forwarded to it by the Security Council should be considered as "delegated", rather than the exercise of pure universal jurisdiction by the ICC.<sup>100</sup> The reasoning behind this is that

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95 Chayes and Slaughter 2000:240.

96 2000:241.

97 Chayes and Slaughter 2000:241. See also Gallon 2000:93 and further on the "International Criminal Court and the challenge of deterrence". According to the author the ideal "independent", "effective", and "strong" international court has not been created, but that the establishment of the ICC does provide future generations with international "legal tools" with which to deal with future atrocities.

98 Kontorovich 2004:200.

99 On US objections to the ICC, see Du Plessis 2002:312, Megret 2001:249, Leigh 2001:126, Schabas 2001:67, Van der Vyver 1999:118, Morris 2000:220, Barret 1999:106 and Marguardt 1995:132.

100 2004:201.

nations, by joining the United Nations, delegate to the Security Council the authority to deal with certain issues in a broad range of ways. Thus the Council could choose to deal with a particular matter by referring it to the ICC.<sup>101</sup> That the mandate and central function of the United Nations Security Council, namely the insurance of international peace and security, has developed into a 'broader' interpretation of this function, (so as to include conflicts that are essentially internal), is further borne out by the first referral to the ICC by the UNSC of the situation in Darfur, Sudan.<sup>102</sup> The situation in Sudan between its government and rebel forces is essentially an internal conflict that has resulted in horrific devastation and killings of civilians. There is evidence that the conflict in Sudan has 'spilled over' into the eastern region of neighbouring Chad which undoubtedly further prompted UNSC resolution 1593.<sup>103</sup> The establishment of the ICC, together with the broader interpretation by the United Nations Security Council of its central function of keeping international peace and security, so as to include conflicts that are essentially internal (or at least at its inception), are welcome development to ensure international justice for the violation of human rights under an international rule of law.

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101 Kontorovich 2004:200: The author points out that although this reasoning for the exercise of universal jurisdiction in a case referred to the ICC may be sound, cognisance should be taken of the fact that the United Nations Charter only authorises the Security Council to take measures against threats to 'international peace', that is against aggression between nations, and not crimes committed by a state against its nationals, even if such acts do constitute core crimes within the jurisdiction of the ICC. Thus the Security Council could not have been given delegated jurisdiction in these circumstances. This statement by the author must be challenged on the grounds that the central function of the United Nations Security Council, namely the maintenance of international peace and security, has on various occasions been interpreted as broader than just questions of interstate conflict or aggression. So, for example, both Security Council Resolutions 808 and 827 of 1993, that created the ICTY, stated that the situation in Bosnia at the time constituted a threat to international peace and security. Usually, internal conflicts result in refugee flows into other countries, energy shortfalls and spillages of fighting into neighbouring states. It is then that these initial internal tensions become international in character which allows the UNSC to exercise its powers under Chapter 7 of the UN Charter. See further Bodley 1999:443 and further, Tocker 1994:546 and further, and the case of *Prosecutor v Joseph Kanyabashi* Case No: ICTR 96-15-T- 724: 20 and further.

102 See [www.globalsolutions.org/darfur/2/28/2007](http://www.globalsolutions.org/darfur/2/28/2007). This was the first time the United Nations Security Council referred a situation to the ICC. Sudan is not a member of the ICC, and therefore the United Nations Security Council used its power under Chapter 7 of the UN Charter and Article 13(b) of the ICC Treaty to refer the atrocities in Darfur to the ICC. The resolution 1593, was passed by 11-0, with four members (the U.S, Algeria, Brazil and China) abstaining.

103 See [www.globalsolutions.org/darfur/2/28/2007](http://www.globalsolutions.org/darfur/2/28/2007). Chad fortunately is since the 1st November 2006, a member of the ICC. The source indicates that '(T)he much-needed access to Darfuri refugees that Chad provides to the ICC's Office of the Prosecutor, coupled with Janjaweed atrocities committed in recent months in Chad, make Chad's ratification particularly timely'.

## 8. Conclusion

The above has demonstrated that the historical justification for universal jurisdiction and its current application are due to an age-old awareness of the international community that they share a common interest in the protection of universally held values and norms. The continued rise and development of the universal jurisdiction principle ( so as to protect and develop universally held values and norms) may therefore be viewed as a natural consequence of globalisation. There is no doubt that the continued debate on universal jurisdiction has received further impetus through the expectations that the ICC Statute has placed on member states to ensure the prosecution of those responsible for the violation of international crimes. In this regard, universal jurisdiction provides a tool to prosecute international crimes in cases where the alleged perpetrator(s) is a citizen of a non-member of the ICC as is currently demonstrated by the attempts that are made to prosecute former US Secretary of State, Donald Rumsfeld and other senior US officials in Germany.<sup>104</sup> The establishment and continued development of the universal jurisdiction principle in international law with regard to the prosecution of individuals for the gross violation of international core crimes before national courts especially, is a welcome development to create a credible international legal order. The establishment of the ICC has greatly contributed towards the renewed focus on universal jurisdiction in national legislation. No doubt the expectation of states to enact and to enforce such legislation remains a cornerstone for its effective implementation. We are all the ultimate beneficiaries of a credible international legal order and most importantly, we owe a duty to the countless generations of wasted lives in the process of fostering the international rule of law. With the necessary resolve of states, universal jurisdiction provides a procedural tool to achieve these ideals.

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104 See <http://www.time/nation/article 2/22/2007> and <http://news.bbc.co.uk 2/22/200>.

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