AN IMPERIAL BEAST OF DIFFERENT SPECIES OR INTERNATIONAL JUSTICE? UNIVERSEAL JURISDICTION AND THE AFRICAN UNION´S OPPOSITION

by

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Abstract

This dissertation is a deconstruction of the African Union’s (AU) current opposition to the increasing expansion in universal jurisdiction’s scope and attempts by some Western states to prosecute some government officials of AU member states in exercise of this principle. In seeking to understand the AU’s opposition, the dissertation examines both the doctrinal basis for this “new” universal jurisdiction claim, as well as the politics and the political implications of this development, particularly on conflicts resolution in Africa. On the first question, it finds that the legal basis for the doctrine’s expansion is, at best, indeterminate and, at worst, nonexistence. On the second, it contends that: (1) the current AU’s opposition is a reflection of the broader climate of suspicion that has often clouded the relationship between the African region and the West, on one hand, and between the African region and international law, on the other hand – suspicion created by colonialism and exacerbate by the complicity of international law in the colonial project; (2) a critical examination of the praxis of universal jurisdiction reveals both the politics of exclusion of Third World states and a striking similarity between the principle and the doctrinal technologies employed by the positivist international law in the nineteenth and part of the twentieth centuries to legitimize colonialism; and (3) the inability of states exercising universal jurisdiction to consider the political consequences of their actions could undermine such indigenous approaches that can successfully facilitate conflicts resolution in Africa, such as peace deals and post-conflict truth commissions. In conclusion, therefore, the dissertation argues that one of the lessons to be learnt from this confrontation is that for any international human rights enforcement approach or mechanism to be effective, it must be accepted by states, particularly those who are most likely to be directly impacted by it – in this case the Third World. For this reason, the AU’s apprehension concerning the ongoing expansion
of universal jurisdiction must not be dismissed. This, it is hoped, would ensure the stability of the international system and reduce the current North/South divide on the important issue of criminal enforcement.
Preface

This dissertation is an original, unpublished, independent work by the author, Eberechi Ifeonu.
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<th>Full Form</th>
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<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>CIL</td>
<td>Customary International Law</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GCC</td>
<td>Gulf Cooperation Council</td>
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<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>LURD</td>
<td>Liberians United for Reconciliation and Democracy</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court of Justice</td>
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<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal</td>
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<tr>
<td>IMTFE</td>
<td>International Military Tribunal for the Far East</td>
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<tr>
<td>MODEL</td>
<td>Movement for Democracy in Liberia</td>
</tr>
<tr>
<td>NATO</td>
<td>Non Atlantic Treaty Organisation</td>
</tr>
<tr>
<td>OAS</td>
<td>Organisation of American States</td>
</tr>
<tr>
<td>PICJ</td>
<td>Permanent International Court of Justice</td>
</tr>
<tr>
<td>PSC</td>
<td>Peace and Security Council</td>
</tr>
<tr>
<td>RDF</td>
<td>Rwandan Defence Forces</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>RPF</td>
<td>Rwandan Patriotic Front</td>
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<tr>
<td>RUF</td>
<td>Revolutionary United Front</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<tr>
<td>SIPRI</td>
<td>Stockholm International Peace Research Institute’s</td>
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<td>TWAIL</td>
<td>Third World Approach to International Law</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
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Consistent with projects this size, this dissertation would not have been completed without the help and sacrifice of so many people their appreciation of which is the least I can offer in return. First, special thanks go my primary supervisor: Prof. Benjamin Goold for his intellectual nudging, clarity of thoughts and gracious temperament. I am also exceedingly grateful to the other members of my Dissertation Committee: Professors Erin Baines and James Stewarts for their incisive comments and thoughtful contributions throughout this grueling process.

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Dedication

I dedicate this project to my eldest brother, Mr. Christian Ifeonu without whom I might not have attained this intellectual height.

To God be the glory.
Introduction

Lately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply such that a judgement from less powerful nations indicts those from the more powerful?

– His Excellency Paul Kagame, President of the Republic of Rwanda.¹

International law should not be wielded as the big stick by strong nations used to pummel the weak ones. We are against selective justice. If we have to be fair, the Georgian President, who is being accused by Russia of genocide, must face similar justice

- African Union Chairperson, Jean Ping²

A. CONCEPTUAL FRAMEWORK OF THE DISSERTATION

I. Research Objectives

Since the twentieth century, there has been an intense debate about the concept of universal jurisdiction as the basis for exercise of jurisdiction by states under international law. At the centre of this debate is the question of the legality or the legitimacy of the increasing expansion in universal jurisdiction’s scope, beginning with the Nuremberg trial in 1945, as well as the potential adverse implications of this development both on diplomatic relations among states and, if exercised at the middle of an ongoing armed conflict, on the resolution of such conflict. In the last few decades, especially, this controversy has escalated following the increasing reliance of states, especially in the West, on this principle to justify criminal proceedings against foreigners in their domestic courts for crimes in respect of which these prosecuting states, except for their heinousness, have no national interest.³ Dubbed the

¹ His Excellency Paul Kagame, President of the Republic of Rwanda, Address at the “Face Tomorrow Conference”, Presidents Discussing Tomorrow, Jerusalem, Israel (May 13, 2008).
² “AU Chief Accuses UN Crimes Court of Selective Justice,” Online: <http://www.ngguardiannews.com/Africa/article01/indexn2.htm>.
“modern” or “new universal jurisdiction”\textsuperscript{4} (in distinction to the “old” or “traditional” universal jurisdiction which historically applied only to the crime of piracy), this jurisdiction deals essentially with human rights offenses by relying heavily on another post-war development: the “new customary international law.”\textsuperscript{5} This new customary law derives not necessarily from states practice but from an ill-defined concept of \textit{jus cogens}.\textsuperscript{6} From Brussels to Madrid, and Paris to Munich, some states have argued that only the active involvement of the judicial institutions of nations, in conjunction with international criminal tribunals, can guarantee a world free from man’s darkest impulses.

For the African region, however, this development is fundamentally troubling. In fact, since 2008, the Africa region has been on the offensive. What originally began as a mere doctrinal debate has since degenerated into a disturbing double-barrel opposition – a bloodless confrontation – between the region and the “international community”\textsuperscript{7} with respect to the enforcement of international criminal justice in the continent, both by the International Criminal Court (ICC) in particular, and some Western states in exercise of universal jurisdiction, in general.

\textsuperscript{4}Ibid.
\textsuperscript{6}\textit{Jus cogens} rules, otherwise known as “peremptory norms” of international law, “are non-derogable rules of ‘public policy’” which “renders as voids other non-peremptory rules which are in conflict with them.” See Michael Byers, “Conceptualising the Relationship between \textit{Jus Cogens} and \textit{Erga Omnes} Rules” (1997) 66 Nordic J Int’l L 211 at 211. The extent to which this principle drives the modern universal jurisdiction is examined in Chapter Four.
\textsuperscript{7}Unless otherwise expressly or impliedly indicated, the term “international community” will be used sarcastically in this dissertation to mean “the West.” The concept itself, especially as it affects the increasing deductive approach to the evolution of customary international norms – “the chick that lays the golden egg” of universal Jurisdiction – is of great analytical interest to this dissertation, and is discussed in the later part of this work. Suffice it, however, to say that, except otherwise expressly stated, the phrase, which is used interchangeably with the term, “the West,” refers to the European power and the United States of America. However, an in depth analysis of the term is provided for in pages 31-32 of the dissertation.
In the case of the former, the earliest manifestation of the region’s misgivings occurred in 2005, following the indictment of the then Liberian President Charles Taylor for war crimes committed during the Sierra Leone conflict.\(^8\) In rejecting the indictment, the African Union (AU), Africa’s regional body\(^9\), warned that such an action would “create credibility problems for [Africans] in conducting affairs in [their] continent or elsewhere.”\(^10\) Further tension between the AU and the international community flared up once again in 2009, as a result of the indictment of the Sudanese President Omar Hassan al-Bashir for war crimes and crime against humanity by the International Criminal Court (ICC), with the former accusing the latter of selective justice\(^11\) and of turning Africa into a “a laboratory to test international law.”\(^12\) In its Thirteenth Ordinary Session held in Sirte, Libya, the AU Assembly expressed its deep concern at the said indictment, noting with grave concern “the unfortunate consequences that the indictment has had on the delicate peace processes underway in Sudan.” It also regretted deeply “that the request by the African Union to the United Nations Security Council (UNSC) to defer the proceedings initiated against President Bashir” was not acted upon, and ordered its members not to cooperate with the ICC pursuant to Article 98 of

\(^8\) He has been convicted and sentenced to 50 years imprisonment by the Special Court for Sierra Leone (SCSL). See “Liberian ex-Leader Charles Taylor gets 50 Years in Jail,” online: BBC News Africa <http://www.bbc.co.uk/news/world-africa-18259596>.

\(^9\) Except Morocco, 54 of 55 countries in Africa are members. The newly created Republic of South Sudan is the last to join the Union on July 9, 2011. See online: African Union, <http://www.au.int/en/member_states/countryprofiles>.


the Rome Statute.\textsuperscript{13} It reiterated the right of the AU and its member states “to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent.”\textsuperscript{14}

In the latter case, which is the subject-matter of this dissertation, the AU, beyond resisting the activities of the ICC in Africa, has also launched a sustained opposition against what it describes as the “abuse” of the doctrine of universal jurisdiction by Western states against Africans,\textsuperscript{15} adopting several resolutions and decisions on the issue. For instance, in its Eleventh Ordinary Session, the Assembly of Heads of the AU, the “supreme organ” of the body,\textsuperscript{16} among others things, argued that the political nature and abuse of this concept “by judges from some non-African states against African Leaders . . . is a clear violation of the sovereignty and territorial integrity of these states” with the capacity to “endanger international law, order, and security.”\textsuperscript{17} Furthermore, at the behest of the AU, the United Nations General Assembly (UNGA) placed the issue of universal jurisdiction on its agenda.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{13}Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court,” Doc. Assembly/AU/13(XIII).
\item \textsuperscript{14}Ibid. This line of attack, which technically is one directed against the regime of international jurisdiction (that is, international criminal tribunals), as opposed to universal jurisdiction \textit{simpliciter}, is not within the purview of this dissertation. For a fairly comprehensive work on the topic, see Eberechi Ifeonu, \textit{From Consent to Suspicion: Understanding the African Union’s Emerging Resistance to the Enforcement of International Criminal Justice in the African Region} (VDM Verlag Dr. Müller Aktiengesellschaft& Co. KG, 2009).
\item \textsuperscript{16}Art. 6(2) of the Constitutive Act states: “The Assembly shall be the supreme organ of the Union.” See \textit{Constitution Act of the African Union}, July 11, 2000, 2158 U.N.T.S. 3.
\item \textsuperscript{17}Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, June 30-July 1, 2008, Sharm El-Sheikh, Egypt, Doc. Assembly/AU/Dec. 199 (XI) [henceforth referred to as Decision on the Report of Commission]
\item \textsuperscript{18}See, for instance, \textit{The Scope and Application of the Principle of Universal Jurisdiction} (Agenda item 84) UNGA, Legal – Sixth Committee, online: \texttt{http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml}.
\end{itemize}
II. Universal Jurisdiction: Background Study

Although the theoretical origin of universal jurisdiction is complex and contested, scholars have coalesced around piracy as its progenitor. A pirate could be prosecuted by any nation in whose custody he is, regardless of his nationality or where on the high sea he was captured. Scholars have offered two reasons for this. First, piracy is regarded as a heinous crime, which affects every state on equal measure. Under this argument, it is the substantive nature of the pirates’ act that justifies universal jurisdiction. Second, the high sea is regarded as forming part of the territory of no particular state, thus making it very difficult to exercise jurisdiction based on territory or nationality. For this reason, it is agreed that in order to combat the scourge of the crime of piracy, it is necessary to allow any state that is capable of capturing piracy suspects to prosecute them in its domestic court.

Following the development of universal jurisdiction over piracy, there was no significant development on this principle until the end of World War II. However, at the end of the war, the vanquished Germans and Japanese were prosecuted for war crimes and crimes against humanity by the victorious Allied Power – the United States, the United Kingdom, the Soviet Union, and France – both in international as well as national tribunals, in exercise of universal jurisdiction.

20 Kontorovich, supra note 3 at 190.
21 Ibid at 205.
22 Slaughter, supra note 19 at 169.
The Nuremberg trial is said to mark “a major development in the doctrine of universal jurisdiction”\textsuperscript{25} under international criminal law.\textsuperscript{26} In assuming jurisdiction over the Nazis, the tribunal stated that the crimes with which they were charged were so heinous that they were not only against the victims but against all humanity, and that in setting up the Tribunal, “the signatory powers did jointly what anyone of them might have done singly.”\textsuperscript{27} Nuremberg, therefore, established the principle that a person who is alleged to have perpetrated an international crime could either be prosecuted jointly by humanity before an international court or by any state vicariously, “without regard to the territory where the crime occurred or the nationality of perpetrator or victims.”\textsuperscript{28} Prior to this, extra-territorial jurisdiction of national courts was limited essentially to situations in which the prosecuting state could establish a national interest or connection with the crime.\textsuperscript{29} Over the last few decades, some states have relied on this Nuremberg principle to prosecute non-nationals in their domestic courts, such as Israel in the \textit{Eichmann} case of 1962,\textsuperscript{30} and Spain whose indictment of the

\begin{itemize}
  \item \textsuperscript{25}Ibid
  \item \textsuperscript{26} Some legal scholars have argued that universal jurisdiction was not the basis of the Tribunal’s assumption of jurisdiction. For instance, Morris argues that it was “based on the Allies’ governmental authority within post-war Germany...At a minimum, the Allies, acting in their capacity as the effective German sovereign, consented to the prosecution of the German nationals at the Nuremberg tribunal. A maximalist reading would be that the Nuremberg prosecutions were actually an exercise of national jurisdiction by the effective German sovereign, the Allies.” See Morris, \textit{supra} note 24 at 342-3.
  \item \textsuperscript{27} Henry T. King Jr., “Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent” (2001) 35 New Eng L R 281 at 282
  \item \textsuperscript{28} Morris, \textit{supra} note 24 at 337.
  \item \textsuperscript{29} King, \textit{supra} note 27 at 283. Note that prior to Nuremberg, states exercised universal jurisdiction over the crime of piracy. This was because piracy often consists of heinous acts of violence or depredation, which are committed indiscriminately against the vessels and nationals of numerous states. See Michael P. Scharf, “Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States” (2001) 35 New Eng L Rev 363 at 369. However, such universal jurisdiction was only exercisable against a “pirate” who operated “privately” and for “private gain” and not “privateers” or others commissioned or authorised by states. See \textit{Convention on the High Seas}, April 29, 1958, arts. 15, 16, 13 U.S.T. 2312, 450 U.N.T.S. 82; \textit{Convention on the Law of the Sea}, Dec. 10, 1982, arts.101, 102, U.N. Doc.A/CONF. 62/122, 21 I.L.M. 1261 (1982). Therefore “by excluding states acts from the definition of piracy, the law of piracy was designed to prevent universal jurisdiction over piracy from becoming a source of interstate conflicts.” See Morris, \textit{supra} note 24 at 339.
  \item \textsuperscript{30} \textit{Att. Gen. of Israel v. Eichmann}, 36 I.L.R. 227.
\end{itemize}
former Chilean President, Augusto Pinochet, who was on a visit to the United Kingdom at the time, led to his now famous extradition trial in the U.K. House of Lords.\textsuperscript{31} It was, however, unsuccessfully invoked in Senegal,\textsuperscript{32} and Belgium, particularly both in the \textit{Case Concerning the Arrest Warrant},\textsuperscript{33} and the indictments against some Israeli and United States officials.\textsuperscript{34}

\section*{III. From Inter-State Conflict to Inter-Regional Confrontation: The \textsc{Au} and the \textsc{EU}}

The confrontation between the \textsc{Au} and the \textsc{EU} has not come out of the blue. Two different but related incidences are responsible. In 2008, a French Magistrate Bruguière, indicted nine Rwandan officials, including James Kabarebe (Chief of General Staff of the Rwandan Defence Forces – RDF – the Rwandan national army hitherto known as the Rwandan Patriotic Front (RPF)), Madame Rose Kabuye (Chief of Protocol attached to the Presidency) and Faustin Nyamwasa-Kayumba (Ambassador to India).\textsuperscript{35} Magistrate Bruguière also called on the UN Secretary-General to direct the International Criminal Tribunal for Rwanda (ICTR) to prosecute the Rwandan President Paul Kagame.\textsuperscript{36} The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{33} \textit{Congo v. Belgium} (2002) I.C.J. 3
\item \textsuperscript{35} Jalloh, \textit{supra} note 15 at 30. In view of the fact that some of the victims of the crimes on the basis of which these indictments were issued were French citizens, it seems has been argued that the jurisdiction which France asserted was not pure universal jurisdiction, but other forms of jurisdiction such as, passive personality. \textit{Ibid.}, at 20
\item \textsuperscript{36} \textit{Ibid.}, at 29
\end{itemize}
\end{footnotesize}
second incidence relates to an arrest warrant issued against 40 current or former Rwandan officials, who were members of RDF, by the Investigative Judge of the Spanish Audiencia Nacional, Andreu Merelles.\textsuperscript{37} Relying on universal jurisdiction, Judge Merelles charged the defendants with genocide, crime against humanity and terrorism committed in Rwanda between 1990 and 2002.\textsuperscript{38}

In response, the Rwandan government accused France of “using the indictment to cover up its own responsibility” having “aided and abetted the planners” of the 1994 Rwandan genocide,\textsuperscript{39} threatened to carry out a “reprisal” indictment of some of the officials of the French government who were allegedly involved in the genocide,\textsuperscript{40} broke diplomatic relations with France, and withdrew its ambassador.\textsuperscript{41} Furthermore, Rwanda applied to the International Court of Justice (ICJ), asking it to declare that France “has violated, and is continuing to violate, international law with regard to international immunities generally and with regard to diplomatic immunities particularly” as well as “the sovereignty of Rwanda.” As it related to France’s request that the Rwandan President be prosecuted, Rwanda asked the court to declare that France “has acted in breach of the obligation of each and every


\textsuperscript{38}Article 23(4) Ley Orgánica del Poder Judicial. Initial investigation was based on complaints by Spanish citizens but was later expanded to include crimes allegedly committed against Rwandan and Congolese citizens. Despite the presence of a strong link between Spain and the crimes, the prosecution had to proceed on the basis of universal because jurisdiction on the basis of passive personality principle was unknown to the Spanish law. \textit{Ibid.}, n 2.

\textsuperscript{39}McGreal Chris, “Top Rwandan aide Chooses French Terror Trial” available Online: guardian.co.uk <http://www.guardian.co.uk/world/2008/nov/10/rwanda-congo-kabuye>.

\textsuperscript{40}“Anti-European Protests Rock Rwandan as Germany Extradites Kagame’s aide” Online: Guardian Newspaper <http://www.ngguardiannews.com/africa/article02/indexn2_html?pdate=201108&ptitle>.

member to refrain from intervention in the affairs of other states” and “is under a duty to respect the sovereignty” of Rwanda.\textsuperscript{42} In the Africa region also, there was a sense that the action of these Western states was part of a “legal campaign against Africans” and an attempt to re-colonise the region “through a form of ‘neo-colonial judicial coup d’état’ under the guise of judicial independence and universal jurisdiction.”\textsuperscript{43}

Following the escalation of diplomatic tension between two of its member states and the West, the AU, through its Conference of Ministers of Justice/Attorneys General, established a commission to examine the use of the principle of universal jurisdiction by some non-African states, with particular attention paid to the ongoing expansion of the crimes subject to this principle. The report of the Commission\textsuperscript{44} was adopted by the Assembly of Heads of States and Government (the Assembly), AU’s “supreme organ,”\textsuperscript{45} in its Eleventh Ordinary Session held between the 30\textsuperscript{th} June and 1\textsuperscript{st} July 2008, at Sharm El-Sheikh, Egypt.\textsuperscript{46} As part of its decisions at the end of the meeting, the Assembly decried the blatant abuse of the doctrine of universal jurisdiction by some non-African states.\textsuperscript{47} To this end, it resolved as follows:

(i) The abuse of the principle of universal jurisdiction is a development that could endanger international law, order and security;


\textsuperscript{43}Ibid.

\textsuperscript{44}Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General [hereinafter referred to as the AU Report]. This was first presented and adopted by the Executive Council of the AU in its Thirteenth Ordinary Session, 24-28 June 2008 at Sharm El-Sheikh, Egypt. EX. CL/411(XIII).

\textsuperscript{45}Art. 6(2) of the Constitutive Act states: “The Assembly shall be the supreme organ of the Union.” See Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

\textsuperscript{46}Decision on the Report of Commission, supra note 17.

\textsuperscript{47}Ibid at paras. 3 and 5,
The political nature and abuse of the principle of universal jurisdiction by judges from non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these states;

The abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of states and their ability to conduct international relations;

Those warrants shall not be executed in AU member states; and

There is need for establishment of an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of universal jurisdiction by individual states.48

Furthermore, the Assembly “requested the Chairperson of the AU to table the matter before the UN Security Council (UNSC) and the United Nations General Assembly (UNGA) for consideration”49; requested the Chairperson to arrange a meeting between the AU and European Union (EU) on the issue “with a view to finding a lasting solution to this problem and . . . to ensure that [the] warrants are withdrawn and are not executable in any country”50; and called on all states, especially the EU states, to impose a moratorium on the execution of those warrants until all the legal and political issues have been exhaustively discussed between the AU, the EU and the UN.”51

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48 Ibid at para. 5.
49 Ibid at para 6.
50 Ibid at para 7
51 Ibid at para 8.
Since 2008, the AU has passed other resolutions calculated to both reinforce its position on the issue and also provide some additional grounds for its opposition. In a resolution adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libya, the AU reiterated its previous positions as articulated above and further called upon “all concerned states to respect international law and particularly the immunity of state officials when applying the principle of universal jurisdiction.”\(^{52}\) Finally, in another resolution, the AU, among other things, stressed the importance of speaking with one voice by the African region as the most effective “response to counter the exercise of power by strong states over weak states.”\(^{53}\) It also “requested member states to apply the principle of reciprocity on countries that have instituted proceedings against African state officials.”\(^{54}\) Finally, it called for a meeting with EU to further discuss the issue and, based on the recommendation of its Conference of Ministers of Justice/Attorneys General, proceeded to set up a Commission on the Use of the Principle of Universal Jurisdiction.

IV. The Report of the Commission

In its Report, which was presented to the Executive Council of AU during its Thirteenth Ordinary Session, the Commission noted the controversy surrounding the concept of universal jurisdiction, especially in the context of the scope of its application, and argued that

\(^{52}\) Decision on the Abuse of the Principle Universal Jurisdiction, Doc. Assembly/AU/11(XIII), 3 July 2009, para. 6 [hereinafter referred to as Decision on the Abuse].

\(^{53}\) Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/3(XII), Para. 5.

the concept only applied to “a very limited category of offenses” — of “piracy, crimes against humanity, war crimes, torture under the Torture Convention, and, potentially, genocide under the Genocide Convention.” It noted the commonality, in the literatures, of “general and expansive assertions including a wider range of international crimes, than is actually the case, within the remit of universal jurisdiction.” Part of the reason for this, according to the Report, is attempt by advocates of universal jurisdiction to conflate “treaty-based universal jurisdiction” principle of *aut dedere, aut judicare* (this principle mandates state parties to a treaty to either prosecute or extradite) with pure universal jurisdiction:

> It is doubtful whether the provisions in multilateral conventions as highlighted above which have been regarded as treaty-based forms of universal jurisdiction are in fact universal jurisdiction in *stricto sensu*. The basis for the exercise of the expanded jurisdiction (beyond the accepted territorial and national grounds) proceeds from the agreement of states which are party to the conventions and do not apply to non-party.

On whether universal jurisdiction exist for *jus cogens* crimes or *erga omnes* obligation, the Report argues that the designation of a norm as peremptory in international law (*jus cogens*) does not mean that universal jurisdiction is applicable to such act” anymore than *moral heinousness* a ground for the invocation of universal jurisdiction. Finally, as part of its recommendation, the Report called on African states to embrace the ICC, arguing that, as

56 *Ibid* at para 33 (Emphasis in the original).
57 *Ibid* at para 11.
59 *Ibid* at para 36.
multilateral treaty court, it “is well placed to address the concern . . . over their sovereignty” and that “referring cases to the ICC would check the excesses and whims of individual states.”

As is explore in Chapter Three of this dissertation, apart from the crime of piracy, the idea that there is an agreement on the universal jurisdiction status of crimes against humanity, war crimes, torture under the Torture Convention, and, potentially, genocide under the Genocide Convention, as suggested by the Report, is fairly generous. In the Arrest Warrant case, President Guillaume of the International Court of Justice (ICJ) found that, other than piracy, there is no universality of jurisdiction in respect of international crimes. The Report appeared to have acknowledged this fact when it stated that “the practice of the matter would be dependent on the extent to which states are bound by the various sources of international law (customary or treaty law) providing for universal jurisdiction.”

V. **The AU-EU Expert Report**

In accordance with the resolution of the AU requesting a meeting with the EU to discuss the former’s allegation of abuse of universal jurisdiction by some member states of the latter, meetings of the AU-EU Ministerial Trioka were held on 16 September and 20-21 November, 2008, at Brussels and Addis Ababa, respectively, to address the issue, particularly in the context of the relationship between the AU and the EU. At the end of the meetings, they agreed to set up an advisory Technical Ad hoc Expert Group with the following terms of

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60 *Ibid* at para 91.
reference: to provide a description of the legal notion of the principle of universal jurisdiction, setting out the distinctions between the jurisdiction of international criminal tribunals and the exercise of universal jurisdiction and related concepts by individual states on the basis of their national laws; to outline the respective understandings on the African and EU sides regarding the principle of universal jurisdiction and its application; and to make, as appropriate, recommendations for fostering a better mutual understanding between the AU and the EU of the purpose and the practice of universal jurisdiction. The group was eventually constituted in January 2009, while its final Report was released on 16 April 2009.

Undoubtedly, the Report deserves a lot of credit for its fairly comprehensive doctrinal treatment of the subject of universal jurisdiction, especially its comparative survey of legislative approaches to the issue in the national laws and practices of member states of the AU and the EU. According to the Report, for African states, the basis of jurisdiction over serious crimes of international concern is either customary international law or treaties to

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64 It was constituted by the following independent members: Professor Antonio Cassese (Italy); Dr Mohammed Bedjaoui (Algeria); Professor Pierre Klein (Belgium); Dr Chaloka Beyani (Zambia); Dr Roger O’Keefe (Australia); and Professor Chris Maina Peter (Tanzania). They were assisted a secretariat of the following four officials: Mr Ben Kioko, Legal Counsel; Dr Sonja Boelaert, Legal Advisor; AU Commission European Commission; Mr Fafre Camara, Legal Officer; and Mr Rafael de Bustamante Tello, UN and ICC Desk AU Commission General Secretariat of the Council of the EU. Ibid at 6.

65 Ibid at 12-30. It should be noted that by the Report’s own admission, the survey is not “a comprehensive account of the national law and practice of AU and EU Member States in relation to universal jurisdiction” but only used “to highlight commonly observed and notable features of this law and practice.” Ibid at 12 n. 11.
which states are parties\textsuperscript{66} - which, perhaps, explains why there are some noticeable differences among states on the vexed question of what crimes are subject to universal jurisdiction.\textsuperscript{67}

For the purposes of the dissertation, it is important to highlight the following points in the Report. First, extraterritorial jurisdiction of most African states, in the absence of national link, is based on both treaty and customary international law. Intrinsically in this, therefore, is the primacy of consent in relation to their international obligation. This is very instructive. African states, like all Third World states, being very protective of their independence and sovereignty, like to fully participate in the making of international law, while remaining very sceptical of the so-called “common interest” norms, which they view as “the international law of the European domination of the world, of European colonialism”\textsuperscript{68} Second, African states overwhelmingly insist on respect for the immunity of their government officials from criminal prosecution, an infraction of which is regarded as a violation of their hard earned sovereignty and territorial integrity.\textsuperscript{69} Third, as part of the corpus of international criminal justice regime for crimes committed in their territories, “some African states have opted for alternative justice mechanisms” such as the Truth and Reconciliation commission.\textsuperscript{70} While this issue, in relation to universal jurisdiction, is explored in Chapter Five of this dissertation, suffice it to say that, to the extent that many Western states still consider this mechanism as a

\textsuperscript{66}Ibid at para. 15.
\textsuperscript{67}Ibid at paras. 16-17. This same situation applies to EU member states. For a survey of practice and treaty law in these states, see Ibid at para. 23.
\textsuperscript{68}Hanna Bokor-Szegö, New States and International Law (Budapest :AkadémiaiKiadó, 1970) 53.
\textsuperscript{69}The AU-EU Expert Report, supra note 63 at para. 18(iv); See the Arrest Warrant case, supra note 34
\textsuperscript{70}The AU-EU Expert Report, ibid at para. 20.
travesty of justice, it is very unlikely that they will accept as applicable the principle of ne bis
in dem under these circumstances, thus, potentially triggering of a diplomatic conflict with
the relevant forum state. Finally, while there have been several prosecutions of persons from
Third World countries by the domestic courts of Western countries in exercise of universal
jurisdiction,\textsuperscript{71} no Third World country, especially in African is known to have exercised

\textsuperscript{71} Some of the countries against whom these cases have been instituted are as follows: (1) Afghanistan – \textit{Zardad}, 19 July 2005, Central Criminal Court (England, UK); \textit{Public Prosecutor v H}, ILDC 636 (NE 2007), 29 January 2007, Court of Appeal of The Hague (Netherlands); \textit{Public Prosecutor v Hesam and Jalalzoy}, 8 July 2008, Supreme Court (Netherlands); \textit{Public Prosecutor v F}, ILDC 797 (NE 2007), 25 June 2007, District Court of The Hague (Netherlands); (2) Argentina – \textit{Cavallo}, 1 September 2000, Audiencia Nacional (Central Examining Magistrate No 5) and order of 14 March 2008, Audiencia Nacional (Plenary) (Spain); \textit{Scilingo}, 1 October 2007, Supreme Court (Spain); Bosnia-Herzegovina – See e.g. \textit{Public Prosecutor v Tadić}, 13 February 1994, Federal Supreme Court (Germany); \textit{Javoret v X}, 127 ILR 126, 132, 26 March 1996, Court of Cassation (France); \textit{Public Prosecutor v Cvjetković}, 13 July 1994, Supreme Court/31 May 1995, Landesgericht Salzburg (Austria); \textit{Public Prosecutor v Knesević}, 11 September 1997, Supreme Court (Netherlands); \textit{Public Prosecutor v Djajić}, 23 May 1997, Bavarian Supreme Court (Germany); \textit{Public Prosecutor v Jorgić}, 30 April 1999, Federal Supreme Court (Germany); \textit{X v SB and DB}, 11 December 1998, Federal Supreme Court (Germany); \textit{Public Prosecutor v Sokolović}, 21 February 2001, Federal Supreme Court (Germany); \textit{Public Prosecutor v Kuslijić}, 21 February 2001, Federal Supreme Court (Germany); the Central African Republic – President of the Central African Republic Ange-Félix Patasse (Belgium); Chile – \textit{Chili Komitee Nederland v Pinochet}, 4 January 1995, Court of Appeal of Amsterdam (Netherlands); \textit{Unión Progresista de Fiscales de España} et al. \textit{v Pinochet}, 5 November 1998, Audiencia Nacional (Plenary) (Spain); \textit{Aguilar Diaz et al. v Pinochet}, order of 6 November 1998, Tribunal of First Instance of Brussels (Belgium); \textit{R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147}, 24 March 1999, House of Lords (England, UK); China – See the complaint filed in Germany against the former head of state of China, Jiang Zemin for crimes against humanity allegedly committed while in office. See also \textit{Bo Xilai}, 128 ILR 713, 8 November 2005, Bow Street Magistrates’ Court (England, UK); \textit{Tibet}, order of 10 January 2006, Audiencia Nacional (Plenary) (Spain); \textit{Falun Gong}, 22 October 2005, Constitutional Court (Spain); Côte d’Ivoire – complaint filed against former Ivorian President Laurent Gbagbo in Belgium; Cuba – complaint filed against in Belgium against President Fidel Castro. See also \textit{Castro}, 4 March 1999, Audiencia Nacional (Plenary) and 13 December 2007, Audiencia Nacional (Plenary) (Spain); the Democratic Republic of the Congo – \textit{Public Prosecutor v Ndombasi}, 16 April 2002, Court of Appeal of Brussels (Belgium); El Salvador – \textit{El Salvador}, 13 January 2009, Audiencia Nacional (Central Examining Magistrate No 6) (Spain); Equatorial Guinea – \textit{ObiangNguema et al.}, 23 December 1998, Audiencia Nacional (Central Examining Magistrate No 5) (Spain); Iraq – complaint filed in Belgium against President Saddam Hussein. See also the case report to the Public Prosecutor of Vienna concerning Izzat Ibrahim Khalil Al Doori, submitted by Peter Pilz on 13 August 1999 (Austria); Israel – See also \textit{Abbas Hijazi et al. v Sharon} et al., 127 ILR 110, 121, 12 February 2003, Court of Cassation (Belgium); \textit{Re Mofaz}, 128 ILR 709, 12 February 2004, Bow Street Magistrates’ Court (England, UK); \textit{Ben-Eliezer et al.}, 29 January 2009, Audiencia Nacional (Central Examining Magistrate No 4) (Spain). In September 2005, an arrest warrant was issued in the UK for Major General Doron Almog, alleged to have committed grave breaches of the Geneva Conventions in the Occupied Palestinian Territory, but he fled the jurisdiction to avoid arrest. In May 2008, an application was made in the Netherlands for the arrest of Ami Ayalon, Minister Without Portfolio in the Israeli government, in relation to allegations of torture committed while he was the Director of the GSS but he too managed to leave the jurisdiction; Guatemala – \textit{Menchú Tum et al. v Ríos Montt} et al., ILDC 137 (ES 2005), 26 September 2005, Constitutional Court (Spain); Mauritania – complaint filed in Belgium against
universal jurisdiction against any Western nation.\textsuperscript{72} The impact of power relations in creating this imbalance is explored in Chapter Five of this dissertation.

VI. The UN Debate on Universal Jurisdiction

In February 2009, a group of African states led by Tanzania requested the inclusion of an additional item on the “Abuse of the principle of universal jurisdiction” in the agenda of the 63d session of the United Nations General Assembly (UNGA).\textsuperscript{73} This requested was granted by the Assembly and the matter was referred to the Sixth Committee (that is, the Legal arm of the UNGA),\textsuperscript{74} and states were invited to “submit information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice.”\textsuperscript{75} Debates have been had on the subject since 2009, with further discussions likely to continue in the years ahead.

\textsuperscript{72} Ibid at para. 19.
\textsuperscript{73} See Letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the United Nations Secretary-General (Doc. A/63/237/Rev. 1)
\textsuperscript{74} UNGA/Decision 63/568.
\textsuperscript{75} A/Res/64/117, para. 1.
So far, comments and positions of states on the issue underscore the depth of confusion that has bedevilled the concept. Despite their affirmation of universal jurisdiction as a principle of international law, delegates expressed different view on its scope:

Some delegations stated that it was uncertain whether the principle had become part of customary international law, whereas some other delegations held that that was the case. With regard to the crimes covered under the principle of jurisdiction, some delegations considered that the principle covered crimes both under treaty law, such as war crimes and torture, and other international crimes, such as genocide and crimes against humanity. Some other delegations cautioned against an unwarranted expansion of the crimes covered under universal jurisdiction. Delegations also expressed differing views as to whether the principle required that there be a link between the offender and the State exercising jurisdiction (such as presence in the territory of the State).

Beyond the question of scope, states, especially from Africa also expressed concern over the effect of the principle on the sovereign equality of states, the immunity of state officials, the possible politicization of the principle, the possibility of a unilateral and selective approach in its application, and the potential adverse effect of universal jurisdiction on a fragile peace situation. Furthermore, African states questioned the process by which international norms, the violation of which supposedly gives rise to universal jurisdiction, are created. Speaking for the African Group, Macharia Kamau of Kenya, argued that it is the responsibility of a state relying on the principle of universal jurisdiction to demonstrate that “the alleged custom had become so established that it was legally binding to the other party.”

The dissertation expands on this point, and will further argue that beyond proving the general acceptability of the norm, such a state must also show that the consenting states, at the time of submission of consent, also contemplated vesting each other with universal jurisdiction in the event of

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77 Ibid.
78 GA/L/3415
violation. This is very important because customary international norms are not necessarily coterminous with universal jurisdiction. The emergence of international norm is one thing, enforcement forum is another.

B. TENTATIVE ISSUES AND ARGUMENTS IN THE DISSERTATION

In seeking to understand the AU’s opposition, the dissertation examines this new universal jurisdiction as currently applied by states, and the new customary international law, as well as the *jus cogens* principle on which it relies.\(^79\) As a start, the dissertation situates the current AU’s opposition within the broader context of the climate of suspicion that have continued to define the relationship between the African region and the West, on one hand, and between the African region and international law, on the other hand – suspicion created by colonialism and exacerbate by the complicity of international law in the colonial project. The central argument is that a critical examination of the praxis of universal jurisdiction reveals a striking similarity with the doctrinal technologies employed by positivist international law in the nineteenth and part of the twentieth centuries to legitimise colonialism.

Furthermore, the dissertation questions some of the fundamental assumptions on which the concepts of universal jurisdiction and customary international norms are predicated, one of which is sovereign equality – the transplanted idea of sovereign rule of law and the notion that under the current regimes of both international law-making and international justice, all states are equal, regardless of size, wealth or might. According to this assumption, Third

\(^{79}\) Going forward, except otherwise stated, reference to, or use of, “universal jurisdiction” in this dissertation means the “new” or “modern” universal jurisdiction, as opposed to the “traditional” universal jurisdiction that applied solely to piracy.
World nations are by no means inferior to the powerful Western nations both in terms of generating customary international law and exercising criminal jurisdiction in their domestic courts against the nationals of these powerful states. The dissertation argues that this, at best, is not only an aspiration – since sovereign equality has remained both “one of the great utopias of international law” and also “one of its great deceptions” – but is also not reflective of the heterogeneous twentieth century international community. The entire concept of sovereign equality, in the context of universal jurisdiction, is a facade. Despite the promise of great justice, there is a sense in which the current application of universal jurisdiction reflects its history as part of the “the gentle civilizer” of the Third World nations. By tracing the genesis of this “new” universal jurisdiction to the nineteenth and twentieth (that is, before the independence of most Third World countries) centuries, the dissertation offers a new lens through which to view both the ongoing expansion of the doctrine by some Western states, and the corresponding resistance of African states, who regard such move as legal colonialism.

For the purposes of this dissertation, the inequalities contemplated goes beyond the fear of universal jurisdiction being used by states “as a political weapon aimed at shaming and denouncing other states or influencing their policies in various areas of international

relations.\(^{82}\) It also includes the unwillingness of states to exercise universal jurisdiction “when citizens of allied and/or powerful nations are involved”\(^{83}\) or to discontinue such prosecution when pressurised to do so by these nations.\(^{84}\) As is demonstrated later in this dissertation, the notorious failed attempt in 1992 by Belgium to prosecute top officials of Israeli, Iraqi and the U.S. governments over complaints of human rights violations\(^{85}\) and the more recent refusal of German and French authorities to commence an investigation regarding the role of high-level U.S. officials in the torture of detainees under U.S. control,\(^{86}\) are only but few examples of this selectivity. In fact, since 1994, more than thirty individuals have been tried in national courts on the basis of universal jurisdiction.\(^{87}\) None of them is a

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86 Katherine Gallagher, “Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture” (2009) 7 J Int’l Crim Just 1087 at 1115
87 For a review of the exercise of universal jurisdiction worldwide since 1994, see Joseph Rikhof, “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity” in Morten Bergsmo, ed., Complementarity And The Exercise of Universal Jurisdiction for Core International Crimes (Oslo : Torkel Opsahl Academic EPublisher, 2010) 7, 45–64. According to Charles Jalloh: “between the late 1990s and 2009, many courts, notably in France, Belgium, Britain, the Netherlands and Spain, have investigated and issued arrest warrants against several African leaders and officials. Indeed, it appears that approximately 60 investigations relating to people from Africa, and possibly more, have been opened by European investigating magistrates and prosecutors. These include cases regarding sitting and former heads of state . . . in respect of allegations of genocide, crimes against humanity and war crimes.” Jalloh, supra note 15 at 14. To be fare, this is only part of the entire story. It should also be pointed out that Africa has been the region with the highest number of internal conflicts in the world, and by necessary implication, susceptible to incidences of heinous crimes. See John C. Anyanwu, “Economic and Political Courses of Civil Wars in Africa: Some Economic Results” Online: <http://www.peacestudiesjournal.org.uk/docs/CivilWarAfrica.PDF>, citing Stockholm International Peace Research Institute’s (SIPRI) 2000, Yearbook of World Armaments and Disarmaments (Oxford: Oxford University Press 2000). According to the United Nations, since 1970, well over 30 wars have been fought in Africa, most of which have been internal, as opposed to between states. See Report of the Secretary-General to the UN Security Council: The causes of conflict and the promotion of durable peace and sustainable development in Africa, UN doc. A/52/871-S/1998/318, April 1998, at para. 4. Between 1980 and 1994, 10 out of the 24 most war-devastated countries were in Africa. See Charles C. Jalloh, “Regionalizing International Criminal Law?” (2009) 9:3 Int’l Crim L Rev 445 at 454. However, Paul Zeleza disagrees with the
national of a Western country.\textsuperscript{88} The extent to which this issue feeds into the broader suspicion of neo-colonialism of Africa by the West is explored in Chapter Five of the dissertation.

Predictably, in view of the colonial experience of the African region, part of the dissertation, as highlighted above, concerns the relationship between the doctrine of universal jurisdiction and the principle of sovereign equality. Underscoring the unique attachment of African states to sovereignty – “the hard won price of their long struggle”\textsuperscript{89} for their emancipation – and the understandable sensitivity of the region to any kind of external intervention, judicial or otherwise, Okoye, stated thus: “the new African states have tended to affirm a strong belief in the concept of sovereignty because it provides them with a legal shield against any further domination or intervention by the old colonial powers and also enables them to claim in international relations all the privileges and immunities traditionally associated with nations states.”\textsuperscript{90}

At the heart of the dissertation is also an interrogation of the legitimacy of the international criminalisation process, especially the so-called customary international law and \textit{jus cogens} above assertion which he regards as a distortion of facts calculated by the West to portray African conflicts as peculiar and pathological without rational explanation. He argues that from historical standpoint, ‘Africa has been no more prone to violent conflicts than other regions. Indeed, Africa’s share of the more than 180 million people who died from conflicts and atrocities during the twentieth century is relatively modest: in the sheer scale of casualties there is no equivalent in African history to Europe’s First and Second World Wars, or even the civil wars and atrocities in revolutionary Russia and China.’ See Alfred Nhema & Paul T. Zeleza, ed, \textit{The Roots of African Conflicts: Causes & Costs} (Athens: Ohio University Press, 2008)\textsuperscript{1}

\textsuperscript{88}Ibid


rationale for universal jurisdiction. Over the last few decades, there has been a marked expansion in the number of crimes in respect of which, advocates argue, has risen to the status of customary international law or *jus cogens* for which states are obligated to assume universal jurisdiction. For human rights advocates, the inability of mankind to restrain “its darkest impulses,” which has not only led to an upsurge in armed conflicts but has also led to perpetrations of the most egregious of war crimes, should justify a corresponding expansion in jurisprudence of international criminal justice, especially universal jurisdiction, in response to this new reality. They further argue that these crimes are “so malignant and so devastating that civilisation cannot tolerate their being ignored because it cannot survive their being repeated”; that through multilateral treaties, these crimes have been elevated to

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91 Used by Marks, this phrase seeks to justify universal jurisdiction on the basis of both the seriousness and universality of the international law allegedly violated. In order words, it It draws on the controversial concept of *jus cogens*, a peremptory or overriding norm of international law from which no derogation is permitted.” See Jonathan H. Mark, “Mending the Webb: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council” (2004) 42 Colum J Transnat’l L 445 at 468. Articulating this principle, together with the principle of common interest, Lord Browne-Wilkinson asserted thus:

The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”

Ex parte *Pinochet Ugarte*, supra note 33 at 198


94 According to Mugambi: “Criminal complaints or investigations have been instituted before courts in Australia, Canada, Denmark, France, Germany, the Netherlands, Senegal, Spain, Switzerland, and the United Kingdom for atrocities in Europe, Africa and South America....More controversially, criminal complaints have been filed in Belgium – until recently, the world capital of universal jurisdiction – against current or former leaders of Chad, Cuba, Iraq, Iran, the Democratic Republic of Congo, the Ivory Coast, the Palestinian Authority, Israel, the United States, and other countries.” See Jouet Mugambi, “Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond” (2007) 35 Geo J Int’l & Comp L 495 at 501. Kontorovich, supra note 3 at 184 n. 9.

95 King, supra note 27 at 281, citing Justice Robert Jackson’s “Opening Statement at Nuremberg Trials”
the “apex of the normative pyramid”\textsuperscript{96} for which their perpetrators are regarded as \textit{hostes humani generis} - enemies of all humankind.\textsuperscript{97}

Currently, there is a near state of anarchy with respect to the crimes that are entitled to this status. The Restatement (Third) of Foreign Relations Law of the United States identifies “Piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”\textsuperscript{98} On the other hand, the Princeton Principles identifies piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture as “serious crimes under international law” to which universal jurisdiction applies.\textsuperscript{99} For scheffer, these crimes are war crimes,\textsuperscript{100} genocide,\textsuperscript{101} terrorism,\textsuperscript{102} crimes against humanity\textsuperscript{103} and within this latter group could be found crimes of torture,\textsuperscript{104} slavery\textsuperscript{105} and apartheid.\textsuperscript{106}

\textsuperscript{96}Joyner, \textit{supra} note 93 at 168.
\textsuperscript{100}Scheffer, \textit{supra} note 93 at 395.
It is argued that at the centre of the ongoing expansion of the range of international human rights norms, the violation of which states are purportedly deemed to possess universal jurisdiction, are three further fundamentally misleading assumptions. The first is an attempt by advocates of universal jurisdiction to conflate “treaty-based universal jurisdiction” principle of aut dedere, aut judicaret (this principle mandates state parties to a treaty to either prosecute or extradite) with pure universal jurisdiction. The suggestion that universal jurisdiction can be conferred on states by treaties, though consistent with popular academic view,107 must be taken with extreme caution. This is because these so called “universal treaty crimes,” differ in a fundamental way from universal jurisdiction under customary international law.108 Crimes created by a treaty can only be enforced by or against a state party, not universally, unless the relevant treaty has either been “universally” ratified or, even controversially, the crime(s) which it contemplates is clothed with the garb of jus cogens. The source and legitimacy of state’s extraterritorial prosecutorial authority, in the absence of

<http://library.law.smu.edu/archive/CourseGuides/intlCrimes%20treaties.htm>.
109Geneuss, supra note 37 at 952.
national link, therefore, is derived from the consent of state parties.\textsuperscript{109} Consequently, this specie of jurisdiction is limited in the sense that it only applies to state parties, and in exercising it, the state is not acting as an agent or a representative of the international community.\textsuperscript{110}

The second is an emphasis on the \textit{nature} of the crime. In other words, the right of the forum state to prosecute regardless of any national link is founded on the idea that the nature of the crime is so serious that the “perpetrators may be characterised as enemies of mankind in general, or \textit{hostis humani generis}, and as such, any state has jurisdiction to try them.”\textsuperscript{111} The argument is that since every state has condemned the violation of certain international norms, they may prosecute the perpetrators for their commission.\textsuperscript{112} For this reason, attempt is made “to divorce the assertion of universal jurisdiction from principles of state sovereignty.”\textsuperscript{113} What is equally very instructive is the regularity with which universal jurisdiction advocates attempt to support their position by reference to the crime of piracy – the linchpin of universal jurisdiction and, for hundreds of years, the only crime to which this principle applied.\textsuperscript{114} In seeking to legitimize the emergence of a new norm, they have often argued that

\textsuperscript{109}Ibid at 953.
\textsuperscript{110}Ibid. It must be pointed out, however, that there is one notable exception to this proposition. By reason of near universal ratification by states, obligations created by a treaty could rise to the status of customary international law, thus, subject to the international law principle persistent objector, binding on every state, including non state parties. See Scharf, \textit{supra} note 29
\textsuperscript{114}United States v. Layton, 509 E Supp. 212, 223 (N.D. Cal. 1981) (“[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes.”); S.S. \textit{Lotus}. S. \textit{Lotus} (France v. Turkey) (1927) P.C.I.J. 26
because these crimes are “similar in gravity to the crime of piracy, they must be subject to the exercise of universal jurisdiction as well.”\footnote{115}{Inazumi, supra note 23 at 51.}

But this argument is arguably at odds with the very conceptual origin of the doctrine of universal jurisdiction. The international criminalisation of piracy, which is generally regarded as the progenitor of universal jurisdiction, was never based on its “heinousness” but because pirates operated in terra nullius (that is, in no man's land) - the high sea being regarded as forming part of the territory of no particular state, thus making it very difficult to exercise jurisdiction based on territory or nationality.\footnote{116}{Slaughter, supra note 19 at 169.} It is the tentative arguments of this dissertation that historically, heinousness has never been the basis for universal jurisdiction. It is further argued that moral heinousness, no matter how repugnant to good conscience, cannot be equated with universal jurisdiction – and that the question about whether a crime has risen to the status of universal jurisdiction can only be answered by reference to general international law and the intricacies of international rule-making. In other words, universal jurisdiction is not exercisable simply because a crime is considered egregious but whether; (a) the process by which the crime was elevated to the status of international crime is legitimate; and (b) whether states overwhelmingly support universal jurisdiction in respect of such crime.

\footnote{Reports, Ser. A, No. 10 (Moore, J., dissenting) ("Piracy by law of nations, in its jurisdictional aspects, is \textit{sui generis}.")}. In the Restatement (Second) of Foreign Relations Law (1965), piracy was listed as the only universally cognizable offense. The Restatement (Third) of Foreign Relations added several other universal crimes, such as war crimes and apartheid. See also The \textit{RESTATEMENT}, \textit{supra} note 99 at 404.\footnote{\textit{Inazumi}, \textit{supra} note 23 at 51.}
The third relates to what is referred to in this dissertation as the increasing “piratization of crimes” by some states – purportedly acting as agents of the international community – to justify their assumption of jurisdiction over such crimes, particularly in cases where there is no national link; to legitimize their taking unlawful measures against perceived enemies; to rationalise their unlawful and inhuman treatment of prisoners such as the terrorists; or most importantly, to obviate the fundamental necessity of proving the democratic participation of states in the emergence of the new international norm. In the Eichmann case, the Supreme Court of Israel, after noting that a “[s]ta\e which prosecutes and punishes a person for piracy acts merely as the organ and agent for the international community”\footnote{Eichmann, supra note 30 at 300 (emphasis added).} went further to hold that this rationale applied equally to the exercise of universal jurisdiction for crimes against humanity: “The State of Israel... was entitled pursuant to the principle of universal jurisdiction and in the capacity of guardian of international law and an agent for its enforcement, to try the appellant.”\footnote{Ibid at 304.} Furthermore, The Sixth Circuit of the United States Court of Appeal also relied upon this rationale in Demjanjuk v. Petrovsky: “The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations.”\footnote{Demjanjuk, 776 F.2d at 583.} In 1985, for instance, a U.S. Senator Arlen Specter relied on the piracy analogy to argue that terrorism had reached the status of customary international law to which the concept of universal jurisdiction must be applicable: “today’s international criminals have left the high seas for airplanes and trucks loaded with explosives. But the threat posed by terrorists is just as universal as that once posed by pirates, and, like piracy, terrorism should be prosecuted as a ‘universal crime
against humanity.‖ The dissertation examines this agency rationale and argues that despite its scholarly appeal, this doctrine is unknown to the principle of extraterritorial jurisdiction under international law.

More importantly, the dissertation argues that the claim of judicial altruism by powerful nations is not new. At the Nuremberg trial, for instance, the victorious Allied power claimed to be acting on behalf of the international community, even as they relied on a set of crime that was, at least from the perspective of customary international law, unknown to the same community they purported to be representing. In his opening statement at the trial, Justice Robert Jackson, the U.S. chief prosecutor, stated that, “the wrong which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilisation cannot tolerate their being ignored because it cannot survive their being repeated.” The Tribunal, too, seem to have corroborated this assertion when it held that in setting up the Tribunal, the signatory powers did jointly what anyone of them might have done singly. This assertion, however, has been criticised by a number of scholars on so many grounds, one of which is that the trial was nothing short of collective vengeance by the victorious Allied power meted against their vanquished Germans. The Allies were not only selective in terms of “who” to prosecute, but also in relation to “what” to prosecute.

121 Kings supra note 27 at 281-282.
122 Ibid at 282
123 As another hypothesis, it has also been argued that rather than universal jurisdiction, the jurisdiction of the Nuremberg tribunal was based on the Allie’s governmental authority within post-war Germany – as an effective German sovereign. See Morris, supra note 24 at 338. This appears to be corroborated by the text of the Berlin Declaration of June 5, 1945: “The Government of the United States of America, the Union of Soviet Socialist Republic and the United Kingdom, and the Provisional Government of the French Republic, hereby
For instance, not only was aggression – one of the “supreme crimes” for which the Germans were prosecuted – not a crime known to international law at the time,\textsuperscript{125} but was criminalised, \textit{ex post facto}, and justified on the bases of the existence of an amorphous conscience of the ‘international society.’\textsuperscript{126} Even liberal scholars concede that the Nuremberg and Tokyo Charters “created new law, an exception to the prohibition on \textit{ex post facto} laws, but insist that “the principle of non-retroactivity was trumped by a higher principle of morality” violated by the atrocities of the Axis leaders.\textsuperscript{127} The dissertation finds a nexus between this argument and the one made by the advocates of modern universal jurisdiction, and argues that as seductive as this argument might seem, the idea that prosecution by states could be justified based solely on the “immoral character” of the act is, a troubling proposition.

Through the lens of international politics, this dissertation examines the concept of “international community” as well as law making process within it. Special attention is paid to the historical evolution of this concept, which is generally accepted to be traceable to the Peace of Westphalia of 1681 - the birthplace of the modern international law.\textsuperscript{128} What is

\begin{itemize}
\item Muhgalu calls this the “internal selectivity of international justice.” See Muhgalu, \textit{supra} note 85 at 7
\item Slaught, \textit{supra} note 19 at177.
\end{itemize}
revealed by this history is that “international community,” which was originally referred to as the “family of nations” was conceived as a “club” of exclusively Western states, and for a long time was relatively homogenous with its members having a common ideological and religious background.\textsuperscript{129} Thus, the relationship between members of this group and the rest of the world was essentially vertical with the former holding the reign of power and determining applicable laws,\textsuperscript{130} until the beginning of the twentieth century when the relationship became supposedly horizontal following the expansion of the “club” in the aftermath of the “emancipation of the Afro-Asian world, the achievement of independence by countries which for centuries had colonials status.”\textsuperscript{131} In spite of this transformation, however, what has occurred is what Koskenniemi refers to as international law’s pull by the contradictory forces of inclusion and exclusion\textsuperscript{132} – a development which might help to explain why the shape of “international community” has continued to remain so unclear and its “interest so ill-defined that little restraint is imposed on actions in its name.”\textsuperscript{133} It is therefore the tentative argument of this dissertation that the phrase, “international community”, as currently relied on by some powerful states to assert universal criminal jurisdiction “has become euphemistic collective noun . . . to give global legitimacy to actions reflecting the interest of the US and other Western powers”\textsuperscript{134} and for failing to reflect the current democratisation of the community of

\textsuperscript{129} Antonio Cassese, \textit{International Law in a Divided World} (New York: Oxford Universal Press, 1986)
\textsuperscript{32.}
\textsuperscript{130} B. V. A. Röling, \textit{International Law in an Expanded World} (Djambatan – Amsterdam, 1960) xiv-xv.
\textsuperscript{131} \textit{Ibid} at xv.
\textsuperscript{132} Marti Koskenniemi, \textit{supra} note 81 at 139
\textsuperscript{133} Krisch, \textit{supra} note 80 at 142. For instance, even without authorization by the United Nations, the North Atlantic Treaty Organisation (NATO) justified its use of in Kosovo mainly by reference to the interest and on behalf of the “international community.” \textit{Ibid}.
nations with the inclusion of Third World states, especially in the area of international law making.

Law-making is of fundamental importance to an international order regime that is dominated by territorial states, but also to the issue of universal jurisdiction. Doctrinally speaking, universal jurisdiction is said to apply to violations of international norms either consented to by the majority of states as inductively discernible from their practices and opinion juris, or that have risen to the level of jus cogens – the so called “common interest crimes” – the identification of which, in contrast, often relies on deductive reasoning. Theoretically, the sovereign equality guaranteed by the Charter of the UN to each of its members is meant to translate into equal democratic participation of every state in the formation of these international norms, at least in the case of customary international norms.

The dissertation questions the legitimacy of the process by which international norms are created, examines the role of power in law-making within the international arena, and highlights a continuing pattern of exclusion of the practices of Third World states from generating international norms. It argues that although the tremendous upsurge in the number of Third World countries since the last century has engendered a quantitative change in the membership of the international community, it has not, contrary to the assertion of

Wang Tieya\textsuperscript{138}, translated into any significant qualitative change to the process of international law-making. The absence of procedural legitimacy of customary international norms not only helps to fuel some feeling of injustice but also creates the impression that they represent the values of the West\textsuperscript{139}. The so called “universal” or “common interest” norms, to the extent that they were imposed on the Third World, represents one of the continuing structures of colonialism – the civilizing mission of international law.\textsuperscript{140} The rhetoric of acting on behalf of the international community or in the interest of mankind touches the heart of world politics. It speaks to the penchant of some powerful states to subsume mankind under themselves, so that their enemies necessarily become enemies of mankind.\textsuperscript{141}

The dissertation further examines the increasing development of customary international law, especially by some international criminal tribunals using deductive approaches – interpretive techniques referred to by Simma and Paulus as “modern positivism”.\textsuperscript{142} Drawing from the works of both Patrick Kelly\textsuperscript{143} and Prosper Weil\textsuperscript{144}, the dissertation, therefore, argues that in view of its procedural illegitimacy, the history of exclusion of the Third World states in its

\textsuperscript{138} He argues that such an increase in number has also led to a corresponding increase in qualitative changes. See Wang Tieya, “The Third World and International Law,” in Macdonald & Johnson, \textit{supra} note 136 at 957.


\textsuperscript{141} \textit{Ibid} at 175.


\textsuperscript{143} Kelly, \textit{supra} note 139

development, the massive expansion of the international community, the continuing
elusiveness of its outer margins, and most importantly, the seriousness of the norms which it
contemplates, in relation to the principle of state sovereignty, customary international law-
making should be subject to a participatory democratic process by the UN General
Assembly.

Furthermore, the dissertation discusses the evolution of the principle of universal jurisdiction
and highlights the potential dangers surrounding its application, particularly its capacity to
since the last century has led to the emergence of several AU-brokered peace initiatives
aimed at resolving regional conflicts and fostering reconciliation between parties involved.
The amnesty provision usually contained in some peace deals between governments and
rebel groups and those granted by Truth and Reconciliation Commissions are only but few
examples. The concern therefore is that states in exercise of universal jurisdiction, as
opposed to the United Nations\footnote{For instance, Art. 16 of Rome Statute states that “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” See the Rome Statute of the International Criminal Court, 1998, online: <http://untreaty.un.org/cod/icc/statute/romefra.htm>.}, are less likely to defer to these regional political
arrangements – a situation which could potentially have an adverse implication on what
could be a fragile situation.\footnote{Broomhall, supra note 103 at 417}
As may have become evident, this dissertation is not limited to strictly legal questions. An important aspect of it deals with political matters. The reason for this is obvious. Any study of international law, especially the type contemplated in this dissertation must deal with the political as well as other forces involved. International law-making and enforcement processes are patently political, and to ignore this reality will obviously undercut the seriousness of the issue at stake. Louise Arimatsu piquantly alluded to this when she stated thus:

The principle of universal jurisdiction marks a pivotal point at which international law and national law intersect, where the ‘twin contradictions’ between the rights of states and human rights confront one another, and law and politics collide. Disputes that arise between different parties in respect of the scope and applicability of the principle therefore cannot be resolved exclusively by reference to the law, though that is not to under-estimate the need for further clarity of the law.148

C. OVERARCHING RESEARCH QUESTIONS AND SOME CAVEATS

The research will ask, and attempt to answer, the following questions: First, what is the character of the tension between the AU and the West as it relates to the principle of universal jurisdiction, and what is the continuing significance of the colonial project in the AU’s perception of this principle? Second, how legitimate is the process by which crimes are elevated to the status of customary international law or jus cogens – the linchpins of the new universal jurisdiction – and to what extent is this process reflective of the existing power imbalance between the West and the Third World. Third, in the case of the Africa region whose susceptibility to internecine conflicts has often led to the adoption of some “uniquely

African” conflict resolution approaches by the AU, to what extent does universal jurisdiction potentially compromise these peace efforts and how much does this fear contribute to the ongoing AU’s opposition? Specifically, where the AU brokers a peace deal between a regime and a rebel group, for instance, which involves amnesty as an incentive for cease fire, what is the likelihood that a non-African state, at least for a period of time, will defer to the political judgment of the AU?

In conclusion, it is important to enter some caveats as to the scope and content of this study. First, despite broaching several topics, this dissertation does not pretend to having comprehensively and exhaustively explored the issues. For instance, despite its discussion of universal jurisdiction, the dissertation focuses mainly, not on the “classical” or “traditional nature of the doctrine but on the “modern” or “new” theory (that is, the recent expansion in its scope). And even so, to the extent that this examination is conducted through the narrow prism of the AU’s opposition, the scope of this discussion is decidedly limited.

Furthermore, this dissertation does not provide or recommend what crimes should or should not be accorded the status of customary international law or jus cogens, for the purposes of universal jurisdiction. However, it insists that given the nature of these crimes, their creation must be supported by the generality of states as well as conform with the international procedural legitimacy advocated by TWAIL scholars for international law making.

Finally, except to assume that the historically incontestably shared experience of marginalisation and injustice by states that today identify as Third World has created a
common sensitivity to any manifestation of power by the West in their relations as members of the international community, the dissertation’s primary focus is the African region. This point is very important considering that throughout this dissertation, the phrase “Third World” is used either in this broad sense or interchangeably with another phrase, “the African region”, thus, the question of which of the meanings is actually intended has to be determined by reference to the context in which it is used.

D. EXPECTED FINDINGS

The expected findings of this dissertation are that:

(a) Despite its moral appeal and the good intention of its advocates, the ongoing expansion of universal jurisdiction through the inclusion of crimes the customary law or *jus cogens* status of which remains contested is illegitimate. In international law, the *nature* of a crime, without more, is not sufficient to confer the forum court with criminal jurisdiction over a foreigner, except such is founded either on the existence of a national link or the consent of the foreign state.

(b) Beyond the above, the character of the AU’s opposition to the new universal jurisdiction, especially as exercised by non-African states, can only be understood fully if examined in the context of the historical suspicion of the African region towards the West, founded on the former’s many decades of colonial subjugation by the latter. While colonialism as a subject of theoretical inquiry has been well covered by the literature, of interest to this dissertation is the extent to which international law concepts and doctrines, such as the ones under review in this dissertation, were developed and relied on, and in some cases modified, qualified or discarded with, by
the colonial powers simply to justify their conquest. For instance, and as argued in Chapter One, sovereignty, as an international law concept, was developed not only to distinguish the “civilised” nations of Europe from the “uncivilised” Third World nations, but also to justify the inapplicability of international law to these non-Western states. In order to rationalise colonialism and deny the colonised the rights and protections guaranteed by natural law, therefore, international law adopted positivists’ jurisprudence in the nineteenth century by which what was considered international law became what a few powerful states said it was. Thus, it is against the backdrop of this history that the ongoing attempt to expand the scope of universal jurisdiction by some Western nations is viewed with the greatest suspicion by the African region.

(c) International criminalisation process, like many aspects of international law, has continued to be irresponsible to the changing dynamics of the global order following the independence of many Third World states and their concomitant admission as members of the international community. For instance, customary international law – one of the linchpins of the new universal jurisdiction and another pre-twentieth century (that is pre-independence) concept developed by the legal positivists, while empirically defensible in the past when only a few powerful Western states were the subjects of international law, has increasingly become a myth in the current dispersed international context. Restrained by the complexity of proving, by inductive method, an overwhelming state practice and opinion juris in favour of universal jurisdiction over some of the so-called “international crimes,” human rights advocates and some international judges have turned to the concept of jus cogens or “common interest”,

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which definition and scope has remained unclear, to justify their theory of new universal jurisdiction.

(d) Considering the colonial experience of the African region in the hands of the West and the unique sensitivity concomitant with it, the legitimacy of both the process of international criminalisation and prosecution is sine qua non for the region’s cooperation in the fight against impunity. To this end, the UNGA offers an excellent democratic environment for the creation of international crimes based on consensus.

E. LITERATURE REVIEW

Since no scholar known to me has treated the core issues that are addressed in this dissertation, the originality of the project is guaranteed. However, as is demonstrated shortly, it will be impossible to effectively explore the issues set out herein without strong reliance on the existing literatures. In fact, the dissertation treads on familiar ground since available literature on universal jurisdiction is both quantitatively and qualitatively enormous. To be sure, what is considered the core subject of this dissertation may constitute an insignificant part of someone else’s.

As a matter of fact, it is hardly original to theorise about the evolution of universal jurisdiction and the factors that provided fillip for its emergence; or to suggest that universal jurisdiction has become one of the means of enhancing the prospect for bringing indicted war criminals to justice; or to assert that states’ exercise of universal jurisdiction is
complimentary to that exercised by the ICC. The literature is replete with such theories. It is also not novel to address the question of whether the presence of an alleged war criminal is required in the forum state for universal jurisdiction to be exercised. Nor is it new to argue that growing state practice of universal jurisdiction seems to suggest a consensus that exercising treaty-based universal jurisdiction over nationals of Non-Party States does not violate the Vienna Convention on the Law of Treaties; nor is it strange to argue to the contrary. Furthermore, it is not novel to highlight attempts made by some states to promote accountability through the exercise of universal jurisdiction, and the political dynamics that trumped some of those efforts. Contemporary international law scholars have written extensively on these issues.

On the specific issue of the ongoing AU’s opposition to universal jurisdiction, some scholars, too, have written on the subject. Charles Jalloh’s excellent article distilled the AU’s stance into three primary concerns: the selective targeting of African leaders; politicisation of universal jurisdiction by the European courts leading to the denial of immunity of African officials; and the potential obstruction of economic and political growth of the African region as a result of the indictment of African officials by the West. While dismissing the claim of selectivity, he urged the West to “strictly comply with the requirements of customary international law on immunities when pursuing African cases” as a way of avoiding, or at

149 Brown, supra note 97; Joyner, supra note 93; Broomhall, supra note 102; Sadat, supra note 92.
150 Rabinovitch, supra note 111.
151 Scharf, surpa note 29.
152 Scheffer, supra note 93.
153 Halberstam, supra note 34; Mugambi, supra note 94; Roth-Arriaza, supra note 31; Reed, supra note 32.
154 Jalloh, supra note 15 at 13-14.
least minimising, accusation of imperialism.\textsuperscript{155} Karinne Coombes, after analyzing some of the objections against universal jurisdiction, including the AU’s, argued that “these criticisms—individually and collectively—do not justify states abandoning universal jurisdiction,” provided that states adopt “reasonable restrictions on their recourse to universal jurisdiction as a basis for prosecution.”\textsuperscript{156} One of such restrictions, she argued, is to make every charge brought by a private person under this principle subject to the “approval of the Attorney General (or similar office) or a special prosecutor.”\textsuperscript{157}

However, the originality of this proposed dissertation consists in its use of the ongoing AU opposition to:

(a) Highlight the role of colonialism-induced old resentment of the African region towards the West in the ongoing confrontation between them on the issue of universal jurisdiction

(b) Expose the obsoleteness of some aspects of international law, especially the international criminalisation process, revealing a continuing and systematic pattern of exclusion of Third World states in international law-making.

(c) explore the implications of states’ exercise of universal jurisdiction on conflict resolution and sustainable peace in Africa.

(d) demonstrate the imbalance in the capacity of states to exercise universal jurisdiction and the vulnerability of states of African region in respect of its exercise.

\textsuperscript{155}\textit{Ibid} at 5.

\textsuperscript{156}Karrine Coombes, “Universal Jurisdiction: A Mean to End Impunity or a Threat to Friendly International Relations” (2011) 43 Geo Wash Int’l L Rev 419 at 457.

\textsuperscript{157}\textit{Ibid} at 459.
(e) make a modest recommendation for future research aimed at ensuring the least possible confrontation between the African region and the West with respect to the enforcement of international criminal justice in the region.

This is the sense in which this proposed dissertation hopes to make contribution to knowledge and to contribute to the scholarly understanding of how universal criminal accountability could be achieved with minimal opposition from the Third World and without compromising the peace and security of the African region.

F. THE METHODOLOGY OF THE STUDY

From the beginning, it must be stated that even though universal jurisdiction, which is the subject of this dissertation is one that is exclusively steeped in a branch of international law known as international criminal law, the scope of this study is not confined to such boundary. In this sense, it relies on, and benefits from, the existing literatures in other fields of knowledge. For a start, the methodology adopted in this research is predominantly analytical. The question of states obligations and the legality of international norm cannot be addressed without analyzing Article 38 of the Statute of the International Court of Justice and Article 53 of the Vienna Convention on the Law of Treaties. The former provides, in part, that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

   (b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognised by civilised nations;

(d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.  

The latter, on the other hands, provides that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Beyond analyzing these provisions, the dissertation also draws extensively from secondary materials for doctrinal guide, including the jurisprudence of international and national courts. Part of the aim is to use the analyses as a context to reflect on the legitimacy of the ongoing expansion in the scope of universal jurisdiction.

As earlier stated, the dissertation is also interdisciplinary. Attempt to answer some of the research questions raised above inevitably requires a foray into other disciplines such as the social science. For instance, such issues as the relationship between the African region and

158 Statute of the International Court of Justice, Article 38, Online: International Court of Justice, online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

the West, the role of power in international law-making, and the African states’ rather unique sensitivity to Western judicial interference can only be properly understood by reference to international politics, international political economy, and international relations. For this reason, therefore, the dissertation draws from some of the literatures in these areas, especially those that have studied the behaviour of states in their relations inter se.

Steeped in the “science of states’ behaviour” and international politics, the dissertation draws from realism – a choice which is not made arbitrarily but based on a conviction that it will advance the theoretical inquiry of this dissertation on these issues\(^\text{160}\) since it has not only dominated the field of international relations theory,\(^\text{161}\) but remains one of the legal theories with substantive view about how international law works. One of the characteristic\(^\text{162}\) elements of modern realism\(^\text{163}\) is its use of power concept to explain the dynamics of international law and politics.\(^\text{164}\) According to this school, “international relation is the struggle for power and peace,”\(^\text{165}\) while state behaviour in their relations, inter se, can be


\(^{162}\)Hathaway and Koh summed up the core assumptions of realism thus: (1) states are key actors in world politics; (2) states can be treated as homogenous units acting on the basis of self-interest; (3) analysis can proceed on the basis of the assumption that states act as if they were rational; and (4) international anarchy. See Oona A. Hathaway & Harold Hongju Koh, Foundations of International Law and Politics (New York: Foundation Press, 2005) 4-5.

\(^{163}\)By “modern realism”, this dissertation contemplates a body of works beginning with E. H. Carr’s seminal publication on international relations, The Twenty Years Crisis, 1919 – 1939, published in 1939, up to the classic modern realist works of H. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (1949), and G. Schwarzenberger, Power Politics (1951).


\(^{165}\)Mansbach and Vasquez, supra note 162 at 5.
determined by reference to power and interest.\textsuperscript{166} Pointing to the absence of a central government to which states are subject,\textsuperscript{167} realists argue that the realm of international relations is dominated by “relentless security competition” among states under the condition of “anarchy.”\textsuperscript{168} Under this situation, it is the responsibility of states to provide for their own individual defence and security since no one else will do such for them. Failure to do this could be fatal: “they are likely to pay a steep price... because if an aggressor appears at the door there will be no answer when they dial 911. That is a risk few states are willing to run. Therefore, prudence dictates that they behave according to realist logic.”\textsuperscript{169}

For realists, international law is merely a pawn in the political chess board of the most powerful states, perpetually reflecting the reality of power imbalance among nations. History, they argue, is replete with concrete instances in which the fundamental norms of international law have been altered by a mere change in power relations.\textsuperscript{170} A state that attains a hegemonic status, therefore, is instantly rewarded with the power to promote and formulate a new international legal order, reflective of its dominance and preference in the global politics.\textsuperscript{171} For this dissertation, therefore, International norms and ideas, therefore, are a function of power. In the context of international criminal justice, this dissertation argues that

\textsuperscript{169} Mearsheimer, \textit{supra} note 168 at 51.
\textsuperscript{171} Byers, “The Complexities”, \textit{ibid}.
states will support either trials or the elevation of specific crimes to the status of customary international law or *jus cogens* only to the extent that they expect to gain from, or are not adversely affected by, them, while opposing those that they consider as disadvantageous to their interests. For example, after the World War II “guns [fell] silent,” the victorious Allied states “proposed new international rules and mechanisms of cooperation” reflecting their interests. An example, arguably, is their criminalisation of aggression. But realising the potential for future litigations against them for their various acts of aggression in the Third World, the Allies “develop[ed] the crime of aggression in a way that made it highly specific to the Nazi State,” by including conspiracy as an element of the offense. Thus “the crime of aggression was reworked into a norm applicable to states captured by a vicious cabal of conspirators intent on regional or global domination.”

Realism offers an insight into the attitude of states in the event of cognitive dissonance between immediate justice and peace. Their decision to proceed with prosecution depends on whether such a move will have an adverse effect on the negotiation of peace settlements, and the maintenance and consolidation of stability. Regional bodies, too, react in the exact same way. They will usually not support criminal trial if they determine that such will

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174 *Ibid*.
engender regional instability. For the dissertation, the above theory offers not only a lens through which to view the AU’s resistance, but highlights the danger inherent in the nature of the new universal jurisdiction in view of its lack of restraint.

Situating itself within realism, the dissertation further argues as follows: (1) In the context of *jus cogens* or the so-called common interest norms, the presumption that states not only agree to be bound by some abstract non-treaty normative principles but also, in case of violation, deemed to endorse universal jurisdiction over such norms is the height of what Carr referred to as “international idealism” – the belief that “peoples and their nations [are] motivated by normative values and aspirations, not merely by a desire to marshal power and defend material interest.” Although there is nothing inherently wrong with idealism in international politics, the dissertation argues that it remains, at best, aspirational, and therefore, the above assumption fails to account for other factors, such as power inequality and political interest; (2) the current assumption of universal jurisdiction in respect of certain crimes has failed to take seriously the contested nature of international norms, the right enforcement mechanism and the likelihood of abuse; (3) the current process by which norms are elevated to the status of international customary law feeds into realist image of international law – as lacking the contributions of the Third World; and (4) except there is an improved democratic participation in international law-making through the UNGA, terms such as “*jus cogens*”, “universality”, “international community” etc. will continue to be viewed by the Third World as what the realists described as “a matter of linguistic

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177 Ibid.
178 Goldsmith & Krasner, *supra* note 167 at 47.
convenience,”179 used by powerful states to mask their pursuit of power. In the context of law-making, there is a legitimate suspicion that “each gesture of greater inclusion in the ‘international legal community’ has been accompanied by a gesture of exclusion”.180

The realist's portrayal of international law is not without some legitimate criticisms. In the early twentieth century, for instance, liberal internationalists rejected the realist’s portrayal of the world as perpetually condemned to a state of jungle in which the strongest win, arguing that “the jungle could be turned into a zoo, with legal institutions acting as the zookeeper.”181 In response, the realists argued that the liberals were wrong to think that the thirst for power and glory by the more powerful nations could be tamed by legal institutions, and that the zoo metaphor was highly misplaced simply because “the strongest animals would never allow themselves to be captured and caged.”182 Among other criticisms,183 realism has also been accused of being “unable to explain the strong commitment of the Third World to international law”184 despite its obvious power disadvantage. In other words, if international law is such a puppet of powerful nations, why have Third World states continue to identify with it? Therefore, to not only answer the question but also examine the

183 Some of the criticisms are that: (1) it does not explain why, in the face of other cheap alternatives, powerful states take the trouble and incur high cost of establishing tribunals; (2) it fails to explain why powerful states pursue criminal trials even when they have no real strategic interest; and (3) it has been unable to account the reason for preferring trial even in the face of its potential to compromise stability. Ibid., at 14-15.
184 Scott, supra note 164 at 314.
broader issue of the attitude of Third World to international law, which is central to the understanding of the AU’s resistance, the dissertation adopts the technique of Third Approach to International Law (TWAIL) scholarship. An in depth discussion of TWAIL is contained in Chapter Two.

The dissertation is also historical. In fact, it is in this key area that this dissertation is fundamentally different. Simply stated, it takes history, especially that of international law seriously. It traces the evolution of international law, revealing in the process its pattern of exclusion of the Third World and the various ways in which it was used to justify colonialism – “how the imperial system marched ahead without let or hindrance from international law.”

Jutta Brunnée& Stephen J. Toope put it most eloquently thus:

These origins [of international law] are cause for concern for contemporary internationalists. International law as it developed in the nineteenth and twentieth centuries was inextricably linked to social and political processes of domination and control. It was accorded all too easily with raw power, and often seemed to be the mere handmaiden of the national interests of “great powers.” This legacy should not be ignored, but neither should it preclude the re-imagining of international law project today.

Specifically, the dissertation situates the AU’s resistance within the broader relationship of mistrust between the African region and the West as a result of this colonial encounter, and argues that from the ashes of this encounter is the emergence of a sense of deep suspicion – a sense of doctrinal paranoia – in the region against both the “international community” and international law, with enormous adverse implication on their relationship. Abdulgani

\[186\] Brunnée & Toope, supra note 181 at 3.
captured this thus: “it is because we [Third World] have such strong suspicion of colonialism that we look closely at all world events, and even at things which on the surface seem to be nothing more than examples of international cooperation and national generosity. Lest any action should be a devise for continuing an old domination in a new form, this vigilance is very widespread. It might be regarded as an inter-continental characteristic.”  

It is for this reason, therefore, that such generalising international law concepts as “universality,” “common interest,” “international community,” etc. on which the argument for the new universal jurisdiction is predicated are viewed as vocabularies of empire, since they were part of the concepts relied on by the West to justify the subjugation of the Third World. As Berman succinctly put it in the case of “international community,” “there have been many moments when the identity of an “international community,” too, has emerged as a back-formation of its relation to its imperial periphery”.  

To the extent that the dissertation examines the effect of the contemporary asymmetry in power between the “North” and the “South” through the prism of the colonial experience of the latter in the hands of the former, particularly in the context of international law-making, the dissertation is postcolonial. Postcolonial theory believes that colonialism takes different forms of which territorial occupation is only one, connects the present with the past, transforms the present “out of the clutches of the past” and, without privileging the colonial, is interested in understanding the extent to which the current power structure between the

188 Berman, supra note 180 at 1529.  
developed and the underdeveloped states is a by-product of colonialism.\textsuperscript{190} Post colonialists debunk the assertion that “to stress the evils of colonialism and imperialism when these are already discredited and dying is to keep alive old resentment,”\textsuperscript{191} arguing, instead, that the end of formal colonial rule “was simply the end of a phase in the history of imperialism, not of imperialism itself.”\textsuperscript{192} Berman captures this more clearly thus: “claim of an historical break can only work if you treat imperialism as a single phenomenon that disappears with the death of specific players and legal forms. But decolonisation was only the end of a specific form of imperial domination, one that only took definitive shape in the late 19\textsuperscript{th} century.”\textsuperscript{193}

For the dissertation, therefore, there is a structural continuity of imperialism in international law, especially in law-making. For instance, the increasing shift from sovereign consent to international community interest, as one of the bases for the modern universal jurisdiction perpetuates inequality and “divert attention from the consequences for distribution of power and wealth of both old and new regimes.”\textsuperscript{194}

G. SCHOLARLY SIGNIFICANCE

As the overarching questions posed in this dissertation show, the existing bodies of literature on the subject-matter of this dissertation have misunderstood the complexities of the AU’s opposition to the prosecution of Africans non-African states in exercise of universal jurisdiction.

\textsuperscript{191} Abdulgani, \textit{supra} note 187 at106.
\textsuperscript{193} Berman, \textit{supra} note 180 at 1531
\textsuperscript{194} \textit{Ibid} at 1542.
jurisdiction. The fundamental value of the research, therefore, lies in its unique diagnostic approach to the understanding of the problem. Since Africa remains most susceptible to conflicts, whether universal jurisdiction is an acceptable mechanism for dealing with crimes arising from such conflicts is more than a theoretical or academic question. The dissertation’s examination of the AU’s opposition through a postcolonial lens enhances a fuller appreciation of the issues involved, and should be of benefit to those, such as policy-maker, who are interested in an international criminal justice system that is relatively less controversial. Furthermore, to the extent that part of the dissertation deals with the tension between universal jurisdiction and conflict resolution, and enhances our understanding of the dynamics of conflicts resolution, particularly in the context of the African region, it is of benefit to both the North and the South. This is because both sides of the geographical/political divide share identical interest in the prevention of conflicts from spiraling out of control with huge cost both in financial and material terms. It is the ultimate intention of this dissertation to stimulate further debate and engagement among scholars on the subject of universal jurisdiction.

H. ROAD MAP

Chapter Two undertakes an in depth study of the TWAIL scholarship and examines in great details the propriety of this theory in the dissertation’s examination of the AU’s resistance to universal jurisdiction. The aim is to situate the position of the AU within the broader attitude of the Third World towards international law. In this context, it takes history seriously. It explores the sensibilities of the TWAIL school, and demonstrates how these sensibilities could be employed in a critical analysis of universal jurisdiction. It interrogates universal
jurisdiction and explores the extent to which its character feeds into the TWAIL scholars’ suspicion of international law as an instrument of subjugation of the Third World. It argues that, while international justice for victims of heinous crimes in Africa cannot be trivialised, the legitimacy of the mechanism adopted to guarantee it is equally as important to the region. The rest of the dissertation relies on the analytical optic developed in this chapter.

As part of the inquiry into understanding the African Union’s opposition to universal jurisdiction, Chapter Three interrogates the legality and/or the legitimacy of the ongoing expansion of universal jurisdiction, examining the various grounds relied on by advocates in its defence. It argues that, stripped of their emotional appeal, none of the theories propounded by advocates of the doctrine to justify its ongoing expansion is legally credible. This lack of legal credibility, it is further argued, is fatal to its acceptability by states as a legitimate instrument in the fight against impunity – legality being an important axis around which states’ cooperation necessary for the effective enforcement of international law/justice revolves. Beyond the African states’ sense of scepticism towards international law doctrines discussed in Chapter Two, this chapter locates the ongoing AU opposition in the uncertainty surrounding the doctrine’s legality.

For the African region, international criminal justice, especially universal jurisdiction, has become the new face of imperialism. This accusation rests, in part, essentially on the increasing unilateral expansion in the scope of crimes subject to universal jurisdiction. Chapter Four examines international criminalisation process, with particular focus on the two doctrinal pillars on which the principle’s expansion is predicated – the doctrines of
customary international law and *jus cogens*. It questions the deductive approach currently adopted by some scholars, including some judges of international tribunals, in their determination of the existence of states consent in respect of the emergence of these crimes, as opposed to the traditional method of inductivity. It argues that this development is largely due to the increasing difficulty associated with proving the emergence of international custom, particularly those the violation of which is subject to universal jurisdiction, through this traditional means as a result of the expansion of the international community following the independence and subsequent admission of many Third World states. It is argued that as innocuous as this development might seem, generation of international norms by reference to some general abstract ideals “undermines both the settled law and the principle of participation in the formulation of the law.”

The central arguments in this chapter are that (1) international customs, especially since the expansion of the international society following the independence of the Third World states, is largely contested. Developed during the colonial period with relative “global” homogeneity as part of the civilising mission of international law, customary international law has remained non-contemplative of practices of the Third World states; and (2) the concept of *jus cogens*, in relation to the ongoing expansion of universal jurisdiction, has further exacerbated the exclusion of Third World states from international criminalisation process, thereby contributing to the AU’s opposition.

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195 Anghie & Chimni, *supra* note 140 at 201
Beyond doctrinal concerns, there equally is a political dimension to the AU’s opposition. Grossly implicated are such issues as selectivity in universal jurisdiction’s exercise by Western states, and the broader political implications of universal jurisdiction, with special focus on its consequences on conflict resolution, particularly in Africa. Chapter Five examines these issues in great detail. Especially, it discusses the various African “indigenous” approaches which have been adopted by or with the endorsement of the AU in an attempt to end armed conflicts in Africa and prevent the continuing perpetration of heinous crimes. It examines the extent to which universal jurisdiction, as opposed to the ICC, could jeopardise these efforts and, consequently, escalate opposition from the region.

Until this century, one of the central defences of universal jurisdiction put forward by its advocates in response to criticisms against the concept was that, in the absence of a supranational criminal court, it represented the best last hope to combat impunity. Universal jurisdiction, they argued, was “a child of necessity,” guaranteeing the absence of safe haven for perpetrators of heinous crimes. This sentiment was expressed by Lord Slynn of the British House of Lords towards the beginning of the first hearing of the Pinochet case. Chapter Six, therefore, summarises the key arguments of the dissertation and, as a subject for future research, questions the continuing relevance of universal jurisdiction in view of the establishment of the ICC.
Chapter 2: International Law Twailized: The Place of Nineteenth Century in Twenty-First Century African Union’s Opposition to Universal Jurisdiction

“It is because we have such strong suspicions of colonialism that we look closely at all world events, and even at things which on the surface seem to be nothing more than examples of international cooperation and national generosity. Lest any action should be a devise for continuing an old domination in a new form . . . .”

“An exslave (or ex-colonial subject) does not see his ex-master in an “objective” manner, i.e., in the same light as others (presumably not ex-slaves) would see him. Whether in love, respect, hate, or all three, his perception of the ex-master is different. What is true of the perception of objects hold true of the understanding of concepts or norms.”

A. INTRODUCTION

It is no news that the relationship between the African region and the international community on a wide range of issues has, sometimes, been tense. The current African Union’s (AU) opposition to the exercise of universal jurisdiction by the West against Africans is only but the latest example. Traditional investigations into the African region’s

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1 Dr. H. Roeslan Abdulgani, Bandung Spirit: Moving on the Tide of History (Badan Penerbit Prapantja, 1964) 19.
3 Admittedly, the term “the West” or “Western” does not always lend itself to a single meaning. Over the last few decades, its meaning has ranged from economic status, to geographical expression and even, in some cases, to a decadent culture. In this dissertation, however, I use the term in the same way as used by Samuel P. Huntington in his iconic essay titled “The Clash of Civilizations?”:
   THE WEST IS NOW at an extraordinary peak of power in relation to other civilizations. Its superpower opponent has disappeared from the map. Military conflict among Western states is unthinkable, and Western military power is unrivaled. Apart from Japan, the West faces no economic challenge. It dominates international political and security institutions and with Japan international economic institutions. Global political and security issues are effectively settled by a directorate of the United States, Britain and France, world economic issues by a directorate of the United States, Germany and Japan, all of which maintain extraordinarily close relations with each other to the exclusion of lesser and largely non-Western countries. Decisions made at the U.N. Security Council or in the International Monetary Fund that reflect the interests of the West are presented to the world as reflecting the desires of the world community.”
belligerence, however, have tended to neglect the issue of colonialism. The tendency has always been to treat the problem “either as a sudden volcanic eruption, or as purely a function of domestic choices.” To stress the evils of colonialism and its continuous impact on the political psyche of the post-colonial African state, critics argue, is simply “to keep alive old resentments and hate against the West for colonialism which the West [has] relinquish[ed].”

This dismissive attitude is ever more prevalent within the literatures on the subject of the increasing opposition by African states to the enforcement of international criminal justice in the Africa region. To defend or justify the attitude of these African states by reference to colonialism is not only considered as outrageous, but is also caricatured as providing a ridiculous alibi for their governance failure. On the specific question of the region’s

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4 In this category are modernity theorists like Ernest Gellner who has questioned the legitimacy of the intellectual attention that has been paid to the subject of colonialism, arguing that whatever exploitations and subjugations that arose from the practice are not different from those that occurred through other conquest or assertion of power in the past or, in fact, from the practices of traditional or modern societies. According to him, contrary to conventional wisdom, colonialism has had a salutary effect on Third World societies in which it was practiced: “the recent domination of the World by the West can be seen . . . as primarily an aspect of the transformation of the World by a new technology, economy, and science which happens, owing to the uneven nature of its diffusion, to engender a temporary and unstable imbalance of power.” See Ernest Gellner, “The Mightier Pen? Edward Said and the Double Standards of Inside-out Colonialism,” Book Review of *Culture and Imperialism* by Edward Said (1993) *Times Literary Supplement* 3. Viewed through this prism, colonialism becomes “a necessary and indeed appropriate system that benefited both rulers and ruled.” See Ruth Gordon, “Saving Failed States: Sometimes a Neocolonialist Notion” (1997) 91 Am Soc'y Int'l L Proc 420 at 421. Or merely an unintended consequence of modernity or globalization, “its only problem resulting from the fact that the west mistook technological advance and power that it brought for cultural superiority. See Robert J.C. Young, *Postcolonialism: An Historical Introduction* (Oxford: Blackwell Publishers Ltd, 2001) 5.


6 Abdulgani, *supra* note 1 at 106. The above assertion is not new. Third World scholars’ scholarships on the effect of colonialism have always been dismissed by the West. Oftentimes, they are either denigrated as not being sufficiently “scientific” to make any meaningful contribution to the modern international law that is essentially “scientific,” or are depicted as being too “emotional” and therefore lacking in objectiveness. See Christopher Weeramantry, “A Response to Berman: In the Wake of empire” (1999) 14 Am U Int’l L Rev 1555 at 1562.
opposition to universal jurisdiction, scholars have confined themselves to questions such as: how can a democratic state be opposed to criminal justice in favour of its citizens, whose rights have been grossly violated?; What sense does it make to question universal jurisdiction when it is only concerned with guarding interests common or fundamental to international community as a whole?; and what kind of coercive power is available to enforce international norms, regardless of questions concerning their procedural legitimacy?

Yet, in order to do justice to the examination of the ongoing tension between the AU and the West, there are powerful reasons to insist that the investigative component of the dissertation, as well as the forecast be preceded by an analysis of what is perceived to be the role of colonialism\textsuperscript{7} in “fostering foment”\textsuperscript{8} of suspicion between the two. Intrinsic in this inquiry is the extent to which international law was complicit in the colonial rule by opening up non-European territories to conquest, their property to annexation, and their people to

\textsuperscript{7} In this dissertation, the terms “colonialism” and “imperialism” are used interchangeably. This is not in oblivion of the distinction which some scholars have made between the two. For instance, Said argues that while “imperialism” represents “the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory,” “colonialism” concerns the actual physical occupation of a territory and one of the direct consequences of imperialism. He concludes that while “colonialism has largely ended . . . imperialism . . . lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic and social practices.” See Edward W. Said, \textit{Culture and Imperialism} (New York: Knopf : Distributed by Random House, 1993) 8. Instead, it is the dissertation’s considered view that whatever conceptual distinction that might exist is immaterial to the argument canvassed herein. If anything, such distinction only re-enforces my point. Thus, the dissertation aligns itself with the sentiment expressed by a recently published study on European imperialism in the nineteenth and twentieth centuries that although “the ‘age of imperialism’ is over,. . . imperialism itself, as a variety of human political and economic behaviour, appears to be quite alive.” See Wolfgang J. Mommsen, “The End of Empire and Continuity of Imperialism,” in Wolfgang J. Mommsen & Jürgen Osterhammel, eds, \textit{Imperialism and After: Continuities and Discontinuities} (London: Allen & Unwin, Inc., 1986) 333.

\textsuperscript{8} Dianne Otto is credited with coining that phrase. See Dianne Otto, “The Third World and International Law: Voices from the Margins” (2000) ASIL Proceedings 50 at 50.
subjugation. Simply stated, it is how “the imperial system marched ahead without hindrance from international law.”

The question is whether there is a direct or indirect connection between international law’s history and the ongoing AU’s opposition. The focus is on international law’s legitimization of colonialism through doctrinal manoeuvres orchestrated by positivist international law, through what Antony Anghie referred to as “the violence of positivist language” against Third World nations. According to him, “positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission – the discharge of the white man's burden.” The argument is that rather than been an isolated case, the AU’s current opposition reflects the broader suspicious attitude of the Third World towards international law – a stance which, in turn, is engendered by the colonial encounter. Implicated in this inquiry are two epochs in the evolution of international law: the nineteenth century and part of the twentieth century. What this inquiry reveals is that there is a stark relationship between the praxis of the modern universal jurisdiction and the imperial character of international law before the independence of Third World states. In other words, viewed through the prism of the past colonial experience, universal jurisdiction perfectly feeds into Africa’s worst suspicion of some aspects of international law as being colonialism by other forms. Thus, many of the doctrines developed during this period – some of which

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10 Ibid.
are at the heart of the modern universal jurisdiction – are by-products of this colonial encounter.

Since the overarching arguments canvassed both in this chapter and the rest of the dissertation draw extensively from the scholarship of the Third World scholars, methodologically referred to as the Third World Approach to International Law (TWAIL), this chapter maps and identifies the key techniques and sensibilities of this school of thought, including its critiques, and positions the whole dissertation within it. Structurally, this chapter proceeds in five parts, including this introduction. Part B conceptualizes the term “Third World” and examines the scholarship of TWAIL scholars. Part C examines the critiques of the TWAIL. Part D uses the some of the key arguments of TWAIL discussed earlier to understand the AU’s opposition to universal jurisdiction. Specifically, it situates the ongoing opposition within the context of the Third World’s broader colonialism – induced reflexive suspicious attitude towards the development of international law doctrines in particular and the West in general. Finally, Part E summarizes the key arguments made in the chapter, and connects them to the remaining dissertation in order to demonstrate the extent to which the practice of international law, particularly the praxis of universal jurisdiction is shaped by political interests of powerful members.

B. CONCEPTUALIZATION OF “THE THIRD WORLD”

Definition of the term “Third World” is neither too difficult to find in the literatures on international law, nor too hard to hear in the daily debates on global issues. Yet agreement among scholars as to its meaning and scope has remained, at best, uncertain. This is, in part,
because it is a broad political concept often used tendentiously. Descriptively speaking, however, Balakrishnan Rajagopal has identified, at least, four different meanings to which the term has been attributed. The first is what he called *ideological model*, which is the understanding of the term as an ideology – the practice of “a certain form of political engagement with the dominant bipolar bloc politics” by a collection of states “mainly through the form of nonalignment”\(^\text{12}\). The second is what he referred to as the *geopolitical model* – “a geopolitical concept, indicating specific areas of the world that were distinguishable from the First World and the Second World in terms of political and economic organisation”.\(^\text{13}\) It is in this sense that Julius Nyerere, one of Africa’s foremost pan-Africanists defined the term. According to him: “The Third World consists of the victims and the powerless in the international economy . . . Together we constitute a majority of the world's population, and possess the largest part of certain important raw materials, but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs.”\(^\text{14}\) The third is the *historical deterministic model* – a definition based on “a unilinear historical process in so far as it included those countries which had suffered the experience of colonialism and imperialism.”\(^\text{15}\) Finally, he described the fourth category as *popular representational model* – the definition of the term by

\(^{12}\) Balakrishnan Rajagopal, “Locating the Third World in Cultural Geography” (1998-99) Third World Legal Stud 1 at 1. This was particularly the case during the Cold War era, when states, which chose to remain neutral in the ideological battle between the defunct communist Soviet Union and its allies and the capitalist United States of America and its allies, formed the Non-Aligned Movement (NAM). Today, following the end of the end of the Cold War, this group of states is often identified with “the Third World”. See Peter Lyon, “The Emergence of the Third World” in Hedley Bull & Adam Watson, eds, *The Expansion of International Society* (New York: Oxford University Press, 1984) 229 at 229.

\(^{13}\) Rajagopal, *Ibid*.


\(^{15}\) Rajagopal, *supra* note 12 at 1
reference to “a certain set of images: of poverty, squalor, corruption, violence, calamities and disaster, irrational local fundamentalisms, bad smell, garbage, filth, technological ‘backwardness’ or simply lack of modernity”. It is argued that these categories are not mutually exclusive. For instance, it is hard not to see a symbiotic co-relation between “the geopolitical model” and “the historical model” since the “economic organization” referred to in the former is, sometimes, a by-product of “the experience of colonialism and imperialism.”

Historically, the term “the Third World” was essentially an invention of the Cold War, and is credited to Alfred Sauvy, a French anti-colonial scholar, political scientist and journalist, who in 1952 in the pages of *L’Observateur* offered “an evocative tripartite division of the planet into the First, Second and Third Worlds”. Prior to this period, earlier political geographers had divided the world into “Old World” which essentially consisted of countries on the eastern side of the Atlantic Ocean, and the New World which was made up of countries on its western shores.

In a metaphorical sense, Sauvy described Third World as holding a position vis-à-vis the First and the Second Worlds akin to that of the “Third Estate” (the commoners), as opposed

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16 *Ibid* at 2.
19 Twaddle, supra note 17 at 1.
Intrinsic in Sauvy’s description of “the Third World” is a strong emphasis on political relations, rather than demography, and this fits well into Rajagopal’s second model.

Deliberate compartmentalization of the globe into three worlds derives from “a scientific analysis of post-war international relations, its development and its future prospect.” But neither the geographical boundaries nor the constituents of each of these worlds are as clear cut as one might expect. In Chairman Mao’s own division, for instance, the United States and the former Soviet Union form the First World. Japan, Europe and Canada, the middle section, belong to the Second World, while the rest of Asia, Latin America and Africa belong to the Third World. On the other hand, some writers limit its scope to only the “new” states of Africa and Asia, without including Latin America. For most Western writers, however, the First World comprises the United States and other Western nations, the Second World consists of the former Soviet Union and the so called communist states in Eastern Europe, while the Third World is made up of the developing nations. In this last category are Asia, Africa, Latin America and other developing nations. In most literatures, “Third World” is frequently used interchangeably with other terms such as “newly-independent nations,”

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23 Fatouros, supra note 2 at 784.
24 Tieya, supra note 21 at 956.
“underdeveloped nations,”25 “non-aligned nations,” Asian-African,” “developing nations,” and the “south.”26 “Developing nations,” however, appears to have become the preferred description of the Third World countries.27

The designation of a set of countries as “Third World” is not without criticisms. The dominant argument is that the category is anachronistic and incapable of dealing with the problems and concerns of its people.28 In fact, from the moment the category was created, there were those who argued that the term had “obscured specificity in its quest for generalizability.”29 A British sociologist Peter Worsely attacked the term based on what he considered as confusion arising from the reliance on a twofold criterion of economy and politics.30


27 Antonio Cassese, International Law in a Divided World (New York: Oxford University Press, 1986) 116. However, this expression has been criticized by T. Mende, on the ground that it gives a “polite fiction” – a false suggestion that these countries are in the process of development and are therefore narrowing the gap between them and the developed nations. See Tibor Mende, De l’aide à la recolonisation, les leçons d’un échec (Paris: Le Seuil, 1972) 8.


30 Peter Worsley, “How Many Words?” (1979) 1 Third World Quarterly 100 at 101.
Some have questioned the term’s continuing relevance in this post-Cold War modern era – of the rise of East Asia and the demise of the “Second World”, and its usefulness in addressing the concerns of its people.31 According to Walker, the “great dissolutions of 1989” nullified every cold war categories and “as a label to be affixed to a world in dramatic motion the Third World became increasingly absurd, a tattered remnant of another time ...”32 In her review of two books which sought to “rethink” the “Third World”33 in 1992, Vicky Randall asked: “can we justify still holding on to the term”?34 Some scholars too have criticized the term both for being geographically amorphous and for lumping together “developed” countries (such as China, Taiwan, Singapore, etc.) and the underdeveloped nations like Bhutan, Mauritania and Jamaica.35 The emergence of these states as an industrial superpower was viewed as an unequivocal announcement of the death of this category.36 Another related criticism is that such categorization fails to acknowledge the existence of a “Third World” within the “First World” and vice versa.37 For Berger, “the idea of a ‘Third World’ now serves primarily to generate both a dubious homogeneity within its shifting boundaries and an analytical irrelevant distinction between the ‘Third World’ (developing) on the one hand and the First World (developed) on the other hand.”38

31 John, supra note 28 at 731.
33 Manor James, ed, Rethinking Third World Politics (London; Longman, 1991); R Galli ed, Rethinking the Third World: Contributions Towards a New Conceptualization (New York: Crane Russack, 1992)
37 Mittelman & Pasha, supra note 35 at 23.
38 Berger, supra note 18 at 258.
Without completely rejecting the category, there are those who have sought to “reinterpret” the term. For instance, Aijaz Ahmad has argued that the “Third World” “does not come to us as a mere descriptive category” but “carries within it contradictory layers of meaning and political purpose.” He then attempted to distinguish between the theoretical uses and abuses of the term from its use in “common parlance” to describe the so-called developing countries, from Cuba to Saudi Arabia and from China to Chad.39 Marc Williams, on the other hand, has predicted that the term could undergo a “resurgence” in the area of global environmental issues, and is hopeful that “the movement toward political plurality in much of the Third World and the important role played by NGOs in the environmental debate suggests that a revitalized Third World coalition will reflect a set of priorities which has not been set exclusively by the political élites.”40 Even some Third World scholars are loathe to identify with the term due to what they describe as its pejorative connotation in the field of international law when applied by international lawyers to describe intellectual tradition or scholars.41

But criticisms against the continuous use of the term missed the point in one fundamental way. The heavy emphasis on the geographical incongruity of the term and the diversity which exists within the Third World category, though understandable, exposes a serious misconception of what the term signifies, which is the sense of shared experience of

40 Marc Williams, “Re-articulating the Third World coalition; the role of the environmental Agenda”, (1993) 14;1Third World Quarterly 28 at 28.
subjugation or what a scholar poignantly described as “geographies of injustice.”  

In this sense, “the Third World” is viewed, not as a place but as a project.  

Accusing the critics of wrongly framing the issue, Obiora argued that, “what is important is the existence of a group of states and populations that have tended to self-identify as such – coalescing around a historical and continuing experience of subordination at the global level that they feel they share – not the existence and validity of an unproblematic monolithic third-world category.”  

As common denominators, therefore, Third World nations lived under colonial bondage at some point in their different histories, gained their independence through armed or political struggle, and suffers from economic underdevelopment, in part, due to this experience.  

In summary, it can hardly be denied that “the Third World” is made up of “a diverse set of countries, extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies . . .”  

Wang Tieya summed up the different strands of the term thus:  

‘The Third World’ is the broadest of the labels; it is not only geographical concept – referring primarily to the Asian, African and Latin American nations, but is also an historical one – adverting primarily to the states which have become independent in the last few decades. In addition, ‘The Third World’ is a political notion which encompasses the non-aligned nations and also an economic one which brings the developing nations to mind.  


\[43\] Prashad, supra note 18 at xv.  


\[45\] Cassese, supra note 27 at 116.  


\[47\] Tieya, supra note 21 at 956.
In the context of this dissertation, therefore, the category “Third World” is adopted to highlight the hierarchical ordering of the international community and the role of historical experience of colonialism and imperialism in this process. More importantly, the category is adopted as a “polemical or counter-hegemonic term that is designed to rupture received patterns of thinking.” In other words, rather than being fixated on geography, the term is used in the context of interrogating the existing power asymmetry in international relations caused substantially by the colonial encounter.

I. The Definition of TWAIL

One of the most noticeable trends in international law over the last few decades is the proliferation of theories, all of which are in perpetual competition with one another. TWAIL, which is the focus here, falls into this long list. Simply explained, TWAIL is a body of critical international scholarships that examines the norms, structures, institutions and policies of the international legal system through the lens of the colonial encounter between the West and the Third World. Central to its mission is a nuanced critique of the contemporary international law regime by using concrete historical and cultural evidence to demonstrate that most of the key doctrines of international law are highly Eurocentric and, therefore, unreflective of the values and interests of the rest of the global population,

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48 Rajagopol, supra note 12 at 3-4.
49 Ibid at 20-21.
especially the Third World.\textsuperscript{52} International law, for TWAIL scholars, is meaningless unless situated within the “context of the lived history of the people of the Third World.”\textsuperscript{53} The Vision Statement of TWAIL, drafted in 1997 at its inaugural conference captures some of the above sentiments and more. It states as follows:

We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing 'third world' peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples. Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: first, we need to contest international law's privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world; and second, we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples. Thus we are crucially interested in formulating and disseminating critical approaches to the relationships of power that constitute, and are constituted by, the current world order. In addition, we appreciate the need to understand and engage previous and prevailing trends in third world scholarship in international law.\textsuperscript{54}

In its historical context, a distinction is frequently made between two related but different epochs of TWAIL scholarship. The first, otherwise referred to as TWAIL I\textsuperscript{55} or “first generation” TWAIL represents all pre-1990 scholarship that criticized international law for “legitimizing the subjugation and oppression of Third World peoples.”\textsuperscript{56} As will be

\textsuperscript{52} Sunter, \textit{supra} note 50 at 476.
\textsuperscript{55} The numerical distinction used here should not be confused with the one adopted by James Gathii. While mine represents distinct historical periods or generations, Gathii’s refers to different the different conferences that have been held under the banner of TWAIL. In fact, the entirety of Gathii’s classifications constitutes my TWAIL II. See James Thuo Gathii, “TWAIL: A Brief History of its origins, its Decentralized Network, and a Tentative Bibliography” (2011) 3:1 Trade L & Dev 26 at 32.
\textsuperscript{56} Anghie & Chimni, \textit{supra} note 53 at 187.
demonstrated later in this chapter, a clear example of this is the various ways in which the adoption of legal positivism as the preferred legal theory of international law in the nineteenth century helped to justify the exclusion of non-European states from the realm of sovereignty and justify colonial expansion. TWAIL I scholars were also pre-occupied with making the case that contrary to the prevailing Eurocentric view, Third World legal systems were as sophisticated as those of the West, laying great emphasis on the principles of sovereign equality of states and non-intervention as being essential to the survival of Third World states.

TWAIL II or “second generation” TWAIL, on the other hand, refers to the body of scholarship of the present generation of Third World scholars. Except in few instances where TWAIL II has maintained a distinct identity, it has largely followed TWAIL I tradition in an attempt to develop the analytical tools necessary to respond to new imperial

57 M. Sornarajah, “Power and Justice in International Law” (1997) 1 Sing J Int’l & Comp L 28 at 30
59 Ibid at 188-89.
60 Unlike TWAIL I that was largely unorganised, this group has morphed into a formal and internationally recognised body. The inaugural conference of TWAIL II, dubbed “New Approaches to Third World Legal Studies”, took place in March 1997, at Harvard Law School. It has since held several other conferences such as Osgoode Hall in 2001; Albany Law School in 2007; University of British Columbia in 2008; University of Paris, Sorbonne in 2010; University of Oregon Law School in 2011; and Albany Law School in 2012. See James Thuo Gathii, supra note 55 at 32-33; “Africa and International Law: Taking Stock and Moving Forward” online: Albany Law School<http://www.africanlaw.org/>.
61 Some of these scholars are Games T. Gathii, Celestine Nyamu, Balakrishnan Rajagopal, Hani Sayed, Vasuki Nesiah, Elchi Nowrojee, Bhupinder Chimni, David Kennedy, Antony Anghie, Makau Wa Mutua, Shaddrake Gatto, Bojan Bugarcic, Obiora Okafor, Karin Mickelson, Antony Carty, Ratna Kapur, Ibironke Odumosu, Pooja Parmar, Michael Fakhr, Chikeziri Igwe, Usha Natarajan, and Ikechi Mgboji.
62 For instance, it took the emergence of TWAIL II for the question of the relationship between Third World nation-states and their people to become part of the inquiry of TWAIL scholarship. Until then, the sole pre-occupation of TWAIL was the advancement of the interest of the Third World and its protection against colonial subjugation. See Anghie & Chimni, supra note 53 at 190.
realities that continuously confront the Third World in its relationship with the international community. To this end, and unlike TWAIL I, it has paid more attention to conducting theoretical inquiry on international law. Thus, rather than viewing international law as external to the problems of the Third World, and using its tools in addressing it concerns, TWAIL II scholars began to question the role of the discipline in creating these problems. The dominant diagnosis among contemporary TWAIL scholars, following this inquiry, therefore, goes in this form: colonialism is both central to the formation of international law and the woes of the Third World. In relation to the former, TWAIL II scholars argue that a critical examination of the history of international law reveals myriad ways in which many important doctrines of the subject were developed through the colonial encounter and for the purpose of justifying the subjugation of the Third World. Some of these doctrines are “universality” and “sovereignty”. Anghie and Chimni put it thus:

It was principally through colonial expansion that international law achieved one of its defining characteristics; universality. Thus the doctrines used for the purpose of assimilating the non-European world into this “universal” system – the fundamental concept of sovereignty and even the concept of law itself – were inevitably shaped by the relationships of power and subordination inherent in the colonial relationship.

II. The Strategies and Sensibilities of TWAIL Scholarship

In terms of methodology, TWAIL is fundamentally both interdisciplinary and post-colonial. In construing international legal norms and institutions, TWAIL draws from ideas from other disciplines. For instance, when it comes to examining the legitimacy of international norms,
TWAIL scholars adopt the view of the constructivist international relations which argues that the test should be whether or not such norm or practice is a by-product of what Habermas described as “deliberative democracy”—discursive interaction among international actors, especially states, and not simply an imposition by powerful nations. As stated in Chapter One, the question concerning the legitimacy of certain international crimes is central to the examination of AU’s opposition to universal jurisdiction, and is, therefore, explored in details in Chapter Four of the dissertation.

TWAIL scholars take history, especially the evolution of international law, very seriously. Of particular importance to them are the nineteenth and the greater part of the twentieth century, when the Third World was subjected to colonial subjugation by the West, with the active connivance of international law. TWAIL scholars, therefore, view contemporary international events and the emergence of new concepts and doctrines of international law through this historical lens. Their main argument is that international law and its institutions

have historically been used to legitimize the exploitation of the Third World People, and that when situated within this historical context, some of the new texts, subtexts, doctrines and practices of international law reveal an anti-Third World tendencies. In other words, there is a broad consensus among TWAIL scholars that by highlighting the techniques used by powerful nations in the past through the instrumentality of international law, they are able to show the “continuity and discontinuity” of imperialism – the continuing “presence of similar techniques in contemporary international relations.” Specifically, in what has been dubbed as “legal colonialism”, TWAIL scholars decry what they view as the continuous imposition of legal norms, doctrines, structures, claims and rules by powerful nations on the Third World. The structure of the current international legal regime is, therefore, not only reflective but also constitutive of the hierarchical nature of the international community.

Apart from history, TWAIL also takes the principles of equality and sovereignty of Third World states seriously, particularly as it relates to both international law-making and international justice enforcement. Article 2 of the United Nations (UN) Charter, which guarantees sovereign equality of states is viewed by Third World States as sacrosanct. This sensitivity is rooted in their colonial experiences – of being denied both sovereignty and equality in order to justify colonialism. TWAIL scholars, therefore, insist on the “procedural and substantive pluralization” of international politics and the equal democratic participation

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69 Okafor, supra note 44 at 178.
70 Ibid at 178.
71 Ibid.
of Third World states in all aspects of global governance, including the activities of international organizations such as the UN, the World Trade Organization (WTO), and the International Monetary Fund (IMF). Decrying the lack of effective participation of the Third World in the WTO, Bhala stated thus:

Even if Third World WTO members comprehended and fully implemented the legal agreements from the previous trade round, they could hardly be expected to keep up with the pace of activity at the WTO. Indeed, they have virtually no say over that pace. The key WTO members, in terms of setting agendas and priorities, organizing meetings, formulating positions, and so forth, are the usual suspects. Many developing countries cannot participate fully in WTO affairs as structured by members like the United States.

Similar sentiments have also been expressed as it relates to decision-making in other international institutions. Talking about international financial institutions, Wood argues that “decision-making processes have remained the same and rely on a hierarchy which reflects fifty year-old inequalities” and that what is needed are major changes that will ensure “greater legitimacy, and a greater degree of representation and participation . . . which is unlikely given the persistence of the old hierarchy.” It is argued that this situation applies to every aspect of international law, particularly international criminalization. Thus, TWAIL scholars reject any international norm the creation of which Third World states did not participate in. Thus, it is argued in Chapter Four of this dissertation that at the heart of the

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74 David P. Fidler, “Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law” (2003) 2 Chinese JIL 29 at 49.


AU’s opposition is the undemocratic manner in which crimes said to be subject to universal jurisdiction are created. In fact, this dissertation contends that universal jurisdiction is inconsistent with the sovereign equality among nations, being more susceptible to power. As Okafor puts it, “claim that states ought to enjoy, or already enjoy, a unilateral right to intervene in Third World societies, when the converse is virtually impossible in practice, are viewed by most TWAILers with much suspicion.”  

Another technique of TWAIL scholarship is suspicion of any claim of “universality” or “common humanity” as a basis for unilateral action by the West. The memory of how the same claim was made in the nineteen century by the West to justify the colonial exploitation and subjugation of the Third World is responsible for this sensitivity. According to Muthucumaraswamy Sornarajah, “a lesson to be learnt [from Third World history] ... is that one must beware of self-proclaimed universalists whose ... reasons for taking universalist stances must be constantly scrutinized.” Thus, TWAIL views the assertion of universality as an attempt to mask “underlying politics of domination.”

It should be pointed out that the idea that international law doctrines have continued to remain an effective tool in the subjugation and oppression of Third World people is by no means unique to TWAIL scholarship. Post-Colonial Theory too adopt the same framework,

77 Okafor, supra note 44 at 179.
79 Okafor, supra note 44 at 179.
except that unlike TWAIL, its focus is broader than a dedication to supporting an international legal system that is responsive to the desires of the Third World.  

Antony Anghie’s seminal treatise titled, *Imperialism, Sovereignty and the Making of International Law*, offers a perfect example of the overlap between Post-Colonial Theory and TWAIL scholarship. In this book, he explores the relationship between imperialism and international and constructed a history of international law shows not only the colonial origins of the subject, but also how these origins “create a set of structures that continually repeat themselves at various stages in the history of international law.” With the complicity of international law in legitimating colonial exploitation established, he questioned the possibility of a post-colonial world constructing a new international law that is free from its “original sins”: “can the post-colonial world deploy for its own purposes the law which had enabled its suppression in the first place?” Thus, central to the relationship between Post-Colonial Theory and TWAIL scholars is a re-reading of international law through the prism of the colonial encounter – an insistence on interpreting international norms and practices with due regard to history rather than in simple normative term. As Igwe put it, “in their [TWAIL scholars’] view, without a critical rethinking of international law’s foundations,

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82 Ibid at 8.
83 Mgboji, *supra* note 68 at 105.
even well-intended and well-conceived norms would produce unfair outcomes that (usually) privilege the West above the non-West."

III. Chorus of voices: The Diversity of TWAIL

One of the hallmarks of TWAIL scholarship is the diversity of its membership both in terms of political and intellectual positions within international law scholarship. This should not come as a surprise, partly considering the complexity of the term “Third World” on which it focuses. It has been described as a “chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns,” and a “broad dialectical opposition to international law.” According to Okafor, “no unanimity can be found within its [TWAIL’s] ranks, and no complete and compulsory liturgy directs its engagement with the international legal order.” This is true even on the important question of whether the Third World should remain bound by international law, especially those aspects in respect of which it did not make any input. There are those who adopt a completely radical approach by “seeking a total transformation of international law and the Third World,” while some are more measured in their opposition. There are also the

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84 Igwe, supra note 51 at 33.
85 Sunter, supra note 50 at 486.
86 Mickelson, supra note 26 at 360 [emphasis supplied].
88 Okafor, supra note 44 at 176.
89 Makau Mutua fits into this category. His piece titled “What is TWAIL? has been described as both “provocative” and “an intellectual call to arm of sorts.” See Sunter, supra note 50 at 487; see Mutua, supra note 94. Another scholar is Dianne Otto. In one of his excellent works, she argues that it is foolhardy to think the Third World can be liberated using the same “liberal concepts” which was used to establish Western domination over non-Western societies. See Dianne Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’, (1996) 5 Social and Legal Studies 348.
90 In this category is Anghie, who argues thus: "TWAIL scholarship ... needs to be self-critical, aware of the limitations of its own analytic framework, and the voices it has excluded and suppressed." See Antony Anghie, "What is TWAIL: Comment" (2000) 94 Proc. Am. Soc. Int’l L. 39 at 39. It has to be noted that neither
“contributionalists” who reject the Eurocentric view of international law arguing, instead, that international law is a product of multitude of civilizations.⁹¹ Some are reconstructionist,⁹² while some are very skeptical of its viability.⁹³ Even feminist scholarship also forms part of the “chorus of voices” within TWAIL scholarship, at least to the extent that it focuses on the subject of “gendered” or the relation of power in international legal discourse.⁹⁴

It is important to point out that discordance of opinions within the membership of a distinct scholarly collectivity is perfectly normal. This is because it is in this disharmony that harmony is achieved. In his usual sense of metaphor, Okafor uses the Choir to make this point: “While there will be some tenors in that chorus, there will be some sopranos, basses,

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⁹¹ Gathii, ibid, at 319-20:
Therefore for African scholars such as Elias and Felix Okoye11amajor purpose of rewriting the history of international law was to correct the historical record; to rescue Africans from their assigned place in history by glorifying a bygone past, where the African, much like the European, was a member of ancient kingdoms or political units equivalent to the ‘modern’ and ‘civilized’ Western states. It was in this sense that a scholar in the Elias tradition ‘challenged the myths of black inferiority, servitude, backwardness’.

⁹² A good example is Bhupinder Chimni. See B.S. Chimni, “Third World Approaches to International Law: A Manifesto‖ in Antony Anghie, et al., eds, supra note 42 at 47.

⁹³ Ngugi comes to mind. See Joel Ngugi, "Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?” (2002) 8 U.C. Davis J. Int'l L. &Pol'y 73. In his critique of Mutua, whom he referred to as one of the "second crop of anti-colonial scholars," he questioned Mutua’s methodology – of “internal transformation” of international law, describing it as tantamount to “tinkering on the margins”. Rather than directly opposing international law, he argues that TWAIL scholars must "look from outside the existing framework with its inherent biases" – "move out of the episteme of international law as presently configured and engage it from outside." See 76, 100-01 & 106.

and altos. These important differences in pitches, resources, and capacities are not usually sufficient to deny coherence or relevance to a chorus or orchestra.”\textsuperscript{95} More importantly, despite the internal differences and vagaries, scholars that self-identify as part of an intellectual rubric are usually glued together by a common sensibility, and TWAIL is no exception. Thus, the unity of TWAIL derives from their “opposition to the politics of empire.”\textsuperscript{96} Mohsen al Attar and Rebekah Thompson put it thus: “TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.”\textsuperscript{97} Likewise, Eslava and Pahuja note: “Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility, and a political orientation. TWAIL is therefore ... defined by a commonality of concerns. Those concerns centre around attempting to attune the operation of International law to those sites and subjects that have traditionally been positioned as the ‘others of international law.’”\textsuperscript{98} There is a consensus around the idea that contrary to the notion of neutrality, international law, having been shaped in the colonial era, is nothing but an instrument of power, “skillfully dressed up so as to hide its objective of controlling the colonized world for the benefit of the colonial powers.”\textsuperscript{99} For most TWAIL

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\textsuperscript{95} Okafor, \textit{supra} note 44 at 175.
\textsuperscript{96} B.S. Chimni, “The World of TWAIL: Introduction to the Special Issue” (2011) 3:1 Trade L & Dev 14 at 17.
\textsuperscript{98} Luis Eslava & Sundhya Pahuja, “Between Resistance and Reform: TWAIL and the Universality of International Law” (2011) 3:1 Trade L & Dev 103 at 104.
\textsuperscript{99} Sornarajah, \textit{supra} note 78 at 285.
\end{flushright}
scholars, therefore, it is only by exposing the technologies and devices of international law"¹⁰⁰ that any meaningful appreciation of the Third World’s suspicion of the current regime of international law, including any suggested changes, can occur.¹⁰¹

C. CRITIQUES OF TWAIL

The mainstream scholarship¹⁰² has remained largely dismissive of the idea of TWAIL, or fails to engage it at all. Huntington, for instance, questioned the continuing relevance of dividing the globe into “three worlds.”¹⁰³ The 1999 American Journal of International Law “Symposium on Methods in International Law” omitted TWAIL in its publication of list of methods in international law due to what the editors of the Symposium later confessed was their “ignorance” of not seeing “postcolonialism as a distinct ‘method,’ or at least as one distinct from critical legal studies.”¹⁰⁴ Only recently did TWAIL begin to gain recognition and rare engagement by some mainstream international law scholars.¹⁰⁵ But even in some of

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¹⁰⁰ Okafor, supra note 44 at 177.
¹⁰² Obviously, the use of the term “mainstream scholarship” is susceptible to many pitfalls, one of which is overgeneralization. Sundhya Pahuja warns of the tendency to "construct a straw man called 'mainstream international law', and then proceed to touch an analytical torch to it.” See Sundhya Pahuja, "Review Essay: Power and the Rule of Law in the Global Context" (2004) 28 Melbourne ULR 232 at 233-34. In this dissertation, the term is used in a highly limited sense as a catchphrase for scholarships that tend to view international law as an instrument for positive change as opposed to being an oppressive institution or a complicit in the exploitation of any part of the international society. See Sunter, supra note 50 at 475 n 1. It is synonymous with James Gathii’s description of the term as the "liberal/conservative consensus in international law,” which he argues "constructs the legal framework that is consistent with the hegemonic interests of the industrialized world.” See James Thuo Gathii, "Rejoinder: Twailing International Law” (2000) 98 Mich L Rev 2066 at 2067.
¹⁰³ Huntington, supra 3 at 23.
¹⁰⁴ “Correspondence” (2000) AJIL 99 at 101. TWAIL was eventually included in the 2006 publication. See Ratner & Slaughter, supra note 53.
¹⁰⁵ For instance, TWAIL was included in the 2006 publication of the American Society of International Law’s (ASIL). The Methods of International Law. See Ratner & Slaughter, supra note 53.
these rare cases, it has been “as an adversary – an exercise in methodological confrontation.”

For instance, some scholars have accused TWAIL of being bereft of intellectual originality and of recycling the same old argument that was used in the struggle for independence. Some view TWAIL scholars’ radical deconstruction of international law as being too nihilistic and completely incapable of offering any positive agenda for the pragmatic reform of international law and relation. One scholar has even questioned TWAIL’s relevance to legal practice: “to distil practical real world legal skills that would enable graduates to pass the professional examinations that would permit them to become lawyers.” There are those who view TWAIL scholarship as “uncongenial and even abrasive”, “an ideology” and as being “so extreme and beyond the pale of international law.”

Jose Alvarez’s criticisms of TWAIL are particularly incisive. He has questioned the viability of constructing a school of thought around the concept of “the Third World” which itself is in perpetual geographical flux with “considerable historical baggage.” Furthermore, he charged TWAIL with having no “particular set of policy prescriptions” and potentially losing its core,

106 Sunter, supra note 50 at 476.
108 Gathii, supra note 55 at 42.
109 Alvarez, supra note 107.
which he attributed to its “overtly expansive ‘big tent’.\textsuperscript{113} On the issue of international criminal justice against Africans, he argued that TWAIL scholars seem confused. According to him, TWAIL always prides itself as “taking the suffering of the Third World people seriously,” yet may not support any UN Security Council (UNSC) sanction geared towards facilitating the International Criminal Court’s (ICC) effective administration of justice in the African region. Citing TWAIL’s professed overarching mission, he argued that such support would be tantamount to “using the world’s foremost ‘hegemonic’ institution, subject to a voting system and membership that owes much to colonialism and notions of cultural superiority in defense of the judicial rulings of another flawed, treaty-based institution, whose very raison d’être is grounded in conceptions of transitional justice that owe a great deal to TWAILers’ despised ‘civilizing mission.’”\textsuperscript{114}

The tension (or confrontation) between mainstream scholars and critical scholars of which TWAIL is part is best captured in a rare exchange between Brad Roth and James Gathii, triggered by the latter’s review of the former’s book\textsuperscript{115} through the lens of TWAIL.\textsuperscript{116} In his scalding response to Gathii’s review, Roth argues that the critical scholars’ misguided belief that they could confront the structure of power relations that privileges the rich and the powerful by challenging the methodological norms of their disciplines has resulted in a scholarship which he describes as “illusionary radicalism,” rhetorically colourful,\textsuperscript{117}

\begin{footnotes}
\item[113] Alvarez, supra not 107.
\item[114] Ibid.
\item[115] Brad R. Roth, \textit{Governmental Illegitimacy in International Law} (New York: Oxford University Press, 1999)).
\end{footnotes}
“programmatically vacuous,” “fantasized radicalism” and “politically dysfunctional.”While criticizing Gathii’s review and, by necessary implication, TWAIL scholarship for being “politically dysfunctional,” he accused critical scholars of “devot[ing] their considerable talents to discrediting the project of legal reasoning, as conventionally understood” and for always seeking to reduce every legal scholarship to ordinary politics. Describing the zeal of TWAIL scholars as “profoundly misguided,” Roth chided Gathii for failing to acknowledge the fact that international law, although a legitimizing exercise of power, also constrains power. He finds Gathii’s “binary thinking” vis-à-vis his division of international scholarship between Eurocentric and Third World approaches disturbing and accuses TWAIL of merely critiquing without providing any credible “programmatic alternative.”

In his equally scalding rejoinder, Gathii questions Roth’s characterization of TWAIL as failing within critical approach to international law – an attitude which he argues is consistent with “neoconservative dismissals of the progressive left, and indeed, of Third World scholarship.” He describes Roth’s defense of his “formalistic and doctrinaire approach to the study of international law,” as tantamount to defending “international law as an iron cage of rules and doctrines as if the law was not itself a ‘crucial site for the


118 Ibid at 2057.

119 Ibid at 2058.

120 Ibid at 2065.

production of ideology and the perpetuation of social power.”\textsuperscript{122} To him, Roth’s characterization of his Review as “politically dysfunctional” evidences a complete disconnect of the mainstream scholarship from the “truisms that states advance their interests, in part through the medium of international law” – a failure to acknowledge that “international law is constitutive . . . of the hierarchical character of international society.”\textsuperscript{123} Gathii insists that TWAIL analysis “does not throw legal concepts overboard, but rather foregrounds the existing reality of economic hierarchy and subordination between nations.”\textsuperscript{124} He concludes that the only to ensure a synergistic relationship between TWAIL and mainstream scholarship is for the latter to renounce “the systematic way in which it silences issues of Western power, economic injustice and neocolonialism.”\textsuperscript{125}

While some of the criticisms of TWAIL are valid, others are somewhat exaggerated. For instance, Alvarez’s charge that TWAIL scholars will not support UNSC sanctions against African leaders aimed at compelling them to cooperate with the ICC is misplaced. This is because many TWAIL scholars have been critical of African governments who have attempted to frustrate the efforts of ICC.\textsuperscript{126} Even one of most radical TWAIL scholars, endorses sanction against recalcitrant African leaders, as one of the steps towards closing the ‘impunity gap’ in Africa.\textsuperscript{127} Contrary to some of its critiques, TWAIL does not reject the

\textsuperscript{122}Ibid.
\textsuperscript{123}Ibid at 2066-67.
\textsuperscript{124}Ibid at 2068-29.
\textsuperscript{125}Ibid at 2070.
\textsuperscript{126}Gathii, supra note 55 at 42.
\textsuperscript{127}Makua Mutua, “The International Criminal Court in Africa: Challenges and Opportunities,” online: Norwegian Peace Building Centre (NOREF) (September 2010). <http://www.peacebuilding.no/var/ezflow_site/storage/original/application/d5dc6870a40b79bf7fc1304f3be0b55.pdf>; Anghie & Chimni, supra note 53 at 202 (endorsing the establishment of ICC).
discipline of international law but yearns for “a more Third World-sensitive reform of its norms, institutions and practice.”\textsuperscript{128} They emphasize the need for necessary connection between state sovereignty/participation and the development of international legal principles.\textsuperscript{129} And to the extent that TWAIL attempts to expose the hypocrisy of the international regime complex, it is, contrary to Roth’s assertion, an alternative programmatic agenda.\textsuperscript{130}

At the minimum, therefore, consensus can be found around the idea that perception is key to the legitimacy of any institution or order and that this is often a by-product of individual or collective experiences. Thus, it naturally follows that Third World’s sensitivity towards doctrines of international law is borne out of its past experiences – of subjugation and deprivation – in the hands of the West for whom, as is shown shortly, international law became a tool in the toolbox of the colonial project.

D. WHEN THE PAST HUNTS THE PRESENT: INTERNATIONAL LAW, THE NINETEENTH CENTURY AND THE AU’S OPPOSITION TO UNIVERSAL JURISDICTION

In a rather pointed way, the AU’s opposition to the prosecution of Africans by some Western states in exercise of universal jurisdiction – highlighted in Chapter One – is a stark reminder of the omnipresence of the ghost of colonialism, particularly in the sphere of international law. Despite the steady progress towards global integration and globalization, it is hardly

\textsuperscript{128} Igwe, \textit{supra} note 51 at 35
\textsuperscript{130} Igwe, \textit{supra} note 51 at 35
deniable that the relationship between the Third World and the West has, at least, remained foggy with the former constantly worried about the latter’s real intent, given its antecedents. The fear of neocolonialism has become the inescapable prism through which the Third World views every action and development in the international hemisphere, especially when such developments are generated or instigated by the West. The latest AU’s accusation of the West of using universal jurisdiction to overstep their lawful power and advance an agenda of “legal colonialism” reflects this suspicion. For these Third World states, “trust but verify” seems to be the guiding principle in their relationship with the international community.

This apprehension is not far-fetched, especially when the principle of universal jurisdiction is viewed through the lense of the history of international law. Contemplated in this assertion is the development and use of international law concepts, principles, doctrines, and practices by the West, particularly during the “Age of Empire” to impose political, economic and legal ideas on non-Western states, as part of the civilizing mission of international law. It is how “law, regarded by the West as its most respected and cherished instrument of civilization, was also the West's most vital and effective instrument of empire during its genocidal conquest and colonization of the non-Western peoples of the New World.” Simply stated, it is how international law sanctioned colonialism, adopting rules and doctrines which helped

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133 Fidler, *supra* note 74 at 34.
to implement it as “fundamental rights”, such doctrines as “sovereignty,” “quasi-sovereignty,” “recognition,” “mandate system,” and “universality”. This section, therefore, seeks to situate the AU’s opposition to universal jurisdiction within this broader context of the Third World’s experience with international law. It is further argued that a critical examination of universal jurisdiction reveals a striking similarity between its technologies and those employed by international law in both the nineteenth century and part of the twentieth century to justify colonialism. The argument advanced in this section forms the foundation for Chapters Four and Five, which examines at least two important technologies of universal jurisdiction – the principle of customary international law and the doctrine of “universality” (or “common interest” doctrine).

I. Spotlighting the Colonial Past of International Law Doctrines

The colonial project that commenced in the nineteenth century took the laws of nation (later international law) by storm. The idea of interference, much less territorial occupation, by one sovereign entity against another was not one that the international legal system fathomed. It was only a short time ago that European nations had successfully fought against, and rejected, the spiritual domination of the Catholic Church as well as the political rule of the Holy Roman Empire, establishing, through what is known as the Peace of Westphalia, a fundamentally new regime of relations among themselves. Widely regarded as the bedrock of the modern inter-state, this peace, which was contained in a treaty, effectively ended the Thirty Year War (1618-1648) fought between Catholics and Protestant powers dubbed by

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historians as “the most devastating European conflict after the barbarian invasion.”

The war was fought precisely to end the claim of exclusive superiority of one ideological system over another. As a result of this treaty, European nations collectively transitioned from a strictly hierarchical or vertical ordering in which the Pope and Emperor was at the summit, to equality or horizontal order consisting of independent and freely negotiating states. As Christopher Harding and C. L. Lim put it, “. . . the Treaty of Westphalia symbolically indicated a sea-change in international organization – the transition to a system of sovereign states, as sovereign subjects to no higher or competing authority and conveniently determining the extent and character of their legal relations with each other.”

Nathaniel Berman captured the significance of Westphalia thus:

Westphalia, in the canonical interpretation, inaugurated international law because it fundamentally broke with the norm of hierarchical relations between peoples. Prior to 1648, in this view, the world's main civilizations all grounded such relations on imperial legitimacy. Mutual recognition by some European sovereigns at Westphalia ushered in the notion of sovereign equality, which it would be the task of future generations to implement fully and extend universally.

By virtue of this new ordering, therefore, the principle of territorial integrity of states became the central organizing principle of international relations, insuring the inviolability of the legal idea of territorial jurisdiction, sovereign equality, and non-intervention in the domestic

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affairs of each state—a substantive tolerance of the domestic pluralities among nations that was only counter-balanced by their collective intolerance “toward attempts by any European nation to disrupt the balance of power.” Gerry Simpson puts it more succinctly thus:

This was not simply a sovereignty of possibility but also a sovereignty of tolerance and constraint. In other words, states were sovereign in the sense that they were at liberty to do as they wished (providing this sovereignty did not interfere with the sovereignty of others) but they were equal, too, in the sense that the interior political order of each sovereign was to be accorded respect and immunity from interference.

At Westphalia, therefore, Europe officially embraced equality, independence and sovereignty as central pillars of its legal system. So abhorrent was the idea of domination that attempts by Spain and France to impose their will on the rest of Europe led to wars waged collectively by European nations to prevent the emergence of a new hegemony. Sovereign equality was also deemed to translate to equality of voting power. Thus, decisions were made on the basis of one sovereign, one vote.

The shift from vertical to horizontal relationship among nations, including the declaration of the sovereign equality of nations, was influenced by the dominant theoretical framework of

144 Simpson, supra note 136 at 31.
146 Fidler, supra note 74 at 36.
147 Simpson, supra note 136 at 31.
international law at the time – natural law, which among other rules, insists on “respect for
other people’s property and the restitution of gain made from it.”148 International law was
viewed as part of the law of nature and, in the case of inconsistency with the latter, was null
and void to the extent of the inconsistency.149 Natural law philosophy believes in the use of
“principles of universal reason to establish basic principles of international law”150 and the
correlation between human nature and those of states. For instance, Vattel once argued thus:

Since men are by nature equal, and their individual rights and obligations the same, as
coming equally from nature, Nations, which are composed of men and may be regarded as so
many free persons living together in a state of nature, are by nature equal and hold from
nature the same obligations and the same rights… A dwarf is as much a man as a giant is; a
small republic is no less sovereign than the most powerful kingdom.151

Naturalism placed great emphasis on principles of justice and the existence of an overarching
morality to which human actions are subject.152 For natural law, therefore, equality is an
inviolable right of every nation, including pre-existing communities. In the belly of this
philosophy are triplet ideas. The first is the idea that the existence of a nation or community
is not subservient to, nor is its legitimacy established by, international law, but is rather a

149 Morton A. Kaplan & Nicholas Deb. Katzenbach, The Political Foundations of International Law
150 Friedmann, supra note 148 at 75.
151 Simpson, supra note 136 at 32, citing E. De Vattel, Le droit des gens, Introduction, Sec. 18 & 19.
The technique of the naturalists was captured by Wheaton in his interpretation of the work of Grotius, one of the
leading natural law philosophers. According to him, natural law philosophy aimed,
First, to lay down those rules of justice which would be binding on men living in a social
state, independently of any positive laws of human institution; or, as is commonly expressed,
living together in a state of nature; and, Secondly, to apply those rules, under the name of
Natural Law, to the mutual relations of separate communities living in a similar state with
respect to each other.
See Anghie, supra note 11 at 11
152 Ibid.
“presupposition of the international legal system.” The second is an assumption that every community or nation, as a member of the international society, is imbued with rights to liberty and equality that are sacrosanct. Finally, the right of a state to equality and liberty is necessarily correlative of that enjoyed by the individuals of whom it is made up.

But natural law philosophy was also problematic. The vagueness of natural law principles deduced from esoteric sources would facilitate the ultimate downfall of this method. Its receptiveness to subjectivity meant that “anyone could prove whatever he wanted to prove, and chancelleries were not slow in using for their own purposes such pliable doctrines.” According to Schwarzenberger, “it did not take statesmen, nor the naturalists employed by them, long to reduce the science of international law to an ideology of raison d’état and thus to jeopardize the scientific value of the deductive method, if not of the law of nations itself.” In fact, every conceivable action or rule was justified by reference to natural law. It was only a matter of time before the naturalist approach collapsed under the heavyweight of suspicion by nations. The extent to which the ongoing expansion of universal jurisdiction correlates with this problem of natural law is explored in Chapter Four of the dissertation.

And so, this was essentially the state of the international legal system until the nineteenth century when the laws of nation was transformed and deployed by the West to legitimize its

153 Simpson, supra note 136 at 32.
154 Ibid.
156 Ibid
157 Ibid.
colonial expansion. This transformation was undoubtedly a desideratum. Framing and managing the relationship between European states and non-European nations presented a difficult problem for international law.\(^{158}\) Colonialism, by its very nature, represented everything that the Peace of Westphalia and, by extension, the laws of nations disdained. Unilateral territorial occupation, including its concomitant implications, was surely a violation of the principles of independence and equality of nations as enshrined in the Treaty of Westphalia and preached by the then dominant legal philosophy – natural law. Therefore, worried that its colonial superstructure was dangerously sitting on a hollow legal substructure, the West sought for a solution – and found one. Since the existing body of the laws of nations was ill-equipped to legalize the colonial project, a new international law paradigm that would be elastic enough to accommodate any alteration or modification that would be made to the existing principle of the law of nations was considered to be an ideal solution. Hence, the emergence of positivism as a replacement for naturalism as international law’s normative and jurisprudential source.\(^{159}\)

Positivism, by way of contrast to naturalism, adopts a state-centric approach to international law, arguing that states are not only the primary actor on the international plane but are only


\(^{159}\) Arnulf Becker Lorca, “Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation” (2010) 51:2 Harv Int’l LJ 475 at 486. There also other explanations for the emergence of positivism. One of such explanations is offered by Antony Anghie thus:

Positivist international lawyers were heavily influenced by the English jurist, John Austin, who questioned whether international law could be regarded a law at all. Accordingly, international legal positivists attempted to develop a jurisprudence that could address these objections. Moreover, they sought to present their discipline as "scientific" in character. Each of these factors was important to the positivist self-image and played a significant role in the development of positivist jurisprudence.

Anghie, supra note 11 at 10
bound by rules to which they have either expressly or impliedly consented to guide their relationship *inter se.*\(^{160}\) Law is not only enforced by the sovereign but is a creation of the sovereign will.\(^{161}\) By situating the state as the fulcrum around which the entire international legal system revolved, positivists completely rejected the naturalists’ idea of the existence of a higher morality of which state actions must satisfy in order to be legitimate. For them, the ultimate arbiter of what constitute international law is not any higher authority but nations or states.\(^{162}\) In fact, “the dominant themes of nineteenth century legal writing were that the nations-state was exclusive source of rights, and that any trans-national or supranational rules were the product of consent given by treaty or custom.”\(^{163}\) This shift from the “celestial” to the “terrestrial” ensured that “the rules of international law were to be discovered, not by speculative inquiries into the nature of justice or teleology, but by a careful study of the actual behaviour of states and the institutions and laws that those states created.”\(^{164}\) For positivists, therefore, instead of natural law or higher morality, treaty and custom are the exclusive sources of international law since they are not only products of states’ consent, but also represent “the best guides to the proper rules of international behaviour.”\(^{165}\) Thus, in what was considered as a zero-sum-game, the rise of positivism “swept away the normative theories which inhibited the exercise of state power” and ultimately ensured the decline of naturalism.\(^{166}\) This, by implication, marked the ascendancy of state practice and treaties in

\(^{160}\) *Ibid* at 2.

\(^{161}\) *Ibid* at 10.


\(^{164}\) Anghie, *supra* note 11 at 13.

\(^{165}\) *Ibid*.

\(^{166}\) Sornarajah, *supra* note 57 at 31
the conduct of international relations, as against reliance on norms distilled from basic metaphysical principles.\textsuperscript{167} It must be pointed out that the customs referred to by the positivists were those of European states, since non-European nations were regarded as incapable of generating internationally recognizable customs. On the other hands, treaties made by European nations with non-European nations were generally accepted as binding even when most of them were tainted with such vitiating elements as duress and false pretences.\textsuperscript{168} This issue is explored later in this part.

Other than replacing naturalism, positivist philosophy of the nineteenth century is credited with the Europeanization of international law\textsuperscript{169} and the projection of European superiority over the rest of the world.\textsuperscript{170} The classical jurists had theorized about “the universal law of the universal family of nations,” which was based on “the natural law doctrine and the principle of non-discrimination”\textsuperscript{171} – universality which, in turn, was viewed as the most important attribute of international law.\textsuperscript{172} According to Alexandrowicz, “[prior to the nineteenth century] the law of nations was inherently a universal concept, conditioned by its affiliation with the law of nature and the highly important and world-wide relations on a footing of equality between the European powers and the East Indian and North African

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\textsuperscript{169} Anand, \textit{supra} note 167 at 15.
\textsuperscript{171} Anand, \textit{supra} note 167 at 15.
\textsuperscript{172} G. H. J. Van Der Molen, “Alberico Gentili and the Universality of International Law” (1964) 13 Indian Y.B. Int’l Aff 33 at 37.
\end{flushright}
rulers joining in a great trade adventure.”

But the transition to the ideology of positivism, despite its vaunted promise of empiricism in the extraction of binding international rules, overlooked the practices of Third World states since they were considered to be inferior and incapable of self-proportion.

Thus, the concept of universality declined with the decline of natural law and the rise of colonialism. Specifically, the jurisprudential foundation of international legal order shifted from the principle of “universal” law of nature to a positivist notion of law. The nineteenth century inaugurated a new regime of differentiation and colonization in contra-distinction to the preceding epoch. Positivist international law, “prescrib[ed] a lighted area of law and order for those within the fold, and an area of outer darkness for those without.” Speaking about the relationship between the Europeans and Asians, Bull and Watson argued that prior to the nineteenth century, “European states sought to deal with Asian states on the basis of moral and legal equality until in the nineteenth century [when] this gave way to European superiority.” And with this came the institutionalization of legalized hegemony and the development of international law based on sovereign hierarchies and distinctions – a pattern which has continued till this day. A good example is “the various divisions employed, from time to time, to describe international society – divisions between lawful and lawless states,

174 Ibid.
176 Simpson, supra note 136 at 36.
177 Weeramantry & Berman, supra note 9 at 1517.
between the ‘successful’ and the ‘failed’, between democratic and autocratic, between Great power and the small and powerless.”

Perhaps, no other aspect of international law bears better witness to this power influence than norm generation. David Armstrong captures this in the following manner: “From 1815, the Great Powers assumed a privilege status that undermined the formal [sovereign] equality that had prevailed in the previous century and enabled them to set norms and lay down rules for international society as a whole.”

II. Positivism, colonialism and the Manipulation of Legal Doctrines

As was earlier asserted, the emergence of positivism as a dominant philosophical framework of international law was, in part, an attempt to cure colonialism of its inherent normative defects. Colonialism, with its concomitant subjugation of the Third World, had not only created gaps within the natural law doctrinal paradigm but had, in fact, become clearly intolerable under the existing philosophical framework of the law of nations. Divesting “nature” of its declaratory power on the legality of sovereign actions and vesting it on the sovereign himself, therefore, was key to providing the empires with the flexibility that was needed to manipulate international legal doctrines in other to advance the colonial project. This is evident in the ways in which early legal doctrines of international law sanctioned colonialism, including the acquisition of Third World territories by European powers and the imposition of their sovereignty over such territories by occupation, subjugation, or cession.

Thus, “the dominance of positivist international law, [together with] the ensuring power

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179 Craven, supra note 168 at 340.
asymmetries in the international legal order, would have critical implications on the modes of legal justification articulated to exculpate the European powers from their treatment of [Third World] during the colonial era.”

To be sure, the development and manipulation of legal doctrines by Europeans to manage the complex relationship between them and the Third World people pre-dates the nineteenth century. Not even natural law could prevent the creation or adaptation of doctrines by Europeans for their self purpose of justifying the acquisition of sovereignty over non-Europeans. A good example is the theory advanced by Francisco de Vitoria, one of the greatest scholars of the modern international law, to justify Spanish claims to sovereignty over the Americas in the aftermath of Columbus voyage. In his seminal book titled *On the Indians Lately Discovered*, he drew extensively from the natural philosophy at the time to assert the humanity of the Indians:

The true state of the case is that they are not of unsound mind, but have according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, law, and workshops, and a system of exchange, all of which call for the use of reason: they also have a kind of religion. Further, they make no errors in matters which are self-evident to others: this is witness to their use of reason.

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185 *Ibid* at 127.
Despite Vitoria’s recognition of the humanity of the Indians and the applicability of universal natural law in the determination of matters concerning them, he unsurprisingly found their socio-cultural practices deficient and below the standard required by natural law:

Although the aborigines in question are not wholly unintelligent, yet they are a little short of that condition, and so are unfit to found or administer a lawful state up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their own towns, and might even give them new lords.  

Based on the above, therefore, Vitoria not only argued in favour of the establishment of *proper* government over the Indians by the Spanish, but even denied the existence, under natural law, of the right of the Indians to resist the Spanish incursion into their territory: ‘The Spaniards have a right to travel to the lands of the Indians and to sojourn there, so long as they do no harm, and they cannot be prevented by the Indians . . . [since] to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war’  

— an act of aggression entitling Spain, *not Indians*, to use force in self

186 *Ibid* at 161. William argues that this false sense of European superiority even predates the nineteenth century:

the “West” has sought to impose its version of truth on non-Western peoples since the Middle Ages. In seeking the conquest of the earth, the Western colonizing nations of Europe and the derivative settler-colonized states produced by their colonial expansion have been sustained by a central idea: the West's religion, civilization, and knowledge are superior to the religions, civilization, and knowledge of non-Western peoples. This superiority, in turn, is the redemptive source of the West's presumed mandate to impose its vision of truth on non-Western peoples.


187 Vitoria, *supra* note 184 at 150 & 151.
This interpretation of natural was endorsed by James Lorimer, who declared that international law “is the law of nature, realized in separate political communities” but that “even now the same rights and duties do not belong to savage and civilized man.”

In spite of Vitoria’s successful manipulation of natural law, international lawyers, in the nineteenth century knew the limitedness of its elasticity and the persuasiveness of criticisms concerning its “unscientific” nature, hence the shift to positivism. Positivism became highly attractive due to its intrinsic ability to project, albeit misleadingly, objectivity and verifiability even as some of the formal doctrines devised by positivist jurists at this time were calculated to advance the imperial power of the European states into the Third World states. In other words, although the bulk of the legal doctrines developed during this period helped to regulate the relationship among European nations, “the conceptual underpinnings of these discussions of legal formalities and proprieties were implicitly or explicitly founded on the distinction between the “civilized” states and their “Others” that existed outside of the international legal system.” It is for this reason that some scholars have argued that colonialism, far from being peripheral, is central to the development of the modern international law.

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188 Anghie, supra note 183 at 40; See generally Antony Anghie, “Francisco De Vitoria and the Colonial Origins of International Law” (1996) 5 Social & Legal Studies 321.
190 Sornarajah, supra note 57 at 287.
192 Anghie, supra note 183 at 38; Lydia Liu, The Clash of Empires: The Invention of China in Modern World Making (Cambridge, Mass.: Harvard University Press, 2004) 24, 108–13. The American diplomat and jurist Henry Wheaton, who authored the highly influential Elements of International Law once argued that international law is not universal, but rather was “limited to the civilized and Christian people of Europe or to
One of the technologies of the positivist international lawyers was the use of “explicitly racial and cultural criteria to decree certain states civilized, and therefore sovereign, and other states uncivilized and non-sovereign.”

For instance, Richard Button, the British explorer and later Consul, once commented in his account of his mission to African nation of Dahomey in 1863 that “the negro, in mass, will not improve beyond a certain point, and that was not respectable.”

According to Davidson:

The advocates of this discourse - Hegel [German philosopher Georg Hegel] most typically, but duly followed by a host of justifiers' - declared that Africa had no history prior to direct contact with Europe. Therefore the Africans, having made no history of their own, had clearly made no development of their own. Therefore they were not properly human, and could not be left to themselves but must be 'led' towards civilization by other peoples: that is, by the peoples of Europe, especially of western Europe, and most particularly of Britain and France.

Thus, the dominant themes of the positivist international law, and those on the basis of which colonialism was justified were “civilization,” “recognition”, and “sovereignty.”

Civilization is a concept which originated in Europe with power as its chief criterion. For instance, Japan became a recognized member of the “civilized group” after it
successfully fought against China. As a Japanese Diplomat bluntly asserted: “we showed ourselves at least your equals in scientific butchery, and at once we are admitted to your council tables as civilized men.” More than anything else, the idea of civilization provided the ideological subterfuge and the colonial logic for the European expansion into Third World territories – derogatorily referred to by nineteenth century international lawyers as the “dark continent” and by one famous Western novelist as “The Heart of Darkness.” This point is very important considering the fact that both the Nuremberg and the Tokyo War Crime trials, which, for the first, expanded the principle of universal jurisdiction beyond its tradition scope, was legitimized, not by the existence of any known rules of international law, but by what a writer referred to as the “judgment of Civilization.” Robert Jackson, the primary architect of Nuremberg and London Charter of August 8, 1945, invoked civilization in his opening statement at the trial: “the real complaining party at your bar is civilization” and that “civilization asks whether the law is so laggard as to be utterly helpless

is the broadest level of identification with which he intensely identifies. People can and do redefine their identities and, as a result, the composition and boundaries of civilizations change.

See Huntington, supra note 3 at 24. In fact, according the Gong, the “confrontation which occurred as Europe expanded into the non-European world . . . was not merely political or economic” but was “fundamentally a confrontation of civilisations and their respective cultures.” He further argued that it was only after the triumph of European civilisation that “the international society of European states evolv[ed] into an international society of self-proclaimed ‘civilised states.’” See Gerrit W. Gong, The Standard of “Civilization” in International Society (Oxford: Clarendon Press, 1984) 3-5.

to deal with crimes of this magnitude by criminals of this order of importance.” Chapter Four explores this issue in greater details.

Emphasis on the cultural superiority of Europe over non-European nations based on an arbitrary criterion developed by the positivists legitimized not only the latter’s characterization as “barbaric,” “uncivilized,” “violent,” “aberrant,” and “backward,” but their expulsion from the realm of international law for lacking in legal personality. This also led to the characterization of the territories of Third World nations as *terrae nullius* – uninhabited. Having legitimated the division between the “civilized” and the “uncivilized” region, international lawyers proceeded to ensure that the former’s criteria coincided with “European”. What it meant was that civilization was synonymous with European ways and standards, thus the “failure of non-European states to adhere to these standards denoted a lack of civilization” for which Europeans were entitled – in fact, under obligation – to intervene “in order to make the world a better and safer place.” Victoria was one of earliest scholars to herald the language of the “white man’s burden” towards the Third World:

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204 Anghie, *supra* note 183 at 40-40.
208 Watson, *supra* note 170 at 27.
see also Duncan Bell, ‘Empire and International Relations in Victorian Political Thought’ (2006) 49:1The Historical Journal 281 at 290 (arguing that over time, international law ceased to be simply an “expression of the desire to pacify the relations between civilised states or to justify the expansion and rationalise the
I say there would be some force in this contention; for if they are all wanting in intelligence, there is no doubt that this would not only be permissible, but also a highly proper, course to take; nay, our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence; and indeed they are no whit or little better than such so far as self-government is concerned, or even the wild beasts, for their food is not more pleasant and hardly better than that of beasts. Therefore their governance should in the same way be entrusted to people of intelligence.\(^{209}\)

Onuma Yasuaki sums it up thus:

\[\ldots\] civilization” basically meant the European civilization. Non-Europeans were regarded as either barbarians or savages, outside the pale of civilization. Since international law was the law among such civilized nations, non-European nations, especially African tribes or natives, could not be a subject of international law. The Europeans had a sacred mission to educate, cultivate, lead and rule non-Europeans so that the latter could enjoy the fruits and advantages of this glorious civilization. Such were the assumptions, ideas and images commonly held by the European leaders at this period.\(^{210}\)

administration of empire; it was one of the key justification of occupation. It was the beneficent gift of the civilised”). The sole “test of civilisation,” for John Westlake, the Whewell Professor of International Law at Cambridge, was “government” – of European type:

When people of Europe race come into the contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and the well-being at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such government, or can or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilisation and the want of it.

See John Westlake, Chapters on the Principles of International Law (Cambridge: Cambridge University Press, 1894) 141. Thus, the absence of “government” acceptable to European would justify territorial annexation under the guise of bringing civilisation to non-civilised people. See Mulligan, supra note 162 at 281; Ingo Hueck, “The Discipline of the History of International Law – New Trends and Methods on the History of International Law” (2001) 3 J His Int’l L 194 at 197 (arguing that “international law, as its proponents and practitioners debated the rights of occupation and conquest, was inflicted by the strategic concerns of the imperial powers”). Vol. 3 (zoos) 194-217 at p. 197 Anghe puts it eloquently thus: “Non-European societies that failed to establish the conditions in which Europeans could live and trade could then be justifiably replaced by European governance, which proclaimed itself as bringing with it civilisation and stability, and, indeed, better protection for the natives themselves.” Anghe, supra note 183 at 42.

\(^{209}\) Vitoria, supra note 184 at 161.

\(^{210}\) Yasuaki, supra note 207 at 42. In 1945, Abe Fortas, then with the United States Interior Department declared thus: “When we take over the Marianas and fortify them we are doing so not only on the basis of our own right to do so but as part of our obligation to the security of the world . . . What is good for us was good for the world.” See William Roger Louis, Imperialism at Bay: The United States and the Decolonization of the British Empire, 1941-1945 (New York: Oxford University Press, 1978) 481, citing Abe Fortas.
Intrinsic in the above is an attempt by the positivists to establish a false moral justification for the colonial enterprise. The “scramble for Africa” by Europe in nineteenth century and the subsequent legitimization by positivist international law following the Berlin Conference of 1884-85, was characterized as an altruistic desire “to bring the blessings of civilization to the ‘dark continent of Africa,’” in order “to camouflage economic and strategic interest of the European power.” Pierre-Oliver Lapie, French Governor of Chad once alluded to this when he justified French occupation of Chad thus:

How are we to create men out of those who are not yet men and then to make citizens out of them and the others who are already more advanced in civilization? That is the dual task. The new French colonial policy is this: the colonizing nation’s sole aim is to transform the colonized areas into states which will someday be its own equals. Under such a policy,

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211 Christopher Weeramantry, “A Response to Berman: In the Wake of Empire” (1999) 14 Am U Int’l LR 1555 at 1560. Lord Curzon, a famous British Viceroy of India once justified British incursion into India thus:

The Almighty has placed your hand on the greatest of his plows and if the Englishman has left a little justice or happiness or prosperity, a spring of patriotism, a dawn of intellectual enlightenment or a stirring of duty where it did not before exist – that is enough. That is the Englishman’s justification in India.

Ibid at 1559, citing G. Curzon, Lord Curzon In India: Being A Selection From His Speeches As Viceroy & Governor-General Of India 589-90. See also Lord Lugard, one of the chief proponents of British expansion in Africa arguing thus: “The merchant, the miner and the manufacturer do not enter the tropics on sufferance . . . as “interlopers,” or as “greedy colonialists,” but in fulfillment of the Mandate of civilisation.”Ibid, citing Lord F. D. Lugard, The Dual Mandates in British Tropical Africa, 2d ed (1923) 60; Lord Balfour, former Prime Minister, speaking of the British occupation of Egypt in Parliament:

[11s it not a good thing for these great nations – I admit their greatness-that this absolute Government should be exercised by us? I think it is a good thing, I think experience shows they have got under it a far better government than . . . they ever had before, and which not only is a benefit to them, but is undoubtedly a benefit to the whole of the civilised West.

Ibid.

212 See General Act of the Conference of the Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo, signed at Berlin, 26 February 1885.

213 Yasuaki, supra note 207 at 44; See also Arts.VI and X of the General Act of the Congress of Berlin (1885), online: <http://www.dipublico.com.ar/english/general-act-of-the-congress-of-berlin-1885/>. Speaking about Europeans’ duty towards the “ignorant and helpless” non-European nations, Westlake, one of the most renowned positivists of the time, in an unusual moment of frankness, argued that,

The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out.

Westlake, supra note 208 at 145.
France is sure that to the ideals of Liberty, Equality, and Fraternity the colonial, peoples will add a fourth – loyalty to France.\textsuperscript{214}

The conference itself was very historic in the sense that it was perhaps the first occasion on which Europe as a body went some way towards articulating a philosophy of colonialism which was appropriate for the late nineteenth century, a time in which the colonial project entered a new phase because of the direct involvement of states in the furtherance of colonialism, and because of the systematic economic exploitation of the colonies which led not only to increasing interstate-rivalries but the increasing importance of the colonies for the metropolitan economy.\textsuperscript{215}

It was largely necessitated by an escalation of chaos and conflicting claims among European nations over title to African territories, and the need to draft “rules of engagement” in accordance with positivist international law. Thus, the Berlin Act introduced, among others,\textsuperscript{216} the concept of sphere of influence by which it was agreed among European nations that a signatory power, once notified of by another power of a concession between it and a

\[\text{Note:}\]

\textsuperscript{214} P. O. Lapie, “The New Colonial Policy of France” (1944) 23 Foreign Aff 104 at 111 (emphasis added). Along this sentiment, Manley O. Hudson, Editorial Board, American Journal of International Law said thus in 1944:

[India's] vaunted "national self-consciousness" has emerged under British tutelage. ... The sweeping assumption that all peoples are fit to govern themselves and to control their territories and resources in an exclusive manner is based on an inadequate understanding of the great problem of colonial administration.

See Manley O. Hudson, “The International Law of the Future”(1944) 38 Am J Int'l L 278 at 282 (emphasis added). Around the same time, Philip Marshall Brown, Editorial Board, American Journal of International Law, described as “abstract” the right of Third World nations to self-government:

The present war has given a great impetus to the acceptance of the principle that colonial administration must be considered as a trusteeship in behalf of the subject peoples.... The arguments now generally used in criticism of the colonial powers, as in the case of India, are not based so much on charges of unjust exploitation as on the abstract right of all peoples to attain self-government.... The term imperialism, with all of its opprobrious connotations, may no longer be fairly applied.


\textsuperscript{215} Anglie, supra note 81 at 96.

\textsuperscript{216} Another was the concept of “protectorate” defined as the recognition of the right of the aboriginal or other actual inhabitants to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and to discharge the duties of the protecting power.” See Mulligan, supra note 162 at 294, citing Memo by the British Lord Chancellor, Lord Selbourne, 3 January 1885. According to Alexandrowicz, “the protectorate means a split of sovereignty and its purpose is to vest in the Protector rights of external sovereignty while leaving rights of internal sovereignty in the protected entity. In this way the Protector shelters another entity against the external hazards of power politics.” See C.H. Alexandrowicz, The European-African Confrontation: A Study in Treaty Making (Leiden, A.W Sijthoff, 1973) 62.
local chief over a territory, must desist from concluding any concession with respect to the same territory. However, the colonial underpinning of this concept was not lost on some nations. For instance, the United States, in opposing the concept, argued that “spheres of influence are new departures which certain Great Powers have found necessary and convenient in the course of their division among themselves of great tracts of the Continent of Africa, and which find their sanction solely in their reciprocal stipulations.” But this objection did little to stem the tide of colonial expansion as European powers launched an aggressive acquisition of territories through concessions obtained on the basis of dubious treaties. In the Island of Palmas Case (United States vs. The Netherlands), the legality of the agreement reached at the Berlin Conference was affirmed by the International Arbitration Tribunal. In proof of its claim of title over the Island, the Netherlands Government had relied on an array of concession agreements concluded by the Dutch East India Company with the Kings of Tabukan, Taruua and Kandashai at different times. The United States, on the other hand, questioned the power of the Dutch East Company, under international law, to validly enter into the said agreements on behalf of the Netherlands. Max Huber, the arbitrator, held that these concessions conferred on the Netherlands a title superior to that of the United

217 Art. 34 of the Berlin Act states thus:

Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.

The General Act, supra note 212.


219 Ibid.

States. Despite the Tribunal’s decision, the contradiction inherent in the notion that the “barbarians” of Africa had the legal capacity to enter into treaties with the “civilised” European nations was not lost on the positivist international lawyers at the time, who, as usual, formulated new legal doctrines in other to manage this contradiction. This issue is explored shortly.

The doctrine of civilization – the distinction between “the civilized self and the barbaric other”221 – was fundamental to the formation of the doctrine of sovereignty,222 which, in turn, was central to the legitimization of colonialism. The implication of the “verdict of civilization” against the Third World nations – and by far the one with the most far-reaching effect – was their depiction by the positivists as lacking in sovereignty, as opposed to the sovereign European states. Consequently, the relationship between the sovereign and non-sovereign nations was one in which the former could do as it wished against the latter, which did not have the legal personality to assert any legal opposition.223 Anghie captured this graphically thus:

The task of defining sovereignty was fundamental to positivist jurisprudence- and not merely because definition was such an integral part of positivist reasoning and methodology. The positivist insistence that sovereignty was the founding concept of the international system led naturally to a careful scrutiny of what entities could be regarded as sovereign. This was an

222 Judge Alvarez, in the Carfu Channel Case, defined the term “sovereignty in the following way: By sovereignty, we understand the whole body of rights and attributes which a state possesses in the territory, to the exclusion of all other states, and also in its relation with other states. sovereignty confers rights upon states and imposes obligations on them. . . . [A]nd we must adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every state, as used to be done under the old law. . . .”
223 Anghie, supra 11 at 3.
important theoretical and practical issue, given the positivist argument that the sovereign had supreme authority. Such a project of definition was not so fundamental to the naturalist framework, since that jurisprudence proposed a system of law that applied to all human activity, whether that of an individual or of a sovereign.224

Sovereignty was a tool in the colonial toolbox of Europe – an apparatus meant to “guarantee the territorial integrity of the then twenty European states and at the time open the rest of the globe for colonial conquest.”225 Hans Kelsen described it as “the twin brother of imperialism.”226 As far as the positivists were concerned, “there [was] only one means of relating the history of the non-European world, and this [they] proceeded to do: it is the history of the civilizing mission, the process by which peoples of the [Third World] were finally assimilated into a European international law.”227 This was essentially the role of sovereignty in the nineteenth century.

Sovereign doctrine was the fulcrum around which participation at the Berlin Conference revolved. Despite the profound impact of the Conference on the future of Africa, no African representative was invited to attend since none of the nations of the region were “recognized” as sovereign entities.228 The doctrine of recognition – the international law doctrine that, till date, confers legal status on a state and without which it is deemed as mere object, instead of subject, of international law,229 which was developed during the colonial era, have, and was

224 Ibid at 25.
225 Ngugi, supra note 93 at 84.
228 Yasuaki, supra note 207 at 41; Mulligan, supra note 162 at 294.
229 Christian Hillgruber, “The Admission of New States to the International Community” (1998) 9 EJIL 491 at 492. According to the Institute of International Law, has defined the recognition of a new state as:
designed to have, a vital political effect on the doctrine of sovereignty. Concomitant with the “verdict of civilization” against non-European nations was the non-recognition of their sovereignty. During the colonial period, positivist international lawyers distinguished between “internal” and “external” sovereignty.\textsuperscript{230} They argued that whereas recognition was optional in the former case, it was indispensable in the latter case.\textsuperscript{231} But even the assertion that recognition could be dispensed with, in the case of internal sovereignty, has been questioned by some scholars. Gerrit Gong and Richard Horowitz have argued in separate texts that positivists pretended as if non-Western societies had an option to stay outside the of the global colonialism.\textsuperscript{232} Thus, viewed through any of the two lenses, the doctrine of recognition was a catalyst for the exclusion of African nations as members of the family of nations, since their civilization was considered inadequate.\textsuperscript{233} Anand captured it thus:

\begin{quote}
During the nineteenth century, as the European countries came to develop their power, however, under the influence of positivism, they began to question the legal personality of the Asian States. At the Congress of Vienna in 1815 a few great Powers established an exclusive club in the Concert of Europe and appointed themselves as guardians of the European community and executive directors of its affairs. They assumed the authority to admit new member States or to readmit old members who did not participate in the foundations of this closed club. They claimed to issue, or deny, a certificate of birth to States or governments irrespective of their existence.\textsuperscript{234}
\end{quote}

\textsuperscript{230} Whereas the former refers to a state’s political and legal supremacy in relations to affairs within its territory, the latter means a state’s political and legal supremacy in relations to affairs outside its territory.


\textsuperscript{231} Ibid.


\textsuperscript{234} Ibid.
According to Alexandrowicz, one of the consequences of this was that the Third World nations, “who for centuries had been considered members of the family of nations, found themselves in an ad hoc created legal vacuum which reduced them from the status of international personality to the status of candidates competing for such personality.”

Even when non-European states eventually began to gain admission into the family of nations, such recognition did not apply to their domestic law. Consequently, domestic courts of non-European states were divested of jurisdiction to try citizens of European states even for crimes committed in the former’s territory. Like today, this came to be justified on the basis of cultural incompatibility as opposed to imperial strategy or one motivated by a sense of cultural superiority. The United States expressed this sentiment in its defence of treaty with China in which the latter is prohibited from prosecuting US citizens thus:

The exercise by the United States of jurisdiction over its citizens in China had its genesis in an earlier agreement that, because of differences between the customs of the two countries and people differences between their judicial systems, it would be wise to place upon the American Government the duty of extending to American nationals in China the restraints and benefits of a system of jurisprudence to which they and their fellow nationals were accustomed in the United States.

However, with the denial of legal personality and equality to non-Europeans came two fundamental doctrinal complications. First, legal positivists were confronted with questions

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236 Mulligan, supra note 169 at 280.
237 Keeton G. William, The Development of Extraterritoriality in China (London: Longmans, 1928) 126-7 (arguing that extraterritoriality, rather than being “repugnant to the best traditions of international intercourse” was in fact “the accepted method of entering into treaty-relations with an Eastern Power whose jurisdiction is not so far developed that it can be recognized by Western States”).
concerning the legality of the numerous treaties entered into between a supposedly non-existing societies and European states. According to Anghie:

The existence of a treaty, in this way, presupposed a legal universe to which both parties adhered. This presupposition, however, contradicted the powerful positivist claim that non-Europeans were uncivilized, that they were lacking in any understanding of law at all, or else, that their understanding of law was so fundamentally different from that of the Europeans that the two parties existed in incommensurable universes. The nineteenth-century European states, however, relied very heavily on treaties with non-European societies in expanding their colonial empires, and in so doing, demonstrated a lamentable disregard for the systematically established and elaborated positivist assertion that non-European peoples were outside the scope of law.\(^{239}\)

Second, positivist international lawyers realized that, by their own criteria of legality, treaties signed between the Europeans and the non-Europeans were, at least, theoretically voidable at the instance of the latter, given that these treaties were tainted with some of the most severe vitiating elements – of duress, undue influence, illiteracy, and, in some cases, mistake of facts. To understand the obvious inequality and, in some cases, relative incapacity of most of these non-European nations, one needs not look further than the contents of some of these treaties which, significantly were drafted in languages other than those of the colonized. For instance, in an agreement signed between the British government and the chiefs of Ngombi and Mafela, the latter purported to transfer their territories to the former in return for:

one piece of cloth per month to each of the undersigned chiefs, besides presents of cloth in hand, they [the chiefs] promised to freely of their own accord, for themselves and their heirs and successors forever .. give up to the said Association the sovereignty and all sovereign and governing rights to all their territories ... and to assist by labour or otherwise, any works, improvements or expeditions which the said Association shall cause at any time to be carried out in any part of these territories. All roads and waterways running through this country, the rights of collecting tolls on the same and all game, fishing, mining and forest rights, are to be the absolute property of the said Association.\(^{240}\)

\(^{239}\) Anghie, supra note 11 at 39.

\(^{240}\) Adam Hochschild, \textit{King Leopold's Ghost} (MacMillan, 1999) 72. See also the treaty in which Wyanasa Chiefs of Nayasaland purportedly agreed as follows:
These issues were problematic, particularly because they struck at the very foundation of positivists’ justification of colonialism – the idea of a civilizing mission of international law. A declaration of invalidity against these treaties would have undermined both European solidarity and international stability.\textsuperscript{241} The case of \textit{Ol le Njong vs. Attorney General}\textsuperscript{242} which was decided by a British court further exposed this conundrum. In this case, the Maasai natives of East Africa which was, at the time, a British Protectorate sought to quash, by judicial review, a certain 1904 agreement between them and the British government. For the purposes of jurisdiction, the question that arose was whether or not the agreement was a treaty, given that the court could not review the treaty obligation of the Crown. The paradoxical aspect of this case was that the Maasai argued that the agreement was not a treaty since they did not have sovereignty to enter into one. The Crown, on the other hand, surprisingly took the view that the Maasai were sovereign, since a protectorate was outside the dominion of the crown, including the fact that they were part of a foreign country with territorial sovereignty.\textsuperscript{243}

\begin{flushright}
We ... most earnestly beseech Her Most Gracious Majesty the Queen of Great Britain and Ireland, Empress of India, Defender of the Faith, &c., to take our country, ourselves, and our people to observe the following conditions:

1. That we give over all our country within the above described limits, all sovereign rights, and all and every other claim absolutely, and without any reservation whatever, to Her Most Gracious Majesty... and heirs and successors, for all time coming.
\end{flushright}

Cited by Anghie, \textit{supra} note 11 at 42.

\textsuperscript{241}Ibid at 39-40.
\textsuperscript{242}\textit{Ol le Njogo v. Attorney General} (1913) 5 E.A.P.L.R. 70
\textsuperscript{243}Ibid at 86.
Dealing with these issues did not pose too much of a problem for international lawyers at the time. The flexibility concomitant with positivist jurisprudence provided some space for the usual ad hoc doctrinal manipulations that subsequently ensured. As it relates to the first issue, the positivists created the doctrine of “quasi-sovereignty” by which they strangely argued that non-Europeans’ savagery did not mean that they were incapable of coming to some understanding with Europeans. This “partial enlightenment,” they argued, was sufficient for the purposes of enforcement of legal obligations created through these “unequal treaties,” not necessarily a wholehearted recognition of their full membership of the law of nations. Westlake, for instance, declared that European international society “exercises the right of admitting states to parts of its law without admitting them to the whole of it.” Thus, in the Maasai case, the court surprisingly dismissed the Maasai’s claim, holding that they had validly signed the treaty as a sovereign entity. But it was its discussion of the applicability of international law to the colonial relationship that is even more instructive:

Treaties are the subject of international law which is a body of rules applied to the intercourse between civilized states . . . [but] "International law touches [P]rotectorates of this kind [Protectorates over uncivilized and semi-civilized peoples] . . . by one side only. The protected states or communities are not subject to a law of which they never heard, their relations to the protecting state are not therefore determined by International Law.

. . . It must, however, I think, be taken to be governed by some rules analogous to International law and to have similar force and effect to that held by a treaty, and must be regarded by Municipal Courts in a similar manner.

244 Anghie, supra note 11 at 43.
245 Westlake, supra note 208 at 143
246 Ibid at 40.
248 Ibid at 91-92.
Apart from the racial undertone of the above decision, a critical examination of the quote reveals an inherent contradiction. On one hand, the court asserted the sovereignty of the Maasai to enter into valid treaty, whereas on the other hand, held that the relationship between them and the British government could not be regulated by the rules of international law since they didn’t have knowledge of them. James Gathii asked the following questions: “if Maasai-British relations could not be governed by international law, how could the Maasai enter into a treaty, which, by definition, is a creature of, and is governed by, rules of international law? How could international law only be available for the purpose of establishing that the Maasai could enter into a treaty but not for the purpose of establishing if the treaty had been observed in accordance with rules of international law?”  

With respect to the second problem, positivists argued that the circumstances of these treaties must not be allowed to trump the unambiguousness of the intentions of the parties to them. In other words, the manner in which these treaties were procured was deemed irrelevant for the purposes of determining their binding character. Anghie puts it thus:

Treaties between European and non-European states thus became the objects of positivist scrutiny. But the methodology used by positivists to examine these treaties had the paradoxical effect of erasing the non-European side of the treaty even when claiming to identify and give effect to the intentions of that party. This was a consequence of the positivist practice of focusing on the words of the treaty to the complete exclusion of the circumstances under which the treaty had been arrived at. In this way, the positivists ignored the massive violence inflicted on non-European peoples and the resistance of these peoples against that violence. 


\[250\] Anghie, supra note 11 at 40.
III. The Concept of “Continuity of Resistance Emotion” and the AU’s Opposition of Universal Jurisdiction

Resistance is perpetually ingrained in the psyche of the post-colonial Third World.251 This is because the expansion of Western international law through colonialism left in much of the Third World “a legacy of bitterness over their past status as well as a host of problems relating to their social, economic and political development.”252 Thus, resistance by the Third World against international law and its institutions is not a recent phenomenon.253 In fact, it predates the modern era of globalization.254 In one of his seminal works, Terence Ranger examined the anatomy of the Third World “revolt against the West” at different epochs255 and found that since the era of colonialism, there has been what he referred to as a “continuity of resistance emotion” in the relationship between the Third World and the West.256 In other words, contemporary national oppositions have been “connected with earlier forms of violent resistance to the imposition or maintenance of colonial rule.”257 He identified two forms of resistance - “primary” and “secondary” resistance. Whereas the former refers to the earliest anti-colonialism movements, the latter relates to the subsequent

256 Ibid at 49.
257 Walraven & Abbink, supra note 254 at 1.
battles for independence. Together with these categories might be added another – “tertiary” resistance, which houses Third World resistance against all forms of post-independence hegemony.

The independence of Third World nations changed the complexion of Third World opposition. With their attainment of statehood came a serious interrogation of the legitimacy of the existing rules of international law and institutions. Röling highlighted the “horizontal expansion of the international community,” noting its implications for both the West and the traditional international law: “The western nations occupy a minority position in the present community. That means that the prosperous, technologically highly developed, industrial and commercial nations are now in the minority. The majority is composed of poor, technologically underdeveloped countries with alarming low standards of living . . . . [T]he change in the sociological structure of the community of nations should therefore be accompanied by an alteration in law.” In their opposition, Third World states argued that not only were these rules created without their participation, but had been used to sanction their colonial subjugation.

The political reality in the nineteenth century, coupled with the creation of international norms, was essentially one which was based exclusively on the decisions of a few select

\[261\] Hanna Bokor-Szegő, supra note 135 at 53.
European states that constituted the Concert of Europe. Most scholars agree with this characterization. For Schrolder, the so-called ‘classical’ international law was simply “the international law of European domination of the World, of European colonialism.” George Abi-Saab was one of the earliest Third World scholars to call for a critical examination of the rules of international law in order to examine their continuous relevance to the new reality. Anand wrote: “... present international law was developed during part of the nineteenth and the beginning of the [twentieth century]. Asian and African countries had very little to do with it because they were conquered and colonized and made to serve merely the interests of the metropolitan states and their masters.” Thus, it did not come as a surprise that “states that were victims of such an unequal position, and were passive objects of these rules of international law, often give the impression that they rebel against their application.”

263 Bokor-Szegő, supra note 135 at 53.
266 Ibid at 387. However, there are some scholars who have argued that having accepting to become members of the international community, Third World states are estopped from denying the binding character of these norms. To do so, they argued, would be tantamount to accepting the benefit that come with such membership while denying the burden. Professor O’Connell, for instance, maintain that:

... a new state is born into a world of law. Indeed it is a state ... only because of a law that lays down the conditions for and the attributes of statehood. There is a tendency to argue that the international law we know is a product of European politics and Western philosophy, and is an emanation of the Age of Reason and the nineteenth-century statecraft, and that as such it has little cogency for the new states of African or Asian culture. The argument, of course, disposes altogether of a law of state succession. However, it is unacceptable for the very explanation that the Age of Reason offered, namely, the social contract. In asserting the facilities of statehood, the new state is accepting the structure and the system of Western international law, and it may not, without offending all juristic doctrine, pick and choose the acceptable institutions, if only because its next-door neighbour, also a new state, will claim a like privilege ...

Choukairy, the Saudi Arabian delegate to the 1958 Law of the Sea Conference echoed this sentiment: “the law of nations was made by some states, nations and some empires, and the other countries are merely the objects of the law, not its subject…Such international law must come to an end and we cannot permit it to exist any longer.”

To be sure, Third World states are not opposed to the entire body of international law which predates their independence, and this view is also shared by TWAIL scholars of different epochs. Their attitude is somewhat in the middle – neither accepting nor rejecting the entire body of international law. As Hazard put it, “No one is asking for a complete rejection of what we know as international law. No one is asking that the books be burned and that we start afresh in rejection of the lessons history has given us as to the rules which minimize friction.” Some aspects of international law, especially those that are not supportive of past colonial rights or equitable by the present reality of the principle of sovereign equality of states, have earned the acceptance of these states. Whenever there is an outburst by Third World states against the present regime of international law, it is often a call to reform the system to make it more equitable and adaptable to the present-day conditions, as opposed to

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267 Röling, supra note 260 at 72
269 Tieya, supra note 21 at 962.
270 John N. Hazard, “A Pragmatic View of the New International Law” (1963) 57 Am Soc’y Int’l Proc 79 at 79; See C. G. Fenwick, “International Law: Old and New” (1966) 60 Am J Int’l L 475 at 481 (noting thus: “perhaps it may even be said to be a matter of surprise that so much respect has been shown for the traditions of Western Europe, apart from occasional psychopathic reactions that relate to matters of policy than general international law”).
an outright rejection.\textsuperscript{272} Such an outburst, as Professor Lissitzyn rightly observes, “must be regarded as an expression of the resentment the newly independent nations still feel over their colonial past and as an assertion of their sovereignty and equality.” They also serve “as a reminder to the older States that the views of the newcomers are not to be disregarded in the formulation and the further development of the law of nations.”\textsuperscript{273} More than anything else, Third World states appreciate the importance of international law to their security. As militarily weak states, for instance, they realize that international legal system is an anti-imperial pill – their protection against potential future arbitrary territorial occupation by the powerful members of the international community.\textsuperscript{274}

Over the last few decades, Third World opposition to international law has shifted to a new but related frontier. The expansion of world society following the admission of independent Third World states has led to a call for the transformation of the structure of the international community, especially as it relates to international law-making. Stephen Krasner alluded to this when he identified three impediments to the development of a viable and stable body of international law: disagreements about substantive and procedural norms; unequal distribution of power; and the absence of any final authoritative decision maker.\textsuperscript{275} As observed by Tieya, even many Western international law scholars acknowledged the inevitabilities posed by the explosion of sovereign nations to traditional international law that

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{272}]Ibid; see also Oliver J. Lissitzyn, “International Law in a Divided World” (1963) 34 Int’l Conciliation 3 at 54-55.
\item [\textsuperscript{273}]Lissitzyn, \textit{ibid} at 54-55.
\item [\textsuperscript{274}]J. J. G. Syatauw, “The Relationship between the Newness of States and their Practices of International Law” in Anand, \textit{supra} note 268 at 15.
\end{enumerate}
\end{footnotesize}
is the product of European civilization, while some are even embracive of the reality of a changing international law. 276 Röling argued for “a new international law” in response to the new global order. 277 Kunz distinguished between the “new international law” (i.e. international law before 1945) and “the newest international law” (i.e. post-1945 international law). 278 Some have, however, reacted with panic, worrying that international law is facing a “crisis” or being “menaced” 279 or describing the changes international law has been forced to undergo as “problematic.” 280

For the Third World states who fought so long for freedom and independence from the burden of European empire, Westphalian state sovereignty – of equality of states – remains the template for relations among states regardless of historical, economic or geopolitical differences. 281 The guarantee of equality associated with their sovereignty ought to translate into equal participation in the making of international law which, they hope, will eventually lead to the development of a more progress doctrines of international law. 282 “The link between sovereign independence personhood and law-making is . . . an especially important

276 Tieya, supra note 21 at 957.
277 Röling, supra note 260 at 7.
278 Ibid at 9.
279 Tieya, supra note 21 at 960, citing H. A. Smith, The Crisis in International Law (1947) 1-32.
282 C. L. Lim, “Neither Sheep Nor Peacocks: T. O. Elias and Post-Colonial International Law” (2008) 22 Leiden J Int’l L 295 at 297; see also Radhabinod Pal, “Future Role of the International Law Commission in the Changing World” (1962) 9 UN Rev 29 at 31 (hoping that “the progressive development of international law would bring about a greater degree of universality through the contributions and the active participation of the many new nations which had emerged on the international scene”)

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A quantitative change in the international community must also translate to a qualitative change in the content of international rules. They also challenge the claim of universality of some of the doctrines of international law, particularly those the making of which they did not participate in and are suspicious of the concept of customary international law which they view as often the practices of a select few powerful nations camouflaged as the "decision of the overwhelming force in the international community." The current AU’s opposition to universal jurisdiction is a good example. To this end, they have sought a greater role for the United Nations General Assembly in international law-making process, given its truly universal and democratic nature – of “equal representation, equal opportunity to participate in the discussions, and equal voting powers.” Part of their intention obviously is to leverage their numerical clout in the international system to attempt to ensure that the manner in which international law is made and implemented is not only reflective of their position but curbs the excesses of the great powers of the West. But the implication of this move has not been lost on powerful nations, who have, among other things, warned of the “tyranny of the majority.” Chapter Four explores this issue in detail.

283 Lim, *ibid* at 297.
284 S. Prakash Sinha, “Perspective of the Newly Independent States on the Binding Quality of International Law” (1965) 14 Int’l & Comp LQ 121 at 121.
285 *Ibid* at 122, citing R. Quadri, *Diritto internazionale publico* (1956) 89
287 Fiddler, *supra* note 73 at 38.
E. CONCLUSION

International law appears condemned to perpetual crisis. Whether real or imagined, “the threat of re-colonization is haunting the Third World.”288 The brutality of the West against the Third World between the nineteenth and the later part of twentieth century has left an indelible scare in the consciousness of Third World states. Of particular interest is the role played by international law in during this period. The triumph of positivism over naturalism in the nineteenth century was not by happenstance; rather, it was deliberately orchestrated to equip European states and international lawyers with an unlimited doctrinal flexibility to legitimize colonialism. In fact, the modern international law owes its existence to the colonial relationship between Europe and the Third World. As Professor Verzijl stated with a sense of pride: “Now there is one truth that is not open to denial or even to doubt, namely, that the actual body of international law, as it stands today, is not only the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of European beliefs, and in both of these aspects it is mainly of Western European origin.”289

In this chapter, an attempt has been made to demonstrate the extent to which Africa’s past colonial experience is influencing the AU’s ongoing opposition to the prosecution of Africans by Western states. The central argument has been that the humiliating manner in which the Third World was brought into the existing system of international law, which was through colonialism, is largely responsible for its anti-Western complex and a perpetual

288 Chimni, supra note 92 at 47.
sense of normative ambivalence, if not downright hostility, towards international law. This is further complicated by the almost interchangeability of the technologies of positivist international law during the colonial era with the praxis of the modern universal jurisdiction. A good example is the doctrine’s reliance on the concepts of “universality” and “international community” – the very same claim that was used to facilitate and justify Europe’s colonial subjugation. To many African states, therefore, the doctrine of universal jurisdiction reminds them of this past. Afsah was quite on point when he stated thus:

Nevertheless, one must not forget justifiable grievances stemming from a long historical memory of exploitation in which the rules of international law have quite reasonably been perceived as perpetuating the rights and interests of powerful Western states, without regard for the legitimate socio-economic needs of weaker non-European states nor respecting their cultural heritage. The “absurdity” of such an “international caste system” has done lasting damage to the normative acceptance of the substantive and procedural content of international law.

But more importantly, and as explored in great detail in Chapter Four, the ongoing crisis exposes a broader problem concerning the obsolescence of some aspects of international law, particularly its norm generation process. As Anghie put it, “the basic feature[s] of nineteenth-century international law remained unchallenged by the new international law.” The emergence of more states following a sustained wave of decolonization which was encouraged by the United Nations that “became a machine for the manufacture of new states” changed the quantitative complexion of the international community. International


291 Afsah, ibid.


law has since seized to be “almost exclusive preserve of the peoples of European blood” whose consent and practices used to be all that was needed in order for an international norm to come into existence.\footnote{294} Despite this expansion, however, it is fairly obvious that international law-making process has remained irresponsible to this new reality.\footnote{295} In other words, “each gesture of greater inclusion in the ‘international community’ has been accompanied by a gesture of exclusion.”\footnote{296} The modern international law has continued to live off the influence of imperial powers, continuously beaching under the sun of hegemonic hierarchy rather than sovereign equality.\footnote{297} Agitations for reform from Third World state have been very intense though with little success. Gathii characterized this effort as a process of “decentering” international legal discourse from its continuing Eurocentricity and deprecation of Third World sources of ideas and practices,\footnote{298} Mutua sees it as "reconceptualizing and restructuring international law."\footnote{299} Anand captures the frustration of Third World states at the slow pace of reform thus:

Acting in concert, these poor and weak countries have come to acquire sufficient influence and strength to challenge the most influential and strongest Powers. The increasing militant demands by the militarily inconsequential poor countries of the Third World, which form vast majority in the United Nations today, upon the privileged minority for an international redistribution of wealth and power are being made with greater frequency and greater intensity. Many a time, their rhetoric is inflammatory and their language hostile, which, it may be said, is merely a reflection of their increasing frustration and desperation.\footnote{300}

\footnote{294} Anand, supra note 233 at 62.  
\footnote{296} Berman, supra note 141 at 1523.  
\footnote{300} Anand, supra note 233 at 130.
Nevertheless, to simply found the AU’s opposition to the ongoing expansion of universal jurisdiction on the mere politics of suspicion will be an intellectual travesty. An examination of its resolutions and declarations on the subject reveals a much more substantive legal issue – one that questions the legality of the expansion itself. In fact, this issue was not only the subject of formal investigation by the Union\textsuperscript{301} but, as stated in chapter one, a subject of debate at United Nations General Assembly (UNGA), at its behest. Therefore, mindful of this doctrinal dimension to its opposition, the next chapter examines the legitimacy of the ongoing expansion of universal jurisdiction.

Chapter 3: International Criminal Justice as Chiefly (Mis)Interpreted: A Critical Examination of The Evolution of Universal Jurisdiction

There are those who think, that an act of cruelty committed, for example, at Constantinople, may be punished at Paris; for this abstracted reason, that he who offends humanity, should enemies in all mankind, and be the object of universal execration; as if judges were to be the Knights errant of human nature in general, rather than guardians of particular conventions between men.¹

A. INTRODUCTION

Since the nineteenth century, the movement for the expansion of universal jurisdiction to include more crimes (the so-called “modern” or “new” universal jurisdiction theory) has been decidedly unprecedented, spreading with an astonishing speed. The passion of its advocates, too, palpably unremitting and, in some cases, combative. And their intention so humanitarian and altruistic that any opposition is considered as counter-intuitive, at best, and as incomprehensively irrational, at worse. To them, an insistence on accountability for gross human rights violation is the least that all “‘compassionate’ ‘right-thinking’ lawyers of the world”² ought to commit to.

At some level, this is quite understandable. An upsurge in armed conflicts, especially since the later part of the twentieth century, with the concomitant gross violations of human rights and the perpetration of the most egregious of crimes has left human rights scholars and groups “desperately seeking new institutional and legal mechanisms capable of restraining

[man’s] darkest impulses.” Both the gravity and the geographical spread of the problem are large in scale. By 1998, it was estimated that 170 million people had died from more than 250 conflicts that had taken place since World War II. The atrocities perpetrated both in the former Yugoslavia and Rwanda in the 1990s, perhaps, sums up the tragedy of the twentieth century. Whereas the civil war that occurred in the former Yugoslavia in 1991-94 left 250,000 dead, 2 million displaced and an entire ethnic group – the Bosnian Muslims – perpetually traumatised, the Rwandan conflict created an estimated 500,000 to 800,000 Tutsi and Hutu moderate dead within 100 days in what has been described as the fastest genocide in human history.

In the context of the African region especially, the Rwandan conflict represents only but a small fraction of the larger fog of conflict that has enveloped the post-independent African states. The Stockholm International Peace Research Institute’s (SIPRI) Yearbook published in 2000 and 2001 stated that “. . . Africa is the most conflict ridden region of the world and the region in which the number of armed conflicts is on the increase” and that “Africa continued to be the region with the greatest number of conflicts,” respectively.
Somalia to Congo, and from Sudan to Uganda, “armed conflicts have become the common denominator of statehood even as peace and security have remained elusive.”

73.PDF, citing SIPRI Yearbook of World Armaments and Disarmaments (Oxford: Oxford University Press, 2000 & 2002). According to the United Nations, since 1970, well over 30 wars have been fought in Africa, most of which have been internal, as opposed to between states. See Report of the Secretary-General to the UN Security Council: The causes of conflict and the promotion of durable peace and sustainable development in Africa, UN doc. A/52/871-S/1998/318, April 1998, at para. 4. Between 1980 and 1994, 10 out of the 24 most war-devastated countries were in Africa. See Charles C. Jalloh, “Regionalizing International Criminal Law?” (2009) 9:3 Int’l Crim LR 445 at 454. However, Paul Zeleza disagrees with the above assertion which he regards as a distortion of facts calculated by the West to portray African conflicts as peculiar and pathological without rational explanation. He argues that from historical standpoint, ‘Africa has been no more prone to violent conflicts than other regions. Indeed, Africa’s share of the more than 180 million people who died from conflicts and atrocities during the twentieth century is relatively modest: in the sheer scale of casualties there is no equivalent in African history to Europe’s First and Second World Wars, or even the civil wars and atrocities in revolutionary Russia and China.’ See Alfred Nhema & Paul T. Zeleza, eds, The Roots of African Conflicts: Causes & Costs (Athens: Ohio University Press, 2008)1. Henderson notes that “in 1995, there were five ongoing wars (in Angola, Liberia, Sierra Leone, Somalia, and Sudan), several countries that were candidates for state collapse or civil war (Burundi, Camerooon, Kenya, Nigeria, Rwanda, Togo, and Zaire), and a host of other countries where low-level ethnic and political conflict remained contained but unresolved (Chad, Congo, Djibouti, Ethiopia, Malawi, Mali, Mozambique, Senegal, South Africa, and Uganda).” See Errol A. Henderson, “When States Implode: Africa’s Civil Wars 1950-92” in Nhema and Zeleza, ibid at 51. Rwanda and Uganda have since joined the first category, while in Nigeria, what began as peaceful agitation for greater resource control has recently turned into a second-degree armed struggle between the militants and the government forces. See Uche Nworah, “How to Resolve the Niger Delta crises” Online: Global Politician <http://www.globalpolitician.com/22460-niger-nigeria>. There have been reported cases of gross violations of human rights such as rape, murder, conscription of child soldiers, kidnapping, etc. See Andrew Walker, “Elusive Peace in Niger Delta” Online: BBC News <http://news.bbc.co.uk/2/hi/afrika/7500472.stm>.

Eberechi Ifeonu, From Consent to Suspicion: Understanding the African Union’s Emerging Resistance to the Enforcement of International Criminal Justice in the African Region (VDM Verlag Dr. Müller Aktiengesellschaft & Co. KG, 2009) 66. Analysis of the causative agents points to the two notorious Cs – Cold War and Colonialism. The former U.N. Secretary General Boutros Boutros-Ghali once admitted that, “[w]e have entered a time of global transition marked by uniquely contradictory trends.” See Boutros Boutros-Ghali, “An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping” (1992) 11 Int’l Relations 201 at 202. The Cold War – the bloodless ideological battle between the capitalism and communism – was not simply a war between the United States and the now defunct United Soviet Socialist Republic (USSR) but involved other states who were conscripted by each side either through economic coercion or in exchange for some forms of assistance. See Tom Lodge, “Towards an Understanding of Contemporary Armed Conflicts in Africa” Online: <http://www.iss.co.za/pubs/Monographs/No36/ArmedConflict.html>. In some cases, especially in the context of the Third World, the realisation of this expansion required the imposition of, and supports towards, repressive or illegitimate governments. A good example is the former Somalia president, General Siad Barre, who assumed power through a military coup d’etat in 1969. Despite the illegitimacy of his government, he was heavily courted, first by USSR and later by the US. O’Neil captured it succinctly thus: “Barre was handsomely for his compliance. His increasing corrupt dictatorship was funded and by Carter, Reagan and Bush senior. This period of Western intervention was especially disastrous for Somalia: through Barre, America manipulated and intensified ethnic divisions in Somalia, in order to shore-up the ever-more isolated Barre’s rule over the country. Barre used American money to buy allies and American weapons to punish enemies. The old dream of a united Republic of Somalia – which motivated Somalia in 1960s and 70s – was consigned to the dustbin of history.” See Brendan O’Neill, “Somalia: Killed by ‘Kindness’” Online: Spiked <http://www.spiked-online.com/index.php?site/article/439>. However, as the Cold War eventually ebbed, the
However, considering the weighty implications of universal jurisdiction, particularly on states’ sovereignty, one would expect that the international legal foundation for this development is solid. This is surprisingly not the case. For so long, advocates for the expansion of the doctrine have failed to explain its philosophical foundation or legal

Superpowers’ interest in these proxy governments declined, and the power struggle that subsequently ensued plunged these states into armed conflicts. In Eastern Europe, the end of the Cold War saw the resurgence of a highly entrenched ethnic and religious tensions initially suppressed by the conflict. The emergence of national sentiments and identity hitherto constrained by the communist government in the aftermath of the break-up of the Soviet Union was responsible for the internal conflict in the former Yugoslavia. See Virginia Morris & Michael P. Scharf, An Insider’s Guide to the International Tribunal for the former Yugoslavia: A Documentary History and Analysis (Irvington-on Hudson NY: Transnational Publishers, Inc., 1995) 21. Colonialism, too, is equally responsible for the crisis situation on the African continent. See Obiora Chinedu Okafor, Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa (Cambridge: Kluwer Law International, 2000) 24. The tragedy of the Berlin Conference of 1884-1885 – the ultimate scramble for Africa – which was discussed in Chapter two lies in the formation of states through coercive assemblage of mutually incompatible groups – “the transformation of relatively ethnic societies to ethnically plural states.” See Ifeou, supra note 9 at 69; Oko, Ibid at 104; Okechukwu Oko, “Confronting the Transgressions of prior Military Regimes Towards a more Pragmatic Approach” (2003) 11 Cardozo J Int’l & Comp L 89 at 104. Throughout the colonial era, the “precarious systems of states,” which emerged from this process, survived not because of any sense of unity and integration but through the coercive military superiority of the Empires. It was not until the independence of these states that the fallacy of this union became obvious as “many ethnic agitations founded on mutual distrust quickly assumed the proportion of armed conflicts.” See Marina Ottaway, “Personal Views: Keep out of Africa,” The Financial Times, February 25, 1999; Ifeou, supra note 9 at 69. Mutua puts it in the brilliant manner that only him can: “Now the protracted problems of the postcolonial African state have raised anew the meaning of state legitimacy and brought forward disturbing questions about the concepts of territorial sovereignty and statehood. The juridical statehood attained with the decolonization of the colonial state has in the last four decades proven inadequate. It is becoming increasingly apparent that these concepts and principles may have trapped Africa in a detrimental time capsule; they now seem to be straightjackets with time bomb ready to explode. The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it. Unlike their European counterparts, African states and borders are distinctly artificial . . .” Dr. Makau wa Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry” (1994-95) 16 Mich J Int’l L 1113 at 1114-5. The negative impact of colonialism on Africa was brilliantly stated by a retired justice of the Supreme Court of Nigeria, Chukwudifu Oputa thus:

“The lumping together of different ethnic groups into one artificial unit is not the worst feature of colonialism. Its most obnoxious feature is the subsequent alienation of the colonized from their roots, from their culture, from their religion, from their language, from their laws and from their concept of justice. You cannot colonize a group without first dehumanizing them, enslaving them, and brainwashing them into believing that they are inferior. The colonial masters, through myths designed to show the inferiority of the oppressed and colonized people, through the imposition of language of the colonial masters, but mostly through the inclusive and frightening character of their authority managed to impose on the colonised a new religion, new ways of behaviour, new ways of seeing and. In particular, a pejorative judgment with respect to their original culture, religion, language, sense of right and wrong.”

elements except to, much like the early universalists, thump the amorphous concept of “international morality.”

In fact, the legal basis for the doctrine of universal jurisdiction has, mildly stated, remained indeterminate, with advocates propounding all sorts of theories to justify their case.

According to one school of thought, its legality is founded on the similarity between the crimes which it contemplates and the crime of piracy – the only offence to which the doctrine traditionally applies. This similarity, they argue, lies in the heinousness of both the crime of piracy and those in respect of which universal jurisdiction is invoked. In other words, the argument is that since states have generally accepted the exercise of universal jurisdiction over piracy due to its heinousness, they must be deemed to have consented to universal jurisdiction over any subsequent crimes adjudged by the “international community” as heinous. Another side to this argument is the presumed effect of certain crimes on humanity as a whole. Certain crimes, it is argued, affect not only the specific victims or state of which the victims are nations but everyone, for which reason “any state may legitimately prescribe to sanction anyone who allegedly committed any of those acts regardless of any jurisdictional


connection between the alleged acts and the state asserting jurisdiction.” Individuals who commit these crimes, the argument goes, are *hostis humanis generis* – enemies of mankind.

There are also those who justify the expansion of the doctrine by reference to both the decision of the Permanent International Court of Justice (PICJ) in the *Lotus* case in which the court appeared to presume in favour of states’ jurisdiction, in the absence of an international rule to the contrary and some post-World War II decisions of courts, beginning with the Nuremberg trial in 1945. For some, the legality of universal jurisdiction is located in both customary international law (CIL) and in the provision of multilateral treaties that obligates parties to either “prosecute or extradite” anyone accused of having committed an international crime – the so-called *aut dedere aut judicare* principle. There are also those who have found the existence of an “independent theory of universal jurisdiction” based on “the normative universalist position and the pragmatic policy position,” as well as on “a functional approach to the assumption and exercise of jurisdiction.”

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15 A good example is Paragraph 2 of the Resolution of the Institute de Droit international (IDI) on universal jurisdiction which states thus: 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. See Resolution of the Institute of International Law *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Seventeenth Commission, Krakow Session – 2005, online: <http://www idi-iil.org idiE/ resolutionsE/2005_kra_03_en.pdf>.


As part of the inquiry into understanding the African Union’s opposition to universal jurisdiction, this chapter interrogates the legality and/or the legitimacy of the ongoing expansion of universal jurisdiction, examining the various grounds relied on by advocates in its defence. It argues that, stripped of their emotional appeal, none of the theories, except the one on CIL, propounded by advocates of the doctrine to justify its ongoing expansion is legally credible. This lack of legal credibility, it is further argued, is fatal to its acceptability by states as a legitimate instrument in the fight against impunity – legality being an important axis around which states’ cooperation necessary for the effective enforcement of international law revolves. Beyond the African states’ sense of scepticism towards certain international law doctrines discussed in chapter two, this chapter further locates the ongoing AU opposition in the uncertainty surrounding the doctrine’s legality.

To be sure, it is the position of this chapter that universal jurisdiction, as an enforcement mechanism, is a concept known to international law and one that has been elevated to the status of customary international law. What is contested, however, is the breadth of crimes to which it applies and the idea that there is necessarily a “logical correlation between the universal validity of a substantive norm . . . and the repression of violations of such a norm by a bystander states.”¹⁸ In other word, it is argued that despite universal jurisdiction’s customary international law status, it remains, as George Abi-Saab calls it, a metaphorical

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“empty box”\textsuperscript{19} whose normative contents can only be determined by reference to the intention of states – an intension which can only be as discerned either by states practice or by treaty commitment.

This chapter proceeds in five parts including this introduction. Part B examines jurisdiction in international law, with specific focus on the doctrine of extraterritorial jurisdiction, examining in the process the “\textit{Lotus} principle,” which is often cited by proponents of universal jurisdiction. It is argued that, in view of subsequent pronouncements of the international court, any reliance on the \textit{Lotus} principle to justify the expansion of universal jurisdiction is grossly misleading. Part C discusses the different types of extraterritorial jurisdiction, highlighting the core distinctions between the rest and universal jurisdiction, one of which is the absence of any link between the crime and the prosecuting state. Part D examines most of the theories advanced by advocates to justify universal jurisdiction, and concludes that none of them could support the asserted claim. Part E, which is the concluding part, sums up the key findings of chapter, arguing that while universal jurisdiction is a doctrine which has attained the status of customary international law, whether or not the violation of a particular norm can be enforced through it should be a separate question altogether.

B. UNIVERSAL JURISDICTION UNDER INTERNATIONAL CRIMINAL LAW

I. Jurisdiction in International Law Context

An organised legal system is one that defines not only the rights and duties of its citizens but also stipulates the method of dealing with legal disputes and violations. Within the latter category, domestic judicial institutions are established, often in a hierarchical order, with clearly defined jurisdictional boundaries in order to prevent judicial anarchy. Thus the question of whether or not a particular court is competent to deal with a matter is answered by reference to the court’s enabling statute. With respect to international law, however, the principles regarding jurisdiction “were established to foster cooperative relations by avoiding and resolving conflicting assertions of domestic penal authority.” This is because these principles, as Randall put it, “rest on and are the typical results of a balancing of sovereignty between States and prohibited interference with internal affairs” as they “indicate either a meaningful link…which describes an internationally legally permissible relation . . . between forum State and offence or offender, or further international legal criteria . . . which prevent an exercise of extraterritorial jurisdiction from infringing on another State’s sovereignty.”

II. Definition of Jurisdiction

Despite its ubiquity in both international law literature and discussions among international lawyers, the definition of jurisdiction is hardly self-evident. Rain Liivoja, for instance

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20 Randall, supra note 11 at 786.
described jurisdiction as an amorphous term that “comes with baggage.” What is evident, however, is that jurisdiction and sovereignty are related, even though in some cases not identical, and that, in the case of international criminal law enforcement, is the most important issue determining the legality of prosecution of those accused of perpetration of international crimes in the domestic court of a state. In a world composed of equally sovereign states, the determination of law, duties and obligation, in relation to citizens and others within its territory, is the exclusive prerogative of every state, but only becomes the concern of international law when a state, in an exercise of its sovereignty, adopt laws or measures that effect matters outside its domestic sphere. Thus the issue of jurisdiction can constitute a delimiting factor preventing an unbridled exercise of sovereign power by states - something that is consistent with the post-Westphalian state-centric nature of the modern international law founded on sovereignty. Because the law on jurisdiction seeks to outline the outer limits of states’ power in their relationship inter se, it has become the most essential as well as the most controversial subjects in international law, especially since the twentieth century following the expansion of the international community to include the “new sovereign states” from the Third World for whom sovereignty remains the hard won price of their long struggle. And to the extent that it is meant to prevent states from interfering in

26 Ryngaert, supra note 18 at 6.
27 Joyner, supra note 5 at 163.
28 Bassiouni, supra note 10 at 89.
the domestic affairs of one another, jurisdiction is closely related to the customary international principle of non-intervention and sovereign equality of states.\textsuperscript{29}

The importance of jurisdiction in international relations cannot be over-emphasised. According to Ryngaert, “Guaranteeing a peaceful coexistence between states through erecting jurisdictional barriers which states are not supposed to cross, the law of jurisdiction is one of the building blocks of the classical, billiard-ball view of international law as a ‘negative’ law of state coexistence.”\textsuperscript{30} Thus, the legitimacy of a domestic jurisdiction lies on its conformity with international principles.\textsuperscript{31} As highlighted in Chapter One, the current confrontation between the AU and the “international community” stems from what the former views as an illegal encroachment on the sovereignty of some of their member states by some Western states, in exercise of universal jurisdiction over crimes the customary international law status of which, as would be demonstrated in chapter four, is in serious doubt.

Loosely defined, jurisdiction, whether it applies to civil or criminal matter, is “the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially.”\textsuperscript{32} In the

\begin{itemize}
\item \textsuperscript{30} Ryngaert, \textit{supra} note 18 at 6.
\item \textsuperscript{31} Randall, \textit{supra} note 11 at 786
\item \textsuperscript{32} Restatement (Third) of Foreign Relations Law of the United States, Section 401, online: <www.kentlaw.edu/faculty.../ntlLawFall2007.../RestatementSources.doc>; See also Vaughan Lowe, “Jurisdiction” in Malcolm Evans, ed, International Law, 2d ed (Oxford: Oxford University Press, 2003) 329 at
\end{itemize}
context of this dissertation, jurisdiction is the authority of a state in international law to regulate the conduct of persons and to punish for the violation of its laws\textsuperscript{33} or international law. In other words, “Jurisdiction involves a state’s legitimate assertion of authority to affect its legal interest, and applies to law-making activities, judicial processes, or enforcement means.”\textsuperscript{34} Although the jurisdiction of states is usually territorial, international law recognises extraterritorial jurisdiction in limited situations.\textsuperscript{35}

III. Extraterritorial Jurisdiction in Historical Perspective

Extraterritorial jurisdiction is not a novel concept.\textsuperscript{36} It is firmly rooted in Anglo-Saxon jurisprudence.\textsuperscript{37} The old English case of \textit{R. v. Brisac}\textsuperscript{38} is illustrative of this principle. In this case, an English court assumed jurisdiction in respect of a crime of conspiracy that occurred in the high seas which was calculated to defraud the King’s Naval Stores in England. This was despite the fact that planning occurred outside the British shores.\textsuperscript{39} The common law

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\textsuperscript{329} (stating that jurisdiction is “the limits of legal competence of a state . . . to make, apply and enforce rules of conduct upon persons”).
\textsuperscript{34} Joyner, \textit{supra} note 5 at 163
\textsuperscript{35} Kaplan & Katzenbach, \textit{supra} note 24 at 173.
\textsuperscript{36} The International Court of Justice alluded to this when it noted thus:

\begin{quote}
A gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by state reflects the emergence of values which enjoy an ever-increasing recognition in the international community. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development . . . has led to… the recognition of other, non-territorially based grounds of national jurisdiction.
\end{quote}

See \textit{Arrest Warrant of 11 April 2000 (Democratic of Congo v Belgium) (Judgement)} [2002] ICJ Rep 3 at 85.
\textsuperscript{39} \textit{Ibid} at 795.
support for this principle was explained in the more recent British case of *D.P.P. v. Doot* in which the House of Lords, speaking through Lord Wilberforce, stated thus:

In my opinion, the key to a decision for or against the offence charged can be found in an answer to the question why the common law treats certain actions as crimes. And one answer must certainly be because the actions in question are a threat to the Queen's peace, or, as we would now perhaps say, to society. Judged by this test there is every reason for, and none that I can see against, the prosecution. Conspiracies are intended to be carried into effect, and one reason why, in addition to individual prosecution of each participant, conspiracy charges are brought is because criminal action organized, and executed, in concert is more dangerous than an individual breach of the law. Why then refrain from prosecution where the relevant concert was, initially, formed outside the United Kingdom?

Extraterritorial jurisdiction allows states to extend their authority beyond their territorial boundaries, and is transnational in character. Jurisprudentially, extraterritoriality is mostly asserted by a state based on the existence of a strong nexus to territorial state - a requirement which “flow[s] from fundamental international legal principles of sovereign equality and non interference in the domestic affairs of sovereign states.” Viewed through this prism, the term itself appears to be misleading, being suggestive of states’ exercise of jurisdiction without any national link when, in fact, the reverse is the case. But more than anything else, since a state is incompetent to prosecute for acts in respect of which it does not have jurisdiction, it must endeavour to prescribe such acts before it can exercise both adjudicatory and enforcement jurisdiction. According to Joyner: “Extra-territorial

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41 *Ibid* at 817-18.
jurisdiction, therefore, involves a two-step process. First, it must be determined whether a domestic law exists that covers the offensive act. Second, it must be ascertained whether a sovereign state may, under international law, prescribe such conduct extraterritorially. Like other issues touching on state sovereignty, however, jurisdiction is not an arbitrary doctrine, but is founded on customary international law. This is intended to prevent a situation in which “the international community become entrenched in ‘bad habits’” of capricious exercise of extraterritorial jurisdiction by states.

a. The Lotus Principle

One of the crucial issues concerning jurisdiction in international is “defining what problems or situations will be handled through national legal systems as opposed to international forum.” In other words, the issue concerns the degree to which a state is permitted to apply its laws to events and persons outside it boundary in a way that affects the interest of another state(s). Due to its huge implication for states’ sovereignty, it is not surprising that the issue has remained a subject of intense controversy in international law and one that sits at the “very heart of public international law.” This is because implicit in the assertion of extraterritorial jurisdiction is a challenge on the highly respected principle of state sovereignty. As Harold Maier notes: “The assertion of national jurisdiction outside of the

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46 Joyner, supra note 5 at 163.
47 O’Keefe, supra note 33 at 736.
48 Ireland-Piper, supra note 42 at 124.
acting state has been a source of continuing controversy since the development of the territorial state as the principal political unit in the world community during the sixteenth and seventeenth centuries.\textsuperscript{52} A recent report from Harvard University concluded that exercises of extraterritorial jurisdiction are “frequently controversial” and contribute to “tension between states.”\textsuperscript{53} The ageless dilemma has been, as one writer put it, “sustaining outdated but still democratically legitimised territorial political structures or embracing non-territorial structures that may be more effective in dealing with new transnational challenges but lack root in people’s consent.”\textsuperscript{54} In fact, some writers have argued for a highly restrictive application of extraterritorial jurisdiction by states.\textsuperscript{55}

While this has historically being the case, the 1927 decision of the Permanent International Court of Justice (PICJ) in the now famous \textit{Lotus case}\textsuperscript{56} only re-energized the debate. In fact, of all the decision of this court and its successor, this remains not only one of the most controversial\textsuperscript{57} but one of the most analyzed both by scholar and jurists. Gerald Fitzmaurice framed the thorny question before the court thus: “must a State, the validity of whose action in a particular respect is challenged, show that such action is – at any rate \textit{prima facie} – justified by a positive rule of international law, or is it sufficient merely to establish that the

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\textsuperscript{55} Alejandro Chehtman, \textit{The Philosophical Foundation of Extraterritorial Punishment} (Oxford: Oxford University Press, 2010) 56.
\textsuperscript{56}S. S. Lotus, \textit{supra} note 14
\textsuperscript{57}Reydams, \textit{supra} note 21 at 13.
\end{flushright}
action in question is not actually contrary to international law?" As a matter of principle, this issue is one of the most important because, among other things, it strikes at the root of state rights, the relationship between state sovereignty and international law, and also the entire concept of the rule of law in international relations. A brief summary of the facts of this case is important.

The case arose as a result of a collision on the high sea between the French steamer the *Lotus* and the Turkish steamer *Boz-Kour*, killing several Turkish sailors and passengers on board the *Boz-Kouts*. Upon arrival of the *Lotus* at the Turkish city of Constantinople, the Turkish authority launched joint military proceedings in pursuance of Turkish law against the French and Turkish commanders, who were subsequently found guilty by a Turkish court of involuntary manslaughter. Feeling that its sovereignty had been violated, France filed an action before the PCIJ challenging the right of Turkey to subject a French subject before a Turkish court. It argued that to justify its action, the onus was on Turkey to point to a specific provision of international law authorising such action. Turkey, on the other hand, argued that it had jurisdiction unless it was prohibited by international law. In rejecting France’s submission, the court held thus:

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60 The suit against the French commander was based on article 6(1) of the Turkish Penal Code, which empowers a Turkish court to assume extraterritorial jurisdiction in respect of an offense affecting the interest of Turkey or its subject regardless of where the offense was committed, provided the foreigner is arrested in Turkey.
Now the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this case jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contains a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allows states to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not extend their jurisdiction of their court . . . it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.61

Intrinsic in the above decision is a proclamation of a presumptive freedom of states to exercise extra-territorial jurisdiction or, in fact, do anything as they deem fit, unless prohibited by an international convention or custom.62 Put in another way, states’ rights are merely regulated by international law, not constituted by it.63 Referred to as the “immanence theory,”64 states are regarded as the creator of the law and since sovereignty precedes international law, “limitations on jurisdiction are always self-imposed [which] can be lifted at any time.”65

The above assertion, however, has been challenged by scholars as well as judges for not being reflective of customary international law. To them, states are not authorised to exercise

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61 *S. S. Lotus*, *supra* note 14 at 18-19.
62 This is popularly referred to as the “Lotus principle”. See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finish Lawyers’ Publishing Company, 1989) 221.
64 Reydams, *supra* note 21 at 13.
65 *Ibid*. 
extra-territorial jurisdiction unless they can justify such action by reference to a provision of international law.  

Mann, for instance, argues that the *Lotus* passages that emphasis discretion “have been condemned by the majority of immense number of writers who have discussed them, and today they probably cannot claim to be good law.” Furthermore, some question the relevance of the *Lotus* principle in this modern era: “but whatever the position may once have been, and even if this was the position, is it still the position today? It is submitted that it is not, and that the view of the foundation of State rights just described is, under modern conditions, obsolete, unscientific and retrograde, and contrary to the spirit and real needs of the progressive development of international law.” There are also those whose rejection of the principle is anchored on their fear of its potentials to predispose the international community to inter-state jurisdictional conflicts, since the presumptive principle in the case “fails to recognise that a state’s right to claim jurisdiction is relative to the rights of other states.”

According to Ryngaert, “Leaving states almost unfettered jurisdiction may run counter to the very regulating purpose of the international of jurisdiction: delimiting states’ sphere of action and thus reducing conflicts between states.” Despite the fact that the

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67 F. A. Mann, “The Doctrine of Jurisdiction in International Law” (1964) 111 *Receuil des cours de l’académie de droit international* 9 at 35.
68 Fitzmaurice, *supra* note 58 at 10.
70 Ryngaert, *supra* note 18 at 21. According to Fitzmaurice, “it (that is the *Lotus* principle) leads in the final analysis to anarchy, since in the absence of any clearly proved restricting rule it makes the rights and actions of States dependent in the last resort on their own will and nothing else.” Fitzmaurice, *supra* note 57 at 10.
*Lotus* principle was a narrow decision\(^{71}\) and has generated enormous debate, the International Court of Justice (ICJ) (which replaced the PICJ) has continued to rely on it.\(^{72}\)

It is, therefore, not surprising that, as was noted earlier, some advocates of modern universal jurisdiction have often cited this case. By invoking this principle, the prosecuting state seeks to divest itself of the burden of proving the legality of its action, thus forcing the complaining state into an evidential position of having to prove that universal jurisdiction or, at least the kind being exercised, is prohibited by international law. In the *Hadamar* trial – one of the numerous post-World War II trials – held in the United States, the defence had argued that there was no international law permitting an occupying power’s military commission to try for crimes committed prior to the occupation. Relying on the *Lotus* principle, the U.S. argued that “the principle of the *Lotus* case applied to the case before the Commission, meaning that the jurisdiction of the Commission, as question of international law, need be denied only upon a showing that there is a generally accepted rule of international law which would prohibit the exercise of such jurisdiction.”\(^{73}\)

\(^{71}\) In fact, it was a 6-6 decision, with the tie broken by the President of the Court.

\(^{72}\) For instance, in the *Nuclear Weapons* case, the ICJ majority opinion concluded: “State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition.” See *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) I.C.J. Report 226 at para. 52. However, in their dissenting opinions, Judges Weeramantry and Shahabuddeen argued that the burden of showing “authorisation” fell on the nuclear powers. *Ibid*. In its Separate Opinion in the *Barcelona Traction* case, Judge Fitzmaurice argued thus: “It is true that under present conditions, international law does not impose hard and fast rules on states delimiting spheres of national jurisdiction . . . , but leaves to states a wide measure of discretion in the matter. It does however (a) postulate the existence of limits – though in any given case it may be for every to indicate what they are for the purposes of that case; and (b) involve for every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to or more appropriately exercisable by, another state.” See *Barcelona Traction, Light and Power Company, Limited* (1970) I.C.J Report 3 at para. 70.

\(^{73}\) Charles H. Taylor, “Memorandum, Has the Commission Jurisdiction to Hear and Determine the *Hadamar Case*?”, cited by Michael P. Scharf, “Application of Treaty-Based Universal Jurisdiction to Nationals
Only recently, in the *Arrest Warrant* case, Belgium sought to justify its exercise of universal jurisdiction over a Congolese national by reference to this principle. Like in the *Lotus* case, the court was divided on the issue. Agreeing with Belgium, Judges Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion argued thus: “while none of the national case law to which [the judges] have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinion juris* on the illegality of such a jurisdiction. In short, national legislation and case law – that is, State practice – is neutral as to exercise of universal jurisdiction.”  

For these judges, therefore, in the absence of a prohibit rule of international law, a state may exercise universal jurisdiction. However, President Guillaume took a diametrically opposed view. In his attack on the principle of universal jurisdiction, he challenged the *Lotus* principle and questioned its applicability to criminal jurisdiction, especially in the twentieth-century international relations. He further argued that the combined effect of decolonisation and the United Nation Charter’s respect for sovereign equality has made any doctrinal support for universal jurisdiction unsustainable: “The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me—totally different. The adoption of the United Nations Charter...}

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74 *Arrest Warrant*, *supra* note 36 at 74-75, para 45 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal)  
75 *Ibid* at paras 49-54.
proclaiming the sovereign equality of states, and the appearance, on the international scene, of new States born of decolonization, have strengthened the territorial principle.”

It is argued that President Guillaume’s position is more persuasive. Indeed the PICJ itself, having laid down the general principle cited by Belgium, then asked itself whether the foregoing considerations really apply as regards criminal jurisdiction. It held that either this might be the case, or alternatively, that: “the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, ipso facto, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers”.

In the particular case before it, the Permanent Court took the view that it was unnecessary to decide the point. Given that the case involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence in question had made themselves felt on Turkish territory, and that consequently a criminal prosecution might “be justified from the point of view of this so-called territorial principle”.

Furthermore, it is argued that extra-territorial jurisdiction of states is extrinsic to state sovereignty, and that it is incumbent upon any state seeking to rely on it (except within the context of the recognised traditional grounds) to show a permissive rule of international law. The basis for this argument is sovereignty – the same ground on which the PICJ founded the

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77 Lotus, supra note 14
principle itself. While the Court’s decision was based on the now discredited concept of absolute sovereignty of states, it failed to realise that central to that concept is the notion of judicial non-intervention, especially in criminal matters. In such period of “mutually assured judicial destruction”, it seems inconceivable that states would have been allowed to exercise unmitigated extra-territorial jurisdiction in view of its destabilizing consequences on global order and inter-state diplomacy.

This is even more so in the context of the relationship between the West and the Third World. It is absolutely inconceivable to imagine that powerful states could have agreed to an extraterritorial jurisdictional arrangement in which their citizens could be prosecuted by a bystander Third World state, given that, as was discussed in Chapter One, in the nineteenth century – the same time when the Lotus case was decided, Third World people, including their judicial institutions, were characterised as “uncivilised” and “barbarous.” Keep in mind that embodied in most of the treaties between the imperialists and the colonised nations was a provision shielding the citizens of the former from prosecution in the domestic courts of the latter. The result is that most of Third World states were generally loathe to accept the compulsory jurisdiction of an international judicial organs, much less that of a state. Even when they accepted such jurisdiction, they did so by adding heavy reservation – something that frustrated most of the Western countries (even though they too adopted the same position).

79Ibid.
Again, an examination of the United States constitutional law jurisprudence, for instance, supports the above assertion. In the recent case of *Kiobel v. Royal Dutch Petroleum Co. and Ors*, the US Supreme Court affirmed the presumption against extraterritoriality under the American law, citing “foreign policy concerns.” According to the court, the “presumption serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” In fact, so strong is this presumption that even when a US statute provide for some extraterritorial jurisdiction, it “operates to limit that provision to its terms.” Therefore, rather than being the rule, extra-territorial jurisdiction, being an attack on state sovereignty, is in fact the exception, justifiable only be reference to customary international law or convention.

Yet, assertion of extraterritorial jurisdiction of which universal jurisdiction is a part has become increasingly popular in the twenty-first century. It was Alejandro Chehtman who once observed that “extraterritoriality is deeply entrenched in the modern practice of legal punishment.” This is hardly surprising given that we are in the age of globalisation – “the phenomenon of our time” in which “cheap travel, advance in technology and telecommunication and the anonymity of the internet have created opportunity for the rapid expansion of transnational crimes such as . . . human rights abuses.” The argument is that globalisation has changed the complexion of many crimes that, hitherto, were considered as

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81 *Ibid* at 2.
82 *Ibid* at 11.
83 Ireland-Piper, *supra* note 42 at 123.
84 Chehtman, *supra* note 55 at 1.
86 Ireland-Piper, *supra* note 42 at 127.
“local phenomena.”  

For many states, therefore, the right to project their judicial authority beyond their borders is an intrinsic part of sovereignty.

In respect of universal jurisdiction specifically, what has emerged is an increasing support for a permissive rule based on a purported “continuing potential” of the *Lotus* principle. The bases for this development are two assumptions. First, there is an attempt to conflate international criminalisation of conducts and universal jurisdiction – the idea that “it is not necessarily inconsistent for states, on the one hand, to pronounce themselves in favour of international condemnation of certain conduct . . . and, on the other hand, to accept a state’s competence to exercise universal jurisdiction over such a crime.”

Second, it is assumed that since universal jurisdiction concerns crimes which affect the “international community as a whole,” every state, by the simple reason of being a member of this community, is vested with authority to prosecute the perpetrators of these crimes. These assumptions, however, are unfortunate. While an examination of these issues is undertaken in Chapter Four, suffice it to say that states’ recognition of crimes under international law “does not necessarily imply the existence of a right of all states to unilaterally take non-forceful counter-measures” since they may, for instance, “consider that the safeguard of the community interest should be exclusively entrusted to a genuine community organ, i.e. a genuine international criminal court.”

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89 See, for instance, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the Arrest Warrant case, supra note 36 at para. 50. In this case too, Judge van den Wyngaert even went further to assert, in the context of universal jurisdiction, the validity of the Lotus-principle. See Dissenting Opinion of Judge van den Wyngaert, para. 44.
court 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."  

C. TYPES OF JURISDICTION

Both the practice of states and the writings of international scholars are emphatic that there are three aspects to jurisdiction – prescriptive; adjudicative and enforcement jurisdiction. Prescriptive jurisdiction refers to the authority of a state “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court.” In other words, it determines the geographical reach of a state’s law. In fact, it is the fulcrum around which extraterritorial jurisdiction revolves since, as was held by the court in United States v. Smith, “under international law a state does not have jurisdiction to enforce a rule of law enacted by it unless it has jurisdiction to prescribe the conduct in question.” Thus, the prescriptive jurisdiction of a state in international law is circumscribed by some limitations so much so that a state that chooses to exercise it must ensure its conformity with those limitations. Adjudicative jurisdiction, on the other hand is the competence of a state’s domestic court to assume jurisdiction in respect of a matter, while enforcement jurisdiction refers to state’s competence “to enforce or compel compliance or to


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punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.”

It must be noted that the power to enforce law is not necessarily co-terminus with the prescriptive power of a state. What this means is that a sovereign state is at liberty to exercise either power without necessarily exercising both. Thus, a state’s enforcement power is not diminished by the fact that the law in question was prescribed by another sovereign state or is international law. Although a state may prescribe laws that tend to govern subjects both within and without its territory, it is generally accepted that it cannot enforce it laws outside its territory, “except by virtue of a permissive rule derived from international custom or from convention.” Enforcement jurisdiction, therefore, is tied to territory and beholden to the principle of state sovereignty.

Therefore, it is universally recognised, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter’s consent. Thus “while a state may take certain measures of non-judicial enforcement against a person in another state . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with the state’s consent.” Any enforcement procedure adopted by states must comply with international law. It was for this reason that after Israel successfully kidnapped Adolf Eichmann in 1960 in Argentina and

97 Restatement, supra note 32 at § 401(c).
98 Bassiouni, supra note 10 at 40
99 SS Lotus, supra note 14.
100 Restatement, supra note 32 at § 432 cmt. b.
took him to Israel for trial, the United Nations Security Council, troubled by this method of enforcement, adopted a resolution declaring that Israel had violated the sovereignty of Argentina. Enforcement as well as prescriptive jurisdiction is, therefore, sovereignty-sensitive, reflecting the historical connection between jurisdictional powers of states and the principle of territorial jurisdiction. However, in relation to the notion of universal jurisdiction, the prescriptive and adjudicative aspects of jurisdiction are controversial, whereas “a universal jurisdiction to enforce is not in issue.” This point is important because, as argued in this dissertation, at the heart of the AU’s opposition to universal jurisdiction is the question of what the process of creation of international crimes is and whether the emergence of the “new universal jurisdiction crimes” satisfies this standard. This is explored in Chapter Four.

Extrapolating from the above, therefore, it does not take a quantum leap to realise how problematic an unrestrained exercise of extraterritorial jurisdiction could be. The idea of extraterritorial conducts being subject to the jurisdiction of multiple states is bound to creating competing jurisdictional claims among them since there is “no obligation on states to accord priority to another state in these situations.” The interconnectivity between the Westphalian Sovereignty around which the global order is structured and criminal

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101 A–G (Israel) v Adolf Eichmann (Trial) (1962) 36 ILR 18 (District Court of Jerusalem).
103 Bassiouni, supra note 10 at 40.
104 Kreß, supra 90 at 564.
jurisdiction only means that any attempt by a state to exercise extraterritorial jurisdiction over persons or matters in the territory of another could be interpreted as a flagrant violation of the latter’s sovereignty.\textsuperscript{107} As discussed in fuller details in chapter five, the consequences of this kind of dispute for Inter-state cooperation and the stability of the international legal order could be grave and may include “breakdown of diplomatic relations, trade boycotts, and armed conflict.”\textsuperscript{108} To prevent these problems, therefore, traditional forms of extraterritorial jurisdiction required that jurisdictional responsibility among states be divided in those situations where these responsibilities would likely overlap by reference to the existence of a sufficient nexus between the asserting state and crime.\textsuperscript{109}

D. INTERNATIONAL LAW’S THEORIES OF JURISDICTION

I. Territorial Principle

Territorial jurisdiction is the most basic of all the strands of jurisdiction\textsuperscript{110} and “operates as the ‘default’ principle employed by states.”\textsuperscript{111} The power of a state to exercise jurisdiction in respect of crimes committed in its territory is uncontested in international law. In other words, the authority to exercise control over a state’s own territory is an intrinsic part of its

\textsuperscript{107} Restatement (Third), supra note 32 at § 403 Reporters' note 8 (1987) (observing that "the exercise of criminal ... jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive").

\textsuperscript{108} Kontorovich, supra note 105 at 189. From the international relations standpoint, this is one of the major critiques of universal jurisdiction. This is explored later in this chapter.

\textsuperscript{109} Ibid.


sovereignty.\textsuperscript{112} It applies to offenses in respect of which some or all of the conducts occurred within the state’s exclusive territory, “including on board its ships and airplanes” or where the impact of the conduct is felt on the territory of the state.\textsuperscript{113} However, despite its general acceptability, territorial jurisdiction has not been impervious to controversy. Implicated in this controversy are cases involving competing claims for jurisdiction.\textsuperscript{114} An attempt to deal with this problem has led to the development of theories which have had a complicating effect on the principle. The two most prominent of these theories are the subjective or initiatory territoriality – the more complicated – by which “a state has jurisdiction over crimes which consist partly of an act committed within its territory and partly of consequences which take place in another state,”\textsuperscript{115} and the objective territoriality – the less problematic – whereby “a state has jurisdiction over crimes which is completed within its territory.”\textsuperscript{116} In other to overcome some of the confusions associated with the former, many states have adopted a modern approach requiring their “real and substantial connection” to the crimes – meaning that “a significant portion of the activities have taken place” in the asserting state.\textsuperscript{117}

\textsuperscript{114} Ireland-Piper, supra note 42 at 131.
\textsuperscript{116} Ibid.
II. Nationality Principle

The nationality principle, together with the territoriality principle, is a specie of jurisdictional base which is least controversial under international law, since it accords more respect to the principle of sovereign equality and non-intervention.\(^{118}\) This principle applies where the perpetrator of the crime is a national of the prosecuting state, regardless of where the offense or the consequences of the offense occurred. In other words, every state has jurisdiction to prosecute its citizen.\(^{119}\) It may also extend to persons who are connected to a state by other means such as permanent residents and foreigners who are serving the armed forces of such a state.\(^{120}\) This principle is generally relied on by states that are adverse to extraditing or allowing their citizens to be subjected to prosecution in a foreign court on ground of national solidarity and interest.\(^{121}\) Assertion of nationality jurisdiction had originally been done on an ad hoc basis, applying only to limited crimes such as bigamy and national security offenses.\(^{122}\) With the rise of terrorism and other transnational crimes, the range of crimes in respect of which states have asserted extraterritorial jurisdiction on the basis of nationality, has, however, increased exponentially.\(^{123}\) Some states require that to assume jurisdiction, the act must also be a crime in the \textit{lex loci} (that is the place of commission) or limits jurisdiction


\(^{121}\) Felkenes, \textit{supra} note 112 at 585; Currie & Coughlan, \textit{supra} note 110 at 146.


\(^{123}\) Ireland-Piper, \textit{supra} note 42 at 131; \textit{Ibid} at 352.
to only serious crimes or where the injured party or his government request prosecution, while others don’t.\textsuperscript{124}

\textbf{III. Passive Personality or Passive Nationality Principle}

According to this principle, the nationality of the victims of the crimes, not the nationality of the offender, provides the ground for the exercise of extraterritorial jurisdiction.\textsuperscript{125} However, the existence of this principle in international law, as well as its use has been a subject of controversy among scholars. In fact, of all the principles of extraterritorial jurisdiction discussed in this chapter, it is the only one omitted in the \textit{Draft Convention on Jurisdiction with Respect to Crimes}.\textsuperscript{126} Describing it as the “most contested in international law,” Chehtman hinges his criticism of the principle on the fact that “while an individual is abroad, the only system of criminal law that can meaningfully contribute to her (relative) sense of dignity and security is the criminal law of the territorial state.”\textsuperscript{127} In the \textit{Lotus} case, Judge Moore, in his dissenting opinion, expressed similar sentiment when he argued thus: “an inhabitant of a great commercial city . . . may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes . . . this . . . is at variance not only with the principle of exclusive jurisdiction of a state over its own territory, but also with the

\textsuperscript{124}Akerhurst, \textit{supra} note 25 at 156. It should be noted, however, that in case of multiple accused persons, jurisdiction over one does not necessarily translate to jurisdiction over others where such others are not nationals of the prosecuting state. \textit{Ibid.}

\textsuperscript{125}Felkenes, \textit{supra} note 112 at 585; Ireland-Piper, \textit{supra} note 42 at 135.

\textsuperscript{126}“\textit{Draft Convention on Jurisdiction with Respect to Crime}” (1935) 29 Supplement to the American Journal of International Law 437

\textsuperscript{127}Chehtman, \textit{supra} note 55 at 68.
equally well-settled principle that a person visiting a foreign country . . . falls under the
dominion of the local law.”

Over the last few decades, and despite these criticisms, an increasing number of states have
begun to rely on the principle of passive personality to assume jurisdiction, particularly over
serious international crimes. Under the Australia *Criminal Codes Act 1995*, for instance, it
is an offense to recklessly or intentionally harm, manslaughter or seriously injure an
Australian citizen or permanent resident anywhere in the world.

IV. Protective Principle

The protective principle permits a state to exercise jurisdiction in respect of conduct which,
though committed outside its territory, affects its national interest or threatens its national
security. Like universal jurisdiction principle, this principle remains controversial for a
number of reasons. For instance, it is unpredictable, while the range of crime covered by it

128 *Lotus*, supra note 14 at 92.
129 Triggs, *supra* note 122 at 355 and 356;
130 Criminal Code div 115. France criminal law also provides for jurisdiction where a crime committed
outside French territory by a non-French national injures a French citizen. In *LICRA v. Yahoo*, a French court,
following a complaint by French non-profit organisations which alleged that they were victims of the
defendant’s business practice, assumed jurisdiction and found the defendants in breach of certain provisions of
the French Penal Code. This was despite the fact that at the relevant time, the defendant was incorporated under
a foreign law and operated principally outside French territory. See Ireland-Piper, *supra* note 42 at 135; see also
Elissa A. Okoniewski, “*Yahoo!, Inc v. LICRA*: The French Challenge to Free Expression on Internet” (2002) 18
Am U Int’l LR 295 at 313, citing Tribunal de Grande Instance de Paris [French Superior Court of Paris],
2000/05308 and 05309, 22 May 2000.
17 Commw L Bull 1391 at 1393.
is debateable. Looking at the degree of elasticity which states have demonstrably superimposed on the principle, the potential for abuse by states is undoubtedly obvious. In the past, there was the tendency of member states of military alliance to prosecute offenses that threaten the security of one another. Today, it is very unlikely that a member state of a multinational force, such as the Non Atlantic Treaty Organisation (NATO), will rely on this form of jurisdiction as a basis to prosecute against offenses in respect of which it otherwise does not have jurisdiction.

In a number of cases, some states have claimed to have exercised universal jurisdiction when in fact the sounder basis for such jurisdiction would have been passive personality. One of such example is the Eichmann’s trial by an Israeli court for crimes committed against the

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133 See Akehurst, supra note 25 at 158.
134 For instance, Arts. 7 and 8 of the Harvard Drafter Convention talks about crimes against security, territorial integrity or political independence of the state, and counterfeiting of the seal, currency, instruments of credit, stamps, passports or public documents issued by the state. However, Art. 13 of the Ethiopian Penal Law of 1957 speaks, among other things about offenses against the servants or essential interests of the state, while the Hungarian Penal Code talks about offenses against “a fundamental interest relating to the democratic, political and economic order of the Hungarian People’s Republic.” Ibid.
135 There are a few decided cases to confirm this. A German court, relying on protective principle jurisdiction, convicted a Jewish alien for having sex with a German girl in Czechoslovakia, holding that such act threatened the racial purity of the German Nation. See Jessup C. Philip, Transnational Law (New Heaven: Yale University Press, 1956) 50. Furthermore, during the Cold War politics, a Czechoslovakian court convicted an American for undertaking research work for Radio Free Europe in West Germany. See The Times, December 19, 1970. During the same period, foreign companies which bought goods from the United States could be required to sign an undertaking not to resell them to the Communist countries, and could be prosecuted for violating the undertaking under this principle of jurisdiction. See Harold J. Berman & John R. Garson, “United States Export Control – Past, Present and Future” (1967) Colum L Rev 791 at 855-9 & 866-7.
136 For instance, France tried offenses against the security of its wartime allies, whereas Communist states claimed jurisdiction in respect of offenses against the security of other communist countries. In 1958, the Supreme Court of Bolivia upheld a conviction for revealing (in a foreign country) secrets about allied forces stationed in West Germany. See Akehurst, supra note 25 at 159.
137 I know of no case law rebutting this assumption.
138 Summers, supra note 113 at 72.
Jews in German.\textsuperscript{139} The reason for this approach is very instructive. By purporting to act on behalf of the “international society” the interest of which universal jurisdiction seeks to protect, states effectively render the fundamental criminal law principle of \textit{nullum crimen sine lege}\textsuperscript{140} inapplicable. This issue is further explored in Chapter Four.

It is important to note that in each of the above situations, there could be more than one state’s interest involved, thereby increasing the chances of inter-state conflict due to conflicting jurisdictional claims.\textsuperscript{141} A state which unjustifiably assumes jurisdiction is regarded as having violated the territorial integrity and the sovereign equality of the affected state.\textsuperscript{142} In a bid to prevent this from happening, the Restatement provides that, “[e]ven when one of the bases for jurisdiction ...is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”\textsuperscript{143} This, however, does not apply to universal

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\textsuperscript{139} Purporting to rely on universal jurisdiction, the court held as follows:

[T]he crimes attributed to the appellant [are crimes whose] harmful and murderous effects were soembracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.


\textsuperscript{140} Otherwise known as \textit{ex post facto} prohibition, it ensures that criminal guilt does not attach to an accused person unless such an act constituted a crime \textit{at the time} of its commission, not after. See Generally Eric S. Kobrick, “The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes” (1987) 87 Colum L R 1515 at 1519.

\textsuperscript{141} Summers, supra note 113 at 72.

\textsuperscript{142}Ibid.

\textsuperscript{143} Restatement, supra note 33 at § 403(1). To determine the reasonability of an action, the document in §§ 403(2), (3) set out some factors to be considered:

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, \textit{i.e.}, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
jurisdiction the exercise of which the drafters of the document view as always prima facie reasonable.\textsuperscript{144}

V. Universal Jurisdiction

Universal jurisdiction, which is the subject of this discussion, is another principle that has made its way into the lexicon of extraterritorial jurisdiction. As far back as the early 1600s, Grotius and other international law scholars floated, albeit with limited success, the idea that certain types of crimes should be made subject to the domestic jurisdiction of every nation regardless of where or by whom they were committed.\textsuperscript{145} About 200 years later, Clausewitz questioned the relevant of international legal principles, especially those restricting the exercise of extraterritorial jurisdiction by states, describing them as “self-imposed restrictions, almost imperceptible and hardly worth mentioning.”\textsuperscript{146} Despite the writings of

\begin{itemize}
  \item[(b)] the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
  \item[(c)] the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
  \item[(d)] the existence of justified expectations that might be protected or hurt by the regulation;
  \item[(e)] the importance of the regulation to the international political, legal, or economic system;
  \item[(f)] the extent to which the regulation is consistent with the traditions of the international system;
  \item[(g)] the extent to which another state may have an interest in regulating the activity; and
  \item[(h)] the likelihood of conflict with regulation by another state.
\end{itemize}

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

\textit{Ibid.}

\textsuperscript{144}Ibid at §§ 403, 404
these early scholars, it was not until the nineteenth century that universal jurisdiction became a familiar term in the international law discourse.

Of all the theories of extraterritorial jurisdiction, universal jurisdiction is the most controversial. Jana Panáková describes it as “a black sheep in the criminal jurisdiction family.”\(^{147}\) Furthermore, as discussed in Chapter One, universal jurisdiction has, over the last few decades, become “the most expansive of the jurisdictional principles.”\(^{148}\) However, as is the case with many social-legal concepts, a generally accepted definition of universal jurisdiction has remained elusive.\(^{149}\) Judge ad hoc van den Wyngaert alluded to this point when, in her Dissenting Opinion in the Arrest Warrant case, she stated thus: “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.”\(^{150}\) Part of the complication relates to the incongruous ways in which the term is used\(^{151}\) and even


\(^{148}\) Currie & Coughlan, supra note 111 at 147.


\(^{150}\) Arrest Warrant, supra note 36 paras. 44-45.

\(^{151}\) Summers, supra note 113 at 69. Bassiouni lists five meanings with which the word “universality” has been associated:

1. Universality of condemnation for certain crimes;
2. Universal reach of national jurisdiction, which could be for the international crime for which there is universal condemnation, as well as others;
3. Extraterritorial reach of national jurisdiction (which may also merge with universal reach of international legislation);
4. Universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and
5. Universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused.
states that have incorporated the universality principle in their domestic legislations have not fared better, reflecting fundamentally different understandings of the concept.\textsuperscript{152}

In order for us to properly understand the principle of universal jurisdiction, it is important to give a recap of what had been stated in the preceding part of this dissertation concerning jurisdiction in international law. Traditionally, state’s criminal jurisdiction is justified on limited grounds: territoriality, nationality, passive personality and protective principle.\textsuperscript{153} As opposed to universal jurisdiction, these traditional jurisdictions insist on some forms of link between the crime and the prosecuting state as a basis for jurisdiction.

In light of the above and in view of the fact that there is no universally acceptable definition of universal jurisdiction at present, “absence” of the normal jurisdictional link to the prosecuting state has continued to be a central element of many scholars’ definitions and commentaries on universal jurisdiction.\textsuperscript{154} For instance, the \textit{Institut de droit international} (IDI) in its 2005 resolution on universal jurisdiction, paragraph 1, states: “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,  

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\textsuperscript{\textit{M. Cherif Bassiouni, supra note 16 at 62.}}
\textsuperscript{\textit{152 Arrest Warrant, supra note 36 at 46 (Dissenting opinion of Judge ad hoc van den Wyngaert).}}
\textsuperscript{\textit{153 However, the Court in \textit{Lotus} case denied this limited nature of state’s criminal jurisdiction when it held thus: Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.}}
\textsuperscript{\textit{See \textit{Lotus, supra} note 14 at 20.}}
\textsuperscript{\textit{154 Yee, supra note 76 at 504.}}
\end{flushright}
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.”\(^{155}\) In the exact words of the IDI Rapporteur of the project, “It was [the] absence of link between the crime and the prosecuting State that captured the essence of universal jurisdiction.”\(^{156}\) Only recently, the AU-EU expert group adopted the same approach:

Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence.\(^{157}\)

Beyond the “link-absence” element, contemporary and perhaps more generally endorsed definition of universal jurisdiction has tended to focus on the “nature” of the crime. A clear example of this is reflected in the Princeton Principle on Universal Jurisdiction, one of the most cited documents on the issue. According to this document, universal jurisdiction is “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, nationality of


\(^{156}\)Christian Tomuschat, Rapporteur of the IDI Commission on Universal Criminal Jurisdiction, as quoted in IDI, (2006) 71(II) Annuaire de l’Institut de droit international, 257; see also *ibid* at 261.

the victim, or any other connection to the state exercising such jurisdiction.”

Jurisprudentially, the right of the forum state to prosecute regardless of any national link is founded on the idea that the nature of the crime is so serious that it constitutes an attack on the fundamental values of the international community as a whole, so much so “that the crime is a matter of universal concern, considered as such by the international community as a whole, and that every State in the world has an interest in prosecuting the perpetrator.” In other words, universal jurisdiction envisages a cosmopolitan world – a community, humanity or a world society – in which states share a common interest, such that some crimes are collectively considered an “assault on the humanity’s self-conceptions; they ‘shock the conscience of humankind.’” For international lawyers, such crimes “must be tried by humanity in humanity’s courts and in humanity’s style.” This is reflected in the term, “obligations erga omnes” often used in relation to the concept of universal jurisdiction, which was imported into the main stream of international law by the International Court of Justice (ICJ) in the case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain):

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all

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159 Yee, supra note 76 at 505.
161 Ibid.
States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.162

But the idea that states can justify their assumption of universal jurisdiction simply on a general proposition that certain international norms – otherwise referred to as “*jus cogens*” or “general principles of law” – are of universal concern is fundamentally flawed. But as is shown shortly, notwithstanding the moral appeal of these norms, it is important to state that universal jurisdiction has historically never been based of the nature of crimes; rather it is founded on customary international law – the collective consent of states to vest each other with jurisdiction relative to a particular offense. According to Chibundu, “it is, however, one thing to say that an individual or a state is bound by a norm, but quite another to assert that the norm can be enforced by the independent and unilateral act of any state; even where that state under its domestic law arrogates to itself the jurisdiction to enforce ‘international law.’”163

Finally, in discussing the history of extraterritorial jurisdiction, it is important to highlight its colonial underpinning. The emergence of the doctrine was, in part, an attempt by the “civilised nations” to protect their citizens from “inappropriate” prosecutions by

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162 *Case Concerning the Barcelona Traction*, supra note 72 at 3.
“uncivilised” nations even when crime occurred outside their territories. In *Reid v. Covert*, the United States Supreme Court, after reviewing the practices of Western states during the Middle Ages, found that treaties were used to shield their nationals against foreign laws or prosecution by foreign courts. However, the emergence of equally sovereign states following the Peace of Westphalia and the subsequent establishment of an international system of exclusive Western states saw the relaxation of this discriminatory practice and the recognition of absolute territorial sovereignty. But all that would change again in the nineteenth century – the golden “Age of Empire” when the principle of extraterritorial jurisdiction was used against legal systems of Third World states generally perceived as “inferior” to those of their colonial masters. For instance, during this period, the British government, as well as their American counterparts, were reported to have negotiated treaties

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166 During this period, the superiority of Christianity over other religion over other religions such as Islam was emphasised and it was considered as sacrilege for Christians to be prosecuted in Islamic courts. As the Court observed:

[I]t was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people. *Ibid*, quoting *In re Ross*, 140 U.S. 453, 462-63 (1891).
167 Brown, supra note 164 at 390.
168 According to the Court’s finding:

The emergence of the nation-state in Europe and the growth of the doctrine of absolute territorial sovereignty changed the nature of extraterritorial rights. No longer were strangers to be denied the advantages of local law. Indeed, territorial sovereignty meant the exercise of sovereignty over all residents within the borders of the state, and the system of extraterritorial consular jurisdiction tended to die out among Christian nations in the, 18th and 19th centuries. But a new justification was found for the continuation of that jurisdiction in those countries whose systems of justice were considered inferior ...

*Reid v. Covert*, supra note 165 at 60.
with China aimed at protecting the former’s citizens from the latter’s jurisdiction.\textsuperscript{169} Paul Coggins and William Roberts remind us of this history:

> It was not uncommon for powerful states to exercise jurisdiction, both criminally and civilly, over their nationals in foreign countries by way of their counsels. Indeed, even the United States, when territoriality jurisdiction was at its peak, wielded extraterritorial jurisdiction in both China and the Ottoman Empire over its nationals.\textsuperscript{170} Thus, as a writer put it, “nineteenth-century international law achieved global geographical scope by including two separate regimes: one governing relations between Western sovereigns under formal equality, and the other governing relations between Western and non-Western polities under inequality, granting special privileges to the former.”\textsuperscript{171}

E. FROM DOCTRINAL UNCERTAINTY TO THEORETICAL CONFUSION: CONFRONTING THE FOUNDATIONAL BASES FOR THE ONGOING EXPANSION OF UNIVERSAL JURISDICTION

I. Piracy Analogy and the Heinousness Argument

As stated in the Introduction, beyond the “Lotus Principle” which was earlier examined, there have been so many other theoretical justifications for the ongoing expansion of universal jurisdiction by human rights advocates. The commonest is the reference to piracy – the first, and indeed, the only crime in respect of which its universal jurisdiction status is universally recognisable – as precedent.\textsuperscript{172} Advocates have sought to legitimize this development by

\textsuperscript{169}Until 1842, China had asserted control over all foreigners within its territory ... but, as a result of the Opium War, Great Britain negotiated a treaty with China whereby she obtained consular offices in five open ports and was granted extraterritorial rights over her citizens. On July 3, 1844, Caleb Cushing negotiated a similar treaty on behalf of the United States. In a letter to Secretary of State Calhoun, he explained: “I entered China with the formed general conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations, -- in a word, a Christian state.” Later treaties continued the extraterritorial rights of the United States. \textit{Ibid}.

\textsuperscript{170}Coggins & Roberts, \textit{supra} note 132 at 1392.


\textsuperscript{172} The legitimacy of universal jurisdiction over piracy is so generally accepted by scholars and jurists that it is almost impossible to find any contrary authority on the issue. See Kontorovich, \textit{supra} note 105 at 190. Its customary international law status is complimented by its codification in both Article19 of the 1958 Geneva Convention on the High Seas and Article 105 of the 1982 United Nations Convention on the Law of the Sea.
invoking piracy as an inspiration and justification. In fact, central to the project of expansion of universal jurisdiction and crucial to its origins is the piracy analogy. According to Benjamin Ferencz, “the first breakthrough [for prosecuting ‘international crime’] occurred when international law accepted the concepts that pirates are ‘enemies of mankind’ and once this concept of an international crime was developed in one area, it was soon applied by analogy in other fields.” Kenneth Randall, too, argues that “The concept of universal jurisdiction over piracy has had enduring value ... by supporting the extension of universal jurisdiction to certain modern offenses somewhat resembling piracy.”

Intrinsic in the piracy analogy is emphasis on the nature of crimes. The claim is that the heinousness of the crime of piracy was the reason for subjecting it to universal jurisdiction and that the same enforcement measure could be legitimately applied to any other crime that possesses this characteristic. In other words, the theory is that “heinousness is the common denominator of piracy and the new universal offenses [since] these are crimes that are

According to the said Article 19 (with similar provision in the said Article 105): “On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”

Kontorovich, supra note 105 at 184.

Princeton Principles on Universal Jurisdiction, supra note 158 at 45.


Randall, supra note 11 at 789. See also Blum & Steinhardt, supra note 11 at 60-63; Susan Waltz, “Prosecuting Dictators: International Law and the Pinochet Case” (Spring 2001) World Pol'y J 101 at 105; Quincy Wright, “War Criminals”(1945)39 Am. J Int'l L 257 at 280 & 283.

profoundly despised throughout the world”\textsuperscript{178} to the end that every state is deemed to have competing jurisdiction.\textsuperscript{179} “Universal jurisdiction was never about piracy per se . . . but about allowing any nation to punish the world's worst and most heinous crimes.”\textsuperscript{180} Like piracy, the argument goes, the perpetrators of these crimes are so universally condemned that they are regarded as \textit{hostis humani generis} (enemies of mankind).\textsuperscript{181} Eric Kobrick puts it thus: “These crimes are said to undermine the very foundations of the enlightened international community as a whole and to jeopardise the security of nations. The fact that such crimes endanger the interests of all nations provides the necessary nexus for international law to extend jurisdiction over them to all states.”\textsuperscript{182} Therefore, “universal jurisdiction over human rights violations is simply an application of the well-settled principle that the most heinous offenses are universally cognizable and not, as critics contend, a radical and dangerous encroachment on nations’ sovereignty.”\textsuperscript{183}

The courts, too, have followed along this part, often relying on the nature-of-the-crime argument to justify their exercise of universal jurisdiction even when, in some cases, other bases of jurisdiction would have sufficed. In \textit{Ferrini v. Germany}, the Italian Supreme Court held that serious violations of international human rights norms justify the exercise of

\textsuperscript{178} Kontorovich, supra note 104 at 205; Stephen Macedo, “Introduction” in Stephen Macedo, ed, \textit{Universal Jurisdiction}, supra note 16 at 4 (arguing that “universal jurisdiction is the principle that certain crimes are so heinous, and so universally recognised and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or victims”).


\textsuperscript{180} Kontorovich, \textit{supra} note 105 at 185.

\textsuperscript{181} Mills, \textit{supra} note 1 at 1322.

\textsuperscript{182} Kobrick, \textit{supra} note 140 at 1520.

\textsuperscript{183} Kontorovich, \textit{supra} note 105 at 185
universal civil jurisdiction, and that all states have a responsibility to prevent the breach of such rights, regardless of where the breach occurred, in accordance with the principle of universal jurisdiction.\footnote{\textit{Ferrini v Federal Republic of Germany}, cited by Anthea Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law” (2011) 60 Int’l & Comp 57 at 64.} Several decisions of the post-World War II military tribunals, \textit{Eichmann}\footnote{\textit{Eichmann v. Attorney-General}, supra note 138.}, \textit{Filartiga}\footnote{\textit{Filartiga v. Pena-Irala}, 630 F2d 876, 890 (2d Cit. 1980).}, \textit{Demjanjuk}\footnote{\textit{Demjanjuk v. Petrovsky}, 776 F.2d 571, 582 (6th Cir. 1985).} and the post-Cold War ad hoc international tribunals, especially the International Criminal Tribunal for the former Yugoslavia (ICTY)\footnote{See for instance, \textit{Prosecutor v. Furundzija}, Case No. IT-95-17, Judgement (Dec. 10, 1998).} have also been based on this idea. The recent dissenting opinion of Justice Breyer in \textit{Kiobel v Royal Dutch Petroleum Co.}, underscores the centrality of this piracy analogy, and by necessary implication the element of heinousness, to the ongoing argument for the expansion of universal jurisdiction. He argued thus:

Who are today’s pirates? Certainly today’s pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are “fair game” where they are found. Like those pirates, they are “common enemies of all mankind and all nations have an equal interest in their apprehension and punishment”…. And just as a nation that harboured pirates provoked the concern of other nations in past centuries . . . so harbouring “common enemies of all mankind” provokes similar concerns today.\footnote{\textit{Kiobel v. Royal Dutch Petroleum Co &Ors}, supra note 79 (Concurring Judgment of Justice Breyer).}

However, the attempt to convert perpetrators of “heinous” crimes into pirates is fraught with an important flaw. Historically, the idea that the crime of piracy was subject to the exercise of universal jurisdiction due to its heinousness is not entirely accurate. Until the eighteenth century, the act of piracy was a “fair game” among Western nations.\footnote{The Phrase “Western nations” is used here advisedly to reflect the unanimity of nearly the Third World in the context of determining the state of customary international law at the time. This is not surprising given that, as was demonstrated in Chapter two, until recently, states that today constitute the Third World were generally dismissed as being barbaric and, therefore, incapable of constituting subjects of international law.} Pirates were generally
agents of the state, treated as patriots by their nations and, in some cases, rewarded with national honours.\textsuperscript{191} For instance, in 1581, Francis Drake, a British national was knighted by Queen Elizabeth for his piracy activities, especially against Spain, which enriched the royal treasury.\textsuperscript{192} It was not until the beginning of the eighteenth century that the view of these nations towards piracy changed as pirates were no longer regarded as patriots but as criminals\textsuperscript{193} against whom prosecution could be instituted in any territory. But this criminalisation was never motivated by any sense of moral outrage at the heinousness of the crime but economic considerations.\textsuperscript{194} In an old English case of \textit{Rex v. Dawson}, the court had argued that failure to punish pirates would lead to the "destruction of the innocent English in those countries, \textit{the total loss of the Indian trade, and thereby the impoverishment of this kingdom.}"\textsuperscript{195} The court further described piracy as “the worst sort of robbery, both in its nature and its effect, since it disturbs the \textit{commerce} and friendship between different nations.”\textsuperscript{196} 

\textsuperscript{192} His contribution at the time to the British economy was estimated to worth around £500,000, which in 1995 was revalued at more than £68 million. \textit{Ibid} at 980; David Cordingly, \textit{Under the Black Flag: The Romance and the Reality of Life Among the Pirates} (New York: Random House, c1995) 31. Drake was not an isolated instance. In the seventeenth century, Henry Morgan, too, became a national icon in Jamaica (which was an English Colony at the time) for his piracy activities, especially against Spanish America. Rather than punishing him, the then governor of Jamaica embraced the money and treasure that he brought. He was knighted by the King of England and would later become the the Deputy Governor of the island of Jamaica. See Goodwin, \textit{ibid} at 980; Philip Gosse, \textit{The History of Piracy} (New York: Tudor Pub. Co., 1934) 160.
\textsuperscript{194} Goodwin, \textit{supra} note 191 at 981 (arguing that “while the courts placed great weight on the heinousness of piracy in English piracy trials, the importance of trade and economic considerations-notably the enrichment of England seem to have played important roles as well for punishing pirates.”)
\textsuperscript{195} \textit{Rex v. Dawson} (1696) 13 Howell’s State Trials 451 at 453 (U.K.) [Emphasis supplied].
\textsuperscript{196} \textit{Ibid} at 482 [emphasis supplied].
An examination of the definition and scope of what eventually became the crime of piracy lends support to the above proposition. What was actually prohibited was only in relation to piracy perpetrated for private gain, while privateering or state-licensed piracy was openly encouraged and regulated. Kontorovich puts it thus: “. . . the law of every nation and the law of nations countenanced such behaviour [i.e. piracy] when carried out by state-licensed sea-robbers called privateers. This suggests that seizing ships and cargos at sea through threat of force was not considered extraordinarily heinous conduct.”

It must be pointed out that even before the eighteenth century, privateering existed side-by-side with piracy. The conduct of privateers, too, was not different from that of pirates – armed robbery on the high sea. This similarity continued after criminalisation of piracy except that privateer carried a letter of marque from the crown as evidence of sovereign authorisation. Since they acted as agents of their governments, any profit realised by privateers was shared between them. Despite this similarity, however, privateers were not subjected to universal jurisdiction nor were they even considered as criminals. Extrapolating from the above, therefore, it is fair to conclude that rather than heinousness, economic consideration was the major driver of the decision to punish piracy. As Joshua Goodwin observed, “If the concern was that piracy was extremely heinous, why have an

197 Goodwin, supra note 191 at 981.
198 Kontorovich, supra note 105 at 210.
199 Goodwin, supra note 191 at 981.
200 Ibid; Michael D.Ramsey, “Textualism and War Power”(2002) 69 U Chi L R 1543 at 1615-16 ("Reprisal [under a writ of marque and reprisal], being these seizure of goods by force, could look a bit like piracy and robbery, especially if conducted by a private party. The critical difference, obviously, was the sovereign authorization.").
201 Lydon, supra note 190 at 25-26.
202 Kontorovich, supra note 105 at 210.
official policy of allowing privateers perform the same heinous acts the pirate performed? The answer is that Europe did not view piracy as particularly heinous, but it was economic consideration behind the decision to punish piracy."\textsuperscript{203}

Furthermore, if heinousness was the central consideration for permitting the exercise of universal jurisdiction over piracy, then it must, by necessary implication, be assumed that no other crime was as equally heinous at the time. But this was not the case. Crimes such as murder\textsuperscript{204}, treason\textsuperscript{205}, rape\textsuperscript{206}, and kidnapping\textsuperscript{207} were considered to be heinous and yet, they were not subjected to same treatment as piracy. The normative illogicality inherent in this was captured by a writer thus: “Canada cannot prosecute one American for the murder of another American that took place within the United States. Yet, the killing of another human being is one of the most heinous crimes is it not? Is robbery on the ocean as heinous as cold-blooded murder? If heinousness is the basis of universal jurisdiction, why are murder and other heinous crimes not subject to universal jurisdiction?”\textsuperscript{208}

The preceding analysis extends to the now hackneyed characterisation of pirates as \textit{hostis humani generis} – enemies of mankind – on which advocates of the expansion of universal

\textsuperscript{203} Goodwin, \textit{supra} note 191 at 982.
\textsuperscript{204} \textit{Davis v. United States} (1895) 160 U.S. 469 at 484.
\textsuperscript{205} \textit{Hanauer v. Doane} (1870) 79 U.S. 342 at 347.
\textsuperscript{206} \textit{United States v. Quiver} (1916) 241 U.S. 602 at 605.
\textsuperscript{207} \textit{Bates v. Johnston}, Ill F.2d 966, 967 (9th Cit. 1940).
\textsuperscript{208} Goodwin, \textit{supra} note 189 at 996. Furthermore, a study conducted by Goodwin shows that the punishment for crime of piracy, when compared with other crimes, is not the most severe in many countries. In the United for instance, while the crimes of murder and treason attract the death penalty (in some states in the case of murder), piracy is life imprisonment. The disparity is even wider in Russia where piracy attracts, in the extreme circumstances, fifteen years imprisonment whereas some homicides offenses attract the death penalty. This underscores the point that piracy has never been the most heinous crime. See \textit{Ibid} at 997.
jurisdiction often rely. For instance, Professor Randall argues that "[t]hose who commit hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture are today's hostis humani generis." The Second Circuit Court of Appeals in the United States has stated that "the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." Underlining this label is the idea that the activities of pirates on the high sea are so indiscriminate that they tantamount to a declaration of war against all nations, thus, entitling any country that apprehends them to prosecute and punish them. This assertion is, at best, weak – a mere “embellishment” or “metaphorical invective.” As a matter of empirical as well as normative reality, it is doubtful whether the asserted effect is synonymous with the crime. The interests against whom the activities of pirates collided in the eighteenth century were those of a minority number of Western nations for whom the high sea was the most effective means of transporting the spoils of colonial conquest. Professor Rubin captured it more graphically thus:

It can be concluded that "universal jurisdiction" was at best a rule of international law only for a limited period of time and under political circumstances that no longer apply; at worst it was merely a British attribution to the international legal order of substantive rules forbidding "piracy" and authorizing all nations to apply their laws against it on the high seas, based on a model of imperial Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England alone.

209 Randall, supra note 11 at 832.
210 Filartiga v. Pena-Irala, supra note 184 (emphasis added).
211 Goodwin, supra note 191 at 994.
It is probably for this reason that Dickinson asked: Is the jurisdiction [over piracy] universal because [pirates] are *hostes humani generis*, or are they said to be *hostes humani generis* because the jurisdiction is universal?”214 According to Goodwin, “it would seem therefore that pirates are *hostes humani generis* not because of their actions, but because the major naval powers have traditionally exercised universal jurisdiction over them.”215

Finally, often overlooked by those who seek to justify universal jurisdiction by reference to piracy is the unique operational circumstances of the crime which made the application of any of the traditional bases of jurisdiction impracticable. The high sea, where the crime is committed, is regarded in international law as *terra nullius* – as belonging to no state – “no states possess jurisdiction to punish such acts, and states including the flag state were unable to prosecute effectively.”216 Thus, “it was held that any state that was capable of capturing suspects and of prosecuting and punishing them effectively could take that opportunity [without which] it would be very difficult to combat the crime of piracy.”217 According to the Harvard Research – a draft convention on jurisdiction prepared by the Harvard Law School – justification for the exercise of universal jurisdiction over piracy was founded on the idea that “the punishable acts are committed upon the sea where all have an interest in the safety of commerce and where *no state has territorial jurisdiction*.218 The lack of jurisdictional

214 Dickinson, *supra* note 212 at 351.
217 *Ibid* at 50 at 51.

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conflict between states, which was concomitant with the absence of territorial jurisdictional claim, therefore, was key to the development of universal jurisdiction over piracy as a customary international law simply because it “did not alter the dominance of territorial jurisdiction under the classical international law.”

Thomas Frank sums it up thus:

‘Universal jurisdiction’ is an old concept in international law, most commonly used to explain the illegal status of piracy. It allowed any court in any country to capture pirates anywhere, seize their possessions, and prosecute them for their crimes. These crimes were likely to have occurred on the high seas against foreign interests; that is, without a link to a particular court. A national court was regarded as an agent of world order, serving the common interest in the suppression of piracy, and its proceedings were not considered an encroachment upon the sovereign rights of any state.

From the preceding analyses, therefore, it is apparent that the piracy analogy as the basis for the ongoing expansion of universal jurisdiction is, at best, weak. The so-called heinousness argument does not reflect the true nature of piracy nor explain the motivation behind its generally accepted susceptibility to universal jurisdiction. If heinousness were to be the major reason for the emergence of universal jurisdiction, then piracy would probably have been the least crime to be contemplated by states.

But the question is, how is universal jurisdiction caught up in this web of inaccurate analogy and what was the motivation? In hindsight, it is not difficult to understand why the heinousness argument has become the dominant mantra of proponents of modern universal jurisdiction. This is explored in the next part of this chapter, which examines not only World War II trials but also a few other high profile cases of interest to the subject – the Pinochet

219 Inazumi, supra note 216 at 52.
case, and the *Arrest Warrant* case. Following from the analysis, the part also questions the value of these cases as evidence of the emergence of universal jurisdiction as customary international law beyond piracy. This is because, all things fully considered, none of these cases is an unmitigated authority on the idea contemplated by the principle. For instance, to the extent that the World War II tribunals relied on universal jurisdiction, they did so by “executive fiat” or “military decree” promulgated by the victorious Allies at end of the war, as opposed to reliance on any theory of extraterritorial jurisdiction known to international law at the time. It represented one of the greatest manifestations of power in the determination of extraterritorial jurisdiction – one that was replicated in the Eichmann’s trial by Israel years later. The *Pinochet* case, too, contrary to what advocates assert, was a decision based not strictly on the principle of universal jurisdiction but on a Convention to which all the states involved were parties. The *Arrest Warrant* case, on the other hand, is, at best, only an authority for questioning the legality of universal jurisdiction in international law.

**II. The Nuremberg and Tokyo War Crimes Tribunals**

The Nuremberg and Tokyo trials are said to be the harbinger of the modern universal jurisdiction and the first time in which piracy analogy was relied on to justify extraterritorial jurisdiction.\(^{221}\) Prior to this period, the principle of universal jurisdiction remained largely in its original nature – as applicable only to the crime of piracy.\(^{222}\) The Nuremberg and Tokyo tribunals were established by the victorious Allied powers – consisting of the United States,


\(^{222}\) *Ibid* at 341.
Great Britain, France and the Soviet Union – under a multilateral treaty to prosecute the leaders of the vanquished Axis states for crimes committed during the war. The Nuremberg tribunal was established through the London Agreement, to which was annexed the Charter of the International Military Tribunal (IMT Charter).\textsuperscript{223} Beyond these tribunals, other prosecutions were also conducted by the Allied states in their respective “territorial zones” within Germany. For instance, after the completion of the IMT trials, the United States prosecuted Germans in Nuremberg, which was regarded as being in American occupied zone, under Control Council Law No. 10.\textsuperscript{224} Furthermore, other trials have taken place in the domestic courts of some other states based on a combination of some of the principles of extraterritorial jurisdiction including universal jurisdiction. According to the United Nations Law Reports on Trials of War Criminals, published in 1947, “there have been numerous . . . trials by the Courts of one ally of offenses committed against the nationals, and in many trials no victims were involved of the nationality of the state conducting the trial . . . .”\textsuperscript{225} The best examples of this kind of prosecution are those of Eichman and Demjanjuk by Israel,\textsuperscript{226} which are examined shortly.

\textsuperscript{223} Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280

\textsuperscript{224} Control Council Law No. 10, which created and regulated the zonal tribunals, was promulgated by the four Zone Commanders in Berlin on December 20, 1945, “to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.” Control Council Law No. 10, 3 Control Council, Official Gazette of the Control Council for Germany 49, 52 (Jan. 31, 1946).

\textsuperscript{225} United Nations War Crimes Commission (1947-49) XV Law Reports of Trials of War Criminals 43.

\textsuperscript{226} Randall, supra note 11 at 802.
It should be noted that the actual basis for the Tribunals’ exercise of jurisdiction is highly contested. On the one hand are scholars who argue that trials conducted by these tribunals are demonstrative of the exercise of universal jurisdiction, and that this principle has, since then, assumed the status of customary international law. They further argue that this was especially the case, considering that the prosecuting Allied states had no recognisable nexus to the crime, given that they were neither the states in which the crimes occurred nor the states of the accused persons’ nationality. In making this argument, they refer to the opening statement of Justice Robert Jackson, the Allies’ Chief Prosecutor at Nuremberg, in which he argued that the charges against Nazi war criminals were laid on behalf of civilisation due to the heinous nature of the crimes committed by them: “the wrongs which

227 The United Nations Secretary-General’s 1949 Report on the Nuremberg tribunals alluded to this debate thus:

In this statement the Court refers to the particular legal situation arising out of the unconditional surrender of Germany in May 1945, and the declaration issued in Berlin on 5 June 1945, by the four Allied States, signatories of the London Agreement. By this declaration the said countries assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority. The Court apparently held that in virtue of these acts the sovereignty of Germany had passed into the hands of the four States and that these countries thereby were authorized under international law to establish the Tribunal and invest it with the power to try and punish the major German war criminals.

The Court, however, also indicated another basis for its jurisdiction, a basis of more general scope. “The Signatory Powers” [the Tribunal said], “created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.” The statement is far from clear, but, with some hesitation, the following alternative interpretations may be offered. It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase “right thus to set up special courts to administer law” is too vague to admit of definite conclusions. See Secretary-General of The United Nations, the Charter and Judgment of the Nuremberg Tribunal: History and Analysis at 80, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949V.7 (1949).

228 Inazumi, supra note 216 at 56.

229 Ibid.
we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilisation cannot tolerate their being ignored because it cannot survive their being repeated.”

The idea of acting on behalf of humanity which is at the heart of the modern universal jurisdiction is explored in Chapter Four.

On the other hand, another hypothesis – one that is more consistent with historical evidence – argues that the trials proceeded on the basis of “delegated territoriality jurisdiction,” representing the “Allies governmental authority within post-war Germany” as a de facto sovereign power following the defeat of Germany and its subsequent unconditional surrender on May 8, 1945. For all practical purposes, this development meant that Germany “ceased to exist as a state in the sense of international law” with its sovereignty as a state passing to the victors. The Berlin Declaration of June 5, 1945, corroborates this assertion: “The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by

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230 Justice Robert Jackson, Opening Remarks of the International Military Tribunal Sitting at Nuremberg, Germany (November 21, 1945). Sammons argues that Jackson may have indirectly argued for universal jurisdiction “not because the tribunal lacked other bases of jurisdiction but in order to soften the appearance of ‘victors justice’”. He finds support for this assertion in another part of Jackson’s statement in which he asked everybody not forget that “the record in which we judge these defendants is the record on which history will judge us tomorrow.” For Simmons, Jackson could not have imagined a future in which universal jurisdiction would superimpose over state sovereignty and become the only basis for the prosecution and adjudication of war crimes. See Sammons, supra note 6 at 125.

231 Kontorovich, supra note 105 at 195.

232 Moriss, supra note 221 at 342.


the German Government, the High Command and any state, municipal, or local government or authority.”

Reflected in the Berlin Declaration is a recognition of the transfer of sovereign rights from Germany to the Allies acting in concert, which was, in fact, a mere “formalis[ation of ] that which already had occurred through the Allies’ military occupation.” Upon the defeat of Germany, therefore, its sovereignty was “‘held in trust by the condominium of the occupying powers’” who asserted “whatever jurisdiction Germany would have had over the specific offenses.” Even the Nuremberg tribunal appeared to have reasoned along this line when it held thus: "[T]he making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.” Thus, at a minimum, the prosecution of Nazi war criminals was an exercise of both territorial as well as nationality jurisdiction consented to by the Allied powers in exercise of sovereign power over the German territory. According to Carnegie, “it is just theoretically conceivable that the principles of territorial jurisdiction and nationality jurisdiction could justify all trials of German accused anywhere, and of defendants of any

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235 Declaration regarding Germany by the United States of America and the United Kingdom of Great Britain and Northern Ireland, the Union of the Soviet Socialist Republics, and the Provisional Government of the French Republic, June 5, 1945, 60 Stat. 1649, 1650.
236 Sammons, supra note 6 at 124.
238 Randall, supra note 11 at 805-806.
240 Sammons, supra note 6 at 124.
nationality for offenses committed in Germany, by one of the four occupying power in Germany."  

Carnegie further argued that, based on evidence of trials in other countries other than those of the Allied powers, passive personality principle was also relied on in the trial of Nazi war criminals.  

For Inazumi, the Allied states might have exercised jurisdiction based on the protective principle since their interests were also affected by the actions of the Germans.

It is important to note that, as was earlier pointed out, even in cases where the Tribunals invoked universal jurisdiction, they did so by reference to the crime of piracy, and argued that the doctrine extended to war crimes as well. For instance, a British military court, in finding a German defendant guilty of killing a Dutch civilian in the Netherlands stated that under the general doctrine called Universality of Jurisdiction over war crimes, every independent state has, in International Law, jurisdiction to punish pirates and war criminals.

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242 Ibid at 422. For instance, it was reported that military tribunals located in Germany, Italy, and the Netherlands tried offenses in respect of which their nationals were victims. See Willard B. Cowles, “Trials of War Criminals (Non-Nuremberg)” (1948) 42 Am J Int’l Law 299 at 299; Carnegie, Ibid at 422-23. Clarifying this issue further, a scholar stated thus:

The jurisdiction of war crimes tribunal is . . . normally confined to offences committed on the soil of prosecuting state or against its nationals and residents. Special occupation courts therefore become necessary in order to deal with those war crimes which are within the jurisdiction of the prosecuting state only qua military occupant. In the absence of these bases of jurisdiction, the state employing municipal law is powerless . . . to deal with other offences committed even by the same accused, despite the fact that war criminals have often been guilty of a course of conduct which does violence to nationals or interests of a number of states.


243 Inazumi, supra note 216 at 57.
in its custody regardless of the nationality of the victim or the place where the offense was committed.\textsuperscript{244}

Reference to the crime of piracy as justification is not surprising. Prior to WWII trials, no precedent existed for the kind of trial that was advocated by the victorious Allied powers against the Nazis – universal jurisdiction over war crimes and crimes against humanity.\textsuperscript{245} Furthermore, since some of the crimes were not committed against the Allied nations, assumption of jurisdiction in respect of all the Nazi crimes in reliance of any of the traditional jurisdictional bases might have been problematic.\textsuperscript{246} Finally and more importantly, considering that some of the crimes, such as “crimes against peace” and “crimes against humanity,” were arguably unknown to international law at the time, the invocation of the crime of piracy as an analogy was essential in overcoming the charge of violation of the customary international law principle of \textit{nullum crimen sine lege} – a customary international law principle that states that no conduct shall be criminal unless it is specifically described in a penal statute.\textsuperscript{247} The same strategy was later employed by Israeli courts in the \textit{Eichmann} case to justify their assumption of jurisdiction over crimes that occurred even before Israel became a state under international law. These issues, including the extent to which the idea of “universality” has become a subterfuge to undermine the evolution of international norms

\textsuperscript{244} Law Reports of Trials of War Criminals, cited by Morris, \textit{supra} note 221 at 344-45. \textit{Almelo} 1945).
\textsuperscript{245} Randall, \textit{supra} note 11 at 803; Morris, \textit{supra} note 221 at 345.
\textsuperscript{246} Kontorovich, \textit{supra} note 105 at 195.
\textsuperscript{247} Kobrick, \textit{supra} note 140 at 1533; Jerome Hall, “Nulla Poena Sine Lega” (1937) 47 Yale LJ 165 at 165.
through the generally accepted traditional principle of customary international law, are explored in Chapter Four.

III. The Eichmann Trial

The *Eichmann* trial\(^{248}\) is one of the most significant cases of the twentieth century in which universal jurisdiction was invoked. The case involved the prosecution of Adolf Eichmann who, as the chief Gestapo’s Jewish Section of German government during World War II, was responsible for the prosecution, deportation and extermination of hundreds of thousands of Jews in Germany.\(^{249}\) It was reported that one of his responsibilities was the supervision of the “final solution” of the Jewish question.\(^{250}\) Eichmann was abducted by the Israeli secret police in 1960 from Argentina and was flown to Israel, where he was indicted by an Israeli court pursuant to Israeli Law — the “Nazi and Nazis Collaborators (Punishment) Law of 1950”\(^{251}\). He was charged with "crimes against the Jewish people, crimes against humanity, and war crimes."\(^{252}\)

\(^{248}\) *Eichmann*, supra note 139

\(^{249}\) Randall, *supra* note 11 at 810.


\(^{251}\) As stated earlier in this chapter, the kidnapping of Eichmann led to a serious diplomatic crisis between Israel and Argentina concerning the question of the violation of the latter’s sovereignty. Although the action of Israeli government was generally denounced by the international community, Israeli courts held that the illegality of Israeli action did not affect their jurisdiction. For a comprehensive discussion of Eichmann’s arrest and the legality of the procedure adopted in that behalf, see Helen Silving, “In Re Eichmann: A Dilemma of Law and Morality” (1961) 55 Am J Int’l L 307.

In assuming jurisdiction over the case, both the District Court and the Supreme Court of Israel argued that the right of all states to exercise universal jurisdiction over crimes for which Eichmann was indicted had risen to the status of customary international law and cited the crime of piracy.\textsuperscript{253} According to the Supreme Court, “the substantive basis upon which the exercise of the principal of universal jurisdiction in respect of the crime of piracy rests justifies its exercise in regard also to the crimes which are the subject of the present case.”\textsuperscript{254} In justifying the expanding universal jurisdiction beyond the crime of piracy, the court argued that to not do so would stymie the growth of the principle.\textsuperscript{255} It further argued that piracy, rather than being the only crime to which universal jurisdiction applied, was only one example of a broader category of heinous crimes to which the principle applied – heinous acts that "damage vital international interests; they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations."\textsuperscript{256}

Many scholars have expressed surprise at Israel’s reliance on the doctrine of universal jurisdiction in this case, considering its controversial nature, when they could have successfully relied on one or more traditional bases of extraterritorial jurisdiction such as the

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\textsuperscript{253} The Supreme Court states as follows:
One of the principles whereby States assume in one degree or another the power to try and punish a person for an offence is the principle of universality. Its meaning is substantially that power is vested in every State regardless of the fact that the offence was committed outside its territory by a person who did not belong to it, provided he is in it when brought to trial. This principle has wide currency and is universally acknowledged with respect to the offence of piracy jure gentium.
\textit{Eichmann, supra} note 139 at 298.
\textsuperscript{254} \textit{Ibid} at 300.
\textsuperscript{255} \textit{Ibid} at 299-300.
\textsuperscript{256} \textit{Ibid} at 291.
\end{quote}
principle of passive personality. Korontovich argues, for instance, that “Israel did not need universal jurisdiction to prosecute Eichmann . . . because of its unique connection . . . [of being] the sole sovereign representative of the Jewish people, as well as the nation where many of the victims took refuge.” In fact, both the trial court as well as the Supreme Court of Israel invoked other grounds of jurisdiction even as they relied heavily on universal jurisdiction.

It is argued that from the circumstances of the case, it is not difficult to see why Israel had to invoke universal jurisdiction as a primary basis for jurisdiction. Keep in mind that at the time of the commission of the alleged crimes, neither the crimes with which the accused was charged nor even the state of Israel was known to international law. Technically, a non-existing Israel could neither have been a victim of the crime to legitimise its exercise of passive personality principle nor was its interest affected for it to rely on the protective principle. Furthermore, the law under which Eichmann was Prosecuted – the Nazis and Nazi Collaborators (Punishment) Law – was enacted in 1950 and so could not have applied to crimes that occurred in the 1940s without violating the hallowed international law

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258 Kontorovich, supra note 105 at 197.
259 The Supreme Court held thus:

The State of Israel's "right to punish" the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault their existence.

Eichmann, supra note 139 at 50.
260 Randall, supra note 11 at 814.
principle of *nulle sine lege*.

261 Stripped of the “heinousness” component, therefore, the question would have become whether, as Inazumi rightfully asked, Israel could have “exercised its jurisdiction over Eichmann, who was not an Israeli national or resident, for crimes committed outside its territory *before* the existence of the state of Israel.”

262 It is therefore argued that, like the Nuremberg trials, the assertion of “universality” by Israeli courts was needed to overcome what was clearly a significant jurisdictional quagmire. Pursuing to be acting on behalf of the “international community,” it is argued, provided Israel with a subterfuge to apply its law retroactively.

263 An examination of part of the reasoning of the Israeli Supreme Court corroborates this assertion:

> …Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.

264 The strategy of invoking the doctrine of universal jurisdiction to overcome serious jurisdictional challenges such as, ex post facto charges, was also evident in the Demjanjuk case in which the United Courts were called upon to decide the legality of an extradition request granted by an Israeli court against the defendant who was an American citizen living in the US. The defendant’s objection, among others, was that Israel had no jurisdiction to try him for genocide against the Jews, which occurred in Poland during World War II – a crime made punishable under the same Israeli domestic law under which Eichmann was prosecution. Like Eichmann, Demjanjuk argued that he was neither an Israeli national nor its resident; that the alleged crime was committed not in Israel, but Poland; and that Israel never existed at the time of the alleged commission of the crime. Without seriously considering the merit of the grounds of the objection, it was held that Israel enjoyed universal jurisdiction under international law and therefore could proceed with the trial. Assertion of universal jurisdiction, therefore, is deemed to trump any jurisdictional deficiencies that might otherwise exist under the traditional grounds of jurisdiction. See In the Matter of Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio), aff’d sub nom, *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986).
Curiously, the statute refers to “crimes against the Jewish people,” in addition to the “crimes against humanity” for which the Nazis were prosecuted at the Nuremberg – the very category on the basis of which universal jurisdiction is predicated.\(^{265}\) As discussed in Chapter Four, other than its very broad nature, with concomitant potential for abuse, the phrase underscores the increasing penchant by some countries to project their interests as that of humanity. In Israel’s case, there appears to be no bright line between hostis judaeorum (the enemy of the Jews) and hostis generis humani (the enemy of all humanity).\(^{266}\)

IV. The Pinochet Case

Despite an initial faulty start,\(^{267}\) the United Kingdom’s House of Lords decision in 1999, approving the arrest warrant issued by a Spanish magistrate against General Augusto Pinochet, former Chilean Head of State, who was then on a visit to the United Kingdom, in exercise of universal jurisdiction occupies a special place in the hearts of advocates of the doctrine. On October 16, 1998, in an exercise of what was originally the passive personality principle of extraterritorial jurisdiction, Baltasar Garsón, a Spanish investigating magistrate, issued an arrest warrant against Pinochet and sought his extradition from Britain. The initial


\(^{267}\) In what was considered as a historic development, the first decision of the court granting Spain’s extradition request was completely wiped out by the same court following an appeal by the defendant, who argued that one of the law lords, Lord Hoffman, was not competent to hear the motion by reason of his association with a charity associated with the Amnesty International, an intervening party in the proceeding. In other words, it was alleged that Lord Hoffman was acting simultaneously as both party and judge in the same case, which incurably tainted his objectivity in the matter. See Michael Mandel, How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity (London: Pluto Press, 2004) 224; Chadwick, supra note 277 at 371; Richard A. Falk, “Assessing the Pinochet Litigation: Whither Universal Jurisdiction” in Macedo, supra note 16 at 112.
allegation was that he had ordered the murder of some Spanish nationals in Chile while still in office. However, when it became obvious that Britain could not act on the said warrant since the principle of passive personality was unknown to her, Garsón quickly presented a second arrest warrant and extradition request in which he charged Pinochet with genocide, torture, hostage taking, conspiracy to commit torture, conspiracy to take hostages, and conspiracy to commit murder in breach of international conventions which he argued justified an exercise of universal jurisdiction.

At the trial, one of the issues was whether both the Spanish authority as well as British courts could legally exercise universal jurisdiction over the case under international law. This was very important, given that it is the cardinal principle of extradition law that the sustainability of an extradition request depends on whether a crime on the basis of which the request is made is recognised by both the requesting and the requested states. Outside Spain, especially among some Third World states, opposition to the arrest warrant was rife. Specifically, states from South America including Chile seriously objected to the idea that a person could be prosecuted in third states, with Chile and Argentina describing Spain’s

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271 White, supra note 267 at 145.
272 Another issue, which is not within the purview of this chapter, was whether Pinochet enjoyed continuing immunity for acts which he committed when he was head of state.
273 Falk, supra note 267 at 115.
action as a violation of state sovereignty.\textsuperscript{274} Many European states, on the other hand, endorsed Spain’s action based on human right concerns with some of them even joining in requesting the arrest of Pinochet.\textsuperscript{275} This dispute between states only underscores the tenuousness of the doctrine of universal jurisdiction beyond the crime of piracy and the North-South divide on the subject.

The Pinochet trial in the United Kingdom, which ended with the 1999 judgement of the House of Lords\textsuperscript{276} has been described, in relation to universal jurisdiction, as “pathbreaking,”\textsuperscript{277} “breathtaking,”\textsuperscript{278} “a decision without precedent . . . [and a] beginning for what can and should be justice without borders,”\textsuperscript{279} and an action that “already revolutionized international law.”\textsuperscript{280} Yet, a nuanced examination of the case’s racio decidendi reveals the hyperbolism or, at least, the incautious optimism of those assertions. The approach adopted by the court showed not only an unwillingness to expand the scope of this principle,\textsuperscript{281} but also evaded what has become the most difficult jurisprudential question hanging on the principle like an albatross – the ultimate legal basis for its expansion beyond the crime of piracy.\textsuperscript{282} First, the judgement of the law lords, which held Pinochet extraditable to Spain was based neither on any notion of universal jurisdiction \textit{per se} nor customary

\textsuperscript{274} Inazumi, supra note 216 at 85
\textsuperscript{275} They included Switzerland, France and Belgium. See \textit{Ibid.}
\textsuperscript{278} Howard Ball, \textit{Prosecuting War Crimes and Genocide: The Twentieth Century Experience} (Lawrence: University Press of Kansas, 1999) 232.
\textsuperscript{279} \textit{Ibid.}
\textsuperscript{281} Orentlicher, \textit{supra} note 42 at 1079.
international law, but on a narrow language of a Convention – the Torture Convention – to which the three countries involved in the litigation were signatories.\textsuperscript{283} Thus, the obligation enforced by the court was not necessary that owed to the whole world as contemplated by the doctrine of universal jurisdiction, rather was one created by a treaty and voluntarily accepted by the parties upon ratification which, in the case of Chile, occurred in 1988. The cardinal question, therefore, as posed by Ruth Wedgwood is “whether universal jurisdiction might have been available even without Chile’s treaty ratification – through third party application of the treaty before Chile agreed to it, or by reading a jurisdictional principle into customary international customary international law or \textit{jus cogens}.”\textsuperscript{284} This dissertation turns to this question shortly.

Finally, to the extent that the principle of double criminality was invoked in the determination of the House of Lords’ competence to grant Spain’s request, the British focus was exclusively on its national law. In fact, the majority of the law lords rejected the argument that a British court could ground its criminal jurisdiction under international law on any other basis other than what is provided for in its positive law.\textsuperscript{285} Lord Brown-Wilkinson, an avid advocate for universal jurisdiction, suggested in his judgement that a permissive extradition provision in the implementing legislation was fundamental to generating the

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cooperation of U.K. courts with respect to crimes that occurred outside its territory.\footnote{Collin Warbrick, Elena Martin Salgado & Nicholas Goodwin, “The Pinochet Cases in the United Kingdom” (1999) 2 Y.B. Int’l Hum L 91 at 102.} It was for this reason that the court limited its inquiry to the crime of torture since other crimes contained in Spain’s extradition request “were not extraterritorial crimes according to British law and hence could not qualify as ‘extradition crimes.’\footnote{Falk, supra note 267 at 114-15.} The only other crime on the charge in respect of which the court would have had jurisdiction was the allegation of hostage taking, giving the extraterritorial reach of the U.K. law, Taking of Hostages Act of 1982. However, an irreconcilable difference between evidence adduced in support of the charge and the elements of the crime as contemplated by the Act robbed the court of jurisdiction.\footnote{The evidence was intended to prove the crime by establishing that the defendant forced the disappearance of his victims, whereas the Act defines a hostage as “a person detained with the intention to compel someone who is not a hostage to do some act or refrain from a particular course of action.” Ibid at 115.} What is more, the court also held that that Pinochet was only liable to prosecution for torture, which he allegedly committed, from the date the U.K. ratified the Torture Convention – December 1988 – since the British parliament did not recognise the crime as one in which British courts could exercise extraterritorial power prior to that date.\footnote{Wedgwood, supra note 282 at 835.} Thus, instead of reading universal jurisdiction into the crime of torture and other crimes in respect of which Pinochet was being prosecuted on the basis of customary international law or \textit{jus cogens}, the court determined its jurisdiction by reference a treaty and thereby created a strict temporal window with respect to the charges.\footnote{Pablo De Greiff, “Comment: Universal Jurisdiction and Transitions to Democracy” in Macedo, supra note 16 at 122.} According to Lord Browne-Wilkinson, “[n]o one has suggested that before section 134 [of the Criminal Justice Act 1988, which

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\footnote{Collin Warbrick, Elena Martin Salgado & Nicholas Goodwin, “The Pinochet Cases in the United Kingdom” (1999) 2 Y.B. Int’l Hum L 91 at 102.}
\footnote{Falk, supra note 267 at 114-15.}
\footnote{The evidence was intended to prove the crime by establishing that the defendant forced the disappearance of his victims, whereas the Act defines a hostage as “a person detained with the intention to compel someone who is not a hostage to do some act or refrain from a particular course of action.” Ibid at 115.}
\footnote{Wedgwood, supra note 282 at 835.}
\footnote{Pablo De Greiff, “Comment: Universal Jurisdiction and Transitions to Democracy” in Macedo, supra note 16 at 122.}
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domesticated the Convention] came into effect torture committed outside the United Kingdom was a crime under United Kingdom law.”

V. The Arrest Warrant Case

In 2000, a rare opportunity was presented to the ICJ to decide the legality of universal jurisdiction under international law and to clarify some of the controversial elements of the principle. Rare because it was the very first time a party had ever requested the court to make an authoritative pronouncement on the issue. The Brussels tribunal de première instance’s charge against Yerodia on the basis of which Congo complained to the ICJ was “as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.” The basis for the Brussels magistrate’s authority was Belgian Law of June 16, 1993, which stipulated for the “Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto,” as amended by the Law of February 1999 ‘concerning the Punishment of Serious Violations of International Humanitarian Law.” In the absence of any link between Belgium and the alleged crimes – the crime having been committed outside Belgium, and Yeridia or the victims having not being Belgium national – none of the traditional grounds of

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293 Arrest Warrant, supra note 36 at 13.
294 Ibid at 15. This law has been amended following strong diplomatic opposition, especially from some powerful nations including the United States and Israel.
extraterritorial jurisdiction could have sustained the charges, hence Belgium’s reliance on the principle of universal jurisdiction.\textsuperscript{295} Thus, everybody with even the remotest interest in the subject-matter of universal jurisdiction waited with an unmeasured eagerness for the court’s decision, sufficiently optimistic that a definite pronouncement would emerge.

To their frustration, however, the ICJ ducked the issue. Instead, it focused its analysis on Congo’s second claim that, as a top government official, Yeridia was entitled to diplomatic immunity, especially because Congo had abandoned her objection to Belgium’s exercise of universal jurisdiction in her final submission.\textsuperscript{296} The decision to avoid a definite pronouncement on the subject came as a surprise, giving that the court had previously regarded the simultaneous determination of the two issues canvassed in Congo’s application as “a matter of logic.”\textsuperscript{297} Within the court itself, opinion was divided on whether it was a blunder to have ignored the issue of universal jurisdiction, while focusing on immunity. For Judge Oda, “the Court ha[d] shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.”\textsuperscript{298} Judge Van den Wyngaert, however,

\textsuperscript{295} Bottini, \textit{supra} note 292 at 508.
\textsuperscript{296} Congo’s application was predicated on two grounds. First, it argued that “[t]he universal jurisdiction that the Belgian state attributes itself under Article 7 of the law in question” was tantamount to a “[v]iolation of the principle that a state may not exercise its authority on the territory of another state and of the principle of sovereign equality among all members of the United Nations as laid down in Article 2, Paragraph 1, of the Charter of the United Nations.” Second, it asserted that “[t]he non-recognition, on the basis of Article 5 [. . .] of the Belgian Law, of the immunity of a Minister of Foreign Affairs in office” amounted to “[v]iolation of the diplomatic immunity of Minister of Foreign Affairs of a sovereign state, as recognised by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations.” Reydams, \textit{supra} note 21 at 227;
\textsuperscript{297} Arrest Warrant Case, \textit{supra} note 36 at 46.
\textsuperscript{298} \textit{Ibid} at 12 (dissenting opinion of Judge Oda).
disagreed and argued that the Court “could and should nevertheless have addressed this question as part of its reasoning.”

Despite failing to confront the issue, both the concurring and dissenting opinions of some of the judges are rich with the examination of the legality of the principle under international law, demonstrating conflicting perspectives on the topic. For instance, President Guillaume, supported by judges Ranjeva and Rezek, argued that universal jurisdiction, beyond the crime of piracy, has not basis in international law. He stated further thus: “International criminal law has itself undergone considerable development and constitutes today an impressive legal corpus . . . But at no time has it been envisaged that jurisdiction should be conferred upon courts of every state in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos . . .” Judge Rezek argued that an examination of international law reveals the continuing centrality of connecting element between the enforcing state and the crime, as a pre-condition for a legitimate assertion of jurisdiction.

On the other hand, Judges Higgins, Kooijmans, Buergenthal, and Van den Wyngaert affirmed the legality of universal jurisdiction in international law, arguing that neither conventional nor customary international law prohibits the principle. As was earlier discussed, in coming to this position they relied on the Lotus principle, with Van den

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299 Ibid at 42 (dissenting opinion of Judge Van den Wyngaert).
300 Ibid (Separate Opinion of President Guillaume, para. 9.
301 Ibid at para 15.
302 Inazumi, supra note 216 at 95.
Wyngaert chiding opponents of universal jurisdiction for paying undue attention to political considerations rather than law:

It may be politically inconvenient to have such a wide jurisdiction because it is not conclusive to international relations and national relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law. . . . A practical consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that states are afraid of overburdening their court system.  

VI. Universal Jurisdiction in Multilateral Treaties and Conventions: Does it Bind Non-Party States?

The argument that universal jurisdiction has extended to certain crimes created by multilateral treaties is as familiar as it is persuasive. Randall, for instance argues that “the universality principle also may allow non-parties to the conventions to prosecute such offenders.” For Meron, “[t]here is no reason why universal jurisdiction should not also be acknowledged in cases where the duty to prosecute or to extradite is unclear, but the right to prosecute when offenses are committed by aliens in foreign countries is recognized. Michael Scharfis also of the view that “international law does not preclude the exercise of treaty-based universal jurisdiction over the Non-Party states.” In a chronological order, he lists these treaties thus: the 1949 Geneva Conventions, the 1958 Law of the Sea

303 Ibid at para.56 (dissenting opinion of Judge Van den Wyngaert).
304 Randall, supra note 11 at 789.
306 Scharf, supra note 73 at 366.
307 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (art. 49 duty to search for and prosecute; art. 50 recognition as a crime); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (art. 50 duty to search for and prosecute; art. 51 recognition as a crime); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (art. 129 duty to search for and prosecute; art. 130 recognition as a crime); Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (art. 129 duty to search for and prosecute; art. 130 recognition as a crime);
Convention, the 1970 Hijacking Convention, the 1971 Aircraft Sabotage Convention, the 1973 Internationally Protected Persons Convention, the 1979 Hostage Taking Convention, the 1984 Torture Convention, the 1988 Airport Security Protocol, the 1988 Maritime Terrorism Convention, the 1994 Convention on the Safety of United Nations Peacekeepers, and the 1998 International Convention for the

Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (art. 146 duty to search for and prosecute; art. 147 recognition as a crime).

308 See Geneva Convention of the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (art. 5 definition of piracy; art. 14 duty to co-operate in the repression of piracy; art. 19 establishment of universal jurisdiction).


310 See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (art. I recognition as crime; art.3 duty to punish; art.5 duty to establish jurisdiction; art.6 duty to apprehend; arts.7, 8 duty to prosecute or extradite; art.11 duty to cooperate in prosecution).

311 See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (art. 2 recognition as crime; art. 3 duty to establish jurisdiction; art. 4 duty to prevent; arts. 6,7 duty to prosecute or extradite; art. 10 duty to provide judicial assistance).

312 See International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/146 (1979) (art.I recognition as crime; art.2 duty to punish; art.4 duty to prevent; art. 5 duty to establish jurisdiction; art. 6 duty to apprehend; arts. 7,8 duty to prosecute or extradite; art. 11 duty to provide judicial assistance).

313 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/RES/39/46 (1984), (art.1 recognition as international crime; art.4 duty to criminalize; art.5 duty to establish jurisdiction; art.7 duty to extradite; art.9 duty to provide cooperation and judicial assistance).


315 See Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted by the International Maritime Organization, at Rome, Mar. 10, 1988, I.M.O. Doc. SVA/CON/I 15 (art. 3 definition of offense; art. 5 duty to punish; art. 6 duty to establish jurisdiction; art. 10 duty to prosecute; art. 11 duty to extradite; art. 12 duty to render mutual legal assistance).

Suppression of Terrorist Bombings.\textsuperscript{317} In the context of anti-terrorism treaties specifically, Scharf observed thus: “none of these treaties purports to limit their application to offenses committed by the nationals of parties; no do the United States criminal statutes implementing these treaties limit prosecution to the nationals of the treaties.”\textsuperscript{318} He argues further that “even if some of these crimes were deemed not to reflect customary international law, there is a precedent for state parties to exercise universal jurisdiction created solely by treaty over nationals of non-party states.”\textsuperscript{319}

In making these assertions, reference is usually made either to the international law principle of \textit{aut dedere, aut judicare} – extradite or prosecute – often contained by these treaties, to certain provisions calling for the exercise of “universal jurisdiction” in respect of crimes proscribed by these treaties, or the \textit{jus cogens} nature of the crimes which they contemplate. The U.S. Department of State, for instance, has argued that “universal jurisdiction is achieved whenever a treaty allows a state to prosecute any offender present in its territory and whom it elects not to extradite.”\textsuperscript{320} Kenneth Randall notes that "in the postwar decades, states at least impliedly have recognized that universal jurisdiction also extends to certain terrorist acts... [t]he parties to various multilateral conventions typically have agreed to prosecute or extradite the perpetrators of these universal offenses, regardless of the offense's

\textsuperscript{317}See\textit{International Convention for the Suppression of Terrorist Bombings}, 37 I.L.M. 249 (1998) (not yet in force) (art. 2(1) recognition as crime; art. 4 duty to punish; art. 6 duty to establish jurisdiction; art. 8 duty to prosecute or extradite; art. 12 duty to prosecute in prosecution). See generally Scharf, \textit{supra} note 73 at 363, ns. 3-13.

\textsuperscript{318}Michael P. Scharf, “The ICC’s Jurisdiction over the National of Non-Party States: A Critique of the U.S. Position” (2001) 64 \textit{L & Contemp Prob} 67 at 100

\textsuperscript{319}Ibid.

\textsuperscript{320}Scharf, \textit{supra} note 73 at 363.
location and the defendant's and the victim's nationalities."\textsuperscript{321} He further argues that "the universality principle also may allow nonparties to the conventions to prosecute such offenders."\textsuperscript{322}

These assertions are not entirely correct. As demonstrated shortly, neither the principle of \textit{aut dedere, aut judicare} nor \textit{jus cogens} in and of themselves confer jurisdiction on domestic courts of every state to enforce international norms. In the former’s case, since the obligation is one that is created under treaties, it only affects parties to the specific treaty creating it, except, of course, in a limited situation where the treaty has attained the status of customary international law by reason of universal ratification. But the conclusion whether or not a treaty has been so ratified is often far from being certain. As for the latter, it is highly misleading to conclude that a crime is subject to universal jurisdiction simply because of its characterisation as an international crime. In other words, that states agree that a crime is an international crime (which in and of itself is often subject to controversy) does not necessarily amount to an agreement that it could be prosecuted by any one of them.

\textbf{VII. \textit{Aut Dedere Aut Judicare} and the Principle of Universal Jurisdiction}

Simply stated, the principle of \textit{aut dedere aut judicare} is defined as the duty of a state in whose territory an accused person is found to either extradite him to the requesting state to stand trial or prosecute him in its domestic court for the crime which he is alleged to have

\textsuperscript{321} Randall, \textit{supra} note 11 at 789.

\textsuperscript{322} \textit{Ibid}
committed. The primary purpose of the principle is to ensure that criminals do not go unpunished. Accordingly, should the custodial state fail to prosecute an accused person, then it is under obligation to extradite him to the appropriate prosecuting authority. This obligation is often referred to as a form of “universal jurisdiction.” To this end, some have described it as “treaty-based” or “conventional” universal jurisdiction in an attempted to conflate the principle and the principle of universal jurisdiction when they are analytically separate, while some make a semantic distinction between the two by arguing that the latter merely refers to the right, not necessarily a duty, of the state to prosecute. But this characterisation is both a misnomer and seriously misleading, giving that the jurisdiction is anchored in treaty – and a treaty can hardly provide a truly “universal” jurisdiction. Regardless of this distinction, the obligation contemplated by the principle remains relevant to the administration of international criminal justice:

The obligation aut dedere aut judicare is nonetheless relevant to the question of universal jurisdiction, since such a provision compels a state party to exercise the underlying universal jurisdiction that it is also obliged to provide for by the treaty. In short, a state party to one of the treaties in question is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extraditing.

324 Inazumi, supra note 216 at 122.
325 Butler, supra note 177 at 363.
326 Coombes, supra note 106 at 435.
327 Bottini, supra note 292 at 516.
Although the emergence of the principle in international law is traceable to some pre-World War II treaties, it is the Geneva Conventions and other post-World War treaties that are often invoked to justify universal jurisdiction. The 1949 Geneva Conventions, with similar provision in some other treaties, mandates each state party “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts.” In the same vein, Articles 75(7) and 75(3) and (4) of the Additional Protocol (1) to the Geneva Conventions merely obligate states parties to surrender “persons accused of war crimes and crimes against humanity”, in order to ensure their prosecution, pursuant to the applicable rules of

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330 For instance, the International Convention for the Suppression of Counterfeiting Currency (ICSCC) – a treaty that never came into effect – states thus:

Foreigners who have committed abroad any offence referred to in article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offenses committed abroad, should be punishable in the same way as if the offence has been committed in the territory of that country. The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person for some reason which has no connection with the offence.

See Article 9, Geneva, 20 April 1929; 112 League of Nations Treaty Series 371. Furthermore, the Convention for the Prevention and Punishment of Terrorism (Terrorist Convention) provides thus;

Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in articles 2 and 3 shall be prosecuted and punished as though the offence has been committed in the territory of that High Contracting Party, if the following conditions are fulfilled - namely, that: (a) extradition has been demanded and could not be granted for a reason not connected with the offence itself; (b) the law of the country of refuge recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners; (c) the foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners.


331 For instance, Article 7 of the 1984 United Nations Convention against Torture; Article 7, paragraph 1, provides:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [acts of torture] is found shall in the cases contemplated in article 5 [cases of territorial, active personal, passive personal, or universal jurisdiction or of failure to extradite], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

See United Nations Convention against Torture, supra note 313.

332 First Geneva Convention, supra note 291, art. 49; Second Geneva Convention, supra note 307, art.50; Third Geneva Convention, supra note 307, art.129; Fourth Geneva Convention, supra note 307, art. 146.

international law. In *Arellana v. Columbia*, the Human Rights Committee stated that “the State is under a duty to investigate thoroughly the alleged human rights violations, and in particular . . . violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations.”

The question whether a treaty provision obligating states to extradite or prosecute binds parties to it is hardly controversial. As a principle of international law – and one that has attained the status of customary international law – parties to a treaty are bound by it. In the *Pinochet* case, except on a narrow ground of immunity, neither Pinochet nor the law lords questioned the jurisdiction of Spain to investigate and prosecute Pinochet for the crime of torture which he allegedly committed in Chile, giving that all the parties – Chile, Spain and the United Kingdom – had ratified the Torture Convention. Lord Slynn of Hadley in *Pinochet I* was, therefore, accurate when he justified Spain’s right on the ground that “Chile was a state party to this Convention and it therefore accepted that, in respect of the offence of torture, the United Kingdom should either extradite [to Spain] or take proceedings against offending officials found in its jurisdiction.”


336 (1998) 1 A.C. 61 at 83 (H.L). Similar view was also expressed by Lord Millet in *Pinochet II* who wrote: “Chile insists on the exclusive right to prosecute [Pinochet]. The Torture Convention, however, gives it only the primary right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.” See *Pinochet II*, 38 I.L.M. at 651-652
Equally uncontroversial is the invocation of this principle by a state against a suspect in its custody even when the suspect’s state of nationality is not necessarily a party to the enabling convention. This is because intrinsic in the principle is the right of the custodian state to prosecute despite the absence of any close nexus to the crime. In fact, there is no case known to this author in which the state of nationality of an accused person objected to the trial of its national by another state in whose territory the suspect resides on the ground simply that it is not a party to the enabling convention. In 1999, the French Cour de Cassation considered whether the 1949 Geneva Conventions empowered it to assume jurisdiction over Bosnian Serb war crimes suspects for crimes in respect of which there was no national nexus. It was held that in the absence of specific domestic implementing legislation, the provisions of the 1949 Geneva Convention "have too general character" to vest jurisdiction on the French courts. Furthermore, the court added that French domestic law implementing the Torture Convention allowed French courts to assume jurisdiction “only where the accused is found on the French territory.” Even the German courts that have shown increasing willingness towards universal jurisdiction have tended to follow this pattern. The German Penal Code, Strafgesetzbuch permits the exercise of universal jurisdiction over a close category of international crimes committed abroad but only when Germany is party to a treaty originating the concerned crime. Thus, other than fulfilling a treaty obligation, the custodial state’s duty to extradite or prosecution, is limited to where it

337 Inazumi, supra note 216 at 122.  
340 Section 6(9) Strafgesetzbuch (Penal Code), cited by Ibid. [emphasis added].
has jurisdiction under the traditional heads of jurisdiction or under customary international law and not merely by reason of the presence of the accused person in its territory.\(^{341}\)

Although it is true that the Convention and other multilateral treaties impose certain obligations binding on state parties, there is no significant degree of doctrinal as well as jurisprudence support in the assertion that these obligations equally apply to states that are not parties to the convention. Simply stated, the idea that universal jurisdiction could be conferred by a treaty is highly disputed.\(^{342}\) Several years ago, Professor Bowett emphatically rejected any interpretation of Geneva Conventions that suggests an authorisation to states to assert universal jurisdiction. According to him, the “obligation imposed on all contracting Parties to enact municipal legislation so as to make grave breaches of the Convention punishable is not the assertion of a universal jurisdiction but merely the provision of the legislative basis for jurisdiction in the event that the contracting Party is involved in hostilities as a belligerent.”\(^{343}\) In a more recent opinion on the issue, a writer suggested that parties to the Conventions “may have seen these provisions as obligating them only to prosecute offenders when extradition to a state with territorial or extraterritorial jurisdiction did not take place.”\(^{344}\) For him, the proper interpretation of the Conventions must be one in which the “extradite or prosecute” provisions means that “jurisdiction is contractual” – in which “the parties to the convention have waived any objections they might have to the

\(^{341}\)Bottini, \textit{supra} note 292 at 517.
\(^{342}\)Abass, \textit{supra} note 339 at 359.
\(^{344}\)Summer, \textit{supra} note 113 at 84.
exercise of jurisdiction by the prosecuting states.” Randall takes similar position, arguing thus: “an analysis of these treaties [war crimes, hijacking, terrorism, apartheid, and torture] does not necessarily include any reference to the universality principle. From a different interpretative standpoint, the treaties may simply have obligated the parties to assume ‘jurisdiction based solely on custody of the defendant pursuant to a convention.’

By way of illustration, the Torture convention defines and criminalises torture, and by virtue of its aut dedere principle, confers universal jurisdiction on states party. However, by the treaty nature of the crime, neither its prescriptive ban by the Convention nor “its [Convention’s] grant of extraterritorial or extra-national adjudicative capacity to courts to prosecute torturers [extend beyond] the jurisdictions of those states party to the Convention.” Put simply, the Torture Convention does not, strict sensu, bind states which are not party to it. The only exception, however, is where the prosecution of the crime in the domestic courts of states has attained the status of customary international law, in which case even none-states party can exercise enforcement jurisdiction over the crime. However, a declaration that a crime has attained such a status is today highly controversial, and as argued in chapter four, the current process for making such a determination has increasingly become too convoluted, and, therefore, in need of a new paradigm.

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345 Ibid.
346 Randall, supra note 11 at 819-20; Kobrick, supra note 140 at 98 (arguing that the aut dedere principle in treaties is “only effective only among the parties” to the treaties).
347 Colangelo, supra note 328 at 167.
348 Ibid
Even with respect to aut dedere obligation, until recently, courts – both national and international – were often cautious not to import one where it is not expressly created by a convention. A good example is the Genocide Convention of 1948.\textsuperscript{349} In \textit{Guatemala Genocide}\textsuperscript{350} and \textit{General Roche}\textsuperscript{351} cases respectively, the issue before the Spanish Supreme Court (Tribunal Supremo) was whether the Convention authorised the court to exercise universal jurisdiction over the crime of genocide allegedly committed in Guatemala by certain officials of that state against the Mayan ethnic people of Guatemala. The court held that “in no agreement between states has there been established un lamented jurisdiction over acts occurring in the territory of another state, having provided for another solution.”\textsuperscript{352} In coming to this conclusion, the court relied heavily on Article 6 of the convention which states: “Persons charged with genocide or any of the acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall accept its jurisdiction.”\textsuperscript{353} According to the court, “the determination of jurisdiction”, laid out in Article 6, ”would not make sense if Article 1 were to be understood as having consecrated the agreement of the contracting parties to proceed to prosecute and punish regardless of the place of commission.”\textsuperscript{354} This reasoning is consistent with Bassiouni’s who argues thus:

\textsuperscript{349} Geneva Convention, \textit{supra} note 307.
\textsuperscript{350} Restated in Decision of the Spanish Supreme Court concerning the Guatemala Genocide case, \textless \texttt{http://www.derechos.org/nizkor/guatemala/doc/stsgm.html} \textgreater.
\textsuperscript{351} Sentenciasdel Tribunal Supremo español en el caso del Gral. Chileno Herndn Julio Brady Roche, \textless \texttt{http://www.derechos.org/nizkor/chile/juicio/brady.html} \textgreater.
\textsuperscript{352} \textit{Ibid} at 24.
\textsuperscript{353} The Genocide Convention, \textit{supra} note 305 [emphasis supplied].
\textsuperscript{354} Sentenciasdel Tribunal Supremo, \textit{supra} note 349 at 21 [emphasis supplied].
It is clear from the plain meaning and language of this provision [Article 6] that jurisdiction is territorial and that only if an ‘international penal tribunal’ is established and only if state parties to the Genocide Convention are also state parties to the convention establishing an ‘international penal tribunal’ can the latter court have universal jurisdiction. However, such universal jurisdiction will be dependent upon the statute of that ‘international penal tribunal,’ if or when it is established.\(^3\)

VIII. **Jus Cogens, Obligation Erga Omnes and Universal Jurisdiction**

In an attempt to justify the expansion of universal jurisdiction, human rights lawyers often point to what they describe as the close relations between the principle and the notions of *jus cogens* and obligation *erga omnes*.\(^4\) At the heart of this assertion is the assumption that any violation of *jus cogens* norms – generally perceived as international human rights norms – automatically justifies the exercise of universal jurisdiction and that the exercise of this power is obligation *erga omnes*.\(^5\) In *Ferrini v Germany*, the Italian Supreme Court held that the non-derogability of the rights contemplated by *jus cogens* principle “lie at the heart of the international order and prevail over other conventional and customary norms, including those

\(^{355}\)Bassiouni, *supra* note 16 at 54. Furthermore, in 1994, a Jean-Paul Getti, a French Investigating judge assumed competence, under Article 689 of the French Criminal Procedure Code, in a case instituted by five Bosnians Muslims resident in France concerning allegations of torture and war crimes against certain Bosnian Serbs but decline jurisdiction over genocide and crimes against humanity for lack of basis under the French law. On further appeal to the French Court of Appeal and the *Cour de Cassation* (the French highest court), it was held that French courts have no universal jurisdiction to allegations concerning acts committed outside the French territory. See Fiona McKay, “Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide”, <http://www.redress.org/documents/inpract.html>; See also Wenceslas v, Munyeshyaka, online: Available at <http://www.redress.org/documents/annex.html#france> where it was held that French courts do not have extraterritorial jurisdiction over the crime of genocide. On the other hand, Michael Scharf, disagrees that Article 6 of the Convention does not contemplate universal jurisdiction for the crime of genocide. Rather, he argues that the provision merely establishes “the minimum jurisdictional obligation for states in which genocide occurs [from which] other states are free under customary international law to expand upon […] – something that the United States itself has done by legislating both nationally as well as territorial jurisdiction in the Genocide Convention Implementing Act of 1987.” See Scharf, *supra* note 72 at 86.


\(^{357}\)Inazumi, *Ibid*; Joyner, *supra* note 5 at 169
relating to State immunity.” Lord Browne-Wilkinson in the Pinochet (No. 3) argues that “[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed” and predicates this conclusion on the familiar language – one inspired by piracy jurisprudence – often used to justify the principle of universal jurisdiction, that torturers are “‘common enemies of all mankind’ [of which] all nations have an equal interest in their apprehension and prosecution.” But as explained shortly, this assertion is misleading since, theoretically, the only relationship between the three is simply normative – the nature of crimes which they contemplate – and not necessarily enforcement.

It may be recalled that the concept of *jus cogens* in international law was hardly a serious subject deserving the attention of scholars until after the end of World War II, specifically after its incorporation in the controversial Article 53 of the Vienna Convention of 1969 on the Law of Treaties. According to the article, *Jus cogens* is defined as a “peremptory norm

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358 *Ferrini v Germany*, *supra* note 183 at 65.
359 *Ex parte Pinochet Ugarte*, (No. 3), *supranote* 171 at 198. This was corroborated by the the International Tribunal for the Former Yugoslavia (ICTY) when it stated:

> [A]t the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.


360 While the concept of *juscogens* was introduced in the treaty in reaction to the events of the Second World War, an examination of statements of a number of representatives at the Vienna Conference highlights other incentives. For instance, Mr. Yapobie, the representative of the Ivory Coast argued thus:

> … the devastation of two world wars and the appearance and proliferation of nuclear weapons which endangered the very survival of mankind, had inspired a new solidarity of nations, based on the inter-dependence of States, international cooperation, peaceful co-existence, and assistance by the wealthier to the less-favored nations . . . The recognition of *jus cogens* by international law was only one result of that process. . .
of general international law. . .accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

It has also been described as “a term derived from Roman law designating rules which may not be altered by contracting parties, as contrasted with *jus dispositivum*, which

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Mr. Dadzie of Ghana gave a similar interpretation:

> In the twentieth century, some of humanity’s most bitter experiences had led it to recognize the peremptory character of an ever-increasing number of rules, such as the principles of self-determination and the sovereign equality of States, and the prohibition of genocide and slavery and its bastard son, racial discrimination

*Ibid* at 301. Mr. Dons of Norway argued along the same line thus:

> . . . as a result of the progressive development of international law and the introduction of humanitarian principles into national and international relations, it had become necessary to limit the freedom of States to derogate from certain fundamental principles designed to safeguard the interests of all. It had become necessary to establish, as it were, a set of higher rules that could not be violated, even by a treaty freely entered into by both parties.

*Ibid* at 300. It should be pointed out that, as with most issues in international relations, there was a sharp division between the North and the South on the importance of the concept of *jus cogens*. While some powerful western nations were opposed to the idea, many Third World states saw it as an important tool in their fight against imperialism. Mr. Cole, the representative from Sierra Leone, captured this sentiment when he argued that the inclusion of *juscogens*, in the Vienna Convention “provided a golden opportunity to condemn imperialism, slavery, forced labor, and all practices that violated the principles of the equality of all human beings and of the sovereign equality of states . . .” See United Nations Conference on the Law of Treaties, 2nd Session 1969, 300, online: <http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/vol/english/1st.sess.pdf>.

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> A norm is peremptory when it meets criteria designed to serve an overriding community purpose structurally differentiated from that served by ordinary rules of treaty and custom. Peremptory norms provide a modicum of normative order among the proliferating prescriptions of international law generated by the nation-state system. They also constitute a method guiding change in the norms affecting fundamental interests of international society.


The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community

Christenson, *ibid*, citing *In the matter of petition for review of the constitutionality of three decisions of the Federal Supreme Tax Court by..., a corporation at Zurich (Switzerland)*, 18 Decisions of the Federal Supreme Constitutional Court 441, 448 (April 7, 1965)
may be so altered,” and “as an attempt to forge a coherence and unity of the international legal system.” By its nature, it is generally viewed as creating a normative hierarchy within international law by clothing certain norms with the quasi-constitutional garb of immortality through a process “that challenges the positivist orthodoxy that views state consent as the wellspring of all international legal obligations.”

According to the report submitted by the International Law Commission (ILC) Study Group on “Fragmentation of International Law,” the *jus cogens* concept helps to resolve potential ambiguities in the application of conflicting sets of international norms by declaring as void any treaty or treaty provision – if separable from the remainder of the treaty, a rule of customary international law or a resolution of an international organisation, or any rule of ordinary international law, which is inconsistent with its rule.

As was earlier pointed out, human rights lawyers justify universal jurisdiction by frequent reference to the *jus cogens* nature of crimes which it contemplates. Lori Damrosch, for instance, argues that had the United States and Iran not diplomatically resolved the hostage crisis of 1979-81, any third country would have been entitled to prosecute the hostage taker...
on a universal jurisdiction theory since the crime was a violation of *jus cogens* norm.\(^{366}\)

Despite acknowledging the distinction between the “development of substantive law and the conferral of domestic jurisdiction over violations of substantive law,” Randall argues that “the international condemnation of the offenses at issue as crimes of global concern implies the right of all states to prosecute such offenders, just as the world legal order earlier permitted every state to prosecute pirates and slave traders.”\(^{367}\)

But hardly are explanations offered for this assertion, as if the evidential burden of proof in this instance is reversed. From a pure jurisprudential position, a norm does not automatically become enforceable through a criminal proceeding in the domestic courts of any country simply because it constitutes “*jus cogens*.”\(^{368}\) In fact, it is possible, and it is often the case, that states would accept and recognise an international norm as one “from which no derogation is permitted” and still reserve the authority to determine for themselves what mode of enforcement is applicable in the event of violation of the norm in question.\(^{369}\)

Jennings, in response to Professor Brownlie, makes this point in the following manner:

> [I]t would be rash to suggest that all and any breaches of a *jus cogens* are therefore subject to a universal jurisdiction. Could it for instance be argued, thinking again of Professor Brownlie’s list of *jus cogens* categories, that an alleged breach of the rule against the use of unlawful force in international relations, or an alleged breach of the “right” of some people to “self-determination” can automatically give rise to a universal jurisdiction in domestic courts?\(^{370}\)

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\(^{367}\) Randall, *supra* note 11 at 829.

\(^{368}\) Chibundu, *supra* note 163 at 1130.

\(^{369}\) Bottini, *supra* note 292 at 518.

Thus, “it is . . . one thing to say that an individual or a state is bound by a norm, but quite another to assert that the norm can be enforced by the independent and unilateral act of any state; even where that state under its own domestic laws arrogates to itself the jurisdiction to enforce ‘international law.’”

Under international law, the power of domestic courts to enforce international crimes are predicated on neither their peremptory or *jus cogens* nature nor on the substantive content of the crimes but rather on the rules and principles that regulate the extra-territorial jurisdiction of states. Chiding the Italian Supreme Court’s decision in *Ferrini v Germany* for what it described as an exhibition of “bare syllogistic reasoning” and not being an ‘accurate statement of international law,” the United Kingdom’s House of Lords, *per* Lord Hoffmann, held in *Jones v Saudi Arabia* thus:

I think that this is a fair interpretation of what the court was doing and, if the case had been concerned with domestic law, might have been regarded by some as ‘activist’ but would have been well within the judicial function. As Professor Dworkin demonstrated in *Law’s Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.

In the United States case of *Committee of US Citizens Living in Nicaragua v. Reagan*, one of the questions before the D.C. Circuit Court was whether the US legal order was under obligation to enforce international *jus cogens* norms which it otherwise could disregard. It was held that the peremptory character of an international rule does not guarantee its

371 Chibundu, *supra* note 163 at 1130.
372 Ibid at 1131.
implementation in the US domestic court.\textsuperscript{374} The ICJ affirmed this principle in a decision in which it concluded that, “on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.”\textsuperscript{375} In the absence of nexus between a specific violation and the territory of the enforcing state, therefore, the basis for such jurisdiction would be either under a treaty to which all the states involved are parties or under customary international law \textit{inductively} discerned from states practice.

Contrary to the assertion of Lord Browne-Wilkinson, the jurisdiction of the House of Lords in the \textit{Pinochet(3)} was not based on universal jurisdiction as popularly understood but rather on the Torture Convention which provides for “universal” jurisdiction and to which all the affected states are parties. This is significant for a number of reasons. First, the fact that the drafters of the Convention could deem it necessary to stipulate the kind of jurisdiction that would be invoked in the case of violation of prohibition against torture – a \textit{jus cogens} norm – lends support to the dissertation’s assertion that the relationship between these norms and the principle of universal jurisdiction is not necessarily symbiotic. What is more, despite the dominant scholarly view that the validity of peremptory norms is not dependent on the consent of states, there is nothing either in the position of the representatives at the Vienna Conference or in state practice to support this view. According to Gould, “although states were willing to accept that \textit{jus cogens} bound them unconditionally, they were not willing to

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\textsuperscript{374} Committee of US.Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir., 14 October 1988). \textsuperscript{375} Barcelona Traction, Light and Power Co. (Belg. v. Spain), supra note 73 at 47
\end{flushleft}
accept obligations to which they had not given their consent,” much less surrender an aspect of their sovereignty – crime enforcement – to a third party. Furthermore, the law lords’ reliance on the Convention demonstrates that, in accordance with the dominant positivist international law jurisprudence, *jus cogens* norms (whatever their identities are) remain externally non-binding and thus unenforceable until they are embodied in treaties. These are what Hobbes referred to as obligations *in foro interno* and obligations *in foro externo* – the former which he associated with natural law are not externally binding whereas the latter represent conventions and treaties which are binding and enforceable. It is probably in this sense that P.M. Dupuy, the Vatican’s representative to the Vienna Convention noted “the ‘positivization’ of natural law” by international law. Finally, the “universal” jurisdiction provided for in the Convention is, at best, contractual, binding only on the parties to it and subject only to the determination that not only the crime of torture but the enforcement contemplated by the Convention has attained the status of customary international law.

F. CONCLUSION

Jurisdiction generally is subject to the principles of legality in international law. This is especially so for extraterritorial criminal jurisdiction, considering its enormous impact on the principle of states sovereignty around which the current international legal order is built. The

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377 *Ibid* at 258.


379 Jennings, *supra* note 370 at 683.
power of states to assume jurisdiction over crimes committed beyond their shores and the legitimacy of such exercise of authority is not based on abstraction but determined by reference to the international law rules on jurisdiction. Contrary to the *Lotus* principle and consistent with more recent authorities on the issue, the burden of proving the foundational basis for the exercise of this power lies on the asserting state. While the presence of a link between a crime and the prosecuting state has traditionally been the foundation for jurisdictional claim, human rights advocates and judges sympathetic to their cause have, with some degree of success, argued for an exception to this requirement of link with respect to crimes deemed as affecting the common interest of mankind – what is referred as universal jurisdiction. In other words, advocates point to the moral reprehensibility or heinousness of these crimes as the basis for extraterritorial jurisdiction, citing the generally accepted universal jurisdiction over piracy, the codifications of some of these crimes in multilateral treaties that also contain the *aut dedere, aut judicare* obligation, and some decided cases, as precedents.

Throughout this chapter, attempt has been made to show that none of these grounds supports the ongoing expansion of universal jurisdiction. From a pure doctrinal standpoint, the scope and the applicability of the principle in international law is by no means as broad as its proponent assert. This is not surprising since the fact that “human rights lawyers are notoriously wishful thinkers”380 only means that “caution is far from being a characteristic of

much of the contemporary human rights literatures.” At best, the current expansive approach adopted by advocates is based on policy consideration as opposed to being legally-oriented. But the inescapable pitfall with this approach is the blurring of the fine and important line between law as it is – *lege lata* – and law as it ought to be – *lege ferenda*. Moral outrage, without more, cannot be the basis for jurisdiction. Therefore, in view of the principle’s susceptibility to opposition from states due to its impact on sovereignty which they traditional guard jealously, customary international law would have been the best foundation for the principle, including the scope of crimes which should be subject to it. However, as argued in the next chapter, this, too, is fraught with problems, given the complexity of the present international institutional order in the aftermath of the expansion of the membership of the international community following the admission of post-colonial Third World states.

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Chapter 4: Customary International Law (CIL) and *Jus Cogens* in an Expanded International Community: Reflection on the Evolution of International Crimes Subject to Universal Jurisdiction from Third World Perspective

Informed by their deep attentiveness to the fact that “universality” and “common humanity” claims have long facilitated and justified Europe’s colonial subjugation and continuing exploitation of much of the Third World, TWAIL scholars are wary of glib assertions of universality that tend to elide or mask underlying politics of domination.¹

[A] lesson to be learnt [from third-world] . . . is that one must beware of self-proclaimed universalists whose . . . reasons for taking universalist stances must be constantly scrutinized.²

A. INTRODUCTION

The role of the principle of customary international law (CIL) in the ongoing expansion of universal jurisdiction cannot be overemphasized. In contrast to other international enforcement jurisdictions such as those created by treaties, “universal jurisdiction is primarily based on CIL.”³ Admittedly, as was argued earlier, some multi-lateral treaties, such as the Geneva Conventions, provide for universal jurisdiction in the event of breach of obligations contained therein but, in reality, a treaty only binds state parties to it, unless such an obligation has risen to the status of CIL. As was discussed in the preceding chapter, universal jurisdiction over acts of piracy is a classic example of CIL and has since found expression in some international instruments. For instance, Article 19 of the 1958 Geneva

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Convention on the High Seas and Article 105 of the 1982 United Nations Convention on the Law of the Sea codify this customary rule thus: “On the high sea, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”\(^4\) It is for this reason that advocates of universal jurisdiction over a broad swath of international crimes often cite CIL. For instance, Kenneth Randall, after conceding that the international treaty which prohibits slavery and slave trading do not expressly confer universal jurisdiction, argues that such action could be justified under the principle of CIL.\(^5\)

Of even a more profound impact in this expansion is the principle of *jus cogens* – a concept provided for in Article 53 of the 1969 Vienna Convention on the Law of Treaties: “[a *jus cogens* norm] is a norm *accepted and recognized by the international community of States as a whole* as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”\(^6\) Proponents argue that universal jurisdiction can be legitimately invoked in situations where the goal is the “protection of fundamental values of the international community.” Those who violate these values are referred to as *hostis humani generis* – enemies of human kind: “all constituent members of the international community are vulnerable to certain crimes . . . In this sense, the world has become like a drum – if hit on one end, the whole thing will

vibrate.”7 Also refers to as the “new CIL” or “common interest” norms, these values are international norms said to be extracted, not from state practice and opinion juris (as is the case with the traditional CIL) but from proclamation by the international community.8 In other words, under this theory, the determination of whether both a crime and its enforcement is subject to universal jurisdiction is no longer a matter for an inductive appraisal of the prophesies of what states do, in fact, but rather based on a deductive assumption of what states ought to do. In Reliance on these principles, therefore, many contemporary human rights lawyers and Non-Governmental Organizations (NGOs) have adopted expansive assertions including a broad swath of international crimes purportedly subject to universal jurisdiction. The Third Restatement of the Foreign Relations Law of the United States mentions the offenses of piracy, slave trade, genocide, war crimes, attacks on or hijacking of aircraft, and certain acts of terrorism as those in respect of which the principle can be exercised.9 It is this expansion in scope and applicability of universal jurisdiction that has become the subject of controversy and at the heart of African Union’s (AU) opposition.10

Recall that in the preceding chapter, universal jurisdiction was described as an “enforcement box” for a privileged class of norms. And so in both literal and metaphorical terms, the knotty question is, how or by what process is the determination made that the enforcement of a given norm deserves being moved into this box? It is generally agreed that in order to

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9 Restatement (Third) of The Foreign Relations Law of the United States, § 702 cmt. g and rep. n. 5 (1987), online: online: <www.kentlaw.edu/faculty/...intlLawFall2007/.../RestatementSources.doc>.
10 See chapter 1.
justify the elevation of a particular crime to the exercise of universal jurisdiction, the
enforcement of such crime in the domestic courts of states must rise to the status of
customary international law. Though more controversial, some scholars and nations have
increasingly argued for universal jurisdiction over certain norms deemed to be so
fundamental to the global order that they are regarded as binding even in the absence of, or
conflict with, state practice – the so called “instant custom” or “common interest” norms.

Yet, despite the heavy reliance on customary international law and the common interest
norms theories for the purpose of universal jurisdiction, scholars agree that a common
understanding of how these norms are generated or an agreement on their contents has
become increasingly complex, at best, and absent, at worse.11 In fact, international theories of
law-making, especially in the context of exercise of universal jurisdiction, are currently in
total disarray.12 For instance, while the crime of torture is regarded by some scholars and
nations as having attained the status of customary international law in both normative and
enforcement contexts,13 others disagree with the assertion.14 Fundamental to this uncertainty,
it is argued, are the changes that have occurred in composition of international legal order
which has undermined the efficiency and effectiveness of the process of generating
international customs. The intensity and regularity with which CIL is challenged by states,

12 Ibid.
13 See Restatement, supra note 9, § 702 cmt. g and rep. n. 5 (1987); Filartiga v. Pena-Irala, 630 F. 2d
876,878 (2d Cir. 1980).
Validity in the Development of Human Rights Norms in International Law,”(1979) UIll L Forum 609 at 609-12.
especially those from the Third World, underscores their disenchantment with, and the need to re-evaluate, the process by which new customs emerge. It probably was for this reason that a writer described customary international law as “a matter of taste . . . [incapable] of function[ing] as a legitimate source of substantive legal norms in a decentralized world of nations . . .”  

This chapter examines the legitimacy of international crimes purportedly subject to universal jurisdiction based on these two principles of CIL and *jus cogens*. Specifically, it questions the process by which the determination of the emergence of customary international norms as well as *jus cogens* norms subject to universal jurisdiction are made by the “international community” and the role of power in this process. Of particular interest is the extent (if any) to which this determination reflects the “horizontal expansion of the international community” following the independence of most Third World nations beginning from the late twentieth century, and how this expansion has complicated the process. This is not surprising, given that traditional customary international law formation had emerged and accepted as one of the methods of international law making “when both the scope of international law and the number of states were limited.”  

In fact, as was argued in chapter two, the modern international law and by implication the doctrine of customary international law was developed in the nineteenth century by a small group of “civilized” nations and constituted part of the civilizing mission of international law – “a ‘ruler’s law’ for their
relations with the extra-European ‘barbarous’ world’\textsuperscript{18} who were the object rather than the subject of international law.\textsuperscript{19} To be sure, the argument canvassed here is not about the existence or continuance of CIL or \textit{jus cogens} norms as sources of international law. Instead, it is about the \textit{legitimacy of the current process} of identifying either international customs or \textit{jus cogens} norms, particularly those subject to universal jurisdiction. In order words, it is about its true \textit{content} in the context of what norms form part of them for the purposes of universal jurisdiction.

Essentially, the argument in this chapter has three components. First, despite its compelling theoretical assumptions, the process by which customary international norms enforceable through universal jurisdiction are generated does not reflect the current composition and complexity of the global community. The qualitative change in the membership of the present international community has not translated into any qualitative change in the process. In other words, it is argued that many decades after the admission of many Third World nations as equal members of the international community, CIL, for all practical purposes, remains the exclusive preserve of few powerful Western states. It is further argued that at the heart of AU’s resistance is their perception of exclusion from the process, which they views as violating the principle of sovereign equality all states on which the global order is founded, given that only few powerful nations practically decide what norm has risen to the status of CIL.

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\item Röling, \textit{supra} note 16 at 50-51.
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Second, the exclusion of the Third World states is even more apparent in what this chapter perceives as the increasing invocation of the so-called “custom of international community at large” as opposed to the traditional customary international law to justify universal jurisdiction. As will soon be explained, this is made possible, in part, by the deductive approach currently employed by some international tribunals and scholars in their determination of what crime has risen to the status of customary international law for the purposes of universal jurisdiction. Under this, the obligation created by a particular norm is deemed to be enforceable against a state on the basis of its implied consent or the general consent of the “international community.” It is argued that, other than its strategic importance in navigating such jurisdictional landmines as charge of *sine crime sine lege* violation as was the case in both the Nuremberg as well as Demjanjuk trials, intrinsic in this development is an attempt to avoid the complicated, yet necessary, process of proving the existence of states practice, including those of the Third World states, by invoking the “morality” of the world community. The phrase, “the world community” has, in fact, become a “euphemistic collective noun . . . to give global legitimacy to actions reflecting the interest of the US and other Western powers,” while “both the implied consent and general acceptance are fictions used at different historical periods to justify the universalization of preferred norms.”

Third, from the Third World perspective, there appears to be an unholy relationship between the current processes of evolution of the so-called universal jurisdiction crimes and the

20 Kelly, *supra* note 11 at 452.
22 Kelly, *supra* note 11 at 542.
nineteenth century positivist international law’s role in legitimizing colonialism. Their present tacit exclusion is akin to the colonial era when the Third World was depicted as “uncivilized” and lacking legal personality and thus incapable of generating customary international law or entering into binding treaties. Therefore, neither CIL (as currently determined) nor the “common interest” theory is meaningful for the purposes of legitimatizing the exercise of universal jurisdiction. And to the extent that norms generated through these processes lack both a coherent and objective method of determining the norms of international law as agreed to by states or when such norms come into existence, as originally contemplated by the positivist international law, their bindingness on states and enforcement through the mechanism of universal jurisdiction will remain largely controversial.

The chapter proceeds in five parts, including this introduction. Part B examines customary international law but more specifically as a source of norms subject to universal jurisdiction, tracing its origin to the early nineteenth century with the emergence of positivism as the dominant theory of international law, and highlighting its increasing indiscernibility in the light of the expansion of the international community following the independence of Third World states. From the Third World perspective, Part C interrogates the legitimacy of customary international law – one of the two linchpins of universal jurisdiction. Drawing extensively from the iconic work of Thomas Frank on the theory of legitimacy, it questions the extent (if any) to which Third World states are included in the process by which

customary international norms are generated. It argues that the absence of democracy in the process further straightens the grip of powerful states on international law-making, thus undermining the legitimacy of any claim of the emergence of customary international norm.

Part D examines the concept of *jus cogens* – another cornerstone of universal jurisdiction – and the amorphous idea of “common good” or “international morality” on which it is based. For advocates of universal jurisdiction, the doctrinal precedent for the right of states to exercise jurisdiction in the event of violation of international morality is the Nuremberg trial of 1945 in which the Nazis were prosecuted by the Allied power for crimes committed during World War II. However, while, as was demonstrated in the preceding chapter of this dissertation, this assertion is not entirely true, this part argues that, if anything, the proper lesson to be learnt from the Nuremberg is that in the absence of democratic process, claim of “international morality” could be used by powerful nations as a subterfuge to trump international law. Finally, Part E summarizes the key argument.

**B. CUSTOMARY INTERNATIONAL LAW AS A SOURCE OF UNIVERSAL JURISDICTION**

**I. Definition of Customary International Law**

The principle of customary international law is not one that is susceptible to an easy definition. Its complexity has often been a source of irritation to both international law scholars and jurists who have always had to hedge their bet in terms of what the custom really is. The worst affected are probably government officials and lawyers whose opinions on the extent of their state’s customary international legal obligation could make or mar
diplomatic relations. There are a number of reasons for this difficulty. Among other problems, CIL is by nature formed through an informal process of rule-making. Simply stated, the nature of customary law making is one that is indirect and unintentional. Consequently, it does not have the kind of precision that is present in more formal process of law-making. What is certain, however, is that CIL is one of three important sources of international law as provided for in Article 38(1) of the Statute of the International Court of Justice (ICJ), the other two being treaties and “general principles of law recognized by civilized nations.” In contra-distinction with domestic custom, CIL is limited to only “evidence of a general practice accepted as law.” In order words, what is envisaged is only customary law of a state, not custom.

CIL has been defined as “one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their

25 Such as the ideological differences between those who view state sovereignty and sovereign will as sacrosanct and those who do not. While the former would normally insist on state consent as the only basis for CIL, the latter are more open to other indicators of CIL. The other is political. There are those, particularly from the Third World, who find CIL in the resolutions of the United Nations General Assembly (UNGA), while some, especially from the West, are sceptical of this claim. Keep in mind that in the Assembly, Third World states outnumber the developed states. See *The Final Report of the Committee on Formation of Customary (General) International Law*, International Law Association, London Conference (2000) 2-3, online: <http://www.ila-hq.org/en/committees/index.cfm/cid/30>. [hereinafter referred to as Report of the Committee on Formation of CIL].
29 Ibid, Article 38(1) (b).
international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.”\(^{31}\) As the definition shows, there are basically two important elements to CIL: (1) state practice, which is an objective presence of state acts; and (2) \textit{opinion juris} – a subjective state of mind of a state indicating that it believes that it is “conforming to what amounts to a legal obligation.”\(^{32}\) The International Court of Justice (ICJ) has severally stressed the important of these two elements in the determination of whether an international custom has come into existence. For instance, in the \textit{North Sea Continental Shelf}, in response to submission of Denmark and the Netherlands that certain delimitation agreements between states that were not parties to the Geneva Convention on the Continental Shelf 1958 was indicative of a new customary norm regarding delimitation, stated thus:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the \textit{opinio juris sive necessitatis}. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.\(^{33}\)

Furthermore, in \textit{Continental Shelf (Libya v. Malta) case}, reiterated this position, stating that “it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and \textit{opinio juris} of States, ...”\(^{34}\) Once an international custom

\(^{31}\) Report of the Committee on Formation of CIL, \textit{supra} note 25 at 8.
\(^{33}\) \textit{Ibid} at 44 (para. 77).
\(^{34}\) \textit{(Continental Shelf case (Libya v. Malta) (1985) ICJ Rep} 13 at 29-30 (para. 27).
is formed, it is deemed to be binding on all states regardless of whether or not it is opposed by any one of them.

The traditional explanations of CIL demonstrate the great emphasis placed by the international community on the principle of state sovereignty. According to Cassese, CIL as well as treaty, “responded to the basic need of not imposing duties on such states as did not want to be bound by them. No outside 'legislator' was tolerated: law was brought into being by the very states which were to be bound by it. Consequently there was complete coincidence of law-makers and law-addressees.” This is consistent with the traditional character of obligation in international law which is both positivist and individualistic. What it means is that under international law, states’ legal obligations are limited to only those to which they have consented— described by a writer as “Westphalian” system of international law.

The requirement of two elements of state practice and opinion juris has a historical root. As a principle developed in the nineteenth century when only few western nations were subjects of international law, CIL was meant to reflect the common practices of these states. These practices were fairly easy to identify, given that, with a few insignificant exceptions, the nations involved were both equally prosperous and powerful and were largely “homogenous

with a common culture and common civilization based on the tenets of Christianity.”38 To this extent, therefore, CIL “evolved entirely between states that were European, or elsewhere of European origin and foundation, or European leanings.39 And, consistent with the positivist international law’s scientific inclination, the determination that state practices merit elevation to the status of customary international law is both inductive and empirically verifiable. Thus, both the legality as well as the legitimacy of any new CIL depends on empirical proof of the presence of these two elements.

With this in mind, the inescapable question becomes, how can the legitimacy of CIL be guaranteed through what has become an amorphous process of gauging a pattern of behavior of a multitude of states acting over a long period time, coupled with a determination that such behaviour is with an intent to create legal obligation? It is argued that, in the absence of reform of the current process, this is impossible, not only given the expansive number of states to together with their diversity, but also the fact that CIL “has expanded substantially into areas that were traditionally the preserve of states’ domestic jurisdiction”40 such as international law enforcement. Put bluntly, the old process of generating CIL is no longer suitable for the present circumstances.41

38 Anand, supra note 18 at 61.
40 Charney, supra note 16 at 543.
41 Ibid.
In discussing legitimacy, scholars have always made a distinction “between the legitimacy of exercise and the legitimacy of origin.”\(^{42}\) This division, which has been part of the politico-legal discourse for a long time, seeks to highlight the difference between legitimacy associated with the source of power and that concerning the exercise of power,\(^{43}\) between “original legitimacy” and “legitimacy of conduct,”\(^{44}\) “instant legitimacy” and “continual legitimacy,”\(^{45}\) or “representative democracy” and “participatory democracy.”\(^{46}\) To the extent that dissertation’s primary preoccupation is with the legitimacy of both the process through which the so called “universal jurisdiction crimes” are created and universal jurisdiction as an enforcement mechanism, it is an inquiry both about the “legitimacy of origin” and the “legitimacy of exercise.”

As further developed in the rest of the chapters of this dissertation, the legitimacy of the contemporary law-making process, particularly the creation of international crimes through customary international law and \textit{jus cogens} is at the heart of the AU’s ongoing opposition. Thus this section examines the character of legitimacy in international law, especially through the lens of TWIAL scholarship. But it is only an important substructure to the


\(^{43}\) \textit{Ibid}.


The overarching thesis of the dissertation, which is that the non-democratic nature of the process of international criminalization, its susceptibility to the influence of powerful states, and the contested nature of the principle of universal jurisdiction undermine their legitimacy, thus rendering them illegitimate to those likely to be subjugated by them – the Third World.

Until the past twenty years, the concept of legitimacy in international law was considered irrelevant to the international legal order. Thomas Frank once asked why no one seemed to be asking the questions about the legitimacy of international law. Writing in early 70s, Martin Wight argued that “the influence of principles of legitimacy upon international politics has been generally overstated” and that “conceptions of international legitimacy have had a minor part in shaping international history, except where they have run with the grain of state-consolidation.” There was also dearth of attention of scholars on this issue during the period as international lawyers were content with focusing exclusively on the question of legality. A combination of factors, however, has caused a seismic explosion of interest among scholars in the problem of international law legitimacy and the placement of the issue “on the map” or what a writer referred to as “a veritable renaissance in international legitimacy talk.” The end of “the danger of Armageddon” associated with the Cold War era, the emergence of globalization and international institutions with concomitant

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48 Martin Wight, “International Legitimacy” (1972) 4:1 Int’l Relations 1 at 28.
negativities,\textsuperscript{51} the need to hold international system more accountable,\textsuperscript{52} and the need to align the increasing inequalities of power among nations with “the requirements of justice in international relation at a given time”\textsuperscript{53} are some of them. It is on this last point that greater focus will be paid, for the simple reason that the question of who is/has the ultimate authority to be the producer and guarantor of norms of international legitimacy strikes at the issue of inequality of states – the divide between the developed and the undeveloped, the North and South or the First World and the Third World. Suffice it to say that there is a consensus among many schools of thought on the subject that question of legitimacy of norms is usually associated with either the notion of procedure by which a particular norm emerged or its substance/content. In terms of procedure, “the legitimacy of norms can be traced to either adherence to a positivist procedure or the outcome of deliberative democracy,” whereas by substance, the concern is whether the norms “lead to morally questionable consequences,” which will robe it of legitimacy.\textsuperscript{54} The dissertation is not concerned with this second meaning.

At the outset, it is important to highlight the interconnectivity of, and the intimacy between, theories of legitimacy and legality.\textsuperscript{55} Whether or not a given rule or practice is legitimate very often triggers an inquiry into its legality.\textsuperscript{56} Laws that are deemed legal are automatically

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\item \textsuperscript{52} Coicaud, \textit{supra} note 50 at 36.
\item \textsuperscript{53} \textit{ibid} at 35.
\item \textsuperscript{54} B. S. Chimni, “Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective” in Charlesworth & Coicaud, \textit{supra} note 50 at 305
\item \textsuperscript{55} \textit{ibid}.
\item \textsuperscript{56} This is not an inquiry into the legality of “international law” in general but is an investigation into the legality of specific norms of international law. The debate whether international law is really “law” or simply “epiphenomenal,” as seductive as it might seem, is not within the purview of this dissertation. For scholarship
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assumed to embody some type of legitimacy. In order words, a norm’s ability to adhere to the generally accepted criteria of legality is vital to “generating a distinctive legal legitimacy and a sense of commitment . . . among those to whom to law is address” – a sense of legal obligation and responsibility. This is what has been variously described as “fidelity” to law, law’s “loyalty-advantages,” and the “self-bindingness of law.”

Over the last few decades, however, international lawyers and scholars, driven largely by human rights impulses, have sought to distinguish between legality and legitimacy by arguing that an international action, though illegal, could, nevertheless, be legitimate if it is moral. This “legitimate but illegal” theory was developed and advanced to justify the 1999 intervention of the North Atlantic Treaty Organization (NATO) in Kosovo without the authorization of United Nations Security Council (UNSC) in accordance with Article 53 of the United Nations Charter. Framing the debate in moral terms, the Secretary-General of NATO said thus: “We must stop the violence and bring an end to the humanitarian
catastrophe now taking place in Kosovo.” We have a moral duty to do so.”64 The argument, therefore, was that, in the face of a humanitarian emergency engendered by the actions of Serbian government, it would have been morally reprehensible to sacrifice humanitarian intervention/assistance on the altar of legality. Put in another way, the argument is that where cognitive dissonance exists between legality and legitimacy, the latter must prevail. Bruno Simma captured this sentiment in his defense of NATO’s intervention in Kosovo, arguing that “unfortunately, there do occur ‘hard cases’ in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law.”65 As is demonstrated shortly, this purported “legitimacy of moral exceptions to international legal structure in case of humanitarian emergency”66 has become the fulcrum around which the ongoing expansion of universal jurisdiction revolves.

Legitimacy is an important index for explaining the attitude of individuals (in the case of domestic realm) or states (in international sphere) to the emergence and enforcement of norms simply because it “accommodates a deeply held popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied.”67 Intrinsic in the word “legitimate” are normative, as well as sociological connotations.68 According to Allen Buchanan, an institution charged

66 Charelsworth, supra note 57 at 390.
with the responsibility is determined as legitimate in the sense that it has the right to rule – normative sense – or is widely believed to have the right to rule – sociological sense.\(^69\) Thus, in a normative sense, the legitimacy of international laws hinges on the legitimacy of the institutions that make them. Although there are different types of international law-making institutions\(^70\) – institution used in a broad sense of “a persisting pattern of organized rule-governed, coordinated behaviour,”\(^71\) the focus in this dissertation is on the legitimacy of institutions of both customary international law and what is here referred to as “cosmopolitan law.”\(^72\)

In discussing legitimacy, Thomas Frank’s seminal works offer a didactic exposé. In fact, most of the contemporary scholarship on the subject admits to owing so much to Frank’s ground-breaking treatises. In advancing his theory of legitimacy, Frank developed what is referred as the “compliance pull” of international law.\(^73\) He argued that states obey rules which they adjudged as having "come into being in accordance with the right process" and that compliance is secured – to whatever degree it is – at least in part by perception of a rule as legitimate by those to whom it is addressed.\(^74\) Legitimacy, for him, is defined as “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process” – right process including valid

\(^69\) Ibid [emphasis in the original].
\(^70\) For instance, Buchanan identified three types: the institution of treaty-making, the institution of customary law, and the global governance institution. Ibid at 80
\(^71\) Ibid.
\(^72\) See chapter 5.
\(^73\) Thomas M. Frank, The Power of Legitimacy Among Nations (Oxford University Press, 1990) 26
sources as well as encompassing “literary, socio-anthropological and philosophical insight.” Thus, he believes that rather than through coercion, international rules will be voluntarily accepted by states if they are considered as legitimate. To be legitimate, Frank argued that a rule must possess the following four characteristics: determinacy, symbolic validation, coherence, and adherence.

Following Frank, other scholars have articulated a theory of legitimacy in international law or the effectiveness of international rules. Structural theorists, for instance, locate states’ reaction to the emergence of international rules at the structural or systemic level. That is, rather than rules being determinant of state behaviour, “state behaviour and rules are determined by more fundamental (structural) causal factors.” Legal rules, for them, are effective only when “they conform to the structure of power in the system to which they are applicable.” In his 3 volume *Order and Disorder in the Human Universe: the Foundations of Behavioral and Social Science*, Johan Vree argued that, in other to be effective, a rule

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75 Ibid [emphasis in the original].
76 This means that the rule must be as clear, unambiguous and as complimentary as possible. Ibid at 713-25.
77 Under this characteristic, decision concerning the creation of a rule must be reached in accordance with the “proper channels” or “time honoured tradition” since the authority of the rule will be greater if it reflects an interpolation of rules from deep-rooted evidence of state practice, than if it were presented as a ‘development’” Ibid at 725-35.
78 That is, the rule must fit closely with precedent and accepted custom. In other words, the rule must be neither capricious nor arbitrary. Ibid at 735-51.
79 This relates to whether or not states obey the rule simply because they view it as necessary to “an underlying sense of community or society upon which co-existence rests.” See John Williams, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia* (New York: St. Martin’s Press, Inc., 1998) 12. Thus it must be consistent with other “secondary rules about how rules are made, interpreted and applied.” Ibid at 751-59.
81 Ibid.
must conform to the structure of power, interdependence and affinity relations prevailing within the system.\textsuperscript{83} This is to incentivize the system’s more powerful members who will be more inclined to disobey any rule that does not reflect their interests, which are already embedded in the system. Thus, the legitimacy of a rule, according to Nolkaemper, denotes the degree to which the rule in itself is being valued by states, and more in particular by the system’s more powerful members . . . [and since] legitimacy depends on the support of the more powerful members . . . rules [in order to acquire legitimacy and to become effective] must fairly accurately reflect the system’s structure of power and interdependence relations.”\textsuperscript{84}

Martha Finnemore and Kathryn Sikkink, on the other hand, have formulated the theory of “norm entrepreneurs,” by whom “norm circle” is triggered off. According to them, norms “do not appear out of thin air,” but are a product of a particular standards of behaviour actively promoted by various actors – the norm entrepreneurs.\textsuperscript{85} In order to create an international norm, the norm entrepreneurs must convince a sufficient number of states to endorse the new norms. They argue that the emergence of a norm is assured when a significant number of states embrace the norm.\textsuperscript{86}

\textsuperscript{84} Nolkaemper, \textit{supra} note 80 at 52.  
\textsuperscript{86} \textit{Ibid} at 901.
Though not expressed, intrinsic in the concept norm entrepreneurship is the theory of international power relations. The capacity of an actor or a group of actors to influence the emergence of an international norm is, among other things, largely a function of the strength of power or influence which the actor wield on the international plane. As is shown shortly, a classic example is a group of norms purportedly generated from state practice plus opinion juris (otherwise known as customary international law) – one of the linchpins of universal jurisdiction – which has proved to be troublesome for international lawyers, who have always had difficulty defending it from a number of charges. For instance, TWAIL scholars have questioned the possibility of practices from the Third World states being elevated to the status of customary international law.

Lon fuller’s locates the legitimacy of law in what he referred to as “internal morality of law.” According to him, both individual rules and systems of rule-making must adhere to his eight specific criteria of legality or what Brunnée & Toope referred to as a “practice of legality” in order to be viewed as legitimate. Agreeing with Fuller, Brunnée & Toope argued that “[i]f the internal morality of law is not fulfilled, if the conditions are not met,

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88 Fuller, The Morality of Law, supra note 59 at 91
89 Brunnée & Toope, supra note 58 at 7.
90 His eight criteria of legality for every norm are: generality, promulgation, non-retroactivity, clarity, non-contradiction; not asking the impossible, constancy, and congruence between rules and official action. See Fuller, The Morality of Law, supra note 59 at 39 & 46-90.
then the process of law creation . . . is fundamentally flawed and . . . lacks distinctive legal legitimacy.”\(^{91}\)

Constructivist international relations theorist, too, adopt a substantive as well as procedural analysis similar to Frank’s and Fuller’s to the determination of the legitimacy of norms. But they also insist that legitimate process must be complimented by a rule that is discursively and logically competent, accepted by the international community, and must possess internal legitimacy that makes is morally reprehensible not to obey such norm.\(^{92}\) For them, one of the characteristics of legitimate norms is their multilaterality,\(^{93}\) which, among other advantages, enhances greater predictability and gives weaker states great power.\(^{94}\) Many critical international law scholars agree with constructivists on the idea of the need for internal legitimacy of norms.\(^{95}\)

The legitimacy of international law, for TWAIL scholars, can be determined by reference to both its substantive and procedural contents.\(^{96}\) For instance, Okafor admonishes international

\(^{91}\) Brunnée & Toope, supra note 58 at 25.


\(^{94}\) Ibid.

\(^{95}\) For instance, Koskenniemi argued that a fair process in the creation of norms would help to ensure that tensions among states are “discursively managed.” See Martti Koskenniemi, “What is International Law for?” in Evans D. Malcom, ed, International Law, 1st ed. (Oxford: Oxford University Press, 2003) 89 at 100.

\(^{96}\) It is important to point out that, in the context of legitimacy of norms, the relationship between procedure and substance is not always symbiotic. It is amply possible for a norm that is considered procedurally legitimate to be substantively illegitimate, and vice versa. An example is where a law, though legal in the sense that its creation complies with all the procedural requirements, is “completely divorced from the dominant understanding in society.” See Brunnée & Toope, supra note 57 at 67. Using the metaphor of “the fist” and “the elbow,” Fuller, however, is confident that procedural requirements will enhance the possibility of substantive justice/legitimacy:
lawyers, who, in their quest for justice, engage in rigorous legal analysis, to “transcend mere doctrinal analysis and climb on its shoulders in the search for justice.” 97 Furthermore, he argues that an international law that hopes to achieve universal acceptance in a multicultural world must be designed in such a manner that it is able to “serve equitably the interest of all states.” 98 Like most critical international law scholars, Okafor argues that, to be legitimate, international norms must be fair and just, especially giving the inequality in the international legal system. His frustration with international lawyers’ lopsided treatment of the theory of legitimacy is captured in his concept of the “southern psych” in which he decried their failure to “appreciate the relevance of factors which influence the general perception of ordinary people in the south, especially their views as to the legitimacy of international decisions and actions.” 99 He is, however, optimistic that “the negative pull of unfairness in the present world scene should critically constrain the emergence of rules which can be described as ‘legitimate but unfair.” 100

Other TWAIL scholars such as Ikechi Mgboji and Mukau Mutua share this insistence that international norms that takes into account the perception of Third World people to be

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98 Ibid at 128.
100 Ibid at 97.
Mutua, after describing the current regime of international law as illegitimate, advocates for what he refers to as “Third World legitimacy” as a precondition for the emergence of a truly legitimate international norm. It means that such norm must be consented to by Third World States, and must also be reflective of the interest and the historical experiences of the Third World people: “To the extent that colonialism and the economics underlying the exercise of public power are not a part of the discussion about legitimacy, the task of engaging legitimacy is both incomplete and consistent with the hegemony of the industrialized countries and their allies over the rest of the world.”

For Igwe, the only way to ensure consensus in international law-making is by injecting southern psyche into the legitimacy determination. In the final analysis, therefore, “legitimacy is the outcome of a process of argumentation that involves appreciation of a range of factors, including the legality of actions, the meeting of fair substantive and procedural preconditions in the creation and enforcement of norms, and the availability of peaceful and democratic means of bringing about changes in the international legal system.”

103 Mutual, “Savage, Victims, and Saviours”, supra note 100 at 206.
104 Mgboji, supra note 101 at 14.
107 Chimni, supra note 54 at 306.
Although there is a “cacophony of voices” in the debate on the issue of the legitimacy of international norms, there is a compelling reason to pay special attention to the TWAIL perspective on it. First, there is a broad consensus that “Third World people have historically formed the building block and testing sites for the production of international law norms, institutions, and practices.”\footnote{Ibid at 44.} In other words, the Third World has always constituted the primary “beneficiary” of international norms and practices. For instance, some of the concepts – concepts such as sovereignty and universality – that today form the bedrock of contemporary international law were created, transformed and implemented during the colonial encounter between the West and the Third World,\footnote{Antony Anghie has written extensively on this issue, which is explored in details shortly. For instance, see Antony Anghie, “Time Present and Time Past: Globalisation, International Financial Institutions, and The Third World” (1999-2000) New York Univ J Int’l L & Pol 243.} as part of the “civilizing mission”\footnote{Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge: Cambridge University Press, 2002).} of international law. With this in mind, and to overcome any charge of imposition, Third World states must be duly consulted and their consent sought before the emergence of any new international norm or practice, given the likely asymmetrical impact it will have on them. This point is very important especially considering the fact that the Third World accounts for not only the world’s largest demography but also its “voices of suffering.”\footnote{Upendra Baxi, “Voices of Suffering and the Future of Human Rights” (1998) 8 Transnat’l L & Comp Probs 125.} Furthermore, the colonial history of international law must be central to the legitimacy discourse of international norms and practices. And as highlighted in chapter one, “it is the neglect of this history – history of colonialism, domination and injustice – that, to a
large extent, accounts for the manner in which many Third World people [in this case Africans] view and approach international actions‘\\textsuperscript{112} such as universal jurisdiction.

It is important to note that it is possible to make a distinction between the legitimacy of norm and the legitimacy of enforcement of a legitimate norm.\\textsuperscript{113} This is particularly true of the ongoing AU’s opposition to universal jurisdiction predicated partly on the legitimacy of the process by which norms violations of which give rise to the exercise of universal jurisdiction and partly on the legitimacy of the concept of universal jurisdiction itself as an enforcement mechanism known to international law. Thus while the absence of deliberative democracy\\textsuperscript{114} in decision-making process could undermine a norm’s legitimacy claim, the absence of institutional enforcement setting, where it is a requirement, could robe a legitimate norm of legitimacy.

Related to the above is the problem of selective enforcement of norms. No matter how legitimate both the process and enforcement of norms are, they pale into insignificance in the face of asymmetry in their application. In order words, legitimacy can hardly be divorced from the principle of rule of law – the idea of equality of enforcement of international

\\textsuperscript{112} Igwe, \textit{supra} note 106 at 45.

\\textsuperscript{113} Chimni, \textit{supra} note 54 at 305.

criminal law against all persons/states before the law irrespective of status.\footnote{Buchanan identifies four ideals of the rule of law as follows: (1) the law must be general and in case of departure from generality, the ability to control the processes which must be informed by general principle; (2) the law should be understandable and publicly proclaimed; (3) the law, especially criminal law, must not be retroactive; and (4) the administration of law must be impartial. See Buchanan, supra note 66 at 89.} In fact, the principle of rule of law has become one of the most frequent refrains heard in trials of international crimes, particularly in international fora, and at least, is as old as the Nuremberg trial,\footnote{Robert Cryer, Prosecuting International Crimes: Selectivity and the International Law Regime (United Kingdom: Cambridge University Press, 2005) 197} guaranteeing the legitimacy of the international justice system by ensuring that states that are similarly situated are similarly dealt with.\footnote{Ibid., at 94} This is especially important considering that, in the absence of coercive mechanism, the enforcement of international law/justice relies in great measure on the reciprocity of legal obligations among members of the international community. Reciprocity in this sense is not necessarily about retaliation but collectivity based on sovereign equality.\footnote{Brunnée & Toope, supra note 58 at 40} It is for this reason that any appearance of, or claim to, preferential treatment, including the so called claim of “exceptionalism” by the United States, is bound to have a corrosive effect throughout the entire international legal system.\footnote{Ibid.} It also explains why Third World states express anger, even opposition towards the evolution of international law, which they describe as both illegitimate and hypocritical.\footnote{Ibid. at 41. The US has been particularly effective in shielding itself and its allies from scrutiny while at the same time mobilizing international sentiments against any Third World state that has sought to pursue nuclear disarmament.} Some examples of this hypocrisy are the issue of nuclear non-proliferation “where the main nuclear powers have failed to discharge their obligation seriously to pursue nuclear disarmament,”\footnote{Ibid at 41.} failure to prosecute foreign multinational companies carrying on
business in Third World states for gross for gross corporate crimes and human rights violations arising directly from their operations,\textsuperscript{122} the failure of Belgium\textsuperscript{123} and Germany\textsuperscript{124} to prosecute top American officials in exercise of universal jurisdiction, and the refusal of the International Criminal Tribunal for former Yugoslavia prosecutor to even open investigation against NATO member states for human rights violations.\textsuperscript{125} In fact, differential treatment of states based on the strength of their strategic military and economic power is a familiar occurrence, especially in the area of international justice enforcement where powerful nations get away with impunity while the usual Third World states are rounded up and prosecuted. In the context of universal jurisdiction, however, and as is shown in this dissertation, the fact

prevent Iraq from acquiring a nuclear weapon,” has become the popular sound track of the hegemonic music of the West, whose motivation is predicated on a purportedly genuine desire to prevent a “game change” – a nuclear armed race – in the Middle East region. But what is hardly mentioned in the narrative is the fact that Israel, a staunch ally of the West, is the World’s sixth most powerful nuclear state “with a stockpile of more than 100 nuclear weapons” – an achievement which would not have been possible but for the assistance of France and the United States. France was reported to have provided the fillip for Israel’s emergence as a nuclear power through its building, in the 1950s, of the Dimona reactor – Israel’s major source of Plutonium which is the main source of its nuclear weapon fuel – while the U.S. was said to have initially supplied a small 5 megawatt (thermal) research reactor at Nahal Soreq. See “Israel’s Nuclear Weapon Capability: An Overview,” online: Wisconsin Project on Nuclear Armed Control <http://www.wisconsinproject.org/countries/israel/nuke.html>. For an account of how the US has effectively avoided the Nuclear Non-Proliferation Treaty’s original goal of disarmament while going after the so called “rogue states”, see Richard Price, “Nuclear Weapons Don’t Kill People, Rogues Do” (2007) 44 Int’l Politics 232.

\textsuperscript{122} For an indebt discussion of this issue, see Chilenye Nwapi, Litigating Extraterritorial Corporate Crimes in Canadian Courts (PhD Dissertation, University of British Columbia, 2012) [Unpublished].


that norms are prescribed through an undemocratic decision-making process, there is sustained resistance from many states, especially from the Third World, and there is selectivity in its application undermines its legitimacy.\footnote{Chimni, supra note 54 at 305}

\section*{I. Legitimacy, State Cooperation and International Justice}

The lack of a centralised enforcement system has remained one of most fundamental critiques of the legality of international law.\footnote{Samantha Bensson \\& John Tasioulas, “Introduction” in Samantha Bensson \\& John Tasioulas, eds. \textit{The Philosophy of International Law} (New York: Oxford University Press, 2010) 11 at 11.} As a practical matter, although the potency of this critique – to the extent that it questioned international law’s \textit{legality} – has since been discredited,\footnote{Hart is renowned for arguing successfully that, contrary to the Austinian view, coercion is not an indispensable characteristic of law. See H. L. A. Hart, \textit{The Concept of Law}, rev. edn (Oxford: Clarendon, 1994) \textit{128}} the absence of international coercive apparatus has meant that international law/justice continues to rely on states to remain effective. Thus, intrinsic in the concept of international law/justice enforcement is state cooperation. However, the willingness of a state to cooperate might, in turn, be determined by question of legitimacy of the norm sought to be enforced or the legitimacy of the process of the enforcement.

The importance of state cooperation in the enforcement of international justice cannot be over-emphasised. Suspects, important material evidence and even witnesses needed to prove cases of international crimes are often located in the territories under the sovereign control of states.\footnote{In respect of international criminal tribunals, Alexander Zahar \\& Goran Sluiter identify four aspects of cooperation thus: cooperation which involves the transfer of prosecution by states to the international criminal court or tribunal; cooperation which relates to transfer of the accused to the international court or tribunal; cooperation touching and concerning investigation and the production of evidence in the custody of the}
extra-territorial exercise of jurisdiction) can enforce their orders against accused persons without the assistance of the state in whose territory such individuals reside.\textsuperscript{130} Even where such power exist, it is hard to imagine a situation in which it can be exercised without violating the territorial sovereignty of the host state, which, of course, is bound to set off diplomatic crisis. Thus, in the event that states refuse to cooperate, the enforcing institution or state will “turn out to be utterly impotent.”\textsuperscript{131}

Depending on the relationship between the requesting and the requested entity, cooperation, in this context, can either be vertical or horizontal. A vertical cooperation refers to a relationship between a state and an enforcement institution in which the latter enjoy primacy or superiority over the former based on a notion which “attaches greater weight to the community interest in an international prosecution than in conflicting interests of the requested state.”\textsuperscript{132} In the \textit{Blaskic} case, the International Court for Former Yugoslavia (ICTY) held that having regard to the primacy of its jurisdiction, its relationship with states must be interpreted as vertical, as opposed to being horizontal.\textsuperscript{133} In issue in this case was the question whether Croatia was under an obligation to cooperate with the court in providing targeted states; and cooperation with respect to the enforcement of sentence. See Alexander Zahar & Goran Sluiter, \textit{International Criminal Law} (Oxford University Press, 2008) 457.\textsuperscript{130} There are so many cases that come to mind. One of such is the refusal of the government of Sudan to co-operate with the International Criminal Court (ICC) in executing the latter’s arrest warrants issued against the former’s president, Umar al-Bashir, for international crimes. See “Sudan” online: Amnesty International <http://demandjusticenow.org/sudan/>. Needless to say that the AU supported this decision of Sudan, and even pulled out its summit from Malawi when it (Malawi) threatened to arrest president al-Bashir should he attend the summit. See “African Union Pulls Summit from Malawi in Row over Sudan’s President” online: The Guardian, Friday 8 June 2012, <http://www.guardian.co.uk/world/2012/jun/08/african-union-malawi-summit-sudan>.\textsuperscript{131} Hans-Peter Kaul & Claus Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises” in Olympia Bekou & Robert Cryer, eds, \textit{The International Criminal Court} (Ashgate Publishing Limited, 2004) 205.\textsuperscript{132} Ibid at 206.\textsuperscript{133} See \textit{Blaskic Subpoena}, and \textit{Blaskic Subpoena Appeal Decision} (citation omitted)
certain documents which it argued were both sensitive and touching on its national security. Horizontal cooperation, on the other hand, refers to the relationship between two states or among states with respect to criminal matters based on sovereign equality. By reason of sovereign equality, the nature of the relationship is such that compliance by a state to a request by another is subject to the convenience of the requested state, and beyond enforcing any relevant treaty obligations the requesting state has no jurisdiction to compel compliance.

The above distinction is, at best, merely theoretical. The stark reality is that, as a practical matter, even an institution that enjoys a superior authority in relation to the requested state is hapless in the face of the state’s refusal to comply with its order. And so, the voluntary cooperation of states remains very central to the effectiveness of international justice. But whether or not a state cooperates depends, among other factors, on the question of legitimacy. Thus, the argument that is made in remaining chapters of this dissertation is that the current absence of cooperation by the AU in the prosecution of Africans by non-African

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134 Zahar & Sluiter, supra note 129 at 458.
135 Kaul & Claus Kreß, supra note 130 at 206.
136 Theories about why states may decide to be bound by international law are legion. For instance, the rationalists school in international relations argues, among other things, that states may cooperate to uphold a rule of international law if there are both an anticipation of interaction on the issue over a long period of time and if the benefit of compliance outweighs the burden of non-compliance. See Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (Oxford: Oxford University Press, 2005) 26, 29-32; Andrew T. Guzman, How International Law Works: A Rational Choice Theory (Oxford: Oxford University Press, 2008) 203-4 & 214. This instrumental approach to international law is said to be grounded in two different logics: the “logic of appropriateness” and the “logic of consequences.” While the former engenders self-reflection by asking the question, “what should I do in this situation,” the latter is more interested in understanding how the behavior of a state will affect its bottom-line. See James G. March & Johan P. Olsen, Rediscovering Institutions (New York: Free Press, 1989); James G. March & Johan P. Olsen, Democratic Governance (New York: Free Press, 1995); James G. March & Johan P. Olsen, “The Institutional Dynamics of International Political Orders” (1998) 52 Int’l Org 943; Martha Finnemore & Kathryn Sikkink, “International Norms Dynamics and Political Change” (1998) 52 Int’l Org 887; Brunnée & Toope, supra note 58 at 39.
state in exercise of universal jurisdiction is due to the illegitimacy of the current process of international criminalisation, as well as the legitimacy of enforcement through the exercise of universal jurisdiction. But as was earlier indicated, this is only part of the reason. The next section examines how the complicity of international law in the colonial project of the nineteenth century is, decades after, fuelling the AU’s suspicion of universal jurisdiction.

II. Customary International Law and the Crisis of Legitimacy

Since the late twentieth century, CIL has increasingly become controversial as a source of international law. Implicated in this controversy is the process and method of its formation as well as the role of power in the development of customary norms. It was Robert Jennings who famously stated that what most contemporary scholars declare to be customary law “is not only not customary law: it does not even faintly resemble a customary law.” His declaration stems from his frustration with what another writer describes as the “conceptual and practical enigmas of customary international law.” Many other legal scholars have also expressed similar sentiment. For instance, Anthony D’Amato has decried the “tremendous amount of disagreement among scholars and publicists over the rule of customary international law” and the absence of a “consistent theory of custom,” while another group of scholars describe CIL as a “mysterious phenomenon” and its existence as

137 Charlesworth, supra note 36 at 1.
139 Lepard, supra note 24 at 9.
“delicate and difficult.” Martti Koskenniemi asserts thus: “[Modern legal argument lacks a
determinate, coherent concept of custom. Anything can argue so as to be included within it as
well as so as to be excluded from it.” For David Fidler, “[o]f all the sources of
international law, customary international law is perhaps the most controversial.” After
examining the decisions of the ICJ, Karol Wolfke found that the Court seldom relies on
“custom” or “customary law” and attributed this to what he described as the “notoriously
controversial character of international customary law in general and the resulting division of
opinions on it in the Court itself.” Professor Kelly, too, has noted:

International law treatises, the writings of international scholars, and the decisions of the
I.C.J. portray an international legal system blessed with a wide array of customary norms to
structure behavior and resolve disputes. While these norms are termed “customary,” they
rarely are based on significant state practice and are devoid of concrete evidence of states'
acceptance of these norms as law. The primary substantive norms in the Restatement, for
example, are judge-made or scholar-declared norms, not customary norms. Advocates and
scholars selectively use state practice and cite each other for the proposition that a norm has
been generally accepted as law. Some are quite candid about this process of norm declaration.
The inductive methodology is rarely used.

In fact, one writer has called for the elimination of CIL as a source international law, arguing
that its abject subjectivity and susceptibility to competing theories have robed it of any
reasonable authority and legitimacy.

142 North Sea Continental Shelf cases, supra note 31 at 175 (Judge Tanaka’s dissenting opinion).
Professor Tunkin also refers to the formation of customary international law as the "most difficult of all the
problems of international law": Tunkin, "Coexistence and International Law" (1958) 95 HR 9 quoted in R. K.
Erickson, "Soviet Theory of the Legal Nature of Customary International Law" (1975) 7 Case Western J Int L
148 at 152.
143 Martti Koskenniemi, From Apology to Utopia: the Structure of International Legal Argument
144 David P. Fidler, “Challenging the Classical Concept of Custom: Perspectives on the Future of
145 Karol Wolfke, Custom in Present International Law, 2d ed (Dordrecht: Martinus Nijhoff
146 Kelly, supra note 11 at 478.
147 Ibid at 540.
At the heart of the challenge on the legitimacy of the doctrine of CIL are the many conceptual as well as practical problems that surround it.\textsuperscript{148} Some of these uncertainties relate to the proper interpretation and the true meaning of the principle’s two elements earlier discussed – state practice and \textit{opinion juris}. The first question concerns the nature of state practice. Scholars are not only divided on what constitutes state practice for the purpose of generating CIL but also about the relationship between state practice and \textit{opinion juris}. Do these elements exist independent of each or are there situations in which one is deemed to be inclusive of the other? How does one even begin to define the term, given the complexity of state activities? Part of the debate is whether or not official “statements” or “claims” of a state are evidence of “practice. For D’Amato, “a claim is not an act . . . . Claims themselves, although may articulate a legal norm, cannot constitute the material component of custom.”\textsuperscript{149} He further argues that what counts is not what a state claims but its enforcement action – “what the state will actually do.”\textsuperscript{150} Iain MacGibbon declares, “[T]he concept of custom completely divorced from practice is as strange as that of custom without the habitual pattern of conduct, the usage, which is non-legal language would be termed ‘customary behaviour’ and which appears to the present writer to be of the essence of custom in the legal sense.”\textsuperscript{151} Hugh Thirlway describes this approach as one of seeing “custom as essentially practice.”\textsuperscript{152} The emphasis on “practice” appears to be consistent with the language of Article 38(1) (b) of the Statute of the ICJ itself, which talks about “international custom, as evidence

\textsuperscript{148} Lepard, \textit{supra} note 24 at 8.
\textsuperscript{149} D’Amato, \textit{supra} note 140 at 88.
\textsuperscript{150} \textit{Ibid}.
of general practice accepted as law.”\textsuperscript{153} According to Oppenheim’s International Law, “[T]he formulation in the Statute serves to emphasize that the substance of this source of international law is to be found in the practice of states.”\textsuperscript{154}

On the other hands, Akehurst argues that, consistent with majority opinion and decisions of international tribunals, statements are reflective of state practice and that it is “artificial to distinguish between what a state does and what it says.”\textsuperscript{155} According to a group of scholars, “[t]here is no inherent reason why verbal acts should not count as practice, whilst physical acts . . . should.” In fact, for them, “[v]erbal acts . . . are in fact more common forms of State practice than physical conduct.”\textsuperscript{156} Instead, state practice is viewed not as an independent requirement but merely as an evidence of opinion juris.\textsuperscript{157} Thirlway explains it thus: “for some authors only the psychological elements is essential, the role of state practice being rule of international customary law where there is insufficient practice, or none, but there is other evidence that states believe in the existence of a rule of law; this is particularly relied on by those who see General Assembly resolution as law-creating.”\textsuperscript{158} This position is especially championed by human rights advocates in what has been labeled the “modern” approach to

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\textsuperscript{153} ICJ Statute, supra note 27. (emphasis supplied). \\
\textsuperscript{155} Michael Akehurst, “Custom as a Source of International Law” (1974-1975) XLVII Brit Y.B. Int’l L 1 at 3. \\
\textsuperscript{156} Report of the Committee on Formation of CIL, supra note 25 at 14. \\
\textsuperscript{157} Charlesworth, supra note 36at 26. \\
\textsuperscript{158} Thirlway, supra note 152 at 123. 
\end{flushright}
CIL.\textsuperscript{159} But this is not without criticisms from those who view any attempt to dispense with state practice as tantamount to a deliberate destruction of the customary nature of CIL.\textsuperscript{160}

Furthermore, it is not clear what time duration is required to generate a rule of CIL. Early judicial opinions adopted the position that the practice forming CIL must have existed since “time immemorial.”\textsuperscript{161} This phrase is reflective of the position of states such as Britain whose law talks about an immemorial custom.\textsuperscript{162} Some statutes, however, require a specific number of years before the obligation contained therein could be elevated to the status of CIL.\textsuperscript{163} Many contemporary scholars, however, seem to be of the opinion that no particular time frame is necessary. According to Wolfke, the idea that a certain length of time would elapse before a custom could be formed has “no foundation either in international practice or in doctrine.”\textsuperscript{164} In the 1958 Geneva conference, one of the issues was whether the doctrine of continental shelf had become a rule of CIL. It was Greece’s position that a period of ten years was too short for the doctrine to mature as custom, while Israel and other nineteen states disagreed.\textsuperscript{165} In the \textit{North Sea Continental Shelf} case, the International Court said that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law,” provided that the practice in question “should

\textsuperscript{159} Lepard, \textit{supra} note 24 at 24.
\textsuperscript{161} See e.g., \textit{Jurisdiction of the European Commission Advisory Opinion}, Dissenting Opinion of Judge Negulesco (1927) PCIJ 84 at 105.
\textsuperscript{163} \textit{Ibid}.
\textsuperscript{164} Wolfke, \textit{supra} note 145 at 33. See also Villiger, \textit{supra} note 29 at 24-25.
\textsuperscript{165} Akehurst, \textit{supra} note 155 at 15.
have been both extensive and virtually uniform in the sense of the provision invoked . . ."\textsuperscript{166} This has been interpreted as ending the requirement that state practice must be “uninterrupted, consistent and continuous.”\textsuperscript{167} In fact, some commentators have even argued that there can be “instant” CIL. According to Cheng, “there is no reason why an \textit{opinion juris communis} may not grow up in a very short period of time among all or simply some members of the United Nations with the result that a new rule of international customary law comes into being among them.”\textsuperscript{168}

Related to the above is the problem of the quantity of state practice needed in order to form a rule of CIL. For obvious reasons,\textsuperscript{169} many older authorities on the issue argued that all states must consent to a rule before it can become a rule of CIL.\textsuperscript{170} Some insist that what is contemplated by Article 38(1) (b) of the ICJ Statute is not a “universal practice” as suggested by earlier authorities, but a “general practice.”\textsuperscript{171} There is also a critical mass of scholars who have coalesced around the idea that the practice to become a rule of CIL “has to be virtually uniform, extensive and representative”\textsuperscript{172} or “widespread,” without stating what

\textsuperscript{166} North Sea Continental Shelf case, supra note 32 at 44 (para. 74).
\textsuperscript{167} Wolfke, supra note 145 at 60.
\textsuperscript{169} This position reflected the composition of the international law-making community in the nineteenth and early twentieth century, which was essentially a very few states of European origin.
\textsuperscript{170} Akehurst, supra note 155 at 17.
\textsuperscript{172} Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict” (2005) 87 Int’l Rev Red Cross 175 at 180; North Sea Continental Shelf case, supra note 32 at 44 (para. 74).
minimum would be sufficient.\textsuperscript{173} In justifying the absence of a precise figure on the extent of participation required, it has been argued that the emphasis is on the quality of the practice rather than quantity: “[I]t is not simply a question of how many states participate in practice, but which states.”\textsuperscript{174} To support this assertion, reference is made to the ICJ’s decision in the \textit{North Sea Continental Shelf cases} in which it stated that for a practice to rise to the status of CIL, it must “includ[e] that of States whose interests are specially affected.”\textsuperscript{175} But as argued shortly, one of the collateral consequences of the “specially affected states” requirement is that it almost ensures that only the practices of powerful states emerge as CIL.

Participation in the process of CIL generation is undoubtedly one that strikes at the heart of the question of the legitimacy of CIL norms, their acceptance by states and the overall effectiveness of CIL as a source of international law. Despite the talk of diminishing role of state due to globalization or the so-called doctrine of cosmopolitanism, the power of CIL to bind states rests on their consent or, at least, participation in the process. Until the late twentieth century, there was little debate about what rule had become part of CIL largely because the few western states that then constituted the international community participated in the process. All that changed as many Third World states gained independence and consequently became members of the international community. Thus, what has emerged is a situation where “the majority of nations and peoples of the world rarely participate in the creation of customary rules that limit their policy choices and sovereignty.”\textsuperscript{176} As a writer

\begin{itemize}
\item \textsuperscript{173} Akehurst, \textit{supra} note 155 at 17.
\item \textsuperscript{174} Report of the Committee on Formation of CIL, \textit{supra} note 25 at 26.
\item \textsuperscript{175} \textit{North Sea Continental Shelf case}, \textit{supra} note 32 at 44 (para. 74).
\item \textsuperscript{176} Kelly, \textit{supra} note 11 at 519.
\end{itemize}
famously noted, “No ‘new’ nation has, or probably ever will, see with anything even faintly approaching serious commitment, a total renovation either of the salient norms of international law or a fixed pattern of international behaviour and relations in the light of its pre-colonial and indigenous traditions of statecraft.”

To be sure, the argument is not an endorsement of voluntarism – the idea that states are only bound by that to which they have consented. In fact, this author remains very dubious of the practical effect of the international law doctrine of “persistent objector,” for the simple reason that, consistent with the generally accepted democratic practice, there is a point beyond which a state or group of states can no longer be availed by its opposition to the emergence of a rule of CIL no matter how persistent such objection might be. That point is when a majority of states have coalesced around a particular rule. The argument, however, is that in order to be relevant to horizontal legal system such as the international one, a rule of CIL must be generated through a lawmaking process that is interactive, reciprocal and...

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178 This is the central argument of Prosper Weil in one of his celebrated works. See Weil, supra note 156 at 420.

179 The doctrine of persistent objector is very controversial. Theoretically, it is intended to relieve a state from any obligation created by a rule of CIL, provided that such a state persistently objected to the development of such a rule. It is, however said to be inapplicable to norms that are “peremptory” or juscogens in nature. See Holning Lau, “Rethinking the Persistent Objector Doctrine in International Human Rights Law” (2005) 6 Chicago J Int’l L 495 at 495. Its origin has been traced to the 1950s – to a pair of ICJ decisions in the Asylum and Fisheries Cases, where it was held that a rule of CIL could not apply to a state that had opposed it. See Curtis A. Bradley & Mitu Gulati, “Withdrawing from International Custom” (2010) 120 Yale LJ 202 at 234; Asylum Case (Colom. v. Peru) (1950) I.C.J. 266, 273 (Nov. 20); Fisheries Case (U.K. v. Nor.) (1951) I.C.J. 116, 125 (Dec. 18). Kelly has argued that the doctrine was developed by the West in response to the Third World states’ attempt to use the United Nations General Assembly where they enjoy majority to challenge the former’s control of the international legal process and exert control over the development of CIL. See Kelly, supra note 10 at 514.
participatory, rather than a hierarchical imposition of authority.\textsuperscript{180} After all, CIL is meant to be a by-product of the “‘general assent’ of nations in the international system” and “implies some element of ‘democratic’ procedure among states.”\textsuperscript{181} It extends to the question whether a nonparty state to a convention that has generated an international customary norm enforceable by universal jurisdiction is bound by it. One of the implications of this democracy is that a rule agreed to by the majority binds even the minority that is opposed to it. Surely, to allow a state to allow a state to perpetually refuse to be bound by a rule of CIL simply because it did not approve of it would completely erode the very essence of CIL.\textsuperscript{182} Thus, the ICJ was correct when it stated that customary international rules, “by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its favour.”\textsuperscript{183}

But even the very concept of “international democracy,”\textsuperscript{184} in the context of CIL, presupposes the equality of all the states that constitute the international community. The idea is that in the determination of what the majority practice is among states, no one state’s practice ought to weigh more than others.\textsuperscript{185} After all, “the exercise of sovereignty without the counterweight of equality leads inexorably to the universal empire of the most

\begin{itemize}
\item Lepard, supra note 24 at 26.
\item Oscar Schachter, “International Law in Theory and Practice: General Course in Public International Law” (1982) 178 Recueil des Cours 38.
\item North Sea Continental Shelf, supra note 32.
\item A term used by Prosper Weil. See Weil, supra note 160 at 420.
\item Lepard, supranote 24 at 27.
\end{itemize}
George Scharzenberger argued that the view that “every state is entitled to be considered as a particle of equal value with any other state in the composite agency which generates principles of international customary law . . . is preferable to the view, not infrequently held, that, in this respect, greater powers as such are entitled to privileged treatment. . . . Power in itself is no title-deed to such preferential treatment.” In fact, the obligatory character of rules CIL has often by justified by reference to the participation of, and acceptance by, the majority of states in their formation, “rather than imposed by a hierarchical state or by distant representatives.” Through the lens of the Third World, the next part examines what is referred to as the “democracy and equality deficits” of CIL.

III. CIL, Power and the Third World

Despite assertions by many international lawyers to the contrary, there is a direct relationship between power inequalities among states and the creation of international norms. It was Reisman who asserts that, “the factitious distinction between law and politics is nowhere more preposterous than in discussions of law-making.” “The making of law,” he argues, “is quintessentially a political process [where] those who have political power use it

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188 Kelly, supra note 11 at 519.
189 For instance, although D’Amato acknowledged that some states are in a better position to shape CIL due to such factors as their unique ability to better publicise their actions and related legal opinions to others, he assumed that the process of CIL offers a level playing field: “all nations have the same set of entitlements; that each entitlement has equal legal standing vis-à-vis other entitlement; that international law strives to preserve the equilibrium that equal entitlements create by permitting retaliation by nations whose entitlements have been violated.” See Anthony D’Amato, “The Concept of Human Rights In International Law” (1982) 82 Colum L Rev 1110 at 1112.
to achieve their objectives.”  

191 This assertion underscores the role of power as an important element in both the emergence of international norms and their application.  

192 For instance, in holding that prohibition of reprisal attacks against civilian population has attained the status of CIL, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Kupreškić case cited only the Dutch and US military manuals, which represent the opinion of only two states on the issue.  

193 According to Michael Byers, “[s]tudies of treaties, customary international law (i.e., judicial decisions and scholarly writings) usually give short shrift to the possibility that relative power differences among states might affect the development, maintenance and the change of rules.”  

194 It is especially true of CIL, which has increasingly become light on the practices of the majority of states and heavy on those of more powerful states. According to Wolfke, “practice being the nucleus of custom, those states are the most important which have the greatest shared and interests in such practice – that is, in most cases the great powers.”  

195 He further argues that the powerful states’ acceptance of a rule “frequently has a decisive effect, because the other states, for this or that reason, pay more heed to the opinion of those powers than to that of minor states.”  

196 Therefore, despite the international lawyers’ claim that international law emerges from processes that, in some sense, are procedurally objective and thus apolitical, often revealed is “the possibility that

191 Ibid.
195 Wolfke, supra note at 145.
196 Ibid at 79.
relative power differences among states might affect the development, maintenance and change of rules” of international law.\textsuperscript{197}

The importance of power relations in the generation of CIL was, perhaps, implicitly alluded to in the judgment of the International Court of Justice (ICJ) in the 1969 case of \textit{North Continental Shelf Cases}, where it held that beyond “a very widespread and representative participation” by states in the generation of custom, it must also reflect the practice of “\textit{states whose interests were specially affected}.”\textsuperscript{198} Describing the phrase “specially affected states” as one of those innocuous but dubious “neutral-sounding criteria which are less likely to attract strict scrutiny, Benedict Kingsbury argued that it “operates mainly (albeit not exclusively) for the benefit of powerful states”\textsuperscript{199} given that, as noted by de Visscher, these states “are more likely than less powerful states to have interests which are affected by any particular legal development.”\textsuperscript{200} Denilenko states:

\begin{quote}
In the absence of a clear definition, the notion of “specially affected” states may be used as a respectable disguise for “important” or “powerful” states which are always supposed to be “specially affected” by all or almost all political-legal developments within international community. However, while as a matter of policy the traditional importance of the views of a preponderant states in custom formation is widely acknowledged, there is no indication that their special status in customary law-making in recognised as a matter of law.\textsuperscript{201}
\end{quote}

In their review of CIL, the International Review of the Red Cross implicitly highlighted the role of power when they identified two implications of the phrase. The first is that a rule of

\begin{footnotesize}
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\item[\textsuperscript{197}] Byers, \textit{supra} note 194 at 35.
\item[\textsuperscript{198}] \textit{North Sea Continental Shelf Case}, \textit{supra} note 32 at 43 para. 73.
\item[\textsuperscript{200}] Byers, \textit{supra} note 194 at 38.
\item[\textsuperscript{201}] Denilenko Gennady, \textit{Law-Making in the International Community} (Dordrecht: Martinus Nijhoff, 1993) 96.
\end{itemize}
\end{footnotesize}
CIL comes into being if states that are “specially affected” are represented regardless of whether or not the majority actively participated, provided they acquiesced to the practice of the “specially affected states.” And conversely, if “specially affected states” do not accept the practice, it will not become a rule of CIL, even though unanimity is not necessarily required.202

Largely responsible for this is the inequalities and the concomitant power relations among states as a result of differences in wealth, military might and so on.203 As highlighted in chapter one, it is a historical fact that in the nineteenth and twentieth centuries, the great powers of the European Concert exercised in relation to the Third World both political and legal powers in their advancement of the colonial project, including the manipulation of doctrines of international law such as CIL. A critical examination of the history of CIL reveals a sustained pattern of exclusion of the Third World in the process and the authorization and perpetuation of its Eurocentric foundation.204 Schachter alluded to this thus: “[a]s a historical fact, the great body of customary international law was made by remarkably few states. Only the states with navies – perhaps 3 or 4 – made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a

202 Henckaerts, supra note 172 at 181.
203 Byers, supra note 194 at 35. Ibid.
large degree, the customary rules on territorial rights and principles of state responsibility. ‘Gunboat diplomacy’ was only the most obvious form of coercive law-making.”

The emergence of positivism as the dominant theory of international law in the nineteenth century and the concomitant distinction which was made between the “civilized” and the “uncivilized” nations would have a dramatic implication for the formation of international custom. Whatever practices that existed in the latter were declared irrelevant for the purpose of determining what international custom was; the only ones that counted were those of the former. Kelly referred to this when he argued that the emergence of the principle of CIL was largely influenced by the determination of Western states to ensure new and non-Western states are bound by rules developed by the Western states. As early as 1866, for instance, Henry Wheaton, one of the renowned positivist international lawyers argues: “Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.” Other positivists argued along the same line, including Bynkershoek, who asserted that “the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized.” Thus, CIL

206 Kelly, supra note 11 at 510-11.
208 Ibid.
became one of the processes by which “universal norms were imposed on non-Western society under the guise of minimum standard of civilization while imperial expansion into African and Asia continued.”  

Prior to this period, this was not the case, at least theoretically. Earlier scholars were willing to accord recognition to the practices of every nation. Grotius, for instance, argues that law (jus gentium) “acquires its obligatory force from the positive consent of all nations, or at least of several.” Even Wheaton concedes that Grotius did not make distinction between nations nor did he suggest that the practices of some nation should be given more preference than others on the basis of any artificial distinction. Even in the early part of the nineteenth century, the Supreme Court of the United States in The Antelope case, found against the existence of a rule of CIL against slavery after considering state practice including those of the African states: “The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them [the modern principles relating to the abolition of slavery]. Throughout the whole of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.”

Kelly, supra note 11 at 510 n.254; see also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) 62 (“All non-European societies, regardless of whether they were regarded as completely primitive or relatively advanced, were outside the sphere of law, and European society provided the model which all societies had to follow if they were to progress.”).  

Anghie, *supra* note 207 at 22.  


*Ibid* at 23, citing *The Antelope*, 23 U.S. (10 Wheaton) 5, 66 (1825). This is not an endorsement of the conclusion reached in this case but merely to show that there was a recognition of the need to examine the practices of African nations for the purpose of determining what the custom was. Furthermore, it also demonstrates the fact that Western nations are more willing to cite practices of Third World states that support their interest, while overlooking those that collide with them.
The exclusive elevation of the practices of European states to the status of CIL and their subsequent imposition on the Third World was justified through the problematization of the cultural difference between Europe and the Third World and the invented need to close the gap – to transform the uncivilized into the civilized. Anghie captures it thus:

this gap was to be bridged . . . by the explicit imposition of European international law over the uncivilized non-Europeans. It was simply and massively asserted that only the practice of European states was decisive and could create international law. Only European law counted as law. Non-European states were excluded from the realm of law, now identified as being the exclusive preserve of European states, as a result of which they lacked both membership and the ability to assert any rights cognizable as legal.\(^{213}\)

It is therefore in this climate of inequality that international law and CIL specifically has continued to thrive. The concept of sovereign equality and its effect on international law-making process, though has been an integral part of legal thought for over two centuries, has become one of the most important concepts to the post-colonial international legal system.\(^{214}\) Wang Tieya observes that “[t]he most fundamental [of the expansion of the international community] is that international law, once dominated by colonialism and imperialism, is now dominated by the principles of sovereignty and equality among states.”\(^{215}\) Article 2(1) of the 1945 Charter of the United Nations states that “[t]he Organization is based on the principle of the sovereign equality of all its members.”\(^{216}\) The United Nations General Assembly resolutions\(^ {217}\) as well as opinions of the judges of the ICJ\(^ {218}\) have always reiterated the

\(^{213}\) *Ibid* at 24.

\(^{214}\) Byers, *supra* note 194 at 36.


\(^{217}\) See e.g. *Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV) (1970).
importance of this concept. What this means is that in the eyes of international law and for the purposes of interstate relations, “all states are entitled to participate in the system because they are formally equal holders of full international legal personality.”\textsuperscript{219} However, it is increasingly hard to argue that the concept of equality means anything in the context of the process of CIL which, in the words of Schachter, “gives weight to effective power and responsibility.”\textsuperscript{220}

For the reasons discussed in Chapter One and above, the concept of sovereignty together with the sovereign equality that it entails is one that Third World states uniquely guard very jealously. For them, sovereignty is the “most treasured possession”\textsuperscript{221} and “the hard won prize of their long struggle for emancipation [and a] legal epitome of the fact that they are masters in their own house.”\textsuperscript{222} Okoye captures this sentiment thus: “The new African states have tended to affirm a strong belief in the concept of sovereignty because it provides them with a legal shield against any further domination or intervention by the old colonial powers. . . .”\textsuperscript{223} Although this near absolutist position may have become anachronistic in the current

\textsuperscript{218} See e.g., the Separate Opinion of Judge Shahabudden in the \textit{NauruCase (preliminary Objection)} (1992) ICJ Reports 240 at 270; the individual opinion of Judge Anzilloti in the \textit{Danzing Legislative Decrees Case} (1935) PCIJ Reports, ser.A/B, No. 65, 39, 66.

\textsuperscript{219} Byers, \textit{supra} note 194 at 36.


\textsuperscript{221} S. Prakash Sinha, “Perspective of the Newly Independent States on the Binding Quality of International Law” (1965) 14 Int’l & Comp L Qty121 at 127.


interconnected world\textsuperscript{224} and, in some cases, responsible for the crisis in the structure of the international community, it is reflective of an understandable desire on their part for total political independence,\textsuperscript{225} fearing that any limitation could engender colonialism by other means.\textsuperscript{226}

Following statehood and subsequent admission as members of the international community, Third World states had high expectations that the quantitative change would translate into qualitative change, especially in the area of international law-making through their greater participation in the process\textsuperscript{227} especially through the instrumentality of the United Nations General Assembly (UNGA). After drawing attention to the “the change in the sociological structure of the community of nations,” Roling believes that this change should be accompanied by an alteration in law.\textsuperscript{228} For Richard Falk, “[t]he expansion of international society to include the active participation of the Afro-Asian states and the growth of a global consciousness has produced a situation that calls for a more sociologically grounded re-

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the extreme form of the doctrine of sovereignty, see Anthony D'Amato, “Human Rights as Part of Customary International Law: A Plea for Change of Paradigms” (1995-1996) 25 Ga J Int'l & Comp L 47 at 59; Arnulf Becker Lorca, “Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation” (2010) 51 Harv Int'l LJ 475 at 492. In 1999, Professor Henkin chastised proponents of sovereignty as an absolute state power for behaving “as if the concept is under siege.” See Louis Henkin, “That 'S' Word: Sovereignty, and Globalization, and Human Rights, Et Cetera” (1999) 68 Fordham L Rev 1 at 5 (“This attitude is largely shaped by the recent historical experience of the states involved. In adopting the new states are continuing on the international arena the struggle which they have already waged against their erstwhile colonial masters. Their pursuit of ‘total independence’ is a direct offshoot of their desire for and acquisition of political independence. The latter is for them meaningful only as a first step toward the elimination of economic, social, even perhaps cultural, dependence on other states or culture”).
\item Abi-Saab, supra note 222 at 103-04.
\item Roling, supra note 16 at xv.
\end{enumerate}
\end{footnotesize}
interpretation of the basis of obligation in international law."\textsuperscript{229} These states were convinced that with their numerical strength, they would be able to influence the decisions of the international system, including the evolution of international norms. The horizontal expansion of the international community reduced the western nations to a minority position in the present international community and elevated Third World states to a majority status. \textsuperscript{230} For the Third World states, therefore, "[t]he link between sovereign independent personhood and law-making power is . . . an especially important one."\textsuperscript{231}

An important area in which change was considered as desideratum is the process of international law-making. It was obvious, at least to these new states, that the old ways of "doing business" had become anachronistic. The increasing lack of representation of the new states raised questions about the international legitimacy, effectiveness and legality of norms generated through the process: "four hundred years of intra-European international law-making could not legitimately be foisted on the African states [and] seeking to do so to three-quarters of the world would render international law not only illegitimate but also ineffective."\textsuperscript{232} In the specific case of CIL, controversy arose as to whether rules that had emerged prior to the independence of these states could bind them, given that they neither

\textsuperscript{229}Richard A. Falk, "On the Quasi-Legislative Competence of the General Assembly" (1966) 60 AJIL 782 at 782.
\textsuperscript{230}Ibid. This expansion did not occur until the late twentieth century. In relation to Africa, in 1945, only Egypt, Ethiopia and Liberia were the only independent nations from the continent that were members of the United Nations General Assembly. South Africa too was a member, except that it was under the apartheid regime of the British government. It was not until 10 years later that Libya joined, and Ghana, Morocco, the Sudan and Tunisia followed later. Two years later, Guinea joined and by the time Sierra Leone became the 100th member of the UN in 1961, there were already twenty-four African member states. See Okoye, supra note 223 at 185. Today, there are more than one hundred and fifty African members of the UN.
\textsuperscript{232}Ibid at 309.
participated in nor consented to them. But more importantly, these nations, skeptical of the undemocratic nature of the process by which new rules of CIL were generated which they viewed as hegemonic, sought for a reform. Viewing the current approach to determining state practice and *opini juris* as largely unrepresentative, at best, and a facade, at worse, and determined to change the rule about how new rules were made, they argued for the involvement of United Nations General Assembly (Assembly) in international law-making. The Assembly, which is one of the organs of the UN, is structured “on the basis of egalitarian in which all Member states would have the right to equal representation, equal opportunity to participate in the discussions, and equal voting powers.” Decisions of the Assembly is by “consensus” based on the principle of “one state – one vote,” not consent – that is, by the majority, not necessarily by every state. Lim explains it thus:

> Those who vote for a General Assembly resolution would be bound by consent and estoppel, those who abstained would be bound by acquiescence since they did not cast a negative vote, while ‘those that vote against the resolution *should be regarded* as bound by the democratic principle that the majority view should always prevail where the vote has been truly free and fair and the *requisite* majority has been secured’. The words emphasized here are especially important. This view depended on prior legal agreement between states or, in the case of

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234 Ibid at 300-01.

235 R. P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries* (Dordrecht: Martin Nijhoff Publishers, 1987) 131. However, Leland Goodrich argues that the agreement to grant equality to all states could not have been possible but for the fact that it was also agreed that the Assembly was supposed to have “no power to take decisions binding on Members with respect to their policies and conduct in their international relations.” Ibid, citing Leland M. Goodrich, *The United Nations* (New York, 1959) 111. Anand puts it thus:

> The Great Powers felt confident that their interests would be adequately protected by their special powers in the Security Council. It was the latter body which was charged with the primary responsibility – practically exclusive power and almost unlimited discretion – for the maintenance of international peace and security. All the important decisions were envisaged to be taken in that body. On the other hand, the General Assembly was expected to be of lesser political significance, not more than a “town meeting of tomorrow’s leaders.”

General Assembly ‘decisions’, a two-thirds majority for important decisions under Article 18(2), and a simple majority under Article 18(3) for all other decisions.  

The question whether and if so to what extent resolutions or declarations of the Assembly can be regarded as a source of international law has continued to be subject to debate among scholars. Even more controversial are those resolutions that attempt to “state or declare principles of international law or rules for the conduct of states” While some view them as binding, others have been unwilling to accord them such recognition. Predictably, states too are nearly divided along geographical line on the issue with Third World states actively supportive of the idea of a binding resolution of the Assembly, while powerful states,

\footnote{Lim, supra note 231 at 309.}

\footnote{Falk, supra note 225 at 782 (calling for the attribution of quasi-legislative status to resolutions of the Assembly: “The idea of attributing quasi-legislative force to resolutions of the General Assembly expresses a middle position between a formally difficult affirmation of true legislative status and a formalistic denial of law-creating role and impact. To affirm the legislative competence of the General Assembly in qualified terms is thus expressive of a certain well-founded uneasiness about how to give an account of the jurisprudential basis for General Assembly competence to develop new law and repeal old law”); R. S. Gupta, “Resolutions of the United Nations General Assembly as Source of International Law” (1986) 23 Int’l Stud 143 at 144 (arguing that “not all resolutions of the General Assembly are merely recommendatory).}

\footnote{Led Gross, “Sources of Universal International Law” in R. P. Anand, supra note 235 at 204.}

\footnote{The International Court of Justice too has been ambivalent on the issue. For instance, in the \textit{South West African (Second Phase) Case}, Judge Jessup, in his Dissenting Opinion, while rejecting “the thesis that resolutions of the General Assembly have a general Legislative character and by themselves create new rules of law,” argued:}

\begin{quote}
But the accumulation of expressions of combination of apartheid . . . especially as recorded in the resolutions of the General Assembly of the United Nations are proof of the pertinent contemporary international community standard. . . . The Court is bound to take account of such a consensus as providing the standard to be used in the interpretation of Article 2 of the Mandate.
\end{quote}

\textit{Ibid} at 441. Judge Tanaka, on the other hand, in his Dissenting Opinion argued that “we cannot admit that individual resolutions, declarations, judgement, decisions, etc., have binding force upon members of the organisation,” but:

\begin{quote}
the accumulation of authoritative pronouncement such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterised as evidence of the international custom, referred to in Article 38, paragraph 1(b).
\end{quote}

together with their scholars, have adamantly opposed such idea, arguing that states practice could not possibly be extrapolated from the resolutions and declarations of Assembly.\footnote{240}{Byers, supra note 194 at 41.}

But underneath this doctrinal argument is a political subtext that propels the conflicting positions. As was discussed above, Third World states saw the primary purpose of the Assembly as well as the establishment in 1947 of the International Law Commission (ILC) pursuant to Article 13(1) of the UN Charter as that of bringing

International law up to date by a process of modifying existing rules to meet the needs of the newly enlarged international community. In this way, some serious efforts is being made to take account of the expanding frontiers of international law. The keynote is the progressive development and codification of the subject, and in the discharge of that task there is to be ensured the widest participation, which includes the representatives of the newly independent states hitherto denied participation in the formulation of customary international law.\footnote{241}{T. O. Elias, \textit{United Nations Charter and the World Court} (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) 19-20.}

In fact, on November 14, 1947, the Assembly under the influence of Third World states passed a Resolution – Resolution 171(II) – tasking the International Court of Justice with the sole responsibility of treating its resolutions as its evidence of international law.\footnote{242}{UN Doc. A/RES/3232(XXIX) (12 November 1974).}

On the other hand, opposition by powerful Western states stems from a rather political concern about the numerical configuration of the Assembly, which is skewed against them and its implications in terms of legislative outcome. Allowing the egalitarian Assembly\footnote{243}{Article 18(1) of the UN Charter stipulates regardless of their political and economic status, that “each member of the General Assembly shall have one vote.” See Charter of the United Nations, supra note 62.} to create international rules would ultimately divest these industrial Western Powers of their much cherished leverage and would cause a situation in which they can practically always be
outvoted. In fact, some Western scholars and statesmen had even deplored the very idea of expansion of international community to include Third World states, arguing that this “has led to erosion of international law.”\footnote{R. P. Anand, \textit{New States and International Law} (Delhi: Vikas Publishing House PVT Ltd, 1972) 66.} For instance, Professor Freeman, referring to the “devastating inroads which the myth of universality has chiseled into the very foundations of traditional international law,” was convinced that “a complete evaluation must impeach the practice of admitting into the society of nations primeval entities which have no real claim to international status or the capacity to meet international obligations, and whose primary congeries of contributions consists in replacing norms serving the common interests of mankind by others releasing them from inhibitions upon irresponsible conducts.” With a sense of nostalgia for the previous status quo, he concluded that “an undignified compulsion to admit these entities as full blown members of the international society upon achieving ‘independence’ has impeded, not advanced, the emergence of a mature code of conduct.”\footnote{Alwyn V. Freeman, “Professor McDougal’s ‘Law and Minimum World Public Order’” (1964) 58 Am J Int’l L 711 at 712.} After attending a General Assembly session, an enraged and frustrated Dutch member of Parliament said:

One is completely mistaken, if one looks upon the United Nations as an organization that represents “civilized peoples”. It is an organization in which barbarians and semi-barbarians have the upper hand. The main characteristic of the evolution of the United Nations is not the civilization of barbarians. On the contrary, it is the barbarization of the entire United Nations.\footnote{Roling, \textit{supra} note 16 at 68.}

Attempts, therefore, to democratize international law-making through the Assembly has met serious resistance and outburst, with John A. Scali, US Ambassador to the United Nations in
1973-6 dubbing it as a “tyranny of the majority.” On December 12, 1975, Daniel P. Moynihan, the United States Ambassador to the United Nations, told the UN Assembly that “it is becoming a theatre of the absurd.” “I begin to feel that the increasing contempt in the world” for the UN, he argued “is increasingly deserved.” Former US Secretary of States, Henry Kissinger, also criticized the Assembly on July 14, 1975 thus: Ideological confrontations, bloc voting, and new attempts to manipulate the Charter to achieve unilateral ends threaten to turn the UN into a weapon of political warfare rather than a healer of international conflict and a promoter of human welfare.” In angry response to the Assembly’s approval by 120 votes to 6 of the controversial Charter of Economic Rights and Duties of States on December 12, 1974, the Chicago Daily News stated: “under the domination of the Afro-Asian-Arab blocs, it (UN) is tossing aside the rules of reasoned debate and substituting raw emotion and numerical power.” It further stated thus: “The spreading miasma of bias and hatred permeating the UN can produce only revulsion and mistrust on the part of the more developed democracies upon which the UN depends primarily for support.” It is pretty remarkable that accusation of politicization of international law could be made by Western states, given their historical antecedents. It is indeed this “strange irony of fate” that now ‘compels those very members of the community of nations on the ebb of tide of their imperial power to hold up principle principles of

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247 Lim, supra note 231 at 314.
250 Quoted in Senate hearing, ibid at 534.
251 Ibid.
morality as shields against the liquidation of interest acquired and held by an abuse of international intercourse.”  

The Great Powers’ opposition is particularly curious given that they have moved the Assembly to adopt resolutions which they consider as legally binding. If anything, it is symptomatic of the “pick and choose” attitude with which they have often approached their international obligations. For instance, on December 13, 1946, the Assembly adopted a resolution affirming “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.”  

It is important to point out that at the time only forty-eight states were members of the Assembly, which is less than half of its population today, with Third World states in the minority. It could therefore be argued that “the affirmation of principles of international law expressed in the resolution was quantitatively non-universal but qualitatively universal.” However, two years after, the US challenged the binding character of a similar resolution – the Universal Declaration of the Right of Man which was adopted on December 10, 1948, arguing that the Declaration “is not and does not purport to be a statement of law or legal obligation.”

The inescapable question therefore is why should a rule of CIL that practically evolves between a few politically relevant states be binding on the whole international community while a decision of the Assembly adopted by a large majority of the states of the world is

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255 19 Dep't State Bull. 751 (1948).
deemed not to have the same effect? Surely, the argument that states are only bound by a norm to which they have consented flies in the face of reality since “advocates of consent . . . are also the first to insist that the three-quarters of the world that took no part in its formation must be regarded as bound by it, consent or no consent.”256 The answer appears to lie in the Great Powers’ greater control of the process of formation of rules of CIL. The continuing heavy reliance on custom, even when its legitimacy has increasingly come into question, is a strategic choice made by those who believe that “in the broader arena of real world power, number will not count.”257 According to Reisman, the United States “can use custom to get the international law [they] want without having to undergo the ‘give’ part of the ‘give-and-take’ of the legislative process.”258 The result is as he further captures: “in terms of effective power, the superpowers and their associates always held sway. International law’s arithmetic may be one state – one vote, but international political arithmetic, as Leonard Legault has put it, still holds that ninety nine minus one oftentimes equals zero, and that one plus one oftentimes equals one hundred.”259 To ensure the legitimacy of CIL and prevent the kind of resistance that was discussed above, the process of CIL must be reformed to reflect the changes that have occurred in the composition of the international community. Jenks captures this thus: “. . . there is an urgent need to marshal the evidence of existing customary law on a much wider geographical basis and progressively to ensure a more broadly based and fuller acceptance of

256 Elias, supra note 227 at 72.
257 Reisman, supra note 190 at 142.
258 Ibid at 134.
259 Ibid at 137.
both established and developing; only so can the existing customary law be protected against an ever-present danger of disintegration.” Otherwise, warned Reisman,

new norms will continue to be established and existing norms amended or terminated in complex patterns of interaction. This will be referred to increasingly as customary international law, and sometimes extolled as natural democracy, but one should have no illusions as to what it really means. The critical factor in the establishment of custom is the relative power balances, corrected by the context of the issue, of the parties concerned and the intensity of the interest they have in security certain outcomes.\textsuperscript{261}

Unfortunately, rather than reforming the process by which rules of CIL emerge to reflect the change in the complexion of the membership of the international community, what has emerged, especially in the area of international criminal law, is even an increased diminution of the level of participation required of a practice, in order to be elevated to the status of CIL.\textsuperscript{262} Grossly Implicated in this development is ascendency of the theory of \textit{jus cogens} which propagates “the idea that there are certain obligations that are incumbent on every state without distinction” by an emphasis on the “international morality” or “legal conscience” of the “international community.” The link between \textit{jus cogens} and the ongoing expansion of universal jurisdiction as well as its contribution to the AU’s opposition is explored next.

\textbf{D. FROM CIL TO “CUSTOMARY INTERNATIONAL MORALITY”: \textit{JUSCOGENS} AS A SOURCE OF UNIVERSAL JURISDICTION}

Martti Koskenniemi once observed that modern international law has genealogically moved, “in a familiar succession of argumentative steps, from formalism to ethics, in order to capture within law a great crisis that under the old, “realistic” view would have fallen beyond its

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{260}C. Wilfred Jenks, \textit{The Common Law of Mankind} (London: Stevens & Sons Limited, 1958) 30.
\item \textsuperscript{261}Reisman, \textit{supra} note 190 at 144.
\item \textsuperscript{262}Weil, \textit{supra} note 160 at 434.
\end{itemize}
\end{footnotesize}
Perhaps, no other doctrine of international law captures this “turn to ethics” than the doctrine of *jus cogens* and its concomitant connection with another – the doctrine of universal jurisdiction.

The link between *jus cogens* and the ongoing expansion of universal jurisdiction’s scope cannot be over-emphasized. Although in a purely technical term, the concept of *jus cogens* is meant to serve as an interpretive guide for resolving doctrinal conflicts between rules of international law by declaring as null and void any “ordinary” rule that is inconsistent with a higher norm – *jus cogens* norm – its impact has become more profound than was originally anticipated. The “peremptory” nature of the norms which *jus cogens* contemplates as well as its association with “a “public order” or “morality” of the “international community” are often cited as providing legitimacy to the exercise of universal jurisdiction in the event of breach, “even where treaties and customary rules do not fully support [such] an

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264 Ibid.
265 Larry May, *Crime Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005) 25 (“*jus cogens* norms are universal norms that ground ‘universal jurisdiction’ in international law . . .”).
267 One of the earliest court decisions to formulate the criteria for peremptory norm was that of the Federal Constitutional Tribunal of the Federal Republic of Germany in 1965:

The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community.

Stefan A. Riesenfeld, “*JusDispositivum* and *JusCogens* in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court” (1966) 60 Am J Int'l L 511 at 513, citing *In the matter of petition for review of the constitutionality of three decisions of the Federal Supreme Tax Court by . . ., a corporation at Zurich (Switzerland), 18 Decisions of the Federal Supreme Constitutional Court* (April 7, 1965) 441at 448.
outcome.”269 Allen Buchanan is one of the scholars to advance this normative theory of legitimacy, arguing that a state or an international organization is legitimate if it is “morally justified in the attempt to make, apply, and enforce general rules within a jurisdiction.”270 In order words, proof of legitimacy of an action is taken as given the moment an “entity’s moral basis for the exercise of political power” is established and whether such entity “displays a minimum form of democracy and protects basic human rights.”271 Buchanan’s view regarding the concept of state consent – the most fundamental pillar of international law – is very instructive. According to him, state consent “is of dubious moral significance in a system in which many states often do not represent all or even most of their citizens or take their basic interests seriously”272 and that “consent of the governed . . . is not necessary for the justified exercise of political power, whether within individual states or in the workings of international legal institutions.”273

Buchanan’s basic argument, and one on which proponents of universal jurisdiction predicate their claim, is that, under certain circumstances, the legitimacy of international norms or practices should be determined not according to their legality but by reference to whether or not they are moral or ethical. For instance, Koskenniemi argues that NATO’s intervention in Kosovo in 1999 was ambivalently “both formally illegal and morally necessary.”274

law in conflict with powerful norms expressing fundamental expectations vitally important to overriding community interests”).

271 Charelsworth, “Conclusion”, supra note 57 at 392.
272 Buchanan, supra note 270 at 234.
273 Ibid.
274 Koskenniemi, supra note 263 at 162.
Bassiouni once observed that the only way to make sense of *jus cogens* norm is that “certain crimes affect the interest of the world community as a whole because they threaten the peace and security of humankind.”275 In other words, the proposition is that certain norms in the world are of universal concern and that “this universal concern is sufficient to justify certain action on the part of states.”276 It is in this sense that the concept has been defined as “a compelling psychological association of normative superiority with universality”277 which “imports notions of universally applicable norms into the international legal process.”278 Also referred to as the “common interest norms,” *jus cogens* norms are based, not on states practice or consent, but on what a writer referred to as “customary transnational law” or “the custom of international community at large.”279

In the context of international criminal law, the idea that states are subject to certain rules of international law in respect of which they have not consented, though found concrete expression in the 1969 Vienna Convention on the Law of Treaties, could actually be traced to the Nuremberg trial conducted after World War II.280 The trial was unprecedented for two reasons. First, it was the first that international criminal law was applied directly by an

280 Charney, supra note 17 at 543.
international tribunal. Second, since the existing theories of subject-matter jurisdiction under international did not contemplates the crimes with which the defendants were charged, the tribunal had to “re-invent the “wheel” of international law in order to found jurisdiction.” In his opening statement at the trial, Robert H. Jackson, chief counsel for the United States, referred to “wrongs . . . so calculated, so malignant and so devastating, that civilisation cannot tolerate their being ignored because it cannot survive their being repeated” as those in respect of which the international community must both condemn and punish. These issues are explored next.

Intertwined within the praxis of this new theory is the dramatic shift in the method of identifying rules of international law – from the traditional inductive examination of specific practices of states to a deductive approach that often presumptuously invokes the “conscience of international community”. Simma and Paulus referred to this interpretive technique as “modern positivism.” Unlike inductive method that relies heavily on states practice, the technique of deductive logic is both convoluted and abstract, extracting rules of international law from more general propositions, such as normative and extra-legal considerations. In a nutshell, norms generated through deductive method are not the result of states acts – of positive norms – but hypothetical norms believed to represent the core value of, and

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282 Ibid.
285 Kammerhofer, *supra* note 26 at 537.
286 Arajärv, *supra* note 281 at 1.
recognized by, the “international community of states as whole.” Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have heavily adopted this approach in their quest to establish the existence of a new rule of customary humanitarian law. For instance, in its ground-breaking but most controversial ruling in the celebrated case of *Tadić Interlocutory Appeal on Jurisdiction*, the ICTY questioned the utility of the two-element approach to CIL in the field of international criminal law, propounding, instead, the concept of the “elementary consideration of humanity.” The issue in this case was whether the rules of its statute – Articles 2 & 3 – applied to non-international armed conflict. The appellant had challenged the jurisdiction of the Tribunal on several ground one of which was that it lacked subject-matter jurisdiction over some of the crimes contemplated by its statute, given that they only applied to international armed conflict. Judge Sidwha in particular argued that in the field of international human rights law, spontaneous development of CIL, as opposed to its “normal” formation had become its intrinsic part. The same reason informed the judgment of the Trial Chambers of the Tribunal in the Čelebići case where it held that common Article 3 of its statute constituted the minimum core of international humanitarian norms regardless of the type of armed conflict in question. Adopting the same deductive approach, the Appeal

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287 Vienna Convention, *supra* note 6, article 53.
288 *Tadić Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72 (2 October 1995). The Tribunal argued thus:

> Indeed, elementary considerations of humanity and common sense make it preposterous that the use by states of weapons prohibited in armed conflicts between themselves be allowed when states try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

*Ibid* at para. 119.

289 *Ibid* (separate opinion of Sidhwa, para. 114).
290 The Tribunal put it thus:
Chambers of the Tribunal upheld the judgment of the Trial Chambers, arguing that international human rights’ concern for human dignity forms the “basis of fundamental minimum standards of humanity” and represents “a common ‘core’ of fundamental standards which [are] applicable at all times, in all circumstances and to all parties, and from which no derogation [is] permitted.” Furthermore, it held that the common goal of both international human rights and international humanitarian regimes is the “protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.”

At first sight, this appears to be a welcoming development. Without a doubt, in the context of global order and the guarantee of the human rights of peoples, this represents a significant progress. A writer describes this deductive approach and the emergence of jus cogens as a response to global “revolt of the masses.” An appeal to states to be guided by the “legal conscience” of humanity in their actions merely underscores the primacy of ethics over rules

It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and on which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Convention because they reflect the most universally recognised humanitarian principles. These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts. In the worlds of the ICRC, the purpose of common Article 3 was to “ensure respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself.” These rules may thus be considered the “quintessence” of the humanitarian rules found in the Geneva Convention as a whole.

See Čelebići, Trial Chamber Judgement, Case No. IT-96-21-T, 26 November 1998, para. 143.
of CIL and other types of positive law. After all, as writer put it, “without higher moral
‘values,’ international law is but a soulless contrivance.”295 Emphasis on the concept of
“international community”, too, reflects the determination of states to forge a sense of
solidarity and normative homogeneity in an increasingly heterogeneous world.296 Thus, given
the expansion of the international community following the independence of many Third
World states and the diversification it brought, a global order anchored on “universal
conscience,” “common interest” and “common value” would facilitate a transition from
“international society” of states to “international community” of states.297 For the Third
World states which actively pushed for the codification of jus cogens in the Vienna
convention,298 the concept would curtail the excesses of positive law and the power of
powerful nations to manipulate legal doctrines as was witnessed especially in the nineteenth
and part of twentieth centuries.

But here is the problem. Relying almost exclusively on this approach, and by implication on
the concept of the so-called “common interest norms” or “elementary consideration of
humanity,” for the formation of a rule of CIL without regard for the traditional approach – of
state practice and opinio juris – presents some real and significant risks, one of which is the
uncertainty surrounding the circumstances under which what is moral may become legal and
the potential for abuse concomitant with this uncertainty. Even Buchanan admits that these

295 Weil, supra note 160 at 422
296 Ibid.
297 Ibid
298 Western states, on the other hand, opposed this, arguing that the concept was both imprecise and
unsupported by state practice or doctrine. See T. O. Elias, New Horizons in International Law (Dordrecht:
conditions remain contested, and further warned that “to accept the thesis that morality can trump law is to open the door to a range of national moralities aspiring to university” or what Classical realists like Morgenthau described as “national moralities masquerading as universal morality.” Thus, this could become a blank cheque used by powerful states to advance the “revolutionary claim” that “if the regime of international law fails, even the hegemonic imposition of a global liberal order is justified even by means that are hostile to international law itself.”

Another is the danger of elevating “law as it ought to be – lex ferenda – to the status of “law as it is” – lex lata. This undoubtedly undermines the credibility and legitimacy of such norm and violates the CIL principle of nullum crimen sine lege - a rule meant to protect the accused from arbitrary prosecution. The importance of this principle in international criminal cannot be over-emphasized. Despite providing for the punishment of perpetrators of international crimes pursuant “to general principles of law recognized by the community of nations,” Article 15, paragraph 2 of the International Covenant on Civil and Political Rights requires that those principles must have been in force “at the time when [the crime] was committed.” As Judge (then President) Cassese has put it, “[A] policy-oriented approach in

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300 Chimni, supra note 54 at 306; see also B. S. Chimni, International Law and World Order: A Critique of Contemporary Approaches (New Delhi: Sage Publications) 61-70.
302 Schlütter, supra note 193 at 236.
303 International Covenant on Civil and Political Rights, 16 December 1966, Art. 15, 999 UNTS 171.
the area of criminal law runs contrary to the fundamental customary principle of *nullum crimen sine lege*.”

Arguably, as was the case with the Nuremberg trial which is discussed shortly, this is one of the fundamental problems associated with the ICTY jurisprudence. In fact, even the Appeals Chambers of the ICTY in the *Ojdanic Interlocutory Appeal on Joint Criminal Enterprise* warned that the heinous character of an act cannot exclusively constitute a “sufficient factor to warrant its criminalization under CIL.” This, in a way, is a subtle rebuke by the Tribunal of the previous reasoning in the *Tadić* and Čelebici cases, where an amorphous concept of the “elementary consideration of humanity” trumped any consideration of actual states practice and *opinio juris*. In his dissenting opinion in the *Galić* appeal alleging violation of the *nullum crimen sine lege* principle by the Trial Chambers, judge Schomburg argued that the deductive approach adopted by the majority opinion in order to establish the CIL status of individual criminality of the infliction of terror “appears to be incorrect, since it could be made in any context in relation to any and every violation of international humanitarian law.” Schomburg further argued that it was the responsibility of the Court to ensure that crimes under its statutes are defined *with precision* in order to avoid any violation of the fundamental principle of *nullum crimen sine lege*. In his conclusion, he argued that the

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305 The Tribunal cited the *Tadić* case as an example of where such technic was employed for the purpose of grounding the finding of the existence of a rule of CIL. See *Ođanić*, Decision of Dragoljub Ođanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber Decision Case No: IT-99-37-AR72, 21 May 2003.
308 *Ibid* (emphasis in the original).
absence of any explicit provision in the Rome Statute of the International Criminal Court (ICC) prohibiting the infliction of terrors on a civilian population was a clear evidence of its non-customary status: “If indeed this crime was beyond doubt part of customary international law in 1998, states would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute.”\textsuperscript{309} Schlütter warned that “one has to be aware of the fact that the foreseeability and clarity of an international crime may be at stake if reasoning on its customary character is driven solely by the gravity of the crime from moral perspective.”\textsuperscript{310}

At the heart of the above proposition is the assumption that states could not only agree on abstract international normative principles – what a writer describes in a less diplomatic language as “‘imagined’ norms existing only in the mind of the proponent”\textsuperscript{311} – to guide their behaviour but also that intrinsic in such agreement is the right of each state to enforce the observance of such norm. Put differently, this assumption discounts such factor as the distribution of power, since the “common interest” of states trumps political considerations.\textsuperscript{312} However, there are so many reasons to question this assumption. First, the idea that global consensus can be easily reached on normative principles as well as the method of their enforcement is too idealistic.\textsuperscript{313} For starters, agreement between states on what constitutes an international norm has historically proven difficult even in the most

\textsuperscript{309} Ibid at para. 20.
\textsuperscript{310} Schlütter, supra note 193 at 248.
\textsuperscript{311} Kammerhofer, supra note 26 at 542.
legislative of settings. For instance, the *jus cogens* provision in the Vienna Convention was very controversial during the conference\(^{314}\) not necessarily due to lack of agreement on the core idea contained within it, rather it was in relation to its normative content, which was left as an “empty box”\(^{315}\) to be subsequently filled by the international community of states as a whole: “The one focal point of agreement to emerge from the debates is that certain rules of present-day international law possess *jus cogens* character. Opinions diverged, however, on the content, sources and means of determination and application of these rules and on the origins, role and sociological significance of *jus cogens* in contemporary international law and society.”\(^{316}\) Mr. Hubert, one of the French delegates to the conference, captured the problem thus: “Did that mean that the formation of such norms required the unanimous consent of all States constituting the international community, or merely the assent of a large number of States but not of them all? If the latter, how large was the number to be and what calculations would have to be resorted to before it would be admitted that it had been reached? Who would decide in the event of a dispute?”\(^{317}\) In short, the question is what norms qualify as principles of *jus cogens* and who determines it? More importantly, who or what is the identity of the “international community as a whole” referred to by the Vienna Convention as the arbiter of *jus cogens norms*?

\(^{314}\) Charlesworth & Chinkin, *supra* note 278 at 64.


In this era of heightened clamour for global justice, the concept of “international community” has become omnipresent.\(^{318}\) Ambiguous personification of the international community has increasingly become an integral part of international legal literature, especially those on \textit{jus cogens} (and by extension universal jurisdiction)\(^{319}\) and today appears to be used with reckless abandon but with little explanation of its precise meaning or content.\(^{320}\) Philip Allot states that the use of the term “by politicians, diplomats, journalists, and academic specialists is tending to establish within general consciousness a fictitious conceptual entity with effects and characteristics which surpass the practical purposes of those who make use of it.”\(^{321}\) The Vienna convention, for instance, talks about the international community as having the capacity to “accept and recognize” the emergence of peremptory norms.\(^{322}\) Reference has also been made of “recognition” by the international community of its obligation to protect


\(^{319}\) Weil, supra note 160 at 426.

\(^{320}\) Edward Kwakwa, “The International Community, International Law, and the United States: Three in One, Two Against One, or One and the Same?” in Byers & Nolte, supra note 306 at 27-28. Without necessarily offering a definition, Kofi Annan, former Secretary-General of the United Nations, described “international community” in the following loose manner:

When governments, urged along by civil society, come together to create the international criminal court, that is international community at work for the rule of law. When we see an outpouring of international aid to the victims of recent earthquakes in Turkey and Greece – a great deal of it from those having no apparent link with Turkey or Greece except for a sense of common humanity – that is the international community following its humanitarian impulse. When people come together to press governments to relieve the world’s poorest countries from crushing debt burdens . . . that is international community throwing its weight behind the cause of development. When the popular conscience, outraged at the carnage caused by land mines, succeeds in banning these deadly weapons, that is the international community at work for collective security. There are many more examples of the international community at work, from peacekeeping to human rights to disarmament and development. At the same time there are important caveats. The idea of the international community is under perfectly legitimate attack because of its own frequent failings.


\(^{322}\) Vienna Convention, supra note 6, art 53.
its “fundamental interest”\textsuperscript{323} or “common interest.” The ICJ too has spoken about the obligations of states to the international community and their capacity to enter into commitment towards it, with one of its judges opining on the rules of law that are the “common property of the international community.”\textsuperscript{324} Another notable jurisprudence of the ICJ in this regard is celebrated attempt to draw an “essential” distinction between the obligations of a state towards the international community as whole and obligations owned between two or more states. It argued that to the extent that the obligations contemplated by the former are those that are the concern of all states, they are obligations owed “\textit{erga omnes},” the “omnes” being states.\textsuperscript{325} Other specific references to the “international community” in international instruments and resolutions of the United Nations abound. The treaty of the International Criminal Court (ICC) limits to Court’s jurisdiction to “the most serious crimes of concern to the international community as a whole.”\textsuperscript{326}

Central to the idea of international community is the existence of states.\textsuperscript{327} Herman Mosler stated that the international legal community exist only when two elements are simultaneously present – “a certain number of independent societies organized on a territorial basis exist side by side, and the psychological element in the form of a general conviction that all these units are partners mutually bound by reciprocal, generally applicable, rules

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\item \textsuperscript{323}\textit{Draft article on State Responsibility}, in Report of the International Law Commission (ILC) on the Work of its 28\textsuperscript{th} session, Art 19 at 75, UN Doc. A/28,4/SER.A/1976/Add.1 (pt.2).
\item \textsuperscript{325}Barcelona Traction, Light and Power Company, Limited (1970) ICJ Report 3 at 32.
\item \textsuperscript{326}Rome Statute of the International Criminal Court, Preamble and Article 5, online \texttt{<http://untreaty.un.org/cod/icc/statute/rome.htm>}.
\end{itemize}
granting rights, imposing obligation and distributing competence.”

But other than an agreement on the nature of the membership of this community, there is lack of clarity in terms of the degree of agreement needed among states to legitimately reflect its position. As a legal concept and in normative term, “international community” draws heavily from the very natural law jurisprudence that positivism replaced from the beginning of nineteen century. Francisco Suárez, one of the earliest scholars on international law had contended that intrinsic in mankind is a certain “moral and political . . . unit, enjoined by natural precept of love and mercy.” From this assertion, he argued that it is the obligation of every community (communitas) to “observe certain common laws, as if in accordance with a common pact and mutual agreement.” Since it is obvious that Suárez’s thesis was heavily influenced by his Christian thinking, Tomuschat has questioned its relevant in this modern time, given that it will be unjust to subject nations not embracing Christianity “to live under a regime essentially inspired by Christian dogma.”

Attempt to link the existence of “international community” with natural law was restated by Christian Wolff in his treaties on The Law of Nations in which he argued that “[n]ature itself has established society among all nations and binds them to preserve society . . . for the purpose of promoting the common good by their combined powers.” In 1963, the special rapporteur to the International Law Commission (ILC) Sir Humphrey Waldock, commenting on the jus cogens provision in the Vienna Convention, argued thus: “Imperfect though international legal order may be, the

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330 Ibid.
331 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum, cited Ibid.
view that in the last analysis there is no international public order – no rule from which states cannot of their own free will contract out – has become increasingly difficult to sustain.”

It is very hard, especially in the twenty-first century, to sustain the legitimacy of an international norm by reference to natural law.

Appeal to nature to justify the emergence of a norm is sure to increase the suspicion of states, especially given, as was stated in Chapter Two of this dissertation, its susceptibility to abuse. After all, it was the same argument that was made during the heydays of naturalist international law by powerful nations to advance their self-interest: “by their interpretations of the state of nature, naturalists provided simultaneously a primitive type of speculative sociology and an element of criticism, for – by projecting back into a dim past ideal pictures of community life or their reverse – they created a plastic vista of a state of perfection to which, in the fullness of time, the law of nations was to approximate.” Furthermore, reliance on natural law underestimates both the centrality of positivist international law jurisprudence and the centrality of states to the generation of rules of international law. The emergence of positivism in the nineteenth century as the dominant jurisprudence of international law was informed by states desire to assume control over the creation of rules of international law and to reject any reference to a higher power. Tomuschat captures it thus:

The invocation of laws of nature may have been acceptable in a time permeated by the belief that God had shaped the world according to his will and that his personal existence as well as in his societal activities man just had to discover and retrace the order predetermined by divine will. In this world of today, critical rationalism has swept away such naïve trust in a harmonious balance that exists independently of any human effort. In fact it is the lesson to
be drawn from the history of mankind that one would fall prey to self-deception if one believed that human policies can be entrusted, in a bind act of reverence, to a mysterious regulatory machine guided by divine inspiration. . . . Mankind can neither rely on God nor on nature. It is the master of its own fate – for better and for the worse.\textsuperscript{334}

It was probably in realization of the incompatibility of this natural-law-layered conception of “international community with the state-centred reality of the modern international law that the International Law Commission (ILC) sought to explain the concept, in the context of Article 53 of Vienna Convention, in positivist term. Its position is that, in the context of law-making, a reference to recognition by “the international community as a whole . . . certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each state an inconceivable right of veto” and that what is needed is recognition “\textit{not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community.}”\textsuperscript{335}

For the ILC therefore, a peremptory norm does not emerge unless it has been accepted and recognized by “all the essential components of the international community.” But which states constitute this “essential components? Given the gravity of the norms contemplated, the existence of a legislative body of the international community ought to be logically the case. According to Tomuschat, “an entity mandated to act as the guardian of the common interest should have at its disposal the most basic tool for maintaining law, order, and justice, namely the power to enact binding prescriptions.”\textsuperscript{336} Locating this legislative organ is, however, as difficult as identifying the entity “international community” itself, largely due to

\textsuperscript{334} Tomuschat, \textit{supra} note 329 at 234.
\textsuperscript{335} ILC 1976 Report, \textit{supra} note 311 at 119 (italics supplied).
\textsuperscript{336} Tomuschat, \textit{supra} note 329 at 239.
the absence of a global law-making institution.\textsuperscript{337} As was argued earlier, the reason for this is not necessary because of lack of a credible international body capable of legislating for the whole world – UN General Assembly being such a body – but rather the UN Charter’s limitation of its power to issuing recommendations,\textsuperscript{338} coupled with the unwillingness of powerful nations to grant such authority to it.

Without a clear definition, Weil predicted that “a number of states (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the supernormativity of rules they were perhaps not even prepared to recognize as ordinary norms.”\textsuperscript{339} Thus, international law-making, though theoretically vested in the international community, is in practice exercised by “a directorate of this community, a de facto oligarchy.”\textsuperscript{340} The danger is captured by Weil: “there is the danger of the implantation in the international society of a legislative power enabling certain states – the most powerful or numerous – to promulgate norms that will be imposed on the others. The fundamental distinction between \textit{lex leta} and \textit{lex ferenda} will be blurred, since the “law desired” by certain states will immediately become the “law established” for all, including the others.”\textsuperscript{341} As is explored shortly, there are historical evidences to justify this assertion. At the end of the First World War, powerful nations under whose control Europe was subject claimed exclusive competency, \textit{as a group}, over matters of \textit{general interest} with the rest of the states only allowed to participate in matters of \textit{their}

\begin{itemize}
  \item \textsuperscript{337} \textit{Ibid.}
  \item \textsuperscript{338} \textit{Ibid.}
  \item \textsuperscript{339} Weil, \textit{supra} note 160 at 427.
  \item \textsuperscript{340} \textit{Ibid.}
  \item \textsuperscript{341} \textit{Ibid.}
\end{itemize}
own interests.\textsuperscript{342} It is submitted that despite the establishment of an international body of states – the UN – the great powers are still, as in the past, wielding enormous influence in the generation of the so-called “general” or “common” interest norms – \textit{jus cogens} norms – “on behalf of the international community.”

The invocation of “international community” in the context of universal jurisdiction is said to highlight the latter’s constitutive function – “a process through which the identity of the international community is imagined [and] an expression of a sense of ourselves (a community of humankind) at a given moment of time.”\textsuperscript{343} Paul Kahn argued that, rather than being merely about substantive or procedural correctness, universal jurisdiction is “an expression of a sense of ourselves as a single, historical community.”\textsuperscript{344}

For the Third World, however, the phrase “international community” masks power and “has been an object of several hijack attempts on the part of a certain particular national interests.”\textsuperscript{345} In fact, the view is that it is nothing other than a “euphemistic collective noun . . . to give global legitimacy to actions reflecting the interest of US and other Western powers.”\textsuperscript{346} There is a sense that the idea itself is implicated in the relationship of their continued domination.\textsuperscript{347} The reason for this is not far-fetched. The origin of the modern

\addcontentsline{toc}{section}{Notes}

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\item Mosler, supra note 328 at 10.
\item Adeno Addis, “Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction” (2009) 31 Hum Rgts Qtly 129 at 129.
\item Huntington, supra note 20 at 39.
\item Alkoby, supra note 180 at 57.
\end{enumerate}
\end{footnotesize}

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The project of colonial expansion in the nineteenth century was advanced on behalf of the “international community,” for “the redemption of mankind,” and “by reference to the interest of the whole.” Shortly after it was founded in 1873, the Institut de droit international began a lobbying campaign to hold a conference on African affairs in order to prevent colonial conflicts from truncating this civilizing mission and would, after the Berlin Conference of 1885, join Professor Frederic Martens to thank King Léopold of the Belgians: “It is without a doubt thanks to the generosity and the political genius of King Léopold that the Congo state will have a regime in full conformity with the requirements of European culture.” Judge Radhabinod Pal, an Indian Justice of the International Military Tribunal for the Far East (IMTFE), commonly known as the Tokyo War Crimes Trial, in his dissenting opinion questioned the World War II victorious Allied powers’ claim that the trial of the Japanese defendants was on behalf of the “international community” or “civilization.” He saw the trial simply as a case of unilateral “formalized

348 S. N. Roy, “Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?” (1961) 55 Am J Int’l L 863 at 866 (“The history of the establishment and consolidation of empires overseas by some of the members of the old international community and of the acquisition therein of vast economic interests by their nationals teems with instances of total disregard of all ethical considerations. A strange irony of fate now compels those very members of the community of nations on the ebb tide of their imperial power to hold up principles of morality as shields against the liquidation of interests acquired and held by an abuse of international intercourse”).


vengeance” conducted by a “European club, not the international community the formation of which, he argued, is, at best, “an aspirational ideal with unrealized prerequisites.” For him, the entire trial was politically motivated and that it was defeat, rather than aggression that was criminalized: “it does not quite comply with the idea of international justice that only the vanquished states are obliged to surrender their own subjects to the jurisdiction of an international tribunal for the punishment of war crimes . . . . It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness; but one thing the victor cannot give to the vanquished is justice.”

A doctrinal examination of the Tokyo war crimes trial, as well as its progenitor – the Nuremberg trial – lends credence to Pal’s outburst. The invocation of universal jurisdiction by World War II tribunals as the basis for extraterritorial jurisdiction represents one of greatest transformations of norm creation in international law. The trials of the defeated Germans and Japanese for, among others, the “crime against peace” (crime of aggression), “crimes against humanity” and “a common plan or conspiracy to commit” those crimes was without precedents and unknown to international law. Jackson conceded this much in his opening statement, but called for a dynamic interpretation of international law in order to meet new challenges:

It is true, of course, that we have no judicial precedent for the Charter. . . . every custom has its origin in some single act, and every agreement has to be initiated by the action of some

state. Unless we are prepared to abandon ever principle of growth of international law, we cannot deny that our own day has the right to institute custom and to conclude agreement that will themselves become sources of a newer and strengthened international law. International law is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority. . . . It grows, as did the common law, through decisions reached from time to time in adapting settled principles to new reality. 357

Until these trials, it was inconceivable that inter-state war could be a subject to criminal prosecution since war was generally viewed as an essentially political act. 358 Lord Bingham captured this in R. v. Jones thus: “it may, I think be doubtful whether such wars [talking about wars of aggression] were recognized in customary international law as a crime when the 20th Century began.” 359 Based on a survey, Quincy Wright concluded that the pre-twentieth-century position on war was that of “. . . an event, the origin of which is outside of international law.” 360 Yet, according to the International Military Tribunal’s (IMT) Charter as well as the reasoning of the Tribunal itself, aggression was viewed as the “crime of crimes” and one containing the “accumulated evil of the whole” or as Robert Jackson described it, “the crime which comprehends all other lesser crimes.” 361

Opinions have sharply divided on the legality of these trials. Some have argued that there was no basis under the positivist international law for these charges and that the charges constituted a violation of customary international law prohibition against ex post facto

357 International Military Tribunal, Opening Statement; Justice Jackson’s Report to the President on Atrocities and War Crimes, 7 June 1945, 2 IMT 98 (1947).
358 Gerry Simpson, supra note 354 at 142.
360 Quincy Wright, “The Outlawry of War” (1925) 19 AJIL 76 at 76.
enactments – the principle of *nullum crimen sine lege*.\(^{363}\) In fact, the British and French officials privately questioned the validity of the charge of the crime against peace with many academics expressing similar concerns.\(^ {364}\) In their objection to the trial which the Tribunal rejected, the defendants in the Nuremberg trial – the Nazis – raised this principle, arguing that they could not be prosecuted for acts which were not illegal or criminal at the time of their commission and that “they were the victims of legislative vindictiveness.”\(^ {365}\) Some, on the other hand, have argued that the *ex post facto* prohibition only applies to domestic field, not international system, “for the simple reason that international law has no legislature to pass statutes defining acts as criminal.”\(^ {366}\) The strongest defence of the Nuremberg is one that appeals to natural law – to the idea of “international morality.” In *R. v. Finta*,\(^ {367}\) one of the issues before the Canadian Supreme Court was whether Finta could be prosecuted for war crimes and crimes against humanity under the Canadian Criminal Code without violating the *nullum crimen sine lege* principle, given that the alleged acts occurred long before the legislation. He was charged for his role in the process of “de-jewification” of Szeged in 1944 pursuant to the “Baky Order” of the Hungarian Ministry of the Interior.\(^ {368}\) In the majority Opinion, Justice Cory avoided arguing that the crimes with which Finta was charged were crimes under international law at the time of commission, having conceded that international law did not prohibit those crimes on individual basis before World War II. He nevertheless


\(^{364}\) Sellars, *supra* note 356 at 1089.


\(^{366}\) *Ibid*.

\(^{367}\) *R. v. Finta*(1994) 1 S C R 701.

\(^{368}\) The “Baky Order” involved several processes all which were designed to isolate the Jews, expropriate their properties and move them to another place called Auschwitz-Birkenau. See David Matas, “The Case of Imre Finta” (1994) 43 Univ New Brunswick L J 281.
concluded that *ex post facto* prohibition was trumped by a higher principle of morality.\(^{369}\) In support of his conclusion, Cory cited the writings of Kelsen and Georg Schwarzenberg. According to Kelsen, both the Nuremberg and Tokyo Charters “created a new law, an exception to the prohibition on *ex post facto* laws.”\(^{370}\) While conceding that prohibition against retroactivity is to ensure justice, he argued that the principle of justice is not a one-way traffic but also required the punishment of the accused persons who knew the “immoral character” of their conducts. Kelsen marshaled his argument thus: “justice required the punishment of these men, in spite of the fact that under positive law they were not punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* law, open to so many exceptions.\(^{371}\)

Other supporters have endorsed this position, arguing that the Charter “codified pre-existing norms, either those of developing international custom or general principle of law.”\(^{372}\) Along the same line, one writer has argued that the legality of the trials derived from natural law, since the crimes for which the accused were prosecuted, though not part of positive law, constituted a violation of higher moral principles.\(^{373}\) Vladimir-Djuro Degan argued that the

\(^{369}\) *R. v. Finta*, *supra* note 367 at 870-74.


\(^{371}\) Ibid.


Nuremberg trials exposed the inadequacy of the positivist international law rather than being “acts of arbitrariness or revenge against the defeated enemy.” For him, the crimes which were committed during the war “have proved the simple fact that beyond and above a set of legal rules which were consented by a particular state, there still exist at least some superior principles of what the Court called – moral law [which] are recognized by civilized nations as binding on all states. . . without any conventional obligation.” After all, International law, a writer argued, is not meant to be a product of statutes but “the gradual expression, case by case, of the moral judgments of the civilized world.” Thus, the consequences of an application of *ex post facto* principle to international law, they warned, would be enormous.

As Kobrick stated thus:

> To apply the *ex post facto* prohibition to a common-law decision of an international tribunal would substantially hinder society's efforts to respond to the exigencies of changing conditions. Since there is no governmental body authorized to enact substantive rules of international law, the only way such law can grow is through judicial decision, treaties and

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> The origins of the Convention show that it was the intention of the United Nations to Condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. . . The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required “in order to liberate mankind from such an odious scourge” (Preamble to the Convention). . .


conventions widely accepted by nations. To apply the ex post facto prohibition to any of these sources would cripple the development of international law.\textsuperscript{376}

Sacrificing a rule of positive international law on the altar of an amorphous international morality, though, sometimes, advances the course of justice,\textsuperscript{377} presents real and substantial danger. While this is explored shortly, suffice it to say that the degree of depravity or fundamental inhumanity necessary to elevate certain acts to the status of international crime subject to universal jurisdiction does not unusually lend itself to precision.\textsuperscript{378} Furthermore, this absence of precision makes it susceptible to abuse as it “could justify prosecution even for acts that are universally recognized as being legal at the time of their commission.”\textsuperscript{379}

Sheldon Glueck’s wouldn’t adopt Kobrick’s naturalist perspective – legal philosophy whose influence on international law, by the way, ceased from the beginning of the nineteenth century – in his justification of the trials, preferring instead to rally positivist international law in support of his defence of the trial. According to him, in relation to the crime of aggression specifically, there were a good number of pre-trial international instruments that could be “regarded as powerful evidence of the existence of a widely prevalent custom among civilized peoples sufficient to energize a juristic climate favourable to the regarding of a war of aggression as . . . downright criminal.”\textsuperscript{380} There is nothing original about Gluek’s

\textsuperscript{376}Kobrick, supra note 365 at 1533.
\textsuperscript{377}Admittedly, strict reliance on positive legal rules could also lead to unjust outcome, hence the emergence of equitable principles to mitigate their harsh effect. Furthermore, some rules of international law are known to have adversely affected the Third World, such as those that legitimized apartheid and colonialism.\textsuperscript{378} Slaughter, supra note 370 at 175.
\textsuperscript{379}Ibid at 177.
\textsuperscript{380}Sheldon Glueck, The Nuremberg Trial and Aggressive War (New York: Alfred A. Knopf, 1946) 34. The instruments cited by are the 1923 draft Treaty of Mutual Assistance, the 1924 Geneva Protocol, the 1927 Eight League Assembly resolution and the 1928 Kellogg-Briand Pact.
positivist’s justification of the trial. The Nuremberg Tribunal was the first to adopt this line of argument. It justified every crime with which the accused were charge by citing treaty provisions. As it related to war crimes, it accepted the argument that the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land\textsuperscript{381} was declaratory of existing CIL.\textsuperscript{382} In relations to crimes against peace, without citing any state practice other than Germany with other few countries being signatories, the Nuremberg tribunal, for instance, referred to the provisions of the Hague Rules of Land Warfare of 1907, the General Treaty for the Renunciation of War,\textsuperscript{383} popularly known as the Kellogg-Briand Pact or the Pact of Paris, of 1928, and the Geneva Conventions of 1929, as being “declaratory of the laws and customs of war.”\textsuperscript{384}

But these assertions beg a number of questions, not the least of which is the evidence of state practice and \textit{opinio juris} to justify the argument that the crime of aggression had risen to the status of CIL prior to the trials. The Tribunal did not make any effort to make explain the point at which this crime was elevated to the status of CIL except to refer to a few instruments that deals with violation of peace.\textsuperscript{385} What is more, other than the 1907 Hague Convention (IV), none of the instruments relied on by the tribunal was legally binding.\textsuperscript{386} As Anthony D’Amato pointed out, “[i]t strains credulity to suppose that state practice had

\textsuperscript{381}Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, 1 Bevans 631.
\textsuperscript{382}Nuremberg Judgment (1946), Cmd. 6964, at 64.
\textsuperscript{383}General Treaty for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 LNTS 57.
\textsuperscript{384}Anthony J. Colangelo, “The Legal Limits of Universal Jurisdiction” (2006-2007) 47 Va J Int’l L 149 at 170
\textsuperscript{385}Arajärvi, \textit{supra} note 372 at 40.
\textsuperscript{386}\textit{Ibid.}
become so detailed by 1939 – particularly between 1929, the date of the Geneva Convention, and 1939! – that the conventions were merely ‘declaratory’ of such practice.”\textsuperscript{387} George Finch questioned the idea that custom could be established by merely “placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, [or] by citing ungrati
tfied protocols or public and private resolutions of no legal effect.”\textsuperscript{388} Judith Shklar described the Tribunal’s jurisdiction as being “buil[t] on the fiction of positive international law envisaged as analogous in its formal structure to the legalistic image of municipal law in matured system.”\textsuperscript{389} It should be noted that it was not until in 2010 that the international community criminalized the crime of aggression, having failed to do so during the earlier negotiation for the creation of International Criminal Court due to disagreement about its proper definition.\textsuperscript{390}

Thus, without a clear doctrinal basis under the dominant positivist international law creation mechanism to justify both the Nuremberg and the Tokyo trials, the Allied had to find a creative solution to the problem. What emerged was the idea of the existence of an international community against which an aggression was perpetrated and “whose existence and fundamental mores had been threatened by German and Japanese ‘aggression.”\textsuperscript{391} Robert Jackson, after conceding that the Germans had not violated any treaty obligation

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\item \textsuperscript{387} D’Amato, \textit{supra} note 140 at 123.
\item \textsuperscript{388} Sheldon Glueck, Book Review of \textit{The Nuremberg Trial and Aggressive War} by George Finch (1947) 41 AJIL 334 at 334 .
\item \textsuperscript{390} Resolution RC/Res.6 of the Review Conference of the Rome Statute (2010), C.N. 651, 2010.
\item \textsuperscript{391} Simpson, \textit{supra} note 342 at 148.
\end{itemize}
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owned to the United States, claimed that the Nazi war constituted a war of aggression: “... an illegitimate attack on the international peace and order.”\textsuperscript{392} The same was also true of the Tokyo court which found no precedents for its judgment except to assert that “... the conspiracy to wage was already criminal in the highest degree.”\textsuperscript{393} Crimes against humanity specifically were included in the charge to cover the Nazis’ atrocities against their own people but this was in the context of the over-arching crime of aggression, which meant that the jurisdiction of the Tribunal in relation to the crime became subservient to proof that the crime was actually committed in connection with the crime of aggression.\textsuperscript{394} The reason for this extra layer of requirement was, as conceded by Robert Jackson, “to avoid scrutiny of Allied practices either in the colonies or in the southern states of the United States.”\textsuperscript{395} The same creativity was applied in the formulation of the crime of aggression which threatened to upend the sovereign prerogative of the powerful states to wage war, if necessary, against recalcitrant colonies. Realizing the potential for future litigations against them for their various acts of aggression in the Third World, the Allies “develop[ed] the crime in a way that made it highly specific to the Nazi State,” by including conspiracy as an element of the offense. Thus “the crime of aggression was reworked into a norm applicable to states captured by a vicious cabal of conspirators intent on regional or global domination.”\textsuperscript{396} As Kingsley Moghalu put it, “[t]he Nuremberg judgment, insofar as it relates to aggressive war,

\textsuperscript{392}London Conference on Military Trials, cited Ibid.
\textsuperscript{393}Ibid.
\textsuperscript{394}Ibid at 145.
\textsuperscript{395}Ibid.
\textsuperscript{396}Ibid at 149; See also Claire Nielsen, “From Nuremberg to the Hague: The Civilising Mission of International Criminal Law” (2008) 14 Auckland Univ L Rev 81 at 93 (“the linking of crimes against humanity and war crimes to international crime of aggressive war in the London Charter served to confine those crimes to instances where there was an international war of aggression)
can now be seen as an attempt to turn a policy or aspiratory declaration into the force of law, because the Allied Powers could.”

It is submitted that the idea of an “international community” in 1945 against whom a crime of aggression could have been committed by the Nazis is misleading and appears to have been a subterfuge by the Allied to overcome some serious doctrinal problems with the charges, one of which was the principle of *nullum crimen sine lege*. Bert Röling, one of the judges at the Tokyo trial, argues that in this period, international community was nonexistent, given the absence of “shared moral purpose, cultural affinity and political direction necessary to the criminalization of sovereign behaviour.” This is especially evidence when one considers the selective nature of the trial and the IMT Charter’s selective focus on “the major war criminals of the European Axis.” Various described as “victors’ justice”, “disguised vengeance” or “collective vengeance,” the four victorious allied nations – the United States, the United Kingdom, the Soviet Union, and France – even as they subjected the defeated Germans to trial, did not face prosecution for war crimes, which they clearly committed during the war, such as the bombing of cities with civilian casualties, including the use of atomic bomb in the Japanese cities of both Hiroshima and Nagasaki. In a letter addressed to President Truman of the United States, Robert Jackson, the chief U.S. prosecutor at the Nuremberg trial said: “the Allies have done or are doing some of the very things we are

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400 Moghalu, *supra* note 397 at 14.
prosecuting the Germans for. The French are so violating the Geneva Convention in the
treatment of prisoners of war that our command is taking back prisoners sent to them (for
reconstruction work). We are prosecuting plunder and our Allies are practising it. We say
aggressive war is a crime and one of our allies asserts sovereignty over the Baltic State based
on no title except conquest.” 401 Worried about the selective nature of the Nuremberg trial, the
British alternate judge, Norman Birkett, after judgment was handed down declared that, “If it
[the Nuremberg Charter] continues to apply only to the enemy, then I think the verdict of
history may be against Nuremberg.” 402

And so, although the legal solidity of Pal’s opinion remains subject to debate, perhaps, one of
his most remarkable insights was to expose international law and the concept of the
international community both as an instrument for the maintenance of the existing power
imbalance between the West and the Third World, and as a tool of imperialism. What was on
trial before the Tribunal, he argued, was not “civilization” as Jackson had said at the
Nuremberg, but the right of the colonized Third World people to exercise their right to self-
determination through war, if needed. According to Simpson, “the deepening juridification of
war was intended to remove armed struggle from the repertoire of ant-colonial, anti-Western
political movement and states.” 403 Japan’s crime, Pal argued, was to have had the audacity to
launch a colonial aggression against another state – an act which, at the time, was not only

402 Norman Birkett, “International Legal Theories Evolved at Nuremberg” in Guénaël Mettraux, ed,
Perspectives on the Nuremberg Trial (Oxford: Oxford University Press, 2008) 307
403 Simpson, supra note 354 at 147.
legal under international law, but was also one of which even the Allied states were equally guilty. This, for him, was the height of imperial hypocrisy.\textsuperscript{404} 

The establishment of the United Nations in 1945, among other things, was meant to transform the concept of international community from its abstraction (and concomitant vulnerability to abuse as the Nuremberg and Tokyo trials showed) by providing an empirical means of verifiability. On coming into existence and with the subsequent expansion in its membership following the independence of Third World states, the UN, (its General Assembly especially) became the true representative and spokesperson of “international community.” One of the most significant implications of this membership is that of sovereign equality of all states and there equal power to participate in every issues, including the creation of legal obligations. To speak for the international community, therefore, connotes the existence of a mandate reflecting, at least, the consensus of the majority of member states on the issue. But like the Nuremberg as well as the Tokyo trial experiences, this idea of international community has remain largely an instrument of power due to the actions of the United States and other Western states. After all, it was Condoleezza Rice, former US Secretary of State, who asserted that “foreign policy of [the US Government] will most certainly . . . proceed from the firm ground of the national interest, not from the interests of an illusory international community.”\textsuperscript{405} Among others, the most striking example is the Kosovo intervention of 1999 by the North Atlantic Treaty Organization (NATO) led by the US. Despite its failure to secure the authorization of the UN, NATO states claimed to act in

\textsuperscript{404}Ibid.  
\textsuperscript{405}Condoleezza Rice, “Promoting the National Interest” (2000) 79 Foreign Aff 45 at 46.
the interest and on behalf of the “international community.” Predictably, this claim trouble many, including India’s permanent representative at the UN, Kamlesh Sharma, who challenged that assumption thus:

Those who continue to attack the Federal Republic of Yugoslavia profess to do so on behalf of the international community and on pressing humanitarian grounds. They say that they are acting in the name of humanity. Very few members of the international community have spoken in this debate, but even among those who have, NATO would have noticed that China, Russia and India have all opposed the violence that it has unleashed. The international community can hardly be said to have endorsed their actions when already representatives of half of humanity have said they do not agree with what they have done.

Like Pal, Sharma did not only raise the issue of the hypocrisy of the West, but emphasized the primacy of democratic representative pronouncements as the only way to guarantee the legitimacy and support of the “international community.”

The importance of the above discussion, in the context of the chapter’s over-arching critique of universal jurisdiction, is less about an examination of the contested concept of unilateral


408Paulus, supra note 318 at 59.
intervention and more about a demonstration of fundamental schism and abuse which saturate the use of the concept of “international community.” Despite the concept’s theoretical promise of “a new global home, a worldwide village of human communality emphasizing interpersonal bonds more than territorial borders,” it has also become an instrument for the exclusion of others and of “divi[sion] of human society into two camps – the trustees of the immanent community of mankind and those who stand in its way . . ., the liberators and the oppressed.”

According to Simpson, “[t]he creation of an international community required identification of groups and states outside this community.” The designation of certain states as “outlaw,” “rogue” or “axis of evil” by the West, on behalf of the “international community” is another example of this manifestation. Thus, “international community” is defined in an exclusive term: “the usage of the term ‘international community,’ today, is often employed either for the purpose of identifying . . . transnational members of the purported community or to dissociate a miscreant – usually a government official – from membership in the ‘community.’”

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409 *Ibid* at 58.


411 Simpson, *supra* note 342 at 142. Paulus captures this even better thus: “[international] community is not possible without exclusion and suppression of ‘the other.’ The exclusion of others is as much the part of [an international] community concept as it is their inclusion. Thus, [international] community may be used as an ideological construct for the maintenance of structures of power, excluding the ‘other,’ the marginal, the different.” See Paulus, *supra* note 306 at 75.

412 This group currently consists of Iraq, Libya, North Korea, Cuba, Iran, Pakistan, Afghanistan and Venezuela. See “United States President’s State of the Union Address of 29 January 2002,” *New York Times*, 30 Jan. 2002, 22. Many writers have defended this exclusion on so many grounds. Fernando Tesón, for instance, argued that it would be wrong to include states that are not liberal as part of the international community. See Fernando Tesón, “Kantian International Liberalism” in David R. Mapel & Terry Nardin, eds. *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998) 109.

413 Chibundu, *supra* note 200 at 149.
Therefore, one of the collateral consequences of vesting the power to determine what constitutes *jus cogens* norm on the “international community” – community whose shape and identity has remained unclear and ill-defined – is that powerful states enjoy wide discretion to determine what these norms are and “what the ‘international community’ desires.”\(^{414}\) Carl Schmitt once expressed dismay that “one of the most important phenomena in the legal and intellectual life of humanity as a whole [is] that he that has real power is also able to define concepts and words.”\(^{415}\)

E. CONCLUSION

The ongoing expansion of universal jurisdiction rests on a normative bipod – of CIL and *jus cogens*. Until the mid-twentieth century, specifically the Nuremberg trial, CIL was the only source of crimes subject to universal jurisdiction with piracy universally accepted by both jurists and scholars as the sole crime in this category.\(^{416}\) Consistent with the positivist jurisprudence of the nineteenth century, a rule of CIL could only emerge if there is evidence of states practice and *opinio juris* in support of such a rule, with the method of such inquiry being decidedly inductive. This is not surprising, given the centrality of the concept of jurisdiction to the sovereignty of states as well as its fundamentality to the functioning of the sovereignty-based global order. Insistence on the consent of states as a pre-condition for the emergence of this specie of crimes was, therefore, both a recognition of the consequences of


universal jurisdiction on state sovereignty/inter-state relations and also the need to prevent jurisdictional “ambush tactics” or “snake bite,” since the law itself abhors surprises. In short, although states agreed that the principle of sovereignty could be violated for good under certain circumstances, there was an acknowledgement that in order to prevent abuse, such circumstances must be consented to by, at the minimum, the preponderance of the majority of states.\footnote{B. S. Chimni, “Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective” in Charlesworth Hilary & Jean-Marc Coicaud, eds. Fault Lines of International Legitimacy (Cambridge: Cambridge University Press, 2010) 305 at 307.}

Then came the Nuremberg trial. The victorious Allied powers’ desire to prosecute the vanquished Nazis for crimes committed during World War II met a serious jurisdictional roadblock. There was grave question and legitimate objection to the legality of the trial on the ground that the crimes in respect of which the Nazis were charged were unknown to international law. In other words, the question was whether there was evidence of states practice and \textit{opinio juris} in support of the international criminalization of the conduct of Germans. Without this proof, the trial would be a violation of the principle of \textit{nullum crimen sine lege} – a rule of CIL that prohibits criminal prosecution for a conduct that was not a crime at the time of commission.

It was, therefore, in an attempt to overcome this problem that the Allied sought for a creative solution – one that ultimately upended inductivism and in its place inaugurated (or rather re-introduced) a new regime of approach to normative inquiry – of deductivism. In a tacit concession, the Tribunal made no effort to debunk the percolating assertions of lack of CIL
support for the crimes, through an inductive exposition of states practices. Instead, the Allied invoked the concept of “civilisation” or the idea of the “morality” of the “international community,” relying on the very natural law jurisprudence that international law had discredited over a century earlier. This is today encapsulated in the concept of *jus cogens* in Art 53 of the Vienna Convention of 1957 and is also the bedrock of ongoing expansion of universal jurisdiction. As was discussed above, both the ICTY and ICTR have relied on this Nuremberg precedent to expand international crimes.\(^418\) Therefore, in addition to the issue of victor’s justice highlighted above, the exclusion of the crimes of the Allied Powers, and the *ex post facto* violation, the Nuremberg embodies some of the wrong lessons of universal jurisdiction claim.

Furthermore, as seductive as the idea of “international morality” for the purpose of universal jurisdiction is, some unanswered fundamental questions still remain. One key flaw is the assumption that a global consensus on normative principles as well as when and how such principles should be enforced can be universally presumed.\(^419\) Intertwined within this is an attempt to minimize the consideration of power and downplay the contested nature of international norms.\(^420\) It is against this backdrop that this chapter questions most of the crimes purportedly subject to universal jurisdiction, particularly those the universal jurisdiction status of which is based on the so-called “conscience” or “morality” of the “international community” as opposed to being empirically extracted from states practice. By

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\(^{418}\)See for instance the Tadić case where it blurred the CIL distinction between International and internal conflict without any proof states practice.


\(^{420}\)Ibid at 49.
extension, this includes attempt by some to treat treaty-based “international crimes” as though they are binding on non-state parties. A good example is the Princeton Principles of Universal Jurisdiction, a document drafted by renowned scholars and leading jurists around the world purporting to be the authoritative declaration of the content, nature and scope of universal jurisdiction. According to the Principle, universal jurisdiction could be exercise over the crimes of Piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture, and enjoined states to invoke it “even if their national legislation does not specifically provide for it.”

To be sure, the argument is not that “international morality” or jus cogens is not an ideal worth pursuing. Rather, it is submitted that the “profound transformations of the international community since the Vienna Convention cannot [has failed to] have an impact on the regime of jus cogens, which is, according to the Convention, created by the recognition of the "international community of States as a whole." Jus cogens, as an ideal, can only be pursued effectively and legitimately through the right process of international law-making that is reflective of the changed complexion of the international community following the independence of Third World states. It was Andreas Paulus who had warned that in the absence of procedure for determining its content,

the powerful players of the system - led by the single superpower - will take matters in their hand and use international hierarchies for the benefit of their perception of community interests through the lens of their own interests, of course. In this alternative, non-institutionalized legal categories such as jus cogens may play a role in the justification of

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superpower intervention, with all the dangers of abuse such unilateral and unchecked application of legal principles by a single actor or group of actors entails.\textsuperscript{423}

Furthermore, morality, without more, cannot take the place of international law unless there is evidence of overwhelming consensus among members of the international community of states.\textsuperscript{424} After all, international law’s legitimacy and legality rest not only on its normative content but also on process in which states are “engag[ed] in the process of democratic dialogue.”\textsuperscript{425} The ICJ described this process as one in which participation of state members of the international community is “very widespread and representative,”\textsuperscript{426} since “it is precisely the core of democracy and human rights that forbids their unilateral realization at gunpoint.”\textsuperscript{427} Habermas argued that “there is no sensible alternative to the development of international law into a cosmopolitan order that offers an equal and reciprocal hearing for the voices of all those affected.”\textsuperscript{428}

If anything, development in international law especially in the aftermath of the terrorist attacks on the United States on September 11, 2001, highlights the susceptibility of this communitarian concept to abuse. The reactions of the United States – a nation notoriously known for demanding strict compliance with rules of international law from others but not willing to be bound by the same rules – have upended the basic assumption underlying \textit{jus}

\begin{thebibliography}{99}
\bibitem{423} \textit{Ibid} at 331.
\bibitem{424} Chimni, \textit{supra} note 417 at 307.
\bibitem{426} North Sea Continental Shelf Cases (1969) ICJ Report 42. See also James Gathii Thuo, “Assessing Claims of a New Doctrine of Pre-emptive War under the Doctrine of Sources” (2005) 43 Osgoode Hall LJ 67 at 67-103.
\bibitem{427} \textit{Ibid} at 25.
\end{thebibliography}
cogens, which is the idea that in spite of the enormous divergence of interests and values, “there is something like an international community with a minimum convergence of interests and values.” Propelled by the claim that the said attack was something “new” or “transformative” in global history, it argued that the existing legal paradigm of international law was ill-equipped to deal with the situation. For the United States and many sympathetic scholars, therefore, fundamental international principles such as the absolute ban on the practice of torture; the prohibition of the unilateral use of force by states, established by article 2(4) of the Charter of the United Nations (the UN Charter); and the ban on pre-emptive strikes were inapplicable. Within this newness logic also, some have called for the elevation of the crime of terrorism to the status of universal jurisdiction crime.

But while the 9/11 terrorist attack on US, by all account, was egregious, the proposition that it was so significantly new as to justify the suggested changes in international law including the assertion of universal jurisdiction lacks credibility and smacks of politics on the part of those who are desperate for radical change in international law enforcement. It is argued that, contrary to the assertion of the US and some scholars, when situated within the context of

\[^{429}\text{Paulus, supra note 399 at 299.}\]
\[^{430}\text{Thomas Franck, for instance, argued that any “adjustments in applicable domestic and international law [relating to the combating of the al-Qaeda threat] ... must begin with the assumption that terrorism, as currently practiced, does constitute a new phenomenon: one to which traditional constitutional and international legal constraints may not be wholly responsive.” See Thomas . Franck, “Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror” (2004) 98 AJIL 686 at 688. Calling it a “megaterrorism,” Richard Falk described it as “a unique challenge, differing from earlier expressions of global terrorism, by magnitude, scope, and ideology, representing a serious effort to transform world order as a whole, and not merely change the power structure of one or more sovereign states.” See Richard A. Falk, The Great TerrorWar (New York: Olive Branch Press, 2003) 39. For an indebt analysis of this “newness theory,” see Igwe, supra note 104.}\]
broader global violence, particularly those inflicted on the Third World through colonialism, the 9/11 attack is not so “significantly new” as to justify these proposed change. Okafor captured this graphically thus:

only by discounting (quite heavily in many cases) the broadly shared historical experiences of many “third-world” peoples can the 9/11 attacks be seen as inaugural of a world order that is so significantly new or different as to necessitate the retrenchment or severe weakening of fundamental international law norms. By placing a single country’s experience in the foreground, and the experience of the vast majority of the world in the background, a particular picture of the world is constructed; one that furthers a particular kind of political project . . . [I]t is through the subtle displacement of third-world suffering from internationalist consciousness that the construction of this "post-9/11" world as a significantly new world order has been made possible.433

In other words, while great powers’ violence on Third World states are often viewed as not “transformative” enough to warrant changes in international law, similar violence on them produces the opposite effect and, in the process, universalizing the particular and ensuring that “particular enemies become enemies of mankind.” In this case, “[their] enemies [automatically] become enemies of mankind.”434

Therefore, when considering the current practice, there is a sense, especially among many Third World states, that “international legal rules, including those purportedly subject to universal jurisdiction are frequently formed, applied, and changed without such development being the will of all the states concerned.”435The democratic deficit and the concomitant illegitimacy of the current regime of CIL was captured by a US court thus:

This notion that professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or

433 Okafor, supra note 431 at 173.
434 Simpson, supra note 354 at 175
national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent? may not be unique, but it is certainly without merit. Put simply, and despite protestations to the contrary by some scholars (or "publicists" or "jurists"), a statement by the most highly qualified scholars that international law is x cannot trump evidence that the treaty practice or customary practices of States is otherwise, much less trump a statute or constitutional provision of the United States at variance with x. This is only to emphasize the point that scholars do not make law, and that it would be profoundly inconsistent with the law-making processes within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law. In a system governed by the rule of law, no private person? or group of men and women such as comprise the body of international law scholars? creates the law. Accordingly, instead of relying primarily on the works of scholars for a statement of customary international law, we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.436

Since the Nuremberg and following the end of colonialism with the concomitant independence of Third World states, participation in the creation of international norms, has continued to shift away from the most inclusive and open international arena, such as the UN General Assembly, to the exclusive alliance of global powers.437 The use of such words as “international community,” “international custom,” and jus cogens to justify the exercise of universal jurisdiction is increasingly becoming “a normative myth masking power arrangement.”438 The use of these slogans have ensured that the illusion of the legislative power of the General Assembly, where numbers would have counted in favour of the Third world, is real and that the relative power of powerful Western nations threatened by the rapid expansion of the membership of the international community since the late twentieth century remains intact.439

437 Reisman, supra note 190 at 135.
438 Christenson, supra note 268 at 590.
439 Reisman, supra note 190 at 137 and 143.
Furthermore, in this era of expanded international community, both CIL and *jus cogens* have become too indeterminate and unstable to ground any assertion of universal jurisdiction and overcome a charge of retroactivity. It was exactly for this reason that the British House of Lords in the Pinochet case, despite its mouthed claim of universal jurisdiction, refused to rely on CIL, invoking, instead, the Torture Convention to which all the parties to the case were signatory. Only one judge was willing to hold that torture was a crime known to British law prior to the incorporation of the Convention on ground of CIL.\(^440\) As another proof of their ambivalence, they examined the double criminality principle under the Extradition Act and found that the act was a crime under the domestic regime at the time it was committed and not at the time of extradition, thus confirming prohibition against retroactivity\(^441\) and rejecting, by extension, *jus cogens* claim. The same reasoning was also applied both in the Australian case of *Nulyarimma v. Thompson*\(^442\) and the Senegalese case of *Hisène Habré*,\(^443\) where the courts refused to recognize universal jurisdiction where the domestic law is silent on the crime or in the absence of express incorporation of the relevant international treaty.

Therefore, in the light of many uncertainties concerning the question of “who will identify the fundamental values [of the international community] and by what process,”\(^444\) the ongoing characterization of norms as peremptory and subject to universal jurisdiction without a meticulous consideration of whether or not such characterization will remain


\(^{441}\) Slaughter, supra note 370 at 178.


consistent with the overwhelming consensus of the international community undermines the legitimacy of *jus cogens*, reducing its advocates to doctrinal magicians.\textsuperscript{445} Universal jurisdiction, too, becomes, as President Guillaume stated, “arbitrary for the benefit of the powerful, purportedly acting as agents for an ill-defined ‘international community.’”\textsuperscript{446}

\begin{flushright}
\textsuperscript{445} Bianchi, *supra* note 315 at 507 & 508.  
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Chapter 5: Beyond Legalism: Examining the Politics and Political Consequences of Universal Jurisdiction

[If universal jurisdiction] could be asserted vis-à-vis a state, potentially undesirable consequences are evident. The threat to international peace and stability could be of grave significance if a state whose interests have not been directly infringed sought to punish a state which authorised an act of piracy. . . . After balancing the threat of state violence against the danger to international peace from the allowing universal jurisdiction against the offending states, it is reasonable to opt for the rule that state acts will not be within the definition of piracy.¹

A. INTRODUCTION

The uncertainty surrounding universal jurisdiction’s legality is not the only fundamental problem that has bedeviled the principle and fueled opposition. Beyond this ambit of concern, the principle also “looms large in international world of politics, as a central doctrine of international criminal law.”² Concomitant with the prospect of states prosecuting suspects for crimes in respect of which there is no national link are the political and practical problems associated with the exercise of such power. In his highly cited piece on the subject published in 2001, Henry Kissinger warned that enforcement of international human rights through universal jurisdiction runs the risk of “substituting the tyranny of judges for that of governments [since] historically, the dictatorship of the virtuous has often led to inquisitions

and even witch-hunts.”3 In the same vein, Cherif Bassiouni, one of the doctrines’ leading advocates warned thus:

Universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of the international legal processes. If that were the case, it would produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and work denial of justice. In addition, there is the danger that universal jurisdiction may be perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations.4

But for decades, the political cost of universal jurisdiction was largely opaque, even as the predictions of its skeptics seemed implausible. The reason for this is a combination of two factors: the relatively slow growth in the principle’s application, and the fact that most prosecutions, in exercise of the principle, were principally undertaken by Western countries against offenders in Third World countries.5 It was only after the Pinochet case that the political consequences of universal jurisdiction assumed greater prominence. But even then, the dominant concern was largely Eurocentric in nature: the potential for a criminal charge being brought “in a state where . . . the government is authoritarian and intensely anti-Western,” as opposed to the Pinochet litigation which “occurred within European Union countries – that is, within legal systems with strong credentials of constitutionalism, judicial independence, shared democratic values, and a common geopolitical outlook.”6 Along the same line, Goldsmith and Krasner warned that “as weaker countries realize that universal jurisdiction can be a tool for creating political mischief on the international stage, especially

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against more powerful countries, such prosecutions will increase.”  

It was, however, not until 2003, following Belgium’s attempt to prosecute some Israeli and United States government officials for international crimes in exercise of universal jurisdiction, that many realized that even in the figurative jungle of the “civilized,” there is no guarantee of immunity from the so-called “political mischief.”

This chapter examines the broader political implications of universal jurisdiction, with special focus on its consequences on conflict resolution, particularly in Africa. At the heart of this chapter are three key arguments. First, at the level of global politics, universal jurisdiction could wreak chaos in diplomatic relations among nations, principally at a time when state actions are increasingly being dictated by national interest and politics. The progressive fragmentation of the world into legitimate and rogue states, exacerbated by the ongoing “war on terror”, heightens the possibility of universal jurisdiction being used as a weapon to settle political scores. Related to this is the potential for inter-state jurisdictional conflicts and struggle for judicial supremacy among states. For instance, imagine what would have happened if, following the Sept 11, 2001 attack on the U.S., several countries had sought jurisdiction over the same terrorists wanted by the U.S. solely on grounds of universal jurisdiction. While such a robust enforcement interest might not necessarily be a bad thing, it can hardly be argued that the United States would have rejected any request to prosecute by a so-called rogue or “undemocratic” nation on ground of lack of judicial independence or

7 Goldsmith & Krasner, supra note 5 at 52.
9 Ibid at 421.
institutional ability. It is argued that in a situation of competing prosecutorial interests among nations, little weight would be attached to any request made by a Third World state.

Second, there is a compelling claim to be made about power imbalances in the exercise of universal jurisdiction and the vulnerability of Third World states to its exercise by powerful states. For instance, one important lesson from Belgium’s experience is an understanding of the enormous power which some select states wield on the international plane, how disadvantaged others, especially from the Third World, are in this regards, and how these powerful states leverage this power to bend the arc of international law to their maximum favour. Belgium’s botched attempts to prosecute some former officials of U.S. government as well as those of Israel for international crimes and the subsequent amendment of its laws due to political pressure underscore this point. From a Third World standpoint, therefore, one cannot but wonder whether Belgium would have been persuaded to change its law or even drop its investigations had the resistance come from the less powerful states, as it did following political pressure from some powerful nations.

Finally, the unwillingness of states exercising universal jurisdiction to consider the political consequences of their actions could undermine such indigenous approaches that can successfully facilitate conflict resolution such as peace deals and post-conflict truth commissions.\(^{10}\) The escalation of conflicts in the African region, particularly since the last century has led to the emergence of several AU-brokered peace initiatives aimed at resolving

\(^{10}\) Goldsmith & Krasner, supra note 5 at51.
regional conflicts and fostering reconciliation between parties involved. The amnesty provision usually contained in some peace deals between governments and rebel groups and those granted by Truth and Reconciliation Commissions are only but few examples. The concern therefore is that states, as opposed to the United Nations, are less likely to defer, at least temporarily, to these regional political arrangements – a situation which could potentially have an adverse implication on what could be a fragile situation, which may include an avoidable prolongation of conflicts, resulting in more deaths, destruction and human suffering.\textsuperscript{11}

It is important to state that it is not the chapter’s assertion that all amnesties or transitional agreements deserve to be accorded recognition by the international community. Without a doubt, some amnesties, particularly those that are granted to brutal regimes or rebel groups “on gun point” in exchange for cease-fire, are undeniably problematic to the overarching goal of ending gross human rights violations. This must be distinguished from those granted through a democratically established processes such as the truth and reconciliation commission or other non-retributive mechanisms highlighted above. In any event, the chapter’s concern, therefore, is that Western states that are generally intolerant to non-retributive forms accountability could deny recognition to the latter and may, in the former’s case, make it difficult for the forum state to suspend investigation into atrocities until it makes a political determination that the time is right and its own society is ready for it to

Surely, there are times when “political compromises or alternatives to prosecution may be a necessity that cannot be easily escaped.” Short of decisive military victory, consolidation of new democratic government is better served by international law that takes account of political constraint on the ground. After noting the illegality of the amnesty granted to Pinochet by the Chilean government as ransom for his departure from government, Richard Falk observed: “Arguably, in the fragile early period of the transition it was prudent to avoid challenging amnesty and the ethos of impunity, acknowledging the wisdom of President Aylwin’s pledge to pursue justice in relation to the past ‘to the extent possible’ (en la medida de lo posible). A more directive approach based on canons of universal jurisdiction would have placed the Chilean political leadership and judiciary in an untenable position of either provoking renewed military interference or repudiating the framework of inquiry and accountability embodied in international law.”

The chapter proceeds in three parts, including this introduction. Part B examines the politics of universal jurisdiction and, with concrete examples, highlights the principle’s heightened susceptibility to political manipulation. The key argument in this part is that given the existing power imbalance between the North and the South, any grant to states of the right to unilateral intervention, either judicially or otherwise, in each other’s domestic affairs will disproportionately affect the latter in a manner that would smack of judicial colonialism and,

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15 Falk, supra note 6 at 104-105.
therefore, create opposition. Part C discusses the political consequences of universal jurisdiction. Specifically, it examines the effect of the principle on peace process and post-conflict reconciliation in states that have been involved in armed conflicts. The main focus is on conflicts in the African region, and the overarching argument is that universal jurisdiction could undermine efforts to end conflicts by rejecting regional mechanisms, some of which may be of political nature, adopted in order to reach a peace deal. Part D is the conclusion.

B. ROUNding up the Usual Suspects? the Politics of Universal Jurisdiction

One of the reasons for the African Union’s (AU) opposition to universal jurisdiction is that its application by European national courts has been selective, targeting only leaders from Africa.\textsuperscript{16} Mugambi Jouet argues that one of the pitfalls of universal jurisdiction is that prosecuting states “may ignore allegations against former officials of certain ‘untouchable’ countries while targeting relatively powerless defendants.”\textsuperscript{17} Without a doubt, majority of those against whom universal jurisdiction has been successfully invoked are Africans, with the figure even more overwhelming when other non-African Third World states are brought into the mix.\textsuperscript{18} On the other hand, and as is demonstrated shortly, prosecution of nationals of Western nations for similar crimes has not been very successful, largely for fear of political repercussion from the prosecuted state. Within the last two decades, many European courts, 

\textsuperscript{17}Mugambi Jouet, “Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond” (2007) 35 Ga. J. Int’l. & Comp. L. 495 at 529.
\textsuperscript{18}Jalloh puts the figure at approximately 60, excluding ex parte indictments. See Jalloh, supra note 16 at 14.
especially those of France, Belgium, Britain, the Netherlands and Spain have instituted investigations and issued arrest warrants against several African leaders and top government officials.\(^\text{19}\) They include former heads of state, serving ministers, and administrative officials. As stated in Chapter One, the most recent example is the 2008 indictment of Rose Kabuye, Rwandan President Paul Kagame’s Chief of State Protocol, by a French investigative judge, Jean-Louis Bruguière. She was subsequently arrested by German police officers at Frankfurt airport while she was on official visit to Germany.\(^\text{20}\)

To be sure, there are a number of good reasons for the disproportionate indictment of those from the Third World. For instance, due, in part, to poverty, many African states lack the institutional capacity – including strong judicial systems – to prosecute international crimes. For instance, many African states, especially those recovering from years of internal armed conflict, do not have functional judicial systems, and even some of those that have are often unwilling to prosecute\(^\text{21}\) for political reasons. Under this situation, the assertion of extraterritorial jurisdiction by foreign courts, therefore, becomes an altruistic attempt to “fill the void” in order to ensure that victims of these crimes find justice.\(^\text{22}\) More importantly, for decades, many Third World states have been mired in armed conflicts with their concomitant implications for human rights. In fact, majority of global internal conflicts have occurred in


\(^\text{20}\) “Senior Rwandan official arrested,” BBC NEWS, online: <http://news.bbc.co.uk/2/hi/7718879.stm>.

\(^\text{21}\) Jalloh, supra note 16 at 16.

\(^\text{22}\) Ibid.
the Third World, especially the Sub-Saharan Africa. By way of scope, the United Nations in its 1998 reported estimated that, at least, thirty violent conflicts had occurred in Africa since 1970. Between 1980 and 1994, 10 out of the 24 most devastating conflicts in the world occurred in the African region.

In a fundamental way, however, the AU’s sentiment is reflective of the broader divide between the North and the South on the issue of universal jurisdiction. At the center of the tension is what many Third World states view as the universal jurisdiction’s illusory promise of states’ “coequal discursive dignity” – the idea of states’ mutually assured equality in its exercise. Since the Nuremberg trial, the principle of rule of law has remained one of the most frequent refrains of universal jurisdiction’s advocates, who argue that it guarantees the legitimacy of the international justice system by ensuring that states that are similarly

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25 Jalloh, supra note 16 at 19; Charles C. Jalloh, “Regionalizing International Criminal Law?” (2009) 9 Int’l Crim L Rev 445 at 454. However, Paul Zeleza retorts this depiction of Africa, arguing that it is simply a Western contraption for the sole purpose of portraying African conflicts in the worst of lights – “as peculiar and pathological without rational explanation.” Adopting a Third World approach, he stated thus: “Africa has been no more prone to violent conflicts than other regions. Indeed, Africa’s share of the more than 180 million people who died from conflicts and atrocities during the twentieth century is relatively modest: in the sheer scale of casualties there is no equivalent in African history to Europe’s First and Second World Wars, or even the civil wars and atrocities in revolutionary Russia and China.” See Alfred Nhema & Paul T. Zeleza, eds, The Roots of African Conflicts: Causes & Costs (Athens: Ohio University Press, 2008) 1. The causes of these conflicts as well as the extent to which the West is complicit has already been explored by this author in an earlier paper. See Eberechi Ifeonu, “Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union’s Cooperation with the International Criminal Court” (2009) 3 African Journal of Legal Studies 53.


situated are similarly dealt with.\(^{28}\) For the AU, however, the enforcement of international justice through the exercise of universal jurisdiction has not only continued to focus on the “other” but, has when viewed through the prism of inter-state relations, remained selective.\(^{29}\) The key question is as captured by Judge Rezek in the \textit{Arrest Warrant} case thus: “how [will] certain European countries react if a judge from [an African state] had indicted their [Western states] officials for crimes supposedly committed on their orders in Africa?”\(^{30}\)

It is argued that intrinsic in a state’s decision to exercise universal jurisdiction are political considerations, the most influential of which is the status of the prosecuted state relative to the prosecuting state. Since the process is deeply steeped in the act of weighing, in an imaginary scale of international relation – of political and economic cost of prosecution on the prosecuting state, the result is that those from poor nations are more likely to be successfully prosecuted than those from developed nations.\(^{31}\) Put bluntly, the politics of

\(^{28}\textit{Ibid} \textit{at} 94\)
\(^{29}\)Timothy McCormack identifies two kinds of selectivity in international justice enforcement. According to him, “there is a dual selectivity on the part of the international community. This is first found in relation to the acts the international community is prepared to characterize as ‘war crimes’ and secondly, in relation to the particular alleged atrocities the international community is prepared to collectively prosecute.” See Timothy I. H. McCormack, “Selective Reaction to Atrocity” (1996-1997) 60 Albany Law Review 681 at 683. As a term, selectivity has been defined as follows: “when an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be clearly justified, the result is a power of selective enforcement. Such power goes to selection of parties against whom the law is enforced. Selective enforcement may also mean selection of the law that will be enforced; an officer may enforce one statute fully, never enforce another and pick and choose in enforcing a third.” See Keneth Kulp Davis, \textit{Discretionary Justice: A Preliminary Enquiry} (Baton Rouge: Louisiana State University Press, 1969) 163.
\(^{30}\)Concerning the \textit{Arrest Warrant} of 11 April 2000 (Congo v. Belgium) (2002) I C J 3 at 43 (Separate Opinion of Judge Rezek, para 9). The same question was posed rather Eurocentrically by Michael Kirby thus: “The principle must be tested by what would happen if the powers of courts in authoritarian were invoked by pliant prosecuting authorities to claim universal jurisdiction against a national of a developed country accused of trumped up war crimes, for example of genocide.” See Michael Kirby, “Universal Jurisdiction and Judicial Reluctance: A New ‘Fourteen Points’” in Macedo, \textit{supra} note 6 at 252.
universal jurisdiction disproportionately affects Third World countries, since their station in life makes them an easier target of prosecution with low “transaction cost” or political consequences on the prosecuting developed state.

Of course, there is a legitimate debate to be heard about whether one can or should really conflate the decisions of a nation’s independent judicial organ with the will of the state. Some have argued that it is not the state, as a matter of fact, that actually makes the decision to exercise universal jurisdiction but an apolitical prosecutor.32 It is argued that while this may be true, particularly in the context of initiating universal jurisdiction proceeding, the ability of the prosecutor to sustain it is largely a matter of politics of which the state, not the prosecutor, is the dominant player. As explored latter, this is best exemplified by the clear disparity in outcomes from Belgium’s earlier attempts to exercise universal jurisdiction over foreign nationals for international crime – between its prosecution of Africans and those of the West or their Allies. Furthermore, to the extent that the exercise of universal jurisdiction is founded on the domestic law of the state, it may be difficult for that state to successfully claim that it has no influence on the process. Halberstam captures this when, writing about Belgium’s universal jurisdiction, he said:

In any event, it was Belgian law that made the prosecution possible and Belgian courts that would hear the case. Belgium cannot avoid responsibility for an action by its courts under its laws simply because it was instituted by private parties. 52 Belgium has an obligation not to permit its laws and courts to be misused for political purposes. Belgium apparently realized that and quickly decided to amend the law when the action against U.S. officials was instituted and the U.S. protested, even though, in this action, as in the action against Sharon,

“the complaint ha[d] not been judged on its merits, nor even on the issue of its eventual validity.”33

Until recently, the Kingdom of Belgium was universally regarded as the world’s capital of universal jurisdiction34 and the “most extensive and far reaching attempt to date of a domestic state within the international system sanctioning the wide scale use of its courts for trying international crimes.”35 A sweeping amendment in its law in 1993 in response to a proposal by military judges and academics had predictably opened its courts to a barrage of litigation and in the process transformed a relatively small and unknown judicial system into a bludgeoning doyen of global justice. It was one that domesticated the 1949 Geneva Conventions and their two additional protocols, criminalizing acts that the conventions view as “grave breaches” and as “crimes under international law.”36 Urged on by various human rights non-governmental organisations (NGOs) and prompted by its ratification of the Rome Statute of the International Criminal Court (ICC), it further amended its statute in 1999 to include the crime of Genocide as defined in the 1948 Genocide Convention, and Crimes against humanity as defined in the Rome Statute. It was this legislation that effectively vested Belgium courts with “sweeping, unconditional universal jurisdiction . . . of utopian scope.”37 According to the Statute, “the Belgium courts shall be competent to deal with breaches

33 Ibid at 256-57.
37 Moghalu, supra note 34 at 90.
provided for in the present Act, irrespective of where such breaches have been committed.‖

A writer has argued that the universal jurisdiction contemplated by the Belgium’s statute was significantly in excess of its international treaty obligation, given that no treaty to which it was signatory (including the Genocide Convention) compels it to exercise jurisdiction over either crimes against humanity or genocide that occurred outside its borders. Furthermore,


39 A Hays Butler, “The Growing Support for Universal Jurisdiction in National Legislation” in Macedo, supra note 6 at 69. Article 6 of the Genocide Convention appears to support this assertion. It confers jurisdiction either on a contracting party in the limited case of where the genocide occurred in the territory of the prosecuting state or on an international tribunal in other cases: “Persons charged with genocide or any of the acts enumerated in Article II shall be tried by a competent tribunal of the state in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to the contracting parties which shall have accepted jurisdiction.” See Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277. However, some countries such as Canada and Spain have exercise universal jurisdiction over the crime of genocide. See Luc Reydams, “Universal Jurisdiction: The Belgian State of Affairs” (2000) 11 Crim L Forum 183 at 196 n. 58. Spain’s Audiencia, for instance, justified its universal jurisdiction power over genocide as follows: “. . . [I]t would be contrary to the spirit of the convention – which seeks a commitment on the part of the contracting parties to use their respective criminal justice systems to prosecute genocide as a crime under international law, and to prevent impunity in the case of such a grave crime – to interpret Article 6 as limiting the exercise of jurisdiction by excluding any jurisdiction not treated therein.” See In Re Pinochet: Order of the Criminal Chamber of the Spanish Audiencia National Affirming Spanish Jurisdiction, November 5, 1998, Reprinted in Brody & Ratner, “The Pinochet Paper”, online: <http://derechos.org/nizador/chile/juicio/denu.html>. As was argued in chapters three, this reasoning is dubious, given that that a treaty obligation only binds parties to it.

As it relates to Geneva Convention, Butler argued that the obligations created therein are in respect of violations occurring only in international armed conflict, citing a recent law review article which explained it thus: “As for war crimes, the Act applies also to armed conflicts not of an international character, whereas the treaty obligation is limited to international armed conflicts. The Geneva Conventions and Additional Protocols require that state parties search for and punish persons, regardless of their nationality, alleged to have committed ‘grave breaches’ thereof, but the term ‘grave breaches’ only appears in the four Geneva Conventions and the Additional Protocol I, applicable only to international armed conflicts. By including Additional Protocol II, which applies to non-international armed conflicts, in the original title and body of the law, the legislature decided to criminalize acts which were not ‘grave breaches’ but merely ‘prohibited’ under the Conventions and Additional Protocols.” See Butler, ibid at 69 n. 10. The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) is at odds with this argument, having conflated both international and internal conflicts for the purposes of obligation pursuant to the Geneva Convention. This issue, together with Third World object to it, has already been explored in preceding chapter of this dissertation.
he argued that even the mandatory “try or extradite” regime of the Geneva Convention is inapplicable to violations of common Article 3 and Additional Protocol II.\textsuperscript{40}

It is important to keep in mind that, more than anything else, the decision to expand the jurisdiction of Belgium courts was essentially a by-product of a domestic political process that began in response to 1994 Genocide in Rwanda which, incidentally, is Belgian’s former colony.\textsuperscript{41} A communiqué issued at the end a colloquium organised in 1996 by the country’s liberal political party in the Senate called for an extension of the 1993 law in order to make it possible for Belgian courts to exercise jurisdiction over those involved in the genocide.\textsuperscript{42} This call was reinforced by a report of a parliamentary commission in 1997 which concluded that “it is necessary to include in domestic criminal law provisions that punish crimes against humanity, in particular the crime of genocide.”\textsuperscript{43}

From a purely international politics standpoint, Belgian’s somewhat desperate effort to prosecute perpetrators of the Rwandan genocide is curious, given that it was its colonial policy that might have partly engendered the genocidal implosion in the first place. The relationship between Tutsis and the Hutus – the two major ethnic groups that were involved in the genocide, which has been rightly described as the “worst outbreaks of violence in black

\textsuperscript{40} Luc Reydams, “Belgium's First Application of Universal Jurisdiction: the Butare Four Case” (2003) 1 J Int'l Crim Just 428 at 434.

\textsuperscript{41} Moghalu, supra note 34 at 90.

\textsuperscript{42} Ibid.

\textsuperscript{43} Amnesty International, “Universal Jurisdiction: The Duty of States to Enact and Implement Legislation,” cited Ibid.
Africa— had not always been catastrophically odious as some have attempted to oversimplify. Pre-colonial Rwanda was one that, though consisted of at least thirteen distinct clans, was largely a homogenous society with one common culture, religion and language – king yarwanda. The population’s classification into Hutus, the Tutsis, and the Twas was merely descriptive or vocational rather than racial – the Hutus being the farmers, the Tutsis the cattle owners and the Twas being those who lived jungle lives. As one writer put it, “a change in marriage or economic status could also change “ethnic” status, making the division something of a caste system similar to that in India. A wealthy Hutu who bought cattle could become Tutsi. A Tutsi who failed as a herder could be reclassified as a Hutu.”

All that would, however, change with the advent of colonialism. Through the Anglo-German treaty of 1880, Germany assumed political control over Rwanda and would latter cede same to Belgium after World War I. For some political reasons, the imperial German government decided to distinguish between the appearances of the Rwandan ethnic groups based on the formula of its “Aryan” culture, and relied on John Hanning Speke’s infamous theory in which he credited the Tutsis with the primordial civilization of the central Africa to elevate

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47Ibid at 27.
49Moghalu, supra note 44 at 10.
50Kolini & Holmes, supra note 46 at 28.
the Tutsis above others. According to Speke, the superior intelligence of the Tutsis was due to their genetic connection with the Europeans.\textsuperscript{51}

Belgium did not only consolidate on this divisive policy but amplified it. It promoted the minority Tutsi as overseers of the rest of the groups and thereby encouraged the subjugation of the majority Hutu for more than six decades.\textsuperscript{52} Like Germany, Belgium saw in the Tutsi a genetic resemblance to Europe. As Moghalu put it, “The Tutsis were taller, lankier, and thin-lipped and had aquiline noses; so Belgian colonialists judged them closer to Europeans in their physical traits than the generally shorter and thick-lipped Hutus.”\textsuperscript{53} Gourevitch details the processes involved in this dubious “Belgium science” thus:

In addition to military and administrative chiefs, and a veritable army of churchmen, the Belgians dispatched scientists to Rwanda. The Scientist brought scales and measuring tapes and callipers and they went about weighing Rwandans’ cranial capacities, and conducting comparative analysis of the relative protuberances of Rwandan noses. Sure enough, the scientists found what they believed all along. Tutsis had “nobler,” more “naturally” aristocratic dimensions than the “coarse” and “bestial” Hutus. On the “nasal index,” for instance, the median Tutsi nose was found to be about two and half millimetres narrower than median Hutu nose.\textsuperscript{54}

Further policies adopted by Belgian would highlight the importance which it placed on this racial distinction. For instance, the successful separation of the “white” Tutsis from the black Hutus enabled Belgium to implement discriminatory socio-economic and political policies. In every facet of economic opportunity, the minority Tutsis enjoyed overwhelming

\textsuperscript{52}Odom, \textit{supra} note 48 at 161.
\textsuperscript{53}Moghalu, \textit{supra} note 44 at 11.
\textsuperscript{54}Philip Gourevitch, \textit{We Wish to Inform you that Tomorrow we will be Killed with our Families} (New York: Farra, Straus and Giroux, 1999) 55-56.
preference over the majority Hutus.\textsuperscript{55} And to avoid any margin for error, it issued Identity Cards to every Rwandan, which bore the ethnicity of the carrier, and those who changed their classification without authorisation were imprisoned or fine or both, while migration to another state or region without proper authorisation was prohibited.\textsuperscript{56} It was, therefore, in the crucible of these colonial policies that the Rwandan bloody ethnic explosion was formed.

The first real application of Belgium’s newly acquired universal jurisdiction power was the trial of the so-called “4 of Bature” in Brussels.\textsuperscript{57} At the end of the trial in 2002 in which the prosecuting Attorney General declared himself as the representative of the international community,\textsuperscript{58} the court with twelve jurors found these four Rwandan civilians – two Roman Catholic nuns, a physics professor, and a former government minister – guilty of crimes connected with the genocide and sentenced them to prison terms of 12 to 20 years.\textsuperscript{59} Many expressed support for the trial, including the New York Times which argued that, though less

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\textsuperscript{55}Moghalu, \textit{supra} note 44 at 11.
\textsuperscript{58}La loi du 16 janvier 1993 qui attribue aux juridictions belges la compétence universelle fait que je représente aujourd’hui aussi l’ordre public international, la société international qui a le droit et le devoir de ne pas tolérer de tels comportements où qu’ils soient commis. La loi estime que la répression de tels crimes ne peut être bloquée par le jeu des frontières. Je suis fier de pouvoir participer à cette justice et de pouvoir, par mes paroles, donner une voix à la communauté internationale, à cette conscience universelle qui rejette cette barbarie.

The Act of 16 January 1993, by attributing universal jurisdiction to the Belgian courts, makes me a representative today of the international public order, the international society that has the right and the duty not to tolerate such conduct, wherever it may be committed. According to the Act, the repression of such crimes cannot be blocked by means of borders. I am proud to be able to participate in this justice and to give a voice to the international community, the universal conscience that rejects this barbarity.

\textsuperscript{59}Ifeonu, \textit{supra} note 45 at 43.
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than ideal, universal jurisdiction was appropriate in the circumstances given Rwanda’s lack of resources and expertise to provide adequate trials.\textsuperscript{60} Furthermore, for an international community that was, at least, negligent in its duty to prevent the genocide,\textsuperscript{61} any judicial intervention, no matter how doctrinally ill-conceived, might have been viewed as a partial atonement. But more than anything else, the trial was uncontroversial largely because it aligned with the post-genocide political mood of the new Tutsi-led Rwandan government, which was that of collective vengeance against the Hutus.

While Belgium’s exercise of universal jurisdiction over the Rwandans won general applause from human rights lawyers and victims of gross human rights violation, subsequent events would prove that the principle might be politically inapplicable outside the circumference of the “usual suspects” – Third World states – and that any attempt to aspire to equal justice could, as Paul Kahn warned, lead to a political disaster.\textsuperscript{62} In June 2001, many Palestinians

\textsuperscript{60} “Rwandans on Trial,” \textit{The New York Times} (Editorial), May 1, 2001.

\textsuperscript{61} There is a general acknowledgment that the genocide would have been prevented or, at least, mitigated had the international community heeded the call of its officials on ground. For instance, at the early stage of the conflict, the United Nations was warned by Lt. Gen. Romeo Dallaire, the Canadian commander of its peacekeeping operation, the United Nations Assistance Mission for Rwanda (UNAMIR) about the insufficiency of the troop to deal with the increasing escalation of the conflict. See Victor Peskin, \textit{International Justice in Rwanda and the Balkans} (Cambridge: Cambridge University Press, 2008) 156. Gerald Caplan captured this sentiment thus: “During the genocide, it was the US’ turn to lead the betrayal of Rwanda. Having lost eighteen Rangers on the street of Mogadishu, Somalia, only six months earlier . . . the Clinton administration . . . energetically ensured that the UN Security Council would do nothing to beef up Daillaire’s puny force.” See Gerald Caplan, \textit{The Betrayal of Africa} (Toronto: Groundwood Books, 2008) 80. In fact, only a paltry 2, 548 soldiers were actually deployed to Rwanda. See Moghalu, \textit{supra} note 44 at 15. Dallaire believed that had the number been increased to 5, 000, with the right mandate, the genocide might have been prevented – a claim which has been tested and confirmed to be correct by the Carnegie Commission on Preventing Deadly Conflicts, the Institute for the Study of Diplomacy at Georgetown University in Washington D.C. and the US Army. See \textit{Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events}, CM 12048 (LXVII), May 2000, Online \url{http://www.peaceau.org/uploads/report-rowanda-genocide.pdf}.

and Lebanese filed complainants with an investigating magistrate in Brussels against the “first ruler of a country of the North”63 – Israeli Prime Minister Ariel Sharon – and Mr. Amos Yaron for their alleged roles in the massacre of the Palestinian and Lebanese militiamen at Sabra and Shatila refugee camps during the Israeli invasion of Lebanon in 1982.64 At the time of the incident, they were Minister of Defence and Division Commander of the Israeli Army respectively, and the crimes which they were alleged to have committed were genocide, crimes against humanity, and grave breaches of the Geneva Conventions of 1949.65

But the reaction of Israeli government – the same nation that had successfully relied on universal jurisdiction for the prosecution and punishment of non-Israeli citizens such as the aforementioned Eichmann for international crimes committed outside its territory – was fast and furious.66 It expressed outrage at the charge, describing it as “a blood libel and harsh blow against truth, justice, and morality.”67 Elyakim Rubsentein, Israeli Attorney General criticised the criminal indictment which he alleged “was submitted solely for political reasons.”68 He also challenged charges on legal ground, arguing that, as top officials of the Israeli government, the accused persons were entitled to immunity under customary

64 Antonio Cassese, “The Belgian Court of Cassation v. the International Criminal Court of Justice: The Sharon and Others Case” (2003) 1 JICJ 437 at 437-48; Ongena & Van Daele, supra note 57 at 693.
65 Cassese, Ibid at 438.
66 As was earlier argued, although the alleged crimes were committed against Jews or Israeli, the crime occurred so many years before the enabling statute was enacted which would have potentially made the trial illegal had Israel relied on any of the traditional theories of jurisdiction. See Richard Falk, “The Case of Ariel Sharon and the Fate of Universal Jurisdiction” Book Review of The Case of Ariel Sharon and the Fate of Universal Jurisdiction Princeton by John Borneman, online: <http://adalah.org/Public/files/English/Publications/Review/5/Adalahs-Review-5-101-Falk-Universal-Jurisdiction.pdf>, p. 101 at 104.
67 Halberstam, supra note 32 at 249.
68 Ibid.
international law. As the diplomatic row reached its crescendo, Ariel Sharon, then Prime Minister, cancelled a scheduled official trip to the European Union’s Brussels headquarters and recalled Israel’s newly appointed ambassador to Belgium.

Sensing grave political danger, Belgian Foreign Minister, Louis Michel, while chiding his “Israel friends” for manifesting clear ignorance about the “ethical underpinnings” of Belgian Law, promised a review of the contentious law. In February 12, 2003, the Belgian Court of Cassation delivered a ruling asserting the universal jurisdiction power of Belgian courts over one of the accused persons – Mr. Yaron – while rightly dismissing the charges against Sharon on ground of immunity. Outside the four walls of the cases’ doctrinal issues which have remained subject to debate till date, the political pressure mounted on the Belgium government by Israel and the former’s willingness to, at least, ‘review’ its law only underscores universal jurisdiction’s susceptibility to power – a point that was later proved by its botched prosecution of some United States officials.

Although other indictments of world leaders and officials followed those of Israeli officials,
it was the indictment of several U.S. political and military leaders for their alleged roles in the bombing of civilian shelter in Bagdad during the Persian Gulf War of 1991 that

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69 Ibid
70 Moghalu, supra note 34 at 92.
71 Halberstam, supra note 32 at 249.
72 Cassese, supra note 64 at 438.
73 Nearly thirty suites where filed against world leaders. See Moghalu, supra note 34 at 92.
ultimately broke the dam of Belgium’s universal jurisdiction.\textsuperscript{74} Over 403 people, including 261 women and children were reported to have died from the incident.\textsuperscript{75} Those against whom indictments were issued were former U.S. President George H. W. Bush, former Vice President Dick Cheney (who was the secretary of defence under President George H. W. Bush), former Secretary of State Colin Powell (who was also former Chairman of the Joint Chiefs of Staff), and Gen. Norman Schwarzkopf, the American Military Commander in the Gulf War. Other suits were also filed against President George W. Bush, Powell, and U.S. military commander Tommy Franks for their alleged roles in the American and British pre-emptive war against Iraq in 2003.\textsuperscript{76}

However, the above indictments would prove to be “the most important factor that led to the ultimate death of the Belgian law in its potent form – and the inevitable decline of universal jurisdiction.”\textsuperscript{77} Following an explicit American backlash (which is discussed in details shortly), the indictments were not only dropped but the statute was amended to reflect both the Israeli and American concerns.\textsuperscript{78} The confrontation between universal jurisdiction law and the world’s powerful nations would subsequently lead to one inevitable outcome – the triumph of politics over the so-called cosmopolitan notion of justice.\textsuperscript{79} As diplomatic threats from the U.S. cascaded, the reaction of the Belgian government became more political, to the point of throwing its judicial arm under the proverbial bus. Its Foreign Minister Louis Michel

\textsuperscript{74} There were nearly thirty other people against whom indictments were issued by Belgian courts. See Moghalu, supra note 28 at 92.
\textsuperscript{75} Halberstam, supra note 32 at 251.
\textsuperscript{76} Ifeonu, supra note 45 at 44; Moghalu, supra note 34 at 92.
\textsuperscript{77} Moghalu, Ibid at 92.
\textsuperscript{78} Falk, supra note 6 at 104,
\textsuperscript{79} Moghalu, supra note 34 at 92.
condemned the suits, describing it as an “abuse” by “opportunists,” while then Prime Minister Guy Verhofstadt, a previous supporter of law, immediately suggested an amendment to the law in order to limit its scope. Belgian Senator and human rights advocate Alain Destexhe, who was also one of the law’s main sponsors, confessed to a journalist that America’s threat left Belgians with “a kind of vertigo.” “Suddenly, the law became very unpopular. People like me were saying, We’ve got to get out of this.” Thus, on 6 April 2003, the Belgian Parliament approved changes to the Belgian universal jurisdiction law to require the consent of the Prosecutor before any crime in respect of which there is no Belgian connection or link is prosecuted in Belgian courts. But this amendment was quickly rejected by the U.S., prompting a further amendment by which only criminal cases in respect of which there is national link would be prosecuted in Belgium.

Only recently, against the backdrop of revelations implicating the United States in the systemic torture of detainees in its notorious detention facilities both at Abu Ghraib and Guantanamo Bay, a coalition of international lawyers instituted criminal proceedings against some U.S. officials under universal jurisdiction law in Germany and France on behalf

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80Halberstam, supra note 32 at 251.
82Moghalu, supra note 34 at 93.
83Ratner, supra note 81 at 891.

of the victims.\textsuperscript{85} The alleged act was an outgrowth and direct result of the post-9/11 U.S. counter-terrorism policy, the so-called “war on terror.”\textsuperscript{86} Two complaints were filed in Germany. The first suit, which was instituted in 2004, was against Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Undersecretary of Defense for Intelligence Steven Cambone, Attorney General Alberto Gonzales, Lieutenant General Ricardo Sanchez, Major General Walter Wojdakowski, Major General Geoffrey Miller, and Katherine Gallagher, “Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture” (2009) 7 JICJ 1087 at 1089.

For instance, in a memo dated 22 January 2002, then Assistant Attorney-General of the United States, Jay Bybee argued that by its nature, the U.S. war against Al Qaeda terrorist was one to which the Geneva Convention was inapplicable and that President Bush had constitutional authority to “suspend our treaty obligations toward Afghanistan” given that it was a “failed state.” For him, the U.S.’s customary international law right to self-defence justified any unilateral suspension of, and deviation from, its international law obligations. See “Application of Treaties and Laws to al Qaeda and Taliban detainees”, online: <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>. Another memo dated 1 August 2002 signed by Bybee and cover-lettered by Deputy Assistant Attorney General John Yoo sought to justify some of the controversial enhanced interrogation techniques adopted by the U.S. to be used on “captured Al Qaeda operatives.” See Memorandum from Jay S. Bybee, the Dep’t of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, online: <http://www.washingtonpost.com/wprv/nation/documents/dojinterrogationmemo20020801.pdf>; Letter from John Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Online: <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>. See also Memorandum from John Yoo to William J. Haynes, II, General Counsel of the Department of Defense, Memo Regarding the Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 14 March 2003 (released 1 April 2008) online: <http://www.aclu.org/safefree/torture/34745res20030314.html>. In fact, a section of the Memo on defences even argued that “under current circumstances certain justification defenses might be available that would potentially eliminate criminal liability [for one charged under the Torture Statute].” See Bybee Torture Memo, \textit{Ibid} at Section VI.

Predictably, many scholars, including those in the U.S. State Department, have questioned the correctness of the above assertion. In his testimony before the U.S. Senate, Harold Koh, former dean of Yale Law School and, until January 2013, the 22\textsuperscript{nd} Legal Adviser of the U.S. Department of States, stated thus:

The August 1, 2002 OLC memorandum is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described as a “disaster.”


\textsuperscript{85} For instance, in a memo dated 22 January 2002, then Assistant Attorney-General of the United States, Jay Bybee argued that by its nature, the U.S. war against Al Qaeda terrorist was one to which the Geneva Convention was inapplicable and that President Bush had constitutional authority to “suspend our treaty obligations toward Afghanistan” given that it was a “failed state.” For him, the U.S.’s customary international law right to self-defence justified any unilateral suspension of, and deviation from, its international law obligations. See “Application of Treaties and Laws to al Qaeda and Taliban detainees”, online: <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>. Another memo dated 1 August 2002 signed by Bybee and cover-lettered by Deputy Assistant Attorney General John Yoo sought to justify some of the controversial enhanced interrogation techniques adopted by the U.S. to be used on “captured Al Qaeda operatives.” See Memorandum from Jay S. Bybee, the Dep’t of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, online: <http://www.washingtonpost.com/wprv/nation/documents/dojinterrogationmemo20020801.pdf>; Letter from John Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Online: <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>. See also Memorandum from John Yoo to William J. Haynes, II, General Counsel of the Department of Defense, Memo Regarding the Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 14 March 2003 (released 1 April 2008) online: <http://www.aclu.org/safefree/torture/34745res20030314.html>. In fact, a section of the Memo on defences even argued that “under current circumstances certain justification defenses might be available that would potentially eliminate criminal liability [for one charged under the Torture Statute].” See Bybee Torture Memo, \textit{Ibid} at Section VI.
Brigadier General Janis L. Karpinski, Lieutenant Colonel Jerry L. Phillabaum, Colonel Thomas Pappas and Lieutenant Colonel Stephen L. Jordan. In 2006, another criminal suit was filed against these same persons in addition to former Assistant Attorney General Jay Bybee, former Deputy Assistant Attorney General John Yoo, General Counsel of the Department of Defense William James Haynes, II and Vice President Cheney’s Chief Counsel, David S. Addington.\(^87\) The suits were based on the German Code of Crimes Against International Law (CCAIL), which entered into force on 30 June, 2002.\(^88\) The purpose of the Code is to define the extent of German’s commitment in the enforcement of international criminal justice, particularly in the context of its obligations under the complementarity provisions of the International Criminal Court (ICC) Statute.\(^89\) In an unambiguous term, the Explanatory Memorandum to the CCAIL identifies the core objective of the code as that of confronting impunity for international crimes regardless of where the crime occurred or the absence of connection between the crime and Germany.\(^90\) The results of investigations initiated in Germany under the code could also be valuable for proceedings before a foreign or international criminal court.\(^91\)

As soon as the complaints were filed, the United States issued a thinly veiled threat to Germany, indicating that its diplomatic relations with the state could be affected. A press

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\(^{87}\) Gallagher, *supra* note 85 at 1101-1107.

\(^{88}\) The English version of the CCAIL is available online at <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf>.

\(^{89}\) Gallagher, *supra* note 85 at 1102.

\(^{90}\) Section 1 of the CCAIL provides: “This Act shall apply to all criminal offenses 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.”

release issued by Lawrence DiRita, the then Pentagon's spokesman, read thus: “Generally speaking, as is true anywhere, if these kinds of lawsuits take place with American servicemen in the cross-hairs, you bet it's something we take seriously... If you get an adventurous prosecutor who might want to seize onto one of these frivolous lawsuits, it could affect the broader relationship. I think that's probably safe to say.”

Subsequently, the German Chief Federal Prosecutor, Kay Nehm, announced that he would not open an investigation against Rumsfeld and others on the basis of the principle of subsidiarity – a principle that bars legal proceeding in a foreign country if proceeding has already begun in the country with direct link to the crime or before an international court. The prosecutor also, curiously, cited the principle of non-interference in the affairs of foreign countries. An application for judicial review of this decision was dismissed by the Higher Regional Court (Oberlandesgericht) in Stuttgart – a decision that has been described as a political, rather than a purely legal one for two reasons. First, contrary to the prosecutor’s claim, there was no evidence that the accused was being investigated in the U.S. over the alleged crime. Secondly, the principle of non-intervention relied on by the prosecutor has never been a defence to prosecution for international crime.

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92 “Lawsuit against Rumsfeld Threatens US-German Relations” online: <http://www.dw.de/lawsuit-against-rumsfeld-threatens-us-german-relations/a-1427743-1>.
94 Gallagher, supra note 78 at 1105.
96 Gallagher, supra note 85 at 1106.
97 *Ibid*. 
Similar proceedings in France did not fare better. On 25 October 2007, some human rights Non-Governmental Organisations (NGOs) filed complaints against former U.S. Defence Secretary Donald Rumsfeld for torture and other violations of international law pursuant to Article 689 of the French Code of Criminal Procedure. He was, among other crimes, charged with the torture and abuse of US detainees, including Mr al Qahtani and Nizar Sassi, a French detainee. Article 689 confers on French courts jurisdiction over perpetrators and accomplices for crimes committed outside French territory under certain conditions such as “when an international Convention gives jurisdiction to French courts to deal with the offence.” Additional jurisdiction is granted to French courts over persons who are in presence in French territory, regardless of their nationality, if they are in violation of series of conventions to which France is signatory, while Article 689-2 implements the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’).

In his stunning decision delivered on 16 November 2007 Jean Claude Marin, the Paris district prosecutor, dismissed the complaint, citing Rumsfeld’s immunity. In a rather bizarre manner, the Prosecutor argued that under the jurisprudence of the International Court

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98 The English version of which is found online: [http://www.legifrance.gouv.fr/Traductions/en-English](http://www.legifrance.gouv.fr/Traductions/en-English).
99 After his release from Guantanamo Bay to France in 2004, Sassi was convicted by a French court for terrorism conspiracy but was acquitted, with five others, by a French appeals court. The court held, among other things, that the manner in which they were interrogated while still at Guantanamo Bay prison by French intelligence official violated French rules for admissible evidence. See Steven Erlanger, “Terror Convictions Overturned in France” The New York Times, February 24, 2009, online: [http://www.nytimes.com/2009/02/25/world/europe/25france.html?_r=0](http://www.nytimes.com/2009/02/25/world/europe/25france.html?_r=0).
100 CCP Art. 689-1 provides in relevant part: “a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offences, in every case where attempt is punishable.”
101 Gallagher, supra note 85 at 1110.
of Justice (ICJ), both former presidents and ministers of foreign affairs continue to enjoy immunity from criminal prosecution for the official action even after their tenure is ended.\textsuperscript{102} According to Gallagher, intrinsic in the assertion, therefore, is the alarming idea that torture could be lawful provided it is committed in official capacity.\textsuperscript{103} It is argued that no such precedent exists in the jurisprudence of ICJ. In the \textit{Arrest Warrant} case, for instance, the ICJ held that certain government officials (it is debatable whether this includes ministers of defence as in this French case) are entitled to diplomatic immunity \textit{but only while still in office}.\textsuperscript{104}

In response to a motion for reconsideration filed by the plaintiffs, the French Federal Prosecutor, in affirming the earlier decision, argued that to the extent that the alleged torture “cannot be dissociated from [Rumsfeld’s] functions,” he was immune against prosecution in perpetuity. He sought to distinguish the case from Pinochet, arguing that the crimes of assassinations and kidnapping for which he was prosecuted “did not fall under the exercise of his functions as President but were marginal to them.”\textsuperscript{105} In other words, the argument seems to suggest that Pinochet was denied immunity because the acts in respect of which he was

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\textsuperscript{102} See Press Release, FIDH, France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint, 27 November 2007, online: \texttt{<http://www.fidh.org/FRANCE-IN-VIOLATION-OF-LAW-GRANTS>}.\textsuperscript{103} Gallagher, \textit{supra} note 85 at 1110.\textsuperscript{104} \textit{Arrest Warrant} of 11 April 2000 (Democratic Republic of the Congo v. Belgium) judgment of 14 February 2002, online: \texttt{<http://www.icj-cij.org/docket/files/121/8126.pdf>}. (Emphasis supplied). In this case, the Court further held that, as long as the official is still in office, this immunity is absolute regardless of whether or not the alleged crime was committed in private or official capacity, before or during the official’s tenure: “It has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.” \textit{Ibid} at para. 58. See also Dapo Akande & Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2001) 21 EJIL 815.\textsuperscript{105} Gallagher, \textit{supra} note 85 at 1111.
\end{footnotesize}
prosecuted were more heinous than torture. This decision was further endorsed by the French Minister of Justice, Rachida Dati, following a petition sent to her by the plaintiffs. But from precedent, it does not take a quantum leap to speculate on the political consideration that ensured the above outcome. It is inconceivable that France could have successfully subjected a former top official of U.S. government – one of its closest allies – to prosecution, given how similar attempts in other western countries have failed. What is more, the argument on the basis of which the Prosecutors refused to prosecute Rumsfeld was actually developed by the French Ministry of Foreign Affairs – foreign affairs departments being where international politics so often intersects with law.

Surely, to suggest that universal jurisdiction is the only mechanism of international criminal justice susceptible to political manipulation would be highly misleading. The reach of international politics is far wider than that, extending to even the most centralised of international institutions of criminal justice – the International Criminal Court (ICC). What is also true is that a regime of international law enforcement in which individual states exercise prosecutorial discretion is bound to be more susceptible to political quid pro quo than a collectively centralised regime. It may be for this reason that when Belgium courts

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106 An English version of which is available online: <http://ccrjustice.org/files/OpenLetterKouchnerDatiFinal.pdf>.  
107 On 5 December 2007, the plaintiffs sent a letter to the Minister of Foreign Affairs, Bernard Kouchner, accusing him of violation of separation of powers and rebuking him for taking a position that was wrong both under French and international law. See the letter online: <http://www.fidh.org/Complaint-filed-against-Donald>.  
108 Allegations of selectivity against the ICC are well documented. For a complete analyses of this issue, see Michael Mandel, How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity (London: Pluto Press, 2004); Ifeou, supra note 45.
began to accept criminal complaints against U.S. officials, Ratner warned that such a move would “clearly put Belgian in the lion’s den.”

More importantly, one important lesson from the above analyses is to highlight the enormous influence which some select states enjoy in their relationship with others, how disadvantaged others, especially from the Third World, are in this regards, and how these powerful states leverage this power to bend the ark of international law to their maximum protection. In 2009, a British court, in exercise of universal jurisdiction, issued an arrest warrant for Israeli’s former foreign minister Tzipi Livni over allegation of war crime committed in Gaza against. The warrant was issued at the behest of Palestinian victims. Predictably, Israeli government rejected this move as politically motivated and an absurdity. Ron Prosor, Israel's ambassador to Britain, warned that unless the British government took a firm stand, British courts would become “a playground for anti-Israel extremists.” The Britain's ambassador to Israel, Tom Phillips, was summoned to the foreign ministry in Jerusalem, and informed that Israeli officials would not visit the UK until the matter was resolved. In a bid to calm the diplomatic row between the two countries, the U.K. government took series of steps including a telephone conversation between the then U.K. Prime Minister the Gordon Brown and Tzipi Livni in which he announced his complete opposition to the warrant and promised

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109 Ratner, supra note 81 at 891.
112 Ibid.
to work to change the law that allowed it.\textsuperscript{113} Subsequently, the arrest warrant was withdrawn and the U.K. government subsequently proposed changes to its law on universal jurisdiction to make it impossible for a private person to institute such proceeding in the country.\textsuperscript{114} The U.K. foreign secretary, William Hague explained that the change was necessarily given that the “the threat of arrest is preventing high-ranking Israelis from visiting the UK.” He warned that the U.K. could not “have a position where Israeli politicians feel they [could] not visit this country.”\textsuperscript{115} Following change in the law and the concomitant thaw in relations between Israel and U.K., Tzipi Livni visited the U.K. in 2011, where she met with the U.K. foreign secretary, William Hague.\textsuperscript{116}

From a Third World standpoint, therefore, one cannot but wonder whether, for instance, Belgium or the U.K. would have been persuaded to change its law or even drop those investigations had the resistance come from a less powerful state. There is no single case known to this author in which diplomatic threat from a Third World state influenced a prosecuting Western state to change course; the reverse is, in fact the case. In 2000, Belgium, in exercise of universal jurisdiction, issued an international arrest warrant in \textit{absentia} against the then minister of foreign affairs of the Democratic Republic of Congo (DRC), Yerodia

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\item 115 Ibid. In a statement, David Miliband, the foreign secretary said: “The procedure by which arrest warrants can be sought and issued without any prior knowledge or advice by a prosecutor is an unusual feature of the system in England and Wales. The government is looking urgently at ways in which the UK system might be changed in order to avoid this sort of situation arising again.” See Black, supra not 111.
\end{footnotes}
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Ndombasi for war crimes. Having failed to persuade Belgium to drop the warrant which it considered a breach of Yerodia’s Sovereign immunity as a serving government official, the DRC instituted an action against Belgium before the International Court of Justice (ICJ),\(^{117}\) which later held that Mr. Yerodia was entitled to immunity.\(^{118}\) It is, therefore, against this backdrop of selective use of universal jurisdiction that many in the Third World perceive it as “a new form of colonialism, a paternalistic attitude towards the ‘less civilized’ nations among us.”\(^{119}\)

**C. LIVING IN THE BUBBLE: THE POLITICAL CONSEQUENCES OF UNIVERSAL JURISDICTION**

An additional reason for the scepticism concerning the ongoing expansion of universal jurisdiction is its inherent political consequences. It was Goldsmith and Krasner who warned that the indictment of some Israeli top government officials by Belgium at the behest of some Palestinian “will not likely dampen discord in the Middle East [but will] much more likely to make matters worse by legitimizing views of extremists on both sides.”\(^{120}\) As Bassiouni cautions,

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\(^{117}\) Congo contended, inter alia, that:

> [t]he universal jurisdiction that the Belgian State attributes to itself ... constituted a [v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations

See *Concerning the Arrest Warrant*, supra note 30 at 43.


\(^{120}\) Goldsmith & Krasner, *supra* note 5 at 51.
unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory.\textsuperscript{121}

Steiner warned that controversial prosecutions by states in exercise of universal jurisdiction could undermine the principle: “If universal jurisdiction courts are seen as ‘taking sides,’ as advancing one or another deeply contested view about highly politicized and ideologically divisive conflicts, they risk being viewed as fully part of political conflict and power rather than as means of strengthening the rule of law.”\textsuperscript{122} Perhaps, no one else captured this sentiment than Henry Kissinger, former United States National Security Adviser and, later, Secretary of State. In his famous attack of this doctrine, he warned in 2001 that:

In less than a decade, an unprecedented movement has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected to systemic debate, partly because of the intimidating passion of its advocates. To be sure, human rights violations, war crimes, genocide, and torture have so disgraced the modern age in such a variety of places that effort to interpose legal norms to prevent or punish such outrage does credit to its advocates. The danger in pushing the effort to extremes that risk substituting the tyranny of judges for that of government; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts.\textsuperscript{123}

Although there are many facets to this danger,\textsuperscript{124} the focus of this part is its potential to harm international relations and engender inter-state conflict. It also considers its potential threat to conflict resolution in the affect countries.

\textsuperscript{121} Bassiouni, \textit{supra} note 4 at 82
\textsuperscript{123} Kissinger, \textit{supra} note 3 at 86.
\textsuperscript{124} One of such ground is non-justiciability based on sovereign equality. According to Lord Millett: “The immunity finds its rationale in the equality of sovereign states.... [T]he courts of one state cannot sit in
As it relates to the former, it should be noted that this is not a recent phenomenon. During the criminalisation of piracy, states’ concern that vesting each other with the kind of universal jurisdiction that today’s advocates have assumed would engender inter-state conflicts necessitated the deliberate definition of piracy to exclude state acts.125 According to Professor Crockett:

[if universal jurisdiction] could be asserted vis-à-vis a state, potentially undesirable consequences are evident. The threat to international peace and stability could be of grave significance if a state whose interests have not been directly infringed sought to punish a state which authorised an act of piracy...After balancing the threat of state violence against the danger to international peace from the allowing universal jurisdiction against the offending

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judgment on the sovereign acts of another.” See Ex parte Pinochet Ugarte, (No. 3) [2002] 1 A.C. at 269. Reflected in the maxim par in parem non habet imperium, one sovereign state is prohibited from adjudicating upon the conduct of another. In Hatch v. Baez, a nineteenth century case, it was held that a former head of state could not be sued for acts performed in a public capacity while he was head of state:

[B]y the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another done within its own territory....To make [the former President of the Dominican Republic] amenable to a foreign jurisdiction for such acts would be a direct assault upon the sovereignty and independence of his country.

See Hatch v. Baez, 14 N.Y. Sup. Ct. 596 at 599 (Sup. Ct. 1876); see also Jonathan H. Mark, “Mending the Webb: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council” (2004) 42 Colum J Transnat’l L 445 at 471 n. 111. Only recently, Lord Wilberforce echoed the above sentiment in I Congreso del Partido: “The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of “par in parem” which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.” See I Congreso del Partido, [1983] 1 A.C. 244 at 262.

Furthermore, it has been argued that that universal jurisdiction violates due process due to absence of uniformity among states with respect to the determination and extent of the penalties, and the applicable procedure. See Leila N. Sadat, “Redefining Universal Jurisdiction” (2001) 35 New Eng L Rev 241 at 256. There is also a related issue of concern over fair hearing principles. See Wolfgang Kaleck, “Universal Jurisdiction: It’s Back!” (2008) 102 Am. Soc’y Int’l L. Proc. 397 at 402. Universal jurisdiction could also violate the criminal law principle of ne bis in idem (double jeopardy). See George P. Fletcher, “Against Universal Jurisdiction” (2003) J. Int’l. Crim. Just. 580 at 580. Some have also questioned the objectivity and impartiality of the courts exercising universal jurisdiction. See Bernhard Graefrath, “Universal Criminal Jurisdiction and an International Criminal Court’” (1990) 1 EJIL 67 at 85. Another objection reflects a concern that prosecution may be brought in bad faith, vexatious and without foundation except to embarrass a government. Kissinger captured this concern thus:

Any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores... It would be ironic if a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice.

See Kissinger, supra note 3 at 86.

states, it is reasonable to opt for the rule that state acts will not be within the definition of piracy.126

Today, the political problems necessarily concomitant with the idea of prosecuting pubic officials in foreign countries are no longer a figment of critic’s imagination. For instance, Israel’s response to the indictment of its officials by Belgium was both immediate and. It recalled its newly appointed ambassador to Belgium, Yehudi Kinar,127 while Israeli press embarked on a campaign against Belgium, accusing it of being an anti-Semitic country.128 Furthermore, there was an appeal to Israelis to boycott Belgian goods,129 and even a racial incitement of the Jews community leaving in Belgium to migrate to Israel.130 Benjamin Netanyahu, who at the time was Israel’s Minister of Foreign Affairs, was even more incisive in his attack of the decision of the Belgium Supreme Court: “[The Belgian court made] a scandalous decision, which legitimizes terror and harms those who fight it. This turns the tables - when those who fight terror turn into the accused and the terrorists are victorious. Belgium is helping to harm not only Israel, but also the entire free world, and Israel will respond with severity to this.”131 He further warned that Belgium’s action would have serious diplomatic repercussion.132 Shortly after this statement, Israeli then Prime Minister Ariel

126 Crockett, supra note 1 at 88.
130 Walleyn. supra note 63 at 64.
132 Ibid.
Sharon cancelled a scheduled visit to the European Union’s Brussels headquarters, and, instead, travelled to Berlin where he was met by then Belgium's Minister of Foreign Affairs Louis Michel.\(^{133}\) It was at this meeting that Michel expressed embarrassment over what he called “the perverse effect of the Belgian law”\(^{134}\) and promised to work towards its repeal.

As intense as the above diplomatic crisis was, it was the confrontation between the U.S. and Belgium over the latter’s indictment of the former’s top officials that was even more significant. The U.S.’s message to Belgium was straightforward – there will be consequences:

> Belgium needs to realize that there are consequences to its actions. This law calls into serious question whether NATO can continue to hold meetings in Belgium and whether U.S. Officials (...) will be able to continue to visit international organizations in Belgium (...) without fear of harassment by Belgian courts (...) It calls into question Belgium’s attitude about its responsibilities as a host nation for NATO and Allied forces. (...) Certainly until this matter is resolved we will have to oppose any further spending for construction for a new NATO headquarters here in Brussels until we know with certainty that Belgium intends to be a hospitable place for NATO to conduct its business.\(^{135}\)

Among other threats, the U.S. warned that it would boycott future meetings of the North Atlantic Treaty Organisation (NATO) in its headquarters in the Belgian capital of Brussels, withhold its financial contribution contributions to NATO, and even ensure that NATO’s

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headquarters was moved out of Belgium.\textsuperscript{136} And for Belgium, there is an economic interest to be protected. Losing the headquarters of NATO could cost the state more 120 million Euros in revenue.\textsuperscript{137} The U.S. business organisations, especially the Brussels office of its Chamber of Commerce, advised Belgium against using its universal jurisdiction power, warning that it could harm its economic interest. There were also reports in Belgian newspapers concerning possible U.S. economic sanction against Belgium, cancellation of investments and boycotting of port of Antwerp by U.S. companies.\textsuperscript{138}

Furthermore, in 2004, the United States warned that an attempt by Germany to investigate or prosecute its former government officials, including Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, and Attorney General Alberto Gonzales for the torture of Iraqi nationals in Abu Ghraib would jeopardise the US-German relations.\textsuperscript{139} In January 2005, the US embassy announced that Rumsfeld would not attend the Munich Conference on Security Policy.\textsuperscript{140} Under pressure from the government which was afraid of the implications of a diplomatic showdown with the US, one of its closest allies, the prosecutor, on 10 February, 2005 – one day before the Conference – announced that he had discontinued the

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\item[136] Moghalu, \textit{supra} note 34 at 92.
\item[139] See “Lawsuit against Rumsfeld Threatens US-German Relations,” \textit{DeutscheWelle}, 14 December 2004, online at \url{http://www.dw-world.de/dw/article/0_1427743_00.html}. For discussion on this case, see e.g. Andrea Fischer-Lescano, “Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law,” (2005) 6 German LJ 689; Kaleck, \textit{supra} note 87 at 102-112
\item[140] Gallagher, \textit{supra} note 85 at 1105.
\end{enumerate}
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investigation of Rumsfeld and others, clearing the way for his subsequent attendance of the conference.\textsuperscript{141}

As it relates to the African region, the conflict between the DRC and Belgium over the latter’s attempt to prosecute the former’s official is not the only diplomatic incidence that has risen which involves an African state. In fact, the ongoing inter-regional dispute between the AU and the European Union (EU) is only an aggregation of diplomatic crises between some African states and their Western counterparts on the issue of universal jurisdiction. In 2008, a French Magistrate Bruguière, indicted nine Rwandan officials, including James Kabarebe (Chief of General Staff of the Rwandan Defence Forces – RDF – the Rwandan national army hitherto known as the Rwandan Patriotic Front (RPF)), Madame Rose Kabuye (Chief of Protocol attached to the Presidency) and Faustin Nyamwasa-Kayumba (Ambassador to India).\textsuperscript{142} Magistrate Bruguière also called on the UN Secretary-General to direct the International Criminal Tribunal for Rwanda (ICTR) to prosecute the Rwandan President Paul Kagame.\textsuperscript{143} There was also an arrest warrant issued against 40 current or former Rwandan officials, who were members of RDF, by Investigative Judge of the Spanish Audiencia Nacional, Andreu Merelles.\textsuperscript{144} Relying on universal jurisdiction, Judge Merelles charged the

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\textsuperscript{141}Ibid. \hfill \textsuperscript{142}Jalloh, supra note 16 at 30. In view of the fact that some of the victims of the crimes on the basis of which these indictments were issued were French citizens, it seems has been argued that the jurisdiction which France asserted was not pure universal jurisdiction, but other forms of jurisdiction such as, passive personality. Ibid., at 20 \hfill \textsuperscript{143}Ibid., at 29 \hfill \textsuperscript{144}Julia Geneuss, “Universal Jurisdiction Reloaded: Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction” (2009) 7 J Int’l Crim. Just 945 at 946.
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defendants with genocide, crime against humanity and terrorism purportedly committed in Rwanda between 1990 and 2002.\footnote{Article 23(4) Ley Orgánica del Poder Judicial. Initial investigation was based on complaints by Spanish citizens but was later expanded to include crimes allegedly committed against Rwandan and Congolese citizens. Despite the presence of a strong link between Spain and the crimes, the prosecution had to proceed on the basis of universal because jurisdiction on the basis of passive personality principle was unknown to the Spanish law. \textit{Ibid}, n2.}

In response, the Rwandan government accused France of “using the indictment to cover up its own responsibility” having “aided and abetted the planners” of the 1994 Rwandan genocide,\footnote{McGreal Chris, “Top Rwandan aide Chooses French Terror Trial” available Online: guardian.co.uk, <http://www.guardian.co.uk/world/2008/nov/10/rwanda-congo-kabuye>;} and threatened to carry out a “repsral” indictment of some of the officials of the French government, who were involved in the genocide.\footnote{“Anti-European Protests Rock Rwandan as Germany Extradites Kagame’s aide” Online: Guardian Newspaper <http://www.ngguardiannews.com/africa/article02/indexn2_html?pdate=201108&ptitle>;} It also broke diplomatic relations with France, and withdrew its ambassador.\footnote{“Rwanda Breaks Diplomatic ties with France” online: USA Today <http://usatoday30.usatoday.com/news/world/2006-11-24-france-rwanda_x.htm>;} Furthermore, Rwanda applied to the International Court of Justice (ICJ), asking it to declare that France “has violated, and is continuing to violate, international law with regard to international immunities generally and with regard to diplomatic immunities particularly” as well as “the sovereignty of Rwanda.” As it related to France’s request that the Rwandan President should be prosecuted, Rwanda asked the court to declare that France “has acted in breach of the obligation of each and every member to refrain from intervention in the affairs of other states” and “is under a duty to respect the sovereignty” of Rwanda.\footnote{“The Republic of Rwanda Applies to the International Court of Justice in a Dispute with France,” International Court of Justice: Press Release (April 18, 2007) online: <http://www.icj-cij.org/presscom/files/1/16921.pdf>.
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The above examples underscore some of the real problems of universal jurisdiction and highlight the conundrum intrinsic in the principle’s application under the existing contour, of the “Wesphalian” international order of which the sovereign equality of state is an indispensable part. It is for this reason that Cassese called for the constraining of the doctrine to exclude high-ranking state officials whose prosecution, he argued, could jeopardise diplomatic relations among states:

Universal jurisdiction may be envisaged for cases involving low ranking military officers or other junior State agents, or even civilians, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to see why, if the national or territorial State fails to take proceedings, another State should not be entitled to prosecute and try them in the interests of the whole international community. With regard to these persons, the initiation of criminal proceedings in their absence, the gathering of evidence, and the issue of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or Heads of State or military leaders. Hence the only way to bring them to trial is to issue arrest warrants so that at some stage they are apprehended and handed over to the competent State.\textsuperscript{150}

Related to the problem of interstate conflict is the potential for both horizontal and vertical jurisdictional tug-of-war – that is, conflict among states as well as conflict between state(s) and a supranational judicial body like the ICTR. Imagine what would have happened if following the Sept 11, 2001, attack on the U.S. several countries sought jurisdiction over the same terrorists wanted by the U.S. solely on grounds of universal jurisdiction.\textsuperscript{151} The multiple extradition requests received from several European nations in the Pinochet case is only an indication that this problem is no longer hypothetical but one that has acquired “flesh


and blood.\footnote{152} The idea that there is no consensus principle for dealing with or resolving competing jurisdictional claims represent real and significant danger to the viability of the principle. Usually, the issue arises when multiple states’ extradition requests are received by a state for the extraction of an individual in respect of whom the requested state also wants to prosecute. Normally, in making a decision, the requested state is often guided by the criteria set out in Extradition treaties to which the interested states must be parties. For instance, the European Convention on Extradition\footnote{153} stipulates that upon receiving multiple requests, the requested state should “make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offenses, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.”\footnote{154} The Princeton Principle on Universal Jurisdiction has attempted a comprehensive elaboration of factors that should be weighed by states as they consider conflicting applications for extradition. It provides in Article 8 thus:

> Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

  a) multilateral or bilateral treaty obligations;

  b) the place of commission of the crime;

\footnote{152} Among other countries, extradition requests were filed by Belgium, France and Spain. See Falk, \textit{supra} note 6 at 107-108.
\footnote{154} \textit{Ibid} art. 17.
c) the nationality connection of the alleged perpetrator to the requesting state;
d) the nationality connection of the victim to the requesting state;
e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
g) the fairness and impartiality of the proceedings in the requesting state;
h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
j) the interests of justice.155

In the case of the ICC, it is not entirely clear whether its statute sufficiently addresses competing extradition requests from states wanting to exercise other forms of jurisdiction.156 Many scholars have argued that the jurisdiction of the Court is complimentary to those of “every” state, citing the Preamble to the Court’s statute as well as its Article 17.157 The Preamble states that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”158 On the other hand, Article 17(1)(a) provides that "a case is inadmissible where [it] is being investigated or prosecuted by a state which has

157 Mark Chadwick, “Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and Beyond” (2009) 9 Int’l Crim L Rev 359 at 388; Steiner, supra note 122 at 207.
jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.” 159 It is argued that the phrase “which has jurisdiction” must be read to exclude universal jurisdiction since it envisages that some states might not have jurisdiction—an idea that is fundamentally inconsistent with the principle of universal jurisdiction that purports to inhere in all states as agents of humanity. It seems inconceivable that, given the contested nature of universal jurisdiction and the refusal of states to confer the power on the ICC during the negotiation to establish the court for fear of an unmitigated interference in their domestic affair, a bystander state would have been vested with such power.

Theoretically, one might assume that this lack of statutory clarity should not be an issue, given that “the values underlying universal jurisdiction have generally been thought to be better served when an international tribunal acts on behalf of the international community than when national court purports to act on its behalf.”160 But this might not always be the case. Although not strictly a competing jurisdictional thug-of-war situation, there has been, at least, a case where a state has controversially indicted a person against whom a sitting international tribunal with requisite jurisdictional competence did not deem indictable. As was earlier pointed out, Rose Kabuye’s indictment by France, for instance, prompted the Registrar of the International Criminal Tribunal for Rwanda (ICTR) – the tribunal with

159 Ibid, Article 17(1)(a).
160 Ibid. Keep in mind that in the pre-ICC era, states justified their exercise of universal jurisdiction by reference to the non-existence of an international tribunal to deal with grave violations of international norms. See for instance the statement of Israeli court in the Eichmann case to the effect that international law is, “in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial.” Ibid, n.128, citing Eichmann – District Court Opinion, 26.
subject-matter jurisdiction over the Rwandan genocide – to accuse France of “disrespect to international law jurisdiction.”

The only provision in the Rome Statute of the ICC that is of some relevance is Article 90. Essentially, it stipulates that when a state party receives competing request from the ICC on one hand and another state that meets certain condition on the other hand, it should “consider all the relevant factors,” “the respective dates of the requests, the interests of the requesting state including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought, and the possibility of subsequent surrender between the Court and the requesting State.” This provision only provides, at best, a minimal guide as to how to balance conflicting jurisdictional interests. Furthermore, given that the obligation is treaty-based, non-party states are not bound to follow the directive.

The question is how much weight would developed nations attach to an extradition request made by a Third World state in such a competing scenario? Given universal jurisdiction’s susceptibility to power and affluence, will developing nations, being politically and financially weaker in the international arena and highly dependent on the West for aid, be able to initiate investigation and prosecution against European and North American nationals in exercise of extraterritorial power? Although this situation – that is a bystander Third

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162 Rome Statute, supra note 158, art. 90(6).
World state disputing with other Western states over jurisdiction – has yet to occur, denial of jurisdictional claims of targeted Third World states have often being predicated on assertion that the political situation in the state makes it unable to exercise such power. This “lack-of-ability” argument has been invoked in a number of cases. In the Pinochet case, for instance, Chile requested the extradition of Pinochet from the United Kingdom to stand trial, arguing that as a sovereign state, it possessed an overriding right and interest to try him in its courts.\footnote{Falk, supra note 6 at 113.} Despite acknowledging Chile’s primary right to prosecute Pinochet, the British House of Lords concluded that the \textit{jus cogens} nature of the crime conferred on all states with equal right and obligation to proceed against him.\footnote{Ibid at 118.} At the hearing, Human Rights Watch argued in its detailed legal submission that “government assurances notwithstanding, a trial of Pinochet in Chile was virtually impossible under current political and legal constraints.”\footnote{“When Tyrants Tremble: The Pinochet Case,” Human Rights Watch, online: <http://www.hrw.org/legacy/reports/1999/chile/>.} Again, on 20 November 2000, the Court of Appeal in Amsterdam, The Netherlands, ordered the prosecutor to begin proceedings, on the basis of universal jurisdiction, against a non-Dutch national – Mr. D.D. Bouterse – for gross violations of human rights, despite the fact that similar prosecution was already taking place in the territorial state – the South American Republic of Surinam.\footnote{Pita J.C. Schimmelpenninck van der Oije, “A Surinam Crime before a Dutch Court: Post-Colonial Injustice or Universal Jurisdiction?” (2001) 14 Leiden J Int’l L 455 at 455.} In justifying the trial, the court argued that given Surinam’s history it was not likely that it would successfully prosecute the accused person and also cited the
historical ties between the two countries – Surinam being a former Dutch colonial territory.\textsuperscript{168}

To be sure, there are situations in which the territorial state is demonstrably unwilling or unable genuinely to prosecute. In the Pinochet case, there were indications that for some political reasons, the Chilean government, at least in the early period, did not want to prosecute him. The key reason was the government’s fear that, given Pinochet’s political influence and the manner in which he was carefully eased out of power, his prosecution could have provoked renewed military interference. Even after his departure from the Presidency in 1990, he remained the head of the country’s armed forces for eight more years and then, orchestrated a constitutional amendment that made him a life senator with full parliamentary immunity.\textsuperscript{169} Further evidence of this unwillingness was Chile’s continuous amendment of charges against Pinochet to make the crime too narrow and the time and place of commission too specific as to make his eventual conviction almost impossible.\textsuperscript{170} In Surinam, too, the political situation raised legitimate suspicion as to whether Bouterse’s trial was not a façade. The accused had used his high position to obstruct prosecution. Like Pinochet, he remained a Member of Parliament and the leader of the opposition party and, as a result, wielded enormous influence on the judicial as well as civil authorities.\textsuperscript{171}

\textsuperscript{168}Ibid at 470.
\textsuperscript{170}Christine M. Chinkin, “In re Pinochet” (1999) 93 Am J Int’l L 703 at 705, n. 11.
\textsuperscript{171}Van der Oije, supra note 167 at 470.
Unfortunately, political leaders, particularly from the Third World, in the face of threat of prosecution for crime committed during conflicts, and, in most cases, as a precondition for a peaceful transition of power, often extract assurances of immunity from their governments. For these states, the choices are simple, yet complicated: to refuse the offer would advance the cause of accountability, yet protract the conflict with no certain outcome, or accept the offer which would end the conflict but encourage impunity. But sometimes, this determination for self-preservation is a little more subtle, manifesting itself in the form an informal control of the domestic courts through the appointment of their loyalists as judges. Under this circumstance, it is hard not to conclude that these domestic courts are both unwilling and unable to prosecute the indicted leader. These issues are explored in the next part.

Regardless, the important issue raised by these cases is as posed by Falk: “To what extent should the representations of the territorial government, particularly if it is currently operating as constitutional democracy, be entitled to respect and deference by foreign governments and their judicial bodies? . . . Should the primacy of Chilean jurisdictional claims be respected if prospects for prosecution and conviction seem strong and the atmosphere is conducive to judicial independence? Or disregarded, if such prospects seem dubious?”¹⁷² To this lists should be added the question, who decides whether an “atmosphere is conducive to judicial independence” or whether there is the prospect of dubiousness. Falk, for instance, was of the firm view that changes in Chile’s political landscape was sufficient to

¹⁷²Falk, supra note 6 at 104
justify its jurisdictional claim: “The passing into history of the cold war, a gradually more secure democratic order in Chile, a displacement of the earlier Pinochet generation of leaders in the armed forces, the ascendancy of post-Pinochet judges . . . lent weight to the Chilean request for Pinochet’s return and weakened somewhat the foundation underlying foreign criminal prosecution . . . .”173 Pablo De Greiff wonders if it is possible to articulate a set of criteria for making decisions of this nature, beyond the chronological priority provided for in the existing treaties and literature.174 While easy answers to these questions are not always possible, as the Surinam example shows, denial of the territorial state’s jurisdictional claim, as credible as it might seem, can sometime “leave an arrogant, post-colonial impression: prosecution of Bouterse should take place, but preferably in The Netherlands.”175

D. UNIVERSAL JURISDICTION AND THE STABILITY OF NEW DEMOCRATIC REGIMES

Since the middle of the twentieth century, an upsurge in internal armed conflicts, coupled with the often inability of either of the factions to inflict a decisive military defeat on the other, have left many states to adopt new approaches in order to deal with or mitigate the effect of these wars on societies.176 These mechanisms share a common makeup – an abiding faith in the transformative capability of restorative justice, one of the necessary elements of which is the grant of amnesty to those who otherwise might have been prosecuted for

173 Ibid at 105.
174 Pablo De Greiff, “Comment: Universal Jurisdiction and Transitions to Democracy” in Macedo, supra note 6 at 123.
175 Van der Oije, supra note 167 at 471.
176 In sharp contrast, this was not an issue during World War II trial. The comprehensive defeat of Germany by the Allied Powers only meant that the former’s leaders were in no political position to negotiate amnesty. This was also the case with Japan. In fact, considering other options available to the Allied Powers, including summary execution, criminal prosecution, albeit victor’s justice, was generally regarded as “an expression of tremendous magnanimity.” See Akhavan, supra note 13 at at 626.
crimes, in exchange for peace and reconciliation.\textsuperscript{177} According to one writer, “[a]mnesties of one form or another have been used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.”\textsuperscript{178} This is especially the case with some countries in the African region, whose transition from years of dictatorships to democratic nations has been very challenging, with the incumbent regimes often unwilling to cede power without a fight. It is usually the case that by the time the warring parties are willing to negotiate a peace deal, the fear of being prosecuted becomes a major stumbling block to reaching a settlement. Thus, “national leaders often face the task of weighing the peace they believe will result from an amnesty against the justice that results from holding trials,”\textsuperscript{179} and have statistically leaned towards the former. For them, the need to ensure societal stability trumps (at least on the short term) that of accountability.\textsuperscript{180}

But this development has legitimately spun controversy and presented a significant challenge. To some scholars, advocated of amnesty fail to realise the “unprecedented rise in demands for accountability for past human rights violations [that] has taken place”\textsuperscript{181} since the last three decades – what has been variously referred to as a “revolution in

accountability,” an “age of accountability” or the “justice cascade.” In the context of the African region, however, two of the persistent problems of international criminal justice in this period are how to reconcile the sometimes conflicting goals of justice and peace, and the extent to which restorative forms of accountability that also rely on amnesty are contemplated by the Western notion of justice that is “deeply associated with core liberal legalist assumptions.” From a purely conflict resolution standpoint, this issue is not merely academic, but one that has some severe consequences. The rejection or acceptance of any or all of these approaches has the capacity to fundamentally affect the trajectory of an armed conflict by altering the calculation of parties involved. In other words, it reduces or increases the “transaction cost” of settlement. Rather than attempting to resolve this long-running conundrum or to prefer one over the other, the overarching argument in this part is that, unlike prosecution by the International Criminal Court (ICC), universal jurisdiction regime of enforcement exacerbates rather than ameliorate this problem.

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Given the inextricable connection between armed conflicts and violations of human rights, it is often the case that there is tension between peace deals brokered to end these conflicts and the enforcement of rights violated during the period of the conflict or between restorative justice on one hand and retributive justice on the other hand. Implicated in this is the status of amnesties agreed to by both parties to the conflict as part of the agreement towards cessation of hostility or those granted by a duly constituted Truth and Reconciliation Commission as part of post-conflict reconciliation. The complexion of situation in which justice might be preferred over peace or vice versa is never self-evident. As Chester Crocker and Fen Osler Hampson rightly state:

The need to establish power – sharing structures that accommodate rival factions and interests may well clash with the need to root out the perpetrators of human rights abuses. Similarly, the need to reform state and enemy security institutions may be at odds with the practical requirement of bringing those groups who have a monopoly on the instruments of coercion into the peace process. Without peace there can be no justice. Without justice, democratic institutions, and the rule of law, the peace itself will not last.187

For some human rights advocates, amnesty of every complexion is “a cover story for amnesia and evading accountability,”188 and “not a necessary evil but a voyage in impunity [and] an affront to the rule of law.”189 They further argue that amnesty provides an incentive for recidivism,190 violates states’ obligation under several treaties to punish those accused of

gross violation of human rights of others,\textsuperscript{191} and “mock[s] the dead and make[s] cynics of the living.”\textsuperscript{192} The gamut of their argument is that “accountability is an essential element in the observance of human rights . . . [and] such individuals must be prosecuted or punished.”\textsuperscript{193} Peace, they argue, will automatically trickle down on the affected society once justice is achieved. For instance, in calling for the arrest and prosecution of Slobodan Milošević, then President of the former Federal Republic of Yugoslavia, for international crimes committed during the country’s armed conflict, Bernard Kouchner, the then United Nations (UN) envoy in Kosovo argued that “there could be no peace and reconciliation in Kosovo until those indicted with human rights violations are brought to justice.”\textsuperscript{194} In \textit{Chumbipuma Aguirre et al v. Peru}, the Inter-American Court of Human Rights held that “all amnesty provisions . . . are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations.”\textsuperscript{195} Reacting to the 1999 Lomé Peace Agreement brokered by the African Union (AU) in order to end protracted armed conflict in Sierra Leone, the United Nations warned that any amnesty for the actors in the conflict must


\textsuperscript{195} \textit{Chumbipuma Aguirre et al v. Peru (Barrios Altos)}, Inter-American Court of Human Rights (Merits) 14 March 2001, para 41, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf>.
not include “the international crime of genocide, crime against humanity, war crimes, and other serious violations of international humanitarian law.”

There are those who have sort to distinguish between what they call “a just amnesty” – those granted by established mechanisms such as the truth and reconciliation commission after full confession – and “unjust amnesty” – those unilaterally granted by a regime to its members or to rebel groups in exchange for peace deal after a long armed conflict. Expressing his disapproval of the El Salvadorean amnesty, the then UN Secretary-General stated that “[i]t would have been better if the amnesty had been taken after a broad degree of national consensus had been created in favour of it.”

Some have described amnesty as “a powerful tool in the Art of Compromise,” a rejection of which “risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities.” As stated by Kissinger: “It is an important principle that those who commit war crimes or systematically violate human rights should be held accountable. But the consolidation of law, domestic peace, and representative government in a nation struggling to come to terms with a brutal past has a claim as well. The instinct to

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punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy.”\textsuperscript{201} For Michael Scharf, a rejection of amnesty and an insistence on criminal prosecutions "can prolong . . . conflict, resulting in more deaths, destruction, and human suffering."\textsuperscript{202} The indictment of Milošević in the middle of the country’s civil war, for instance, was viewed by some as “counterproductive” given that, as they argued, it forced him into “total isolation in which he is prepared to do anything to achieve his goal. Milošević will do anything to stay in power because in this way he will delay his extradition to The Hague. He will, therefore, be fighting for his sheer survival.”\textsuperscript{203}

Aside the question of political ramifications, granting amnesty to those alleged to have committed gross violations of human rights raises serious legal objections. Under international law, the validity of amnesties is yet to be settled. While treaty laws have largely remained, at best, ambiguous on the issue (even then, as a general rule, a treaty has no binding effect beyond the parties to it, unless it is recognised as codifying existing customary rule), an examination of customary international law reveals lack of consistent and general state practice on the issue.\textsuperscript{204} Yet, recent pronouncements of some international tribunals seem to suggest the crystallisation of customary international rule prohibiting amnesty. According to Ronald Slye, “[e]very international tribunal that has addressed the issue [and the international tribunals are recent constructs] has concluded that amnesties for gross

\textsuperscript{201} Kissinger, supra note 3 at 91.
\textsuperscript{202} Scharf, supra note 11 at 507.
\textsuperscript{203} Akhavan, supra note 13 at 18.
\textsuperscript{204} King, supra note 188 at 604. See chapter four for the dissertation’s critique of such findings.
violations of human rights violate fundamental principles of international human rights law.”

Attempts, however, have been made to distinguish between international armed conflict and non-international armed conflict with amnesty said to be inapplicable to the former but permitted in the latter. In *Azanian Peoples Organisation v President of the Republic of South Africa* – a case which arose in response to the amnesty power of the defendant’s Truth and Reconciliation Commission – the South African Constitutional Court, while upholding the legality of the country’s amnesty law, distinguished between international and non-international armed conflict. In the latter case, it argued that it is only the forum state that is best equipped to adopt appropriate measures to facilitate reconciliation and reconstruction. This position is nearly consistent with those of some international human rights bodies and even the UN – “that the question of amnesty is one for the sovereign state.” According to Thomas Buergenthal, former member of the Inter-American Commission and one of three UN appointed Commissioners on the El Salvador Commission for Truth, which was established in 1992, “[u]ltimately, the decision whether to grant amnesty was one for the people of El Salvador to make after an appropriate dialogue on the subject.” A similar statement was issued by the United Nations Mission in Guatemala (MINUGUA) following

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205 Slye, *supra* note 178 at 197-80.
the adoption of amnesty by Guatemala. While construing the law narrowly, he argued that it was the sole responsibility of the country to decide on the proper scope of an amnesty provided that it is consistent with its international obligations. In its Annual Report of 1985/6, the Inter-American Commission of Human Right noted thus: “A difficult problem that recent democracies have had to face has been the investigation of human rights violations under previous governments and the possibility of sanctions against those responsible for such violations. The Commission recognises that this is a sensitive and extremely delicate issue where the contribution it – or any other international body for that matter – can make is minimal.” It concluded: “The Commission considers that only the appropriate democratic institutions usually the legislature – with the participation of all the representative sectors, are the only ones called upon to determine whether or not to decree an amnesty [or] the scope thereof, while amnesties decreed previously by those responsible for the violations have no juridical validity.”

Some scholars, however, argue that the decision by the Allied powers to prosecute war criminals at the end of World War II, coupled with the aut dedere aut judicare provisions in the Geneva Conventions and other international multilateral treaties, have cemented the expectation that gross human rights violators in international armed conflicts would be punished, thereby creating an implied rule prohibiting blanket amnesties. Some of these

209 Guvran, supra note 207 at 94.
210 1985/6 Annual Report, cited Ibid..
211 Sadat, supra note 124 at 242.
treaties are the Genocide Convention of 1948,\textsuperscript{212} the Apartheid Convention,\textsuperscript{213} the 1984 Convention against Torture,\textsuperscript{214} the International Covenant on Civil and Political Rights,\textsuperscript{215} the European Convention for the Protection of Human Rights and Fundamental Freedom,\textsuperscript{216} and the American Convention on Human Rights.\textsuperscript{217} According to Antonio Cassese, the international prohibition of certain crimes coupled with the obligation of states to prosecute and punish their authors should be viewed as having risen to the status of peremptory norm of international law (\textit{jus cogens}), hence forbidding states from entering into international agreements or passing national legislations that grant amnesty.\textsuperscript{218} The Human Rights Committee has also concluded that “[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their Jurisdiction;

\begin{itemize}
\item \textsuperscript{212}The Convention on the Prevention and Punishment of the Crime of Genocide 1948, Arts V and VI, 78 UNTS 277.
\item \textsuperscript{213}The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Arts IV & V.
\item \textsuperscript{214}Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 4, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. Article 4 prohibits torture and obligates states party to prosecute those who commit the act, stating as follows:
\begin{enumerate}
\item Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
\item Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.
\end{enumerate}
\item \textsuperscript{215}International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171 (entered into force 23 Mar 1976). Article 2(3) states the following:
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\item Each state party to the present Covenant undertakes:
\begin{enumerate}
\item To ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
\item To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
\item To ensure that the competent authorities shall enforce such remedies when granted.
\end{enumerate}
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Furthermore, Article 2(1) states that parties to the ICCPR must make efforts to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”

\textsuperscript{216}Adopted 4 Nov 1950, 213 UNTS 221, Europ TS No 5 (entered into force 3 Sept 1953).
\textsuperscript{217}Adopted 7 Jan 1970, 9 ILM 673 (1970).
and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy including compensation and such full rehabilitation as may be possible." Some courts, too, have reached a similar conclusion. In Velásquez-Rodríguez v. Honduras, the Inter-American Court of Human Rights that intrinsic in the duty of state parties to the American Convention is the duty to "prevent, investigate, and punish" those who are alleged to have violated any of the rights provided for in the treaty: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." Implicit in the above decision is a prohibition amnesty, which is viewed as illegal under the Convention. A more explicit pronouncement on the matter came in 2001, in Barrios Altos – a case that turned on the validity of an amnesty law enacted by Peru following the massacre of fifteen people by the government death squad – where the court held as follows:

"[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

As it relates to non-international armed conflict, the permissibility of amnesty is said to derive from Article 6(5) of Protocol 2 Relating to the Protection of Victims of Non-

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219 United Nations Human Rights Committee General Comment No. 20 In relation to Article 7 of the International Covenant on Civil and Political Rights, cited Ibid.
221 King, supra note 188 at 602.
International Armed Conflict, which provides: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, whether they are interned or detained.” Whether or not this is the right interpretation is open to debate. The commentary to Article 6(5) of Protocol II provided by the International Committee of the Red Cross (ICRC) states simply: “Amnesty is a matter within the competence of the authorities.” It continues: “[t]he object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.” For Fania Domb, there is nothing inherently illegal about amnesty in internal armed conflict given that the principle of Jus in bello is not applicable to civil wars. Until recently, the generally held view was that that Common Article 3 and Protocol II was neither a reflection of rule of customary international law nor provided a basis for individual criminal accountability in international law. This view is corroborated by a 1990 opinion written by a legal adviser to the ICRC: “International Humanitarian Law applicable to non-international armed conflicts does not provide for international criminal responsibility of persons guilty of violations.”

226 “[T]he content of customary international law applicable to internal armed conflict is debatable. As a result ... the only offences committed in internal armed conflict for which universal jurisdiction exists are "crimes against humanity" and genocide, which apply irrespective of the conflicts' classification.” United Nations War Crimes Commission (for Yugoslavia) final report UN Doc S/1994/674, annex, para 42 (1994). See also Gavron, supra note 207 at 102.
Some scholars, however, have offered a more limited interpretation. In his letter to Douglas Cassel dated 1997, Head of the Legal division of the ICRC argued that Article 6(5) extends only to “combatant immunity” – a principle under international armed conflict which shields a combatant from criminal liability as long as he acted within the confines of international humanitarian law. The letter concluded that the provision “does not aim at an amnesty for those having violated international humanitarian law.” He left unanswered the question of what the international humanitarian law was, in the context of internal armed conflict, when the Protocol was drafted. Osim Ndifon argues that the amnesty envisaged by this provision is “that which relates to violation of domestic laws like the commission of treasonable offence or petty crime in the course of armed conflict and not for war crimes, crimes against humanity, genocide and other serious violations of international humanitarian law (IHL).”

Furthermore, shift in the type of conflict waged since the twentieth century – from international to non-international – compels a re-examination of such an artificial boundary. Finally, the distinction between international and non-international armed conflicts appears to have become obsolete, especially in the light of the recent decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic case, which effectively eliminated the division between international and non-international armed conflict for the purpose of international accountability. Gavron alluded to this when he argued that “a broader interpretation of the amnesty recommendation in Article 6(5) would now be out of

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228 Letter from Dr Toni Pfanner to Cassel, 15 Apr 1997, cited by Gavron, supra note 207 at 102.
229 Ndifon, supra note 189 at 26.
230 Gavro, supra note 207 at 92-92.
231 See chapter four of this dissertation.
step with the recent extension of international humanitarian law into the arena of internal conflicts.\textsuperscript{232}

In \textit{The Prosecutor v Morris Kallon and Brima Buzzy Kamara}\textsuperscript{233}, the Special Court for Sierra Leone (SCSL) was called upon to examine the limits of amnesties in international law. The issue before the court was whether the defendant could be prosecuted despite amnesty granted to all the parties in the Sierra Leone conflict under a peace deal – the Lome Peace Agreement. The said agreement obligated the government of Sierra Leone to ensure that “no official or judicial action would be taken against any members of the RUF and other participants in the conflict.”\textsuperscript{234} The defendant argued that the said agreement, for all intent and purposes, was a treaty and therefore governed by the Vienna Convention on the Law of Treaties, and that that being the case, the subsequent treaty agreement between the United Nations and Sierra Leone, which established the court was null and avoid to the extent of its inconsistency with the earlier treaty.\textsuperscript{235} It was held by the Appeals Chamber of the court that while there is no customary international rule prohibiting national amnesty laws, there is a “development” in international law towards the exclusion of amnesty.\textsuperscript{236}

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\item \textsuperscript{232}Gavron, \textit{supra} note 207 at 103.
\item \textsuperscript{233}Special Court for the Sierra Leone (SCSL) – 2004 -15 – AR 72 (E) and SCSL – 2004 – 16 – AR 72 (E), Decision on Challenge to jurisdiction: Lome Accord Amnesty (Appeals Chamber, 13 March 2004).
\item \textsuperscript{234}Ibid, paras 24.
\item \textsuperscript{236}Ibid at para 82.
\end{itemize}
\end{footnotesize}
For the African region in particular, the importance of this debate cannot be over-emphasised for three fundamental reasons. First, the escalation of armed conflicts in the region has led to the adoption of several “African solutions to African problems.”\textsuperscript{237} At the end of its meeting in Sitre, Libya, in 2005, the then AU chairperson and former Nigerian President, Olusegun Obasanjo, warned that the indictment of former Liberian President Charles Taylor by the SCSL amounted to a deliberate attempt to undermine the AU’s regional effort to find “a unique peaceful African solution to a potentially dangerous and bloody situation.”\textsuperscript{238} One of these “unique peaceful African solution” is the regional and sub-regional support for peace deals between warring factions, which may include amnesty for those potentially responsible for gross human rights violations, “as part of the bargain by which [their] impunity was ‘purchased’ as the price for [their] voluntary [cessation of hostility].”\textsuperscript{239}

For instance, following years of armed conflict in Sierra Leone between the government forces and a rebel group – Revolutionary United Front (RUF) – led by Corporal Foday Sankoh, which had claimed over 23,000 lives,\textsuperscript{240} the Economic Community of West African States (ECOWAS) in conjunction with some international organisations, brokered a peace deal between the parties in 1999, otherwise known as the Lomé Peace Accord. The agreement called for national unity, reconciliation ad amnesty:

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\textsuperscript{240} Ndifon, supra note 189 at 16.
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In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. To consolidate the peace and promote the cause of national reconciliation, the government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons currently outside the country for reasons related to the armed conflict shall be adopted, ensuring the full exercise of their civil and political rights with a view to their re-integration within a framework of full legality.\(^{241}\)

A similar approach was also adopted in Liberia to deal with the bloodied armed conflict between the government of Charles Taylor and insurgent groups known as the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL). On August 18, 2003, the AU and ECOWAS, and supported by the international community, brokered what is today known as the Accra Agreement between the factions, which, among other things, provided for a de facto amnesty and a comprehensive power sharing formula.\(^{242}\) In Mozambique, after nearly 16 years of armed conflict in 1992, the country’s parliament granted amnesty to those involves as part of the process of national reconciliation – and the country has remained peaceful till date.\(^{243}\)


Second, many African societies have historically relied on a number of non-prosecutorial conflict resolution mechanisms to deal with human rights violations and central to their nature is preference for amnesty/forgiveness as opposed to punishment, and their non-recognition by states outside the region could undermine the whole process and, therefore, prolong conflicts in the continent. It is believed that these approaches are rooted in the socio-political philosophy of Africa – the notion of “ubuntu,” “unhu,” “ujama,” or community, in contradistinction to Western individualism – and are generally effective, especially in engendering reconciliation between the conflicting parties. Some of their core characteristics are that they emphasis restorative justice by broadening the process to include not only parties to the conflict but also the entire community, and they are built around the concept of amnesty. According to MacMillan, these mechanisms “emphasise reconciliation as the ultimate goal of justice, not retribution or punishment, and speak to the


244Ifonu, supra note 45 at 135.
245Professor Bolaji Akinyemi, a renowned scholar of international relations and one time Nigerian foreign minister described the conflict between Western retributive form of justice and these African approaches as “a clash of civilization:”

The issue at state should not be perceived as a conflict between [the West] and [Africa]. It is much more serious than that. The competing versions of the strategic doctrine of the regional enforcer as played out in the Liberian case are in fact an illustration of a clash of civilization. African civilization does not emphasize revenge. It emphasizes conciliation and forgiveness. This has been amply demonstrated in post-colonial attitudes towards former colonizers and in the most dramatic case, in the attitudes of Nelson Mandela towards his persecutors. Western civilization on the other hand, with its roots in “eye for an “eye” syndrome, emphasizes vengeance in the name of justice. While few African societies have blood feuds going back centuries, European culture is noted for such blood feuds. Getting this distinction right is important as Africa and the rest of the world square off over Darfur and whatever African conflicts may be in the picture.

attitude of people whose acceptance of justice is needed for success." Some examples are the *mato oput* in Uganda, the *Gacaca* in Rwanda, and the truth and reconciliation

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247 This is a traditional conflict resolution mechanism used by the Acholi people in Northern Uganda. The term is an Acholi vernacular, which means “drinking the herb of the oput tree.” See Birgit Brock-Utne, “Indigenous Conflict Resolution in Africa,” A draft Presented to the Week-end Seminar on Indigenous Solutions to Conflicts, held at the University of Oslo, Institute of Educational Research, February 23-24, 2001, online: <http://www.africavenir.com/publications/occasional-papes/BrockUtneTradConflictResolution.pdf>. The process is one that involves roughly five steps: the guilty acknowledging responsibility; the guilty repenting; the guilty asking for forgiveness; the guilty paying compensation; and the guilty being reconciled with the victim’s family through sharing the bitter drink – *mato oput*. Ibid. This mechanism is used even in cases involving the commission of violent crimes. See Eric Blumenson, “The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court” (2006) 44 Colum. J. Transn’l L 801 at 810-12. The jurisprudential underpinning of mato oput is captured by Barney Afako thus:

Like many African resolution mechanisms, the Acholis believe that deep social rifts are caused by killings and require elaborate reconciliation mechanism to restore fractured relations. Mato oput is performed after a mediation process has brought together two families and clans. The offender accepts responsibility, asks for forgiveness and must make reparation to the victims. The perpetrator and the victim’s family then share the root drink from a calabash, to recall and bury the bitterness of the soured relations.


As one authority tells us, “Defining gacaca is a hard thing to do . . . A gacaca is not a permanent judicial or administrative institution. It is a meeting which is convened whenever the need arises and in which members of one family or of different families or all inhabitants of one will participate . . . supposedly wise old men . . . will seek to restore social order by leading the group discussions which, in the end, should result in an arrangement that is acceptable to all participants in the gacaca. The gacaca intends to ‘sanction the violation of rules that are shared by the community, with the sole objective of reconciliation’. . . . The objective is, therefore, not to determine guilt or to apply state law in a coherent and consistent manner (as one expects from state courts of law) but to restore harmony and social order in a given society, and to re-include the person who was the source of the disorder.

commission such as the one established in South Africa. Speaking about the effectiveness of these local approaches in post-conflict reconciliation, Paul Rusesabagina, a survivor of the Rwandan genocide said:

The adversarial system of justice practiced in the West often fails to satisfy [Africans]. I am convinced because it does not offer warring parties the opportunity to be human with each other at the end. Whether you were the victim or the aggressor you had to strip yourself of pride and recognise the basic humanity of the fellow with whom you were now sharing a banana beer. There was public shame in this system, true, but also display of mutual respect that closed the circle. Everyone who showed up to hear the case was invited to sip the banana beer too, as a symbol of the accused man’s reconciliation with the entire people. It was like a secular communion. The lasting message for all that gathered there was that solutions could always be found inside – inside communities and the people.

Finally, the selection of one over the other comes with some significant practical consequences to the societies affected and, by implication, to global peace and stability. Levitt’s excellent hypothetical is very instructive:

a rebel group, through brutal force, coerces a democratically elected government into a power sharing arrangement that not only refashions the constitution of order but confers on the rebels unconditional amnesty, key government positions, and other privileges. Although the incumbent government prefers to punish the rebels rather than negotiate with them, it shares power out of political necessity and expediency because it lacks the muscle to defeat the rebels on the battlefield and the status or legitimacy to mobilize international military assistance to impose its political

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249 This was established by Promotion of National Unity and Reconciliation Act 34 of 1995, online: <http://www.justice.gov.za/legislation/acts/1995-034.pdf>. The Commission was charged with four tasks:

- to provide for the investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from March 1, 1960 to December 6, 1993, as well as the fate of whereabouts of the victims of such violations; to grant amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with political objective committed in the course of the conflicts of the past during such period; to afford victims an opportunity to relate the violations they suffered and take measures aimed to grant reparation to and rehabilitate and restore the human and civil dignity of victims; and to make a report about such violations and victims and recommend measures aimed at preventing such violations in the future.

See the Preamble.


In South Africa, for instance, the outgoing leaders of the apartheid government were granted amnesty as part of the truth and reconciliation process and in attempt to end 34 years of apartheid.\footnote{Grono & O’Brien, supra note 243 at 13 & 18.} The era of apartheid is best remembered for gross violations of human rights of the country’s majority black population by the minority whites.\footnote{Wilson Nagan details some the criminalities of the apartheid government thus: By the 1990s, a police state was rapidly created and the arsenal of weapons of repression became an intrinsic part of the legal and political culture of apartheid. Apartheid thus evolved into domination and subjugation of the black citizens. The policy and practice was supported by the power of contemporary “garrison” state. By the 1990s the national security state was integrating vast institutions of white society, and certain Civil Corporation Bureaus had been created to totally mobilize white society against the threatened black “total” onslaught. The practical effects for the society were widespread repression, murder, gross rights violations and the emergence of shadowy death squads. South Africa also developed a nuclear arsenal and there is evidence of experimentation with the lethal chemical weapons, some of which were to solve the racial with injections into blacks, making them lose the pigmentation and become “white.” See Wilson P. Nagan, “Transitional Justice: The Moral Foundation of Trials and Commissions in Social and Political Transformation” (2007) 13 East Afr J Peace & Hum Rights 190 at 202, citing Helen E. Purkitt & Stephen F. Burgess, “South African’s Weapon of Mass Destruction,” online: \url{http://www.indiana.edu/~iupress/book/0-253-34506-5.shtml}; Antje Du Bois-Pedain, Transnational Amnesty in South Africa (Cambridge: Cambridge Universal Press, 2007) 19.} The alternative, which would be an insistence in criminal prosecution, would have prolonged the conflict. Archbishop Desmond Tutu was very emphatic when he argued that the Nuremberg-style trials were never an option for South Africa at the time for the simple reason that the security forces together with right wing groups that were sympathetic to apartheid policy would have sabotaged the process by making the country ungovernable.\footnote{Desmond Tutu, “What About Justice?”, cited by Gavron, supra note 207 at 115.} Again, in 1993 (in fact the exact period the UNSC was passing resolutions establishing both ICTY and the ICTR), the UN and the Organisation of American States (OAS) negotiated and agreed on a broad
amnesty as part of the Governors Island Agreements in Haiti, aimed at easing the Cedras regime out of office and re-instating the exiled President Aristide. Justifying its preference for amnesty instead of insisting on criminal prosecution, the UNSC argued that the agreement constituted “the only valid framework for the solution of the crisis in Haiti.”\(^{255}\) The US Secretary of State Warren Christopher Jeremy described it as “a broad amnesty for all the military.”\(^{256}\) The preamble to the Amnesty Law states that “an amnesty is likely to reconcile the nation with itself by covering it with a lawful shield of oblivion to general political events that disrupted the life of the nation.”\(^{257}\) Only recently, in an effort to end months of bloody armed conflict, the Yemeni cabinet approved a law that granted amnesty its former President Ali Abdullah Saleh, his family, and those who worked with him for “all acts committed before [the law] is issued.”\(^{258}\) This was to speed up Saleh’s exit from power. Although conceding that the decision was largely political, the Prime Minister Mohammed Basendowah argued that it was necessary to avoid further violence in the country: “We granted President Saleh immunity to rid the country from a civil war or possible bloodshed.”\(^{259}\) Despite opposition from human rights groups,\(^{260}\) the US defended its support

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\(^{257}\) Gavron, supra note 207 at 107. It should be noted that Aristide opposed this amnesty but later accepted it as a result of pressure from both the UN and OAS appointed negotiators. See generally Michael Scharf, ibid; Kenneth Roth “Human Rights in the Haitian Transition to Democracy” in Carla Hesse & Robert Post, eds, Human Rights in Political Transitions: Gettysburg to Bosnia (New York : Zone Books, 1999) 9.


\(^{260}\) For instance, Philip Luther, Amnesty’s interim director for the Middle East and North Africa, in a statement raised objection to the idea: “This is even worse than we feared. Granting President Ali Abdullah Saleh and his allies immunity from prosecution rules out any form of accountability for gross human rights
for the law. According to the State Department spokeswoman Victoria Nuland, "The immunity provisions were negotiated as part of the GCC (Gulf Cooperation Council) deal to get Saleh to leave power [and was] part and parcel of giving these guys confidence that their era is over and it's time for Yemen to be able to move forward towards a democratic future." Among Yemenis, opinion was predictably divided on the issue but there was an overarching consensus that, at least on the short run, anything that could help to end the conflict would suffice. As was expressed by Abdullah al-Kuraimi, a youth activist in Sanaa: “We are against the immunity bill, but it will play a big role in ending the Saleh family rule in Yemen and give us a chance to build a new nation.”

But, beyond the debate concerning the legality of these approaches, another important issue, from the standpoint of conflict resolution, and one which might further explain the AU’s opposition, has to do with the question of timing of an indictment. It is the age-long debate about whether the immediate pursuit of justice is inimical to peace. In other words, it is less about the overall validity of such an amnesty and more about the immediate goal of cessation of hostility, which an indictment might upend. Justice Richard Goldstone, while debunking the claim that prosecution interferes with the promotion of peace, concedes that in

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violations that have taken place in Yemen over decades . . . This is a smack in the face for justice, made all the more glaring by the fact that protesters have been calling for an end to impunity since mass protests began in early 2011. The Yemeni parliament ought to reject this outright.” See “Yemen urged to reject amnesty law for President Saleh and aides,” online: Amnesty International, [https://www.amnesty.org/en/news/yemen-urged-reject-amnesty-law-president-saleh-and-aides-2012-01-09].


262 Almasmari, supra note 259.


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the context of “short term cease-fire, short term cessation of hostilities, it could be that the investigation of war crimes is a nuisance.”\(^{264}\) Essentially, the debate captures two different but interrelated sets of concern:

First, could indictments during conflict hinder justice and prolong conflict and suffering—by precluding otherwise optimal political arrangements for peaceful transition to a more just society in exchange for non-prosecutorial alternatives? Second, could indictments possibly have positive effects? Might they deter political actors from expediency when insistence on prosecution would ultimately prove preferable? Can they deter existing or prospective war criminals engaged in the conflict from future crimes? In other words, could early indictment provide a sort of conflict-specific deterrence that is distinct from the goal of general international deterrence?\(^{265}\)

Whether or not there is a direct cause and effect relationship between an indictment and its aftermath has remained a subject of debate. For instance, many, including both the U.S. and European diplomats had worried that the indictments of Bosnian Serb President Radovan Karadžić and General Ratko Mladić in 1995 a few months before the Dayton peace negotiations, and Yugoslav President Slobodan Milošević in 1999 during NATO's Operation Allied Force would endanger peace negotiations in Bosnia. On the other hand, Justice Richard Goldstone, former International Criminal Tribunal for former Yugoslavia (ICTY) Prosecutor believes that the indictments were central to the peace “because Karadžić and Mladić's subsequent exclusion from the negotiation of the historic Dayton peace accord facilitated the participation of Bosnia's Muslim-led government in those talks.”\(^{266}\) Regardless, it is argued that, in the context of conflict resolution, a closer of examination of some cases


\(^{266}\) Ibid.
will show why peace should supersede justice, in the event of cognitive dissonance between the two, *at least in the short term.*

In the African region, there are some evidence to suggest that a poorly timed indictment could escalated, rather than end, a conflicts and, in the process, create more human rights violations. In March 2003, while the AU and ECOWAS were actively engaged in diplomatic efforts to find solution to the Liberian conflict, the Special Court for Sierra Leone (SCSL), which was established a year earlier by the United Nations Security Council (UNSC), to prosecute those responsible for gross human rights violations in the Sierra Leonean conflict, indicted Charles Taylor. In what was general considered an insult on African leaders and their efforts towards finding solution to the conflict, Taylor’s indictment was communicated to them through an email to the Ghana government while some West African heads of states were meeting in Accra to negotiate a peaceful resolution of the conflict. Incensed by the timing of the indictment – the idea of indicting a sitting African head of state participating in a peace talk in his sovereign territory – the Ghanaian President John Kuffour refused to surrender Taylor, rather provided means with which he returned to Liberia.

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267 This was at the behest of a letter from then Sierra Leonean President Tejan Kabbah. See Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the UNSC, August 9, 2000, UN Doc S/2000/786. Acting on the request, the UNSC adopted Resolution 1315 on August 14, 2000, requesting the Secretary-General to negotiate with the Sierra Leonean government on an agreement for the establishment of a Special Court. The agreement that followed led to the creation of SCSL. See UN SCOR, 4186th Mtg., UN Doc.S/REV/1315; See generally Kathryn Howarth, “The Special Court for Sierra Leone – Fair Trials and Justice for the Accused and Victims” (2008) 8 Int’l Crim L Rev 399; James L. Miglin, ‘From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone” (2007) 16 Dalhousie J Legal Studies 20.


Many in Liberia feared that Taylor’s indictment would complicate matters: “why upset a still-fragile peace? . . . The rebels will simply take up their weapons once more . . .”\textsuperscript{270} And the events that followed would confirm their fears. In the weeks that followed, the humanitarian crisis in Liberia worsened against the backdrop of escalation in the conflict by Taylor’s supporters in response to the indictment. By August, the Liberian capital Monrovia was under siege and thousands of citizens had no food or medical supplies.\textsuperscript{271} Worried that the situation could lead to a humanitarian disaster, the United States and Great Britain prevailed on Nigeria to grant Taylor asylum on the term that that he would never be prosecuted if he ended his involvement in the affairs of Liberia and other states in the region.\textsuperscript{272} With this assurance, Taylor resigned as President of Liberia and proceeded to Calabar, Nigeria, having been granted asylum by the Nigerian government.\textsuperscript{273}

\textsuperscript{270}Nicole Fritz, “When International Justice is feared as Colonization by Law,” online: Global Policy Forum, \textless http://www.globalpolicy.org/intjustice/general/2008/0525opencase.htm\textgreater .


\textsuperscript{273}Ifeonu, supra note 45 at 129. According to Moghalu, the successful resolution of this crisis through a regional approach was seen by African leaders as the birth of African renaissance:

On the day Taylor left Liberia, he was flanked at a press conference on Monrovia by key African leaders – President Olusegun Obasanjo of Nigeria, the then President Joachim Chissanno of Mozambique, who was chairman of the African Union, President John Kuffour of Ghana, who was also the chairman of ECOWAS, and President Thabo Mbeki of South Africa . . . The presence of the African leaders who came to see him off and escorted him into exile was highly symbolic. It was at once a message of fraternal solidarity with their “brother” head of state and a political rejection of the legal reality of the indictment of Taylor by the war crimes tribunal. Reading the indictment as a rebuff to the peace process in which they had been engaged, their public solidarity with Taylor was symbolic rejection of “international” or “global” (but in fact hegemonic) justice, a phenomenon African leaders are decidedly unenthusiastic about.

See Moghalu, supra note 34 at 111. However, there is equally another subtext to the solidarity. Some of these African leaders have also been accused of gross human rights violations in their countries, and so it can be argued that the show of solidarity is a reflective act in political self-preservation.
To be sure, an indictment at the middle of an armed conflict can have some salutary effects. A threat of prosecution could unnerve the leaderships of the warring parties, force them to a negotiating table, and provide an incentive for the resolution of the conflict.\textsuperscript{274} For instance, many have argued that the negotiation between the Ugandan government and the leaders of LRA in 2006 would not have taken place but for the latter’s indictment by the ICC.\textsuperscript{275} Payam Akhavan argues that “[s]tigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence . . . [while their] exclusion from the international sphere can significantly impede their long-term exercise of power.”\textsuperscript{276} Justice Richard Goldstone argued that without the indictment of top level Bosnian Serb leaders – Dr. Karadzic and General Mladic – the Dayton Peace Agreement that ended the conflict would not have been possible.\textsuperscript{277} Also, it could shame foreign governments on whose support the indicted leaders rely into withdrawing their assistance, thus increasing the parties’ desire to resolve the conflict through diplomatic means.\textsuperscript{278} Furthermore, a foreign indictment could escalate the awareness and focus of the international community on the conflict, which is central to providing a broad-based effort at resolving the crisis.\textsuperscript{279} A weak international interest in a conflict reduces the chances of a precipitous resolution.

\textsuperscript{274} Grono & O’Brien, supra note 243 at 15; Akhavan, supra note 13 at 629.
\textsuperscript{277} Goldstone, supra note 264 at 233.
\textsuperscript{278} Grono & O’Brien, supra note 243 at 15
\textsuperscript{279} Ibid at 16.
More importantly, from the perspective of the victims of human rights abuse as well as human rights organisations, there is little evidence to seriously believe that any suspension placed on indictment due to political situation on ground would ever be lifted when condition improves. To them, amnesty is a double-edged sword, facilitating conflict resolution and also helps to sustain the culture of impunity.\textsuperscript{280} Furthermore, justice delayed, even for a short period of time, is justice denied.

At the minimum, however, the lesson from the above analysis is that in the enforcement of international criminal justice, the tension between justice and peace is no longer hypothetical but real, and that the \textit{immediate} triumph of the former over the latter could have some unintended consequences. In Uganda, while a military solution to nearly two decades of civil war between the government forces and the main opposition rebel group – the Lord’s Resistance Army (LRA) – has achieved some success, attempt by the ICC to prosecute the rebel leaders might have partly contributed to the collapse of some efforts at a permanent peace deal. In 2005, the LRA abandoned its preliminary agreement with the government, which had granted its members amnesty in exchange for a cease-fire, citing their apprehension that the agreement was a highly orchestrated plot to capture and hand them over to the ICC, which had earlier indicted them.\textsuperscript{281} According to Vincent Otti, the deputy commander of the LRA and one of those against whom arrest warrant was issued by the ICC told Reuters, “[t]hey [the government] want to capture some of our

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\textsuperscript{280} Jeffery, \textit{supra} note 181 at 2.
\textsuperscript{281} MacMillan, \textit{supra} note 246 at 200.
people.” Unsuccessfully, they insisted that the ICC dropped its indictments as a pre-
condition for a successful peace negotiation. In 2008, another attempt at peace deal failed
because the leader of the LRA, Joseph Kony, failed to turn up for the signing of a peace
agreement between the rebel group and the government due to fear that he might be arrested
to stand ICC trial. For the influential civil society and religious leaders in northern
Uganda, the prosecutor’s decision amounted to a reckless interference in what otherwise was
a tenuous effort to end a long and brutal armed conflict.

Furthermore, a party to a conflict against which an indictment has been issued is likely to
continue to fight, and if it is a government cling to power, to avoid arrest. A good example is
the Zimbabwean President Mugabe who has indicated to friends that at the heart of their
motivation to continue to stay in power – potentially till death or he is forcefully removed –
is his fear of ICC’s prosecution were he to step down. There are also some indications that
the same consideration is weighing heavily on the mind of Sudanese President Umar al-
Bashir, who is currently facing ICC’s indictment for gross violations of human rights during
the country’s civil war. In 2008, the AU’s Peace and Security Council (PSC), worried that
Bashir’s indictment would undermine the peace process, requested the UNSC to invoke
Article 16 of the Rome Statute, in order to suspend the ICC’s proceeding for at least one

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282 “Uganda Peace Talks Stall as Rebels Walk Out,” Sept. 28, 2006, online: CNN.com,
284 Victor Peskin, “Caution and Confrontation in the International Criminal Court's Pursuit of
At the end of the meeting, the then Nigerian Minister of Foreign Affairs, Ojo Maduekwe predicted that if Bashir was arrested, “the whole place could turn into one huge graveyard,” while South Africa warned that “search for justice should not jeopardize the other priorities in Sudan.”

As difficult as it has been for the ICC to strike a balance between these two competing interests, it is even more problematic under the regime of universal jurisdiction. This is because there is always a sense of disconnectedness on the part of foreign courts in dealing with the question of what value is to be attached to amnesties, given that these courts are generally detached from the complex range of political considerations and perspective that gave fillip to these arrangements in the first place. Therefore, as argued in chapter six of this dissertation, while the ICC is statutorily empowered to suspend an indictment or defer to some forms of domestic amnesties based on political considerations, states that exercise of universal jurisdiction are less inclined to do so, thus presenting a more significant threat to conflict resolution. As a matter of international law, states are generally in no obligation to accord extraterritorial recognition to an amnesty granted by another for international crimes. A state that purports to enact amnesty is only deemed to be exercising its domestic prescriptive jurisdiction as opposed to legislating into existence a rule of international law.

289 Steiner, supra note 122 at 221.
290 Goldsmith & Krasner, supra note 5 at 51
291 Orentlicher, supra note 156 at 237.
Thus when the crimes in respect of which an amnesty is granted include those subject to universal jurisdiction, then other states are at liberty to ignore the amnesty and apply their own law to the conduct in question. The Princeton Principle on Universal Jurisdiction provides that “[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law’ and that “[t]he exercise of universal jurisdiction with respect to serious crimes under international law . . . shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.” Lacking in this provision is any recognition of the processes of transition justice such as truth commissions, peace deals, and other non-retributive measures aimed at reconciling societies that are seeking to end their so many years of brutal conflicts and transit to democracy. Universal jurisdiction, therefore, could constitute an impediment for the implementation of unique policies that reflect the peculiar experiences and sensibilities of these societies. The key implication is as hypothetically captured by Eugene Kontorovich:

Israeli-Palestinian peace negotiations have achieved a breakthrough. All of the previously intractable issues have been resolved, and the path seems clear to signing a final peace settlement, ending over sixty years of conflict, and establishing a Palestinian state. Only one issue remains to be resolved. A few months earlier, Israel captured the leader of Hamas's military wing. Brought before civilian courts, he was charged with genocide and numerous grave breaches of the Geneva Conventions. As a final condition to signing the peace accord, Hamas demands he be immediately released, and given an amnesty to protect him from future prosecution. After agonizing debate-the leader had been responsible for the brutal slaying of hundreds of innocent civilians -Israel ultimately agrees to release him to secure a permanent peace. However, Hamas realizes that the leader's offenses are subject to universal jurisdiction. Israel's promise of non-prosecution would not protect him from indictment by the United States, or even Egypt, which, fearing rising Islamicism, has threatened to prosecute if Israel does not. Hamas asks Israel to guarantee that no other nation will prosecute. Israel says it is happy to request that other countries not prosecute, but securing the agreement of all nations is implausible, and, in any case, negotiating with even a few

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292 **Ibid.**
293 The Princeton Principles, art 7, *supra* note 155
294 Orentlicher, *supra* note 156 at 232.
countries could take a while. As a result, Hamas cancels the scheduled treaty signing, and thus hopes for peace are again indefinitely deferred.295

The U.K’s indictment of Tzipi Livni, for example, was reported to have stymied both the peace talk between Israel and Palestinian and the U.K’s efforts in that regard. According to Israeli government, the move damaged Britain's ability to play a role in the Middle East peace process.296 The U.K. Foreign Office alluded to this in its statement: “. . . The UK is determined to do all it can to promote peace in the Middle East and to be a strategic partner of Israel. To do this, Israel's leaders need to be able to come to the UK for talks with the British government. We are looking urgently at the implications of this case.”297 The foreign secretary, William Hague, made the government's position clear to parliament thus: “It was abused, in my view, when there was a threat to the proposed visit of Mrs. Livni to the United Kingdom. She is an Israeli politician of great importance and a strong advocate of the peace process . . . If we want, as we do, to be able to engage in pushing forward the peace process, we need such people to be able to visit the United Kingdom.”298

Furthermore, consider, for instance, the Truth and Reconciliation in South Africa. By the nature of universal jurisdiction, the entire proceedings of this Commission, including its amnesties to perpetrators of heinous crimes during the apartheid era, would have no no ne bis in

295 Kontorovich, supra note 186 at 389.
296 Black, “UK to review war crimes “, supra note 111.
297 Black & Cobain, supra note 110. This idea, however, was panned by Daniel Machover, the victims’ lawyer: "It is disgusting that the Foreign Office is exaggerating the impact on the peace process to get a few people who are suspects of very serious international crimes off the hook.” See Hirsch, supra note 114.
idem value in another country, which could insist on prosecutorial accountability. In a “Pinochet scenario,” a victim of the apartheid, who might be dissatisfied with the decision of the Commission, could have decided to file a criminal complaint in this country which might have assumed jurisdiction over the crime. Such insistence could have upended the peace process, precluded the reconciliation altogether and potentially plunged the country into a prolonged conflict. After all, in The Prosecutor v Morris Kallon and Brima Buzzy Kamara, the SCSL concluded that the grant of amnesty is the prerogative of a state exercising sovereign power, subject, however, to the right of another state to prosecute where “universal jurisdiction crimes” are committed. According to the court, “[a] state cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other states are entitled to keep alive and remember.” Citing the Nuremberg as well as Eichmann cases, held that the crimes enumerated in Articles 2 to 4 of its Statute constitute international crimes under international law and, therefore, subject to universal jurisdiction on the ground that “the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation erga omnes.” The grant of amnesty over these crimes, the court argues, is not only a violation of international law, “but it is a breach of an obligation of a state towards the international community as a whole.”

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299 This is a customary international principle that prohibits the trial of a person twice for the same crimes. For a fuller discussion, especially in the context of Rome Statute of the ICC, see Tijana Surla, “Ne bid in idem in Conjunction with the Principle of Complementarity in the Rome Statute,” online: <http://www.esilsedi.eu/sites/default/files/Surlan_0.PDF>.
300 Guvrán, supra note 207 at 115
301 Goldsmith & Krasner, supra note 5 at 51-52.
302 LomeDecision, supra note 233 at para. 67.
303 Ibid at para. 71. The validity of this assertion has already been challenged in chapter three of this dissertation.
304 Ibid at para. 73.
In the context of armed conflict, therefore, universal jurisdiction could inject instability into an already fragile situation.\textsuperscript{305} Foreign indictments and request for extradition of parties in the middle of an armed conflict could exacerbate the situation on ground, especially where the indicted persons wield enormous influence and enjoy a strong base of both domestic and international support.\textsuperscript{306} The concurrent right of states to prosecute increases the cost of conflict resolution and could become a barrier to peace by stymieing a state’s flexibility to adopt measures of non-prosecutorial nature, including a grant of amnesty, in order to achieve peace. This is because to the extent that every state is evenly entitled to take criminal action against the same persons for the crimes, a universally binding peace deal would have to gather the consent of literally all states – a task which is nearly impossible.\textsuperscript{307} Without an assurance of primacy of prosecutorial discretion, the ability of the forum state to take measures even of political nature that could have some positive effects on a conflict is diminished since a disinterested third party state could veto such measure.\textsuperscript{308}

But even with its promises and prospects of conflict resolution, intrinsic in the concept of amnesty, particularly those offered in a desperate attempt to appease war lords in order to end conflict (as opposed to the South African model of democratic truth commission), is a fundamental moral problem. Though useful, amnesty could also become means of guaranteeing zero accountability for victims of gross human rights abuses for whom only justice will offer the much needed healing and closure. Furthermore, amnesty may also


\textsuperscript{306} Ibid.

\textsuperscript{307} Kontorovich, supra note 186 at 391.

\textsuperscript{308} Mills, supra note 305 at 1356.
provide a collateral incentive for the future commission of more heinous crimes, since there will be no “transaction cost” on the perpetrators.

This is certainly not the type of amnesty that is advocated for here. For the purposes of brokering a peace deal between warring factions, the debate has often been cast as a choice between justice and amnesty or impunity. It is argued that this is a false choice, since both could paradoxically be employed together, albeit at different times, to achieve, potentially, both the goals of peace and justice. This is achieved by making this kind of amnesty temporal, with the possibility of prosecution after the political situation on the ground has improved. As is explored in the next chapter, the ICC Statute appears to have envisaged this possibility when it granted the Prosecutor the Security Council the power to defer prosecution for a period of time if it determines that such prosecution could constitute a threat to peace. Unfortunately, universal jurisdiction lacks this important flexibility.

E. CONCLUSION

There is no doubt that intrinsic in the principle of universal jurisdiction is the promise of greater justice.309 After all, accountability in the aftermath of human right violations is both the society’s intuitive expectation and part of the victim’s healing. Yet, even its advocates concede that “this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice.”310 From the forgoing analysis, there is a legitimate case to be made that the enforcement of international criminal justice through universal jurisdiction

portends dire consequences. Among other things, the increasing asymmetry in socio-political and economic power between developed northern nations and their underdeveloped Southern counterparts has confined the concept of sovereign equality of states that underpins universal jurisdiction to the dustbin of utopianism. The notion of equality of states – the idea that every state regardless of size or might enjoy comparable and reciprocal entitlement – represents one of the fundamental promises of the twentieth century international relations, as evidenced by its centrality in the UN Charter.\footnote{Benedict Kingsbury, “Sovereignty and Equality” (1998) 9 EJIL 599 at 603.} Oppenheim alluded to this when he stated thus: [i]n entering the Family of Nations a state comes an equal to equals; it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy. . . . The equality before international law of all member-states of the family of nations is an invariable quality derived from their international personality.”\footnote{Oppenheim’s International Law, cited Ibid.} Although inequality before the law is generally a problem which besets the entire regime of international criminal justice system, its manifestations in the domain of universal jurisdiction are more serious, given the state-centric nature of the principle. For many Third World states, especially, the absence of evenness in the principle’s application and the failure of those exercising it to prosecute powerful Western countries while exerting enormous pressure on them is not only a double standard but also smacks of imperialism.\footnote{Claire Nielsen, “From Nuremberg to the Hague: The Civilizing Mission of the International Criminal Law” (2008) 14 Auckland Univ L R 81 at 82.}
Even more significant are the political implications associated with the exercise of universal jurisdiction. Consistently, many states against whom the principle has been invoked have often unleashed torrents of diplomatic confrontation with the prosecuting states. As both a political as well as a legal matter, there is an overwhelming sense that the idea that a state can, without any direct connection or interest to a crime, subject citizens of another state, including its leaders, to prosecution in its domestic court is a serious violation of the fundamental principle of sovereignty around which the modern international community is built. Whether or not this is tantamount to unbridled sovereignty that has become largely discredited is open to debate, but it must be pointed out that states are generally more receptive to collective intervention in their domestic affairs than a unilateral interference, regardless of the pretences.

In the context of armed conflict, therefore, the question is what should be the limit of a state’s sovereignty in its attempt to end a conflict and facilitate post-conflict reconciliation. In the era of global justice, advocates of universal jurisdiction are happy to “gloss over the complexities of conflicts by creating an idyllic meta-political sphere within which justice is done.”\(^\text{314}\) Justice for these “judicial romantics”\(^\text{315}\) only means one thing: a Western-styled retributive form of justice that must be pursued regardless of its potential implication. What this means is that states that adopt mechanisms of non-retributive nature to deal with gross human rights violations do so at their own risk, as any international assurance of non-prosecution is has no legitimacy whatsoever.

\(^{314}\) Akhavan, supra note 13 at 630.
\(^{315}\) Ibid.
CHAPTER 6: Conclusion

This dissertation is a diagnosis of the ongoing rift between the African Union (AU) and the international community over attempts by some Western states to prosecute some African government officials for gross human rights violations, in exercise of universal jurisdiction. Throughout the dissertation, I have argued that central to the AU’s opposition are universal jurisdiction’s doctrinal as well as political problems. To unpack this claim, I raised four primary concerns that the principle’s application invokes, all of which are discussed in the different chapters of the dissertation. The first is an attempt to understand the AU’s opposition through the prism of the Third World’s deep suspicion of some doctrines of international law – suspicion created by colonialism and international law’s complicity in the colonial project. The second is to understand the doctrinal basis for universal jurisdiction, especially in its current form – what was referred to as the “modern” universal jurisdiction, in contradiction to the traditional type. In this respect, I have attempted to examine the extent to which this “new” form of universal jurisdiction is contemplated by the existing theories of extraterritorial jurisdiction under international law. The third seeks to examine the extent to which this opposition feeds from the crisis of normative legitimacy that currently afflicts the emergence of international norms, but specifically those the violation of which are said to give rise to the exercise of universal jurisdiction. And finally, the fourth is a consideration of the politics and political implications of the exercise of universal jurisdiction. Part of the inquiry was an examination of the effect of the principle on conflict resolution in Africa, especially given the region’s susceptibility to conflicts.
For practical as well as principled reasons, this study has largely been confined to the narrow context of the Third World or, more specifically, Africa, as evident by the choice of methodology – the Third World Approach to International Law (TWAIL). It is hoped, however, that the effort made and the knowledge advanced in this dissertation is of borderless benefit and could be useful in the advancement of research in this area. But in order to better foreground the conclusion reached, it is important to recap the specific issues raised and discussed in this dissertation.

In Chapter Two, it was suggested that the AU’s opposition is a by-product of the colonial experience of Third World states for whom suspicion of international law doctrines is a necessary posture in their relationship with international law. This attitude is informed by what was described as “the violence of positive international law” in the 19th and part of 20th centuries – the West’s invention, modification and application of international law doctrines to justify colonialism – and that the praxis of universal jurisdiction feeds into this suspicion. To better understand this point, I examined the colonial project, with particular focus on ways in which international law doctrines were manipulated by the West to justify it. It was argued that prior to the colonial conquest, the dominant legal framework around which the global order was organized was that of sovereign equality and territorial integrity based on the natural law philosophy. Naturalism privileges human justice and morality as well as the inviolability of the rights of every nation. This was contained in the Peace of Westphalia – a peace treaty that ended a thirty-year war between the Catholics and Protestants fought over the latter’s domination by the former. As M. Charles Dupuis noted:
… having asserted their independence against the supremacy of pope and emperor, they (sovereigns) were unable to deny those who were in the same position that sovereignty and independence which they claimed for themselves. Between sovereign and independent states, freed from a previous common inferiority, there could exist no relations of either superiority or subordination. The equality of states was the natural and necessary consequence of their sovereignty and independence. Thus the principle of equality before the law was proclaimed between states before it was admitted by municipal law in respect individuals, and at a time when the triumph of absolutism gave the sovereigns little incentive to grant to their subjects that liberty and equality which they asserted for themselves.¹

But this shift from vertical to horizontal inter-state relation would become problematic for the West for the simple reason that colonialism, by its nature, was clearly incompatible with the spirit and letters of the Treaty. To overcome this doctrinal conundrum, the West abandoned naturalism and adopted a state-centric approach to international law, arguing that whether or not a state act is legal or valid should be determined not by reference to morality and divinity but by sovereign agreement – what is referred as the positivist philosophy. Armed with this greater flexibility, the West would proceed to develop legal theories, doctrines and characterization in order to justify the subjugation of the Third World and their exclusion from the international legal order. Some of these are the concepts of “uncivilized,” “quasi-sovereign,” “recognition” and “civilization.” It was argued that it is this experience that ingrained in the psyche of Third World states what was described as the “continuity of resistant emotion” which is the idea that the present Third World opposition to international

¹ M. Charles Dupuis, cited by R. P. Anand, “Equality of States in an Unequal World: A Historical Perspective” (1986) 197 Recueil De Course: Collected Courses of the Hague 52 at 52-53. Similar Sentiments were also expressed by other eighteenth century writers. For instance, Vattel once declared thus:

Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant; a small republic is no less a sovereign as state than the most powerful kingdom.

From this equality it necessarily follows that what is lawful or unlawful for one nation is equally lawful or unlawful for every other nation.

See Emmerich de Vattel, Le Droit des Gens, cited by Anand Ibid at 53.
law is connected to previous resistance to, and struggle against, colonialism. Ebrahim Afsah captured this:

Due to the imposed and humiliating manner in which the [the Third World] was brought into the existing system of international law in the context of colonialism, elite and popular attitude towards international law have shown considerable degree of normative ambivalence, if not outright hostility, partly due to the above indicated ant-Western complex. Nevertheless, one must not forget the justifiable grievances stemming from a long historical memory of exploitation in which rules of international law have quite reasonably been perceived as perpetuating the rights and interests of powerful Western states, without regard for the legitimacy socio-economic needs of weaker non-European states nor respecting their cultural heritage. The “absurdity” of such an “international caste system” has done lasting damage to the normative acceptance of the substantive and procedural content of international law.2

However, the AU’s opposition to universal jurisdiction is more nuanced than mere political resentment. And so in Chapter Three, the dissertation examined the doctrinal basis for “modern” notion of universal jurisdiction, focusing on some of the theories that have been advanced by its advocates, such as the “the piracy analogy or heinousness theory,” “the lotus principle theory,” and “the aut dedere aut judicare principle.” It was suggested that part of the AU’s opposition stems from the legal uncertainty surrounding the principle’s ongoing expansion. To be accepted as a legitimate instrument in the fight against impunity, universal jurisdiction must be perceived by state to be legal and legitimate. This is because in the absence of a centralized global enforcement mechanism, legality and legitimacy become important fulcrums around which states’ cooperation which is necessary for the effective enforcement of international law/justice revolve.

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In questioning the legality of modern universal jurisdiction, it was argued, among other thing, that its advocates have tried to conflate the international prohibition of certain crimes and their enforcement through universal jurisdiction. Finally, it was suggested that while universal jurisdiction, as an enforcement mechanism, is founded in customary international law, whatever norms that are enforced through it must by collective consent of the majority of states, the determination of which must be empirically verifiable. In other words, while international law does not simply contain a “frozen compendium of norms” subject to universal jurisdiction, new universal jurisdiction, to be legitimate, must emerge through a consistent, consensual and democratic process of international law-making. Thus, the idea that there is necessarily a logical correlation between the universal validity of a substantive norm and the repression of violations of such a norm by a bystander states is not accurate.

In Chapter Four, it was suggested that there is a legitimacy deficit with respect to the process by which norms that are said be subject to universal jurisdiction emerge. Implicated here are the principles of customary international law (CIL) as well as jus cogens – the two doctrinal linchpins of universal jurisdiction. It was suggested that despite the admission of Third World states as members of the international community following their independence, the process by which norms are elevated to the status of CIL and jus cogens has been largely influenced by powerful nations. It was argued, in the context of international criminalization, that there has been a gradual and steady shift from CIL to jus cogens – also known as “international morality” – for the simple reasons that the complexity of the current composition of the international community has made proof of international custom very difficult, since it require an inductive examination of the practices of states, in addition to
their *opinion juris*. But from the ashes of this development has arisen a tendency to over generalize, thereby becoming what a writer aptly described as a “euphemistic collective noun . . . to give global legitimacy to actions reflecting the interest of the US and other Western powers.”

Chapter Five presents another shade of universal jurisdiction’s problem that explains the AU’s opposition. Beyond the question of legality, there has been serious debate concerning the principle’s desirability, given its political as well as practical problems. To allow states to exercise prosecutorial right over anybody alleged to have committed international crime irrespective of the absence of a link between prosecuting state and the crime, some warned, would run the risk of replacing the cruelty of judges for that of governments. But a critical examination of these criticisms reveals their Eurocentric nature. Much of the fear has often turned on the implications of the exercise of universal jurisdiction by Third World states against citizens of Western states. Very little has been said about the implications of the principle on the Third World. This chapter engages with this debate but from this slightly nuanced perspective. It contends that, given the political power imbalance between the Third World and the West, any conferment of an unbridled power of enforcement of international norms on states, such as universal jurisdiction, will likely privilege the latter. This is evident in the current selective approach by European national prosecutors of targeting mostly Third World states, while turning a blind eye to allegations of human rights violations perpetrated by officials of powerful states. Furthermore, it was argued that the political implications of

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universal jurisdiction, among other things, may extend to the nullification of regional efforts at conflict resolution, such as those brokered by the AU, since a by-stander state is far removed from the political considerations that informed whatever choice that was made. This, in turn, might lead to the escalation of the conflict. These, it was suggested, are partly responsible for the AU’s opposition.

A. RETHINKING UNIVERSAL JURISDICTION THROUGH TWAIL

Evidently, at the very center of this dissertation is the issue of power imbalances between the North and the South, and the extent to which the current expansion as well as exercise of universal jurisdiction represents some of the worst forms of this reality. The relationship between power and international law is one that has animated international legal scholarship for years.4 For Third World states, the need to examine power relations in the international system is very important, especially given their experience as objects of power domination.5 They fully understand power’s latent as well as patent impacts and, therefore, understandably factor them into their analyses of developments in international law. Professor James Gathii once noted that “the relations between colonial people and their denominators or overlords cannot be understood outside the prism of power, domination, hegemony and control.”6 Viewed through this lens, the general sense is that “power relations in the international order

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are of historical as well as contemporary relevance”\(^7\) – that, paradoxically, there is both a discontinuity and continuity of the colonial project in international law. According to Ibironke Odumosu, “[i]n fact, beginning from colonialism to the military invasions in the name of war on terror, the power relationships may be seen as a continuum with specific points on the continuum assigned different name.”\(^8\)

Over the course of the last few decades, the emergence of the United States as the World’s single hegemonic power and the divisive effects of its policies since the 9/11 terrorist attack have combined to set international law upon the path of legitimacy crisis. Outside the confines of its sophisticated alliances, and particularly among Third World States, there is a deep feeling that international law has become “an instrument of power rather than as a neutral body of rules that applies to the international community through processes of law making in which the whole world shares.”\(^9\) As noted both in Chapters One and Four, for much of international law’s history, powerful states have used their military and economic power to create new sets of international legal norms and rules in order to advance their interests at the detriment of other members of the international community,\(^10\) particularly the Third World. Aptly referred to by one writer as the “hegemonic international law,”\(^11\) nearly every century has witnessed the dominant power of one powerful nation – Spain in the

\(^7\) Odumosu, supra note 5 at 472.
\(^8\) Ibid at 472-73.
16th Century, Britain in the 19th Century and America in the late 20th and 21st centuries. Richard Falk captures this more aptly: “it is evident that, from time past, international law has provided the powerful with a series of instruments by which to exploit and control the weak, and even provided legal cover for colonial rule.”

Without a doubt, international law has been an important ally of the Third World. The very idea of “decolonization” – a move towards the total emancipation of the colonized Third World nations – gathered momentum only after it became a concept known to international law following the adoption of the U.N. Charter. Since then, other benefits have followed, such as the modification of the law of the sea by which the concept of exclusive economic zone of coastal states was introduced in order to make it beneficial to their interest, particularly in the context of fishery and other resources. Furthermore, in the area of international trade, reform has been undertaken to ensure that goods manufactured in Third World states are accepted by markets in developed countries. This and many other reasons account for why both powerful as well as weak nations have continued to rely on international law in spite of its shortcomings. Balakrishnan Rajagopal has rightly argued that both hegemonic and counter-hegemonic forces in the global order have continued to appeal

14 Sornarajah, supra note 9 at 21.
15 Ibid.
to the legitimacy of international law for different reasons.\textsuperscript{16} In other words, the legitimacy of a state’s action is always determined by reference to international law. For the powerful states, especially, recourse to international law is, sometimes, meant to disguise their real intention. For instance, and as was explored in Chapter Four of this dissertation, despite its penchant for refusing to be bound by aspects of international law that it considers antithetical to its interest, the United States often invokes international law to justify its actions, even in situations where such actions have no support in law.\textsuperscript{17}

However, despite the modern international law’s intrinsic quality as a force for good and its boundless potential for positive transformation of humanity, its susceptibility to this kind of instrumental use by powerful states remains.\textsuperscript{18} To some extent, Third World’s suspicion is not misplaced. A critical examination of the structure of the current global order shows its striking resemblance of the old colonial order. The creation of new identities – of allies/rogue states, particularly since 9/11 – and the increasing power imbalance between the West and the Third World largely engendered by economic inequality, are some of the manifestations of these similarities. The different appears to lie in the technique adopted under the two regimes. Sornarajah captures this succinctly thus:

\begin{quote}
The potential for the continuation of this instrumental use of international law remains, predisposing international lawyers of the Third World to view the discipline with suspicion, while recognizing that it also has an immense potential for achieving good for humanity. The creation of new identities by leaders of the developed world by branding certain states as rogue states or failing states entrenches old visions of standards of civilization. Academic writings provide further justification for such strategies. The alienation of whole regions as
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\textsuperscript{17} Igwe, supra note 12 at 359.

\textsuperscript{18} Sornarajah, supra note 9 at 27.
being based on fundamentalist irredentism promotes a fear which enables the easy introduction of rules favorable to the will of the powerful. So do writings which describe some states as quasi-states or as failed states. The division of the world into pre-modern, modern and post-modern states also raises similar problem. Whereas previously, the “standard of civilization” was used by powerful states which were new to civilization against states with ancient civilizations like India and China, the modern technique is for the powerful states to exclude states which do not toe the lines they draw from the protection of international law.19

There are those, however, for whom hegemonic international law is not necessarily a bad idea.20 Cronin, for instance, cites the United States’ influence in the formulation and drafting of U.N. Charter and other human rights instruments like the Universal Declaration on Human Rights as evidence of its salutary effect.21 While this is probably true, the important question is whether hegemony should be accepted as the rule, rather than as the exception, in international law-making. Furthermore, it is important to situate the legitimacy and acceptability of these earlier influences within a historical context. As was argued in Chapter Four, one of the inevitable consequences of the expansion of the global community of states following the independence of Third World states is an expectation of the enlargement of the democratic or participatory pace to include these new states in the generation of international norms. Thus, while in the colonial conception of legitimacy, the decisions of few powerful Western states might suffice, it is very difficult to make the same argument today. Regardless of how just or fair a norm may be, “the idea that naked power should be the basis of law sits uneasily with the notions of democracy and which lies at the very basis of the new paradigm”22 of the global order. As Igwe aptly puts it: “. . . under the present system, the

19 Ibid at 27-28.
22 Sornarajah, supra note 9 at 29.
construction of power and the legitimacy of the norms and practices that a dominant state espouses is determined in part by the credibility of the ideas through which it identifies itself and its interest in the World, and, in part by the acceptance of those ideas by other actors in the international system.”

It is against this background that this dissertation has to be best understood as an opposition to what is perceived as an unjust, unequal and unfair regime of international legal order that is complicit in the subjugation, domination and continuing serious disadvantage of the Third World. It joins Karin Mickelson’s 1998 work, which has almost become the “Holy Bible” of Third World scholarship in calling for “a fundamental rethinking of international relations” and the expansion of “debate about particular legal issues or areas by confrontation with the full panoply of historical, and economic and cultural debates which surround them.” For her, the fundamental mission of TWAIL scholars is to “challenge and critique traditional international legal scholarship and to provide institutional and imaginative opportunities for participation from the Third World…”

In confronting or opposing the so-called modern universal jurisdiction, this dissertation is driven by what Sunter calls the “hermeneutical suspicion” of international law. Sensitive to

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23 Igwe, supra note 12 at 356.
26 Ibid at 416.
27 Andrew F. Sunter, “TWAIL as Naturalized Epistemological Inquiry” (2007) 20 Can J L & Jurisprudence 475 at 476. He defines the phrase:
the often (but not always) anti-subaltern tendencies of international legal politics and discourse, the dissertation, like most TWAIL scholarships, systematically approaches international legal doctrines, including those on which the modern universal jurisdiction is founded, such as the doctrines of customary international law as well as *jus cogens* with both caution and suspicion. According to Igwe, TWAIL “conducts its analysis of international legal norms and practices with an eye for the subtexts of subjugation and the uneven treatment of the global south which too often characterise global relations.”28 They point to the “ability of the imperial imagination to reinvent itself under changing conditions” and argue that “decolonisation was only the end of a specific form of imperial domination.”29

To be sure, at the very core of the ongoing expansion in universal jurisdiction’s scope is an idea that is unquestionably noble. Ensuring that accountability and justice are brought to areas of the world where they are absent, by granting every state the power to prosecute those accused of gross human rights violation regardless of the lack of connection between the prosecuting state and the crime, ought to pass with a voice vote in the global assembly. For centuries, and particularly before Nuremberg trials after World War II, the presence of a gaping hole in the extra-territorial jurisdictional architecture meant that so many international wrongs were left unaddressed. Some even exploited this to perpetrate evil against their

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A hermeneutics of suspicion is an interpretive account that reads against the grain, attempting to expose hidden meaning from the person making the expression and not the expression itself. According to this account, there often exist unexamined causal forces that explain the real reasons that we make certain oral and written expressions. If we can understand these causal forces then we are in a better position to evaluate the veracity of these expressions.

*Ibid* at 498.

people. Kenneth Roth argued that “tyrants commit atrocities, including genocide, when they calculate they can get away with them [and that] too often, dictators use violence and intimidation to shut down any prospect of domestic prosecution.”

Despite its moral appeal, however, only very few international law principles are as powerful and contentious as universal jurisdiction. At the center of this debate is the extent to which this states’ borderless international criminal enforcement power is contemplated by the extant theories of extra-territorial jurisdiction that are, themselves, designed to protect the territorial integrity of states. In other words, should, as Mills asked, “the decidedly noble cause of achieving permit one state to perform the moral obligation of another state, even when the other state objects?” While resolution of this issue remains a distant reality, it is hard to deny that this doctrinal uncertainty is already taking its tolls on the principle’s legitimacy. The AU’s opposition discussed in this dissertation is only but one example.

But beyond this, a TWAIL-driven analysis of the principle reveals other significant concerns. In a very strange way, there appears to be a disquieting resemblance between the technologies of universal jurisdiction and those adopted by international law in the nineteenth and part of twentieth centuries to justify the colonial conquest of the Third World by the West. From the way norms said to be subject to universal jurisdiction are created, to the

32 Ibid.
manner in which the principle is selectively exercised, there is legitimate perception that universal jurisdiction is colonialism by another means.

Surely, perception could, in some cases, be both speculative and divorced from reality, and this may be the case here. Universal jurisdiction may not be as irretrievably imperialistic as has been alleged, while the concern about state sovereignty may have been grossly over-exaggerated. A charge of “legal colonialism” from a region notorious for some of the worst abuses of fundamental rights of its citizens might, at least, seem disingenuous and completely self-indulgent. For all its underlining shortcomings discussed in this dissertation, universal jurisdiction could be the last best hope of protecting the interests of the ordinary people of the Third World (as opposed to the interest of their states).

What is also true, however, is the power of perception in the complex system of international relations. Keep in mind that the absence of any centralized enforcement apparatus (like the police force in the domestic realm) only means that the international community relies solely on states’ cooperation in the enforcement of rules of international law. Thus, for any international human rights enforcement approach or mechanism to be effective, it must be accepted by states, particularly those who are most likely to be directly impacted by it – in this case the Third World. At the very minimum, it is for this reason that the Third World’s apprehensions expressed in this dissertation concerning the ongoing expansion of universal jurisdiction must not be dismissed but rather be addressed. This, it is hoped, would ensure the stability of the international system and reduce the current North/South divide on the important issue of criminal enforcement.
All in all, it is hoped that the findings of this research, and the analyses foregrounding them, may offer a unique perspective on the subject of universal jurisdiction as well as on the relationship between the Third World and international law. But in order to further consolidate on the knowledge gained, a major policy-oriented recommendation, which would require further research, is offered in the next section of this chapter.

B. RECOMMENDATION FOR FURTHER RESEARCH

“If the international community already had an international criminal court, then the English courts wouldn’t have to be grappling with these issues”33

Despite universal jurisdiction’s arguably hollow doctrinal foundation as well as its real political consequences, the absence of a legitimate alternative mechanism for international criminal enforcement, coupled with broad recognition that certain crimes must not go unpunished effectively neutralized some of the criticisms of the principle. From a purely functional standpoint,34 both proponents and opponents of universal jurisdiction admit that the principle’s expansion after World War II to include human rights crimes was fundamentally due to the unavailability of a centralized international court with criminal jurisdiction over these crimes,35 especially where none of the traditional forms of jurisdiction


34 The term “functionalism” as used here refers to “a way of looking at legal phenomena without relying on abstract or formalistic reasoning.” See Chilenye Nwapi, Litigating Extraterritorial Corporate Crimes in Canadian Courts (PhD Dissertation: University of British Columbia, 2012) 44.

would suffice. Luc Reydams describes it as “a substitute for a non-existing international criminal court, an idealistic solution to the incomplete structure of the international legal order.”

A U.S. Military Tribunal operating in Germany as part of the Allied powers’ trial of the defeated Axis powers alluded to this in justification of its exercise of universal jurisdiction: “[T]he inalienable and fundamental rights of common man need not lack for a court... It is inconceivable that ... the law of humanity should ever lack for a tribunal. Where law exists, a court will rise. Thus, the court of humanity... will never adjourn.”

Until recently, similar sentiments were also expressed by other domestic courts. For further research, the overarching question therefore would be, if the involvement of municipal courts in each other’s domestic affairs was considered necessary because of the absence of an international tribunal, is this argument weakened by the creation of the International Criminal Court (ICC)? In other words, is universal jurisdiction still necessary in light of the creation of ICC?

After failed previous attempts and the subsequent international community’s reliance on ad hoc arrangements to combat impunity, the establishment of a permanent International

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38 See Lord Slynn in the Arrest Warrant Case, supra note 3.
39 At the end of the Nuremberg and Tokyo trials in the late 1940s, the International Law Commission (ILC) of the United Nations was mandated to explore the possibility of establishing a permanent international criminal court. After deliberations, the Commission concluded that the establishment of such a court was a desideratum and even proceeded to adopt a Draft Code of Offences against the Peace and Security of Mankind in 1954. However, this effort fell through as the great powers (excluding France) objected to the idea. See Kingsley Chiedu Moghalu, Global Justice: The Politics of War Crimes Trials (London: Praeger Security International, 2006) 127.
Criminal Court (ICC) in 1998 represented a seismic overhaul of the regime of global criminal enforcement legal order. For the first time in history, a multilateral centralized international judicial body would be established by a community of states with jurisdiction over specific crimes adjudged by them as “most serious crimes of concern to the international community as a whole.”\textsuperscript{41} They include (1) the crime of genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression.\textsuperscript{42} Article 5(2) provides that the Court shall not exercise jurisdiction over a crime unless the crime has been defined by states that are parties to its statute. It was for this reason that “the crime of aggression” remained unenforceable for several years despite its inclusion in the statute. It was only in 2010, after the Review Conference held in Kampala that the crime became enforceable following the Statute’s amendment to define the crime.\textsuperscript{43}

Article 5(2) is very instructive. It underscores, among other things, the disagreement among members of the international community concerning the existence and definition of crimes some of which have purportedly become subject to universal jurisdiction, as was highlighted in chapter 4 of this dissertation. An insistence on consensus among States’ Parties on what crime should be “of concern to international community” for the purposes of prosecution by the ICC undercuts the assertion of human rights scholars that there is a rich body of pre-

\textsuperscript{40} For instance, in 1993 and 1994, the United Nations Security Council (UNSC) voted to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively.


\textsuperscript{42} Ibid.


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determined “common interest” or international crimes the commission of which entitles states to assume universal jurisdiction. The Article, therefore, ensures that, unlike universal jurisdiction, the ICC’s subject-matter jurisdiction is sufficiently determinate and unambiguous, thus guaranteeing due process.\(^{44}\) As an author put it, the invocation of universality principle by a state to assume jurisdiction in respect of a contested crime “would fail to fulfill the due process requirements that the criminal law be non-vague, specific, and prospective in its application.”\(^{45}\)

Worthy of further research, therefore, is the question whether, considering the contested nature of universal jurisdiction as currently exercised by states, the political problems associated with it, and the availability of a permanent international court, the time has not come to abandon the doctrine and replace it with the ICC.

Preemptively, it has to be said that at the center of this potential recommendation lies one major challenge: Calling for the replacement of universal jurisdiction with a more jurisdictionally assertive ICC as a panacea to the tension between the African Union and some Western states would seem both ironic and counter-intuitive, given the well documented frosty relationship between the African region and the Court. There is no doubt that there has been intense hostility by the African Union towards the ICC’s activities in the


region, with the former accusing the latter of selective justice,\textsuperscript{46} turning Africa into “a laboratory to test international law,”\textsuperscript{47} being an instrument of colonization\textsuperscript{48}, being a Western neo-imperialism,\textsuperscript{49} and “create(ing) credibility problems for (Africans) in conducting affairs in (their) continent or elsewhere.”\textsuperscript{50} The AU has also repeatedly called on its members not to cooperate with the ICC in its prosecution of some African state officials.\textsuperscript{51}

Part of the proposed research, therefore, would seek to examine the contours of the AU’s oppositions to these international enforcement mechanisms to see if they are driven by the same or a different set of concerns. At first blush, though, it does not appear that the AU is adamantly opposed to the idea of enforcement of international norm by an international court. Unlike the AU’s opposition to universal jurisdiction (that appears to question the doctrine’s legitimacy by essentially querying the legality of its expansion to include certain crimes), its resistance to the ICC has never been a rejection of the institution itself or the idea of international criminal enforcement through the Court. After all, African region was the earliest region to accept the jurisdiction of the Court. On February 2, 1992, Senegal became the first nation in the world to ratify the Court’s Statute, thus “symbolically capp(ing)

\textsuperscript{46} “AU Chief Accuses UN Crimes Court of Selective Justice,” Online: Africa, \texttt{<http://www.ngguardiannews.com/africa/article01/index2.htm>}.  
\textsuperscript{47} “Sudan Lobbies against Bashir Case,” Online: BBC News, \texttt{<http://www.news.bbc.co.uk/2/hi/africa/7630071.stm>}.  
\textsuperscript{48} Nicole Fritz, “When International Justice is Feared as Colonization by Law,” Online: Global Policy Forum, \texttt{<http://www.globalpolicy.org/intljustice/general/2008/0525opencase.htm>}.  

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Africa’s early support for the idea of a permanent international criminal court.” Further evidence can be found in the number of states in the region that has ratified the Statute, which stands at 34 out of the 54 that make up the region.

At a glance, though, three grounds of the AU’s opposition to the ICC can be gleaned. The first relates to the question of immunity – whether the ICC can prosecute a sitting president or an official of government. For instance, in a Resolution opposing the indictment of President Uhuru Kenyatta and Deputy President William Samoei Ruto both of Kenya, the AU, while expressing outrage, “reaffirm(ed) the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office.” Although a doctrinal analysis of the subject of immunity under international law will be a part of my next research, suffice it to say that the issue is one that the court, unlike states with universal jurisdiction power, is sufficiently equipped to deal with politically under Article 16 of the ICC Statute. The Article confers on the Court the power to defer for 12 months the investigation or prosecution of a situation or proceeding if the Security Council adopts a resolution under Chapter VII of the United Nations Charter to that effect. The resolution may be renewed by the Security Council.

The second has to do with the ICC’s perceived selective enforcement of international criminal justice – the idea that the ICC targets only Africans while turning a blind eye to crimes committed by powerful states and their allies.\(^57\) Whether or not the accusation is fair remains a subject of intense debate.\(^58\) However, it must be pointed out that this perception is, in part, fed by the ease with which the UN Security Council reaches a referral resolution against African states, while showing no interest or deadlocking when a powerful state or its ally is involved. As Professor William Schabas asked, in relation to the failure of the ICC to prosecute American and Israeli officials for gross human rights violations: "Why prosecute post-election violence in Kenya or recruitment of child soldiers in the Democratic Republic of the Congo, but not murder and torture of prisoners in Iraq or illegal settlements in the West Bank?"\(^59\)

The final, and arguably the most sensitive, ground relates to the issue of timing of an indictment by the ICC against Africans, particularly where there is an obvious cognitive


\(^{58}\) In a press conference at the end of a recent AU Summit, the chairperson of the AU Assembly - Ethiopia’s Prime Minister Hailemariam Desalegn, said: “African leaders came to a consensus that the ICC process conducted in Africa has a flaw. The intention was to avoid any kind of impunity but now the process has degenerated to some kind of race-hunting rather than the fight against impunity.” See Solomon Dersso, “The International Criminal Court’s Africa Problem,” Online: Aljazeera, [http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html](http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html). On the other hand, some believe the attack on ICC is disingenuous. For instance, Amnesty International has accused the AU of having In recent years, “become a forum for some African leaders to attack the ICC and to seek to protect those charged by the Court rather than demand justice for the victims.” See “African Union: Reject Kenya’s attempt to shield its leaders from accountability,” Online: Amnesty International, [http://www.amnesty.org/en/news/african-union-reject-kenya-s-attempt-shield-its-leaders-accountability-2013-05-24](http://www.amnesty.org/en/news/african-union-reject-kenya-s-attempt-shield-its-leaders-accountability-2013-05-24).

\(^{59}\) Dersso, *Ibid*, citing Professor William Schabas
dissonance between immediate justice and peace. The AU’s position has always been that a poorly timed indictment could complicate the region’s efforts to end a conflict and project the ICC not as an institution for justice but as a “threat to peace”\textsuperscript{60} in the region. For instance, in opposing the ICC proceedings against President Omar Al Bashir of The Sudan and Senior State Official of Kenya, the AU argued that the search for justice should not be pursued in a way that impedes or jeopardizes efforts aimed at promoting lasting peace.\textsuperscript{61} It is possible that unlike in the case of universal jurisdiction, inherent in the statute of the ICC are tools with which it is able to bridge the gap between the demands for justice and the preservation of often fragile peace in an affected state secured through some negotiated political arrangements. It seems that the power to suspend an indictment for a period of time granted to the Security Council under Article 16 of the Statute is meant to prioritize peace over immediate justice if the pursuit of the latter would further escalate the situation. After all, in the context of statutory limitation, time is never of essence in international criminal prosecution. According to Article 29 of the Statute, “the crime within the jurisdiction of the Court shall not be subject to any statute of limitation.”\textsuperscript{62}

As a practical matter, though, these issues are more complicated than they appear, and future research would have to grapple with them. For instance, is there anything as the “right time” to commence prosecution and how does one scientifically make this determination? An empirical examination of the so-called post-conflict societies would reveal that there is


\textsuperscript{61} Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec.482(XXI)

\textsuperscript{62}Rome Statute, supra note 41, art 29.
always a sense of perpetual fraility about peace in these societies, so much so that the potential for relapse is ever patent. What this means is that perpetrators of international crimes might never face prosecution, since the “timing” of any indictment would always be wrong. Furthermore, from the victims’ perspective, there is a serious moral question surrounding any justification for delayed justice. The idea that the society is willing to grant a prosecutorial adjournment to a mass killer to enable him complete his heinous mission seems to be deeply offensive.

Admittedly, in contradistinction to universal jurisdiction, the ICC’s jurisdiction is highly limited. In fact, during the negotiation for the establishment of the Court, a proposal by Germany and South Korea that would have vested the Court with universal jurisdiction was rejected. Guided, arguably, by their experiences of how the principle has been abused, states did not want to establish a Court with an open-ended jurisdictional claim. Additionally, other than the above limit on its subject-matter jurisdiction, there is also a temporal restriction on its power. According to Article 11 of its Statute, the Court "has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Furthermore, given its treaty nature, obligations created by its Statute bind only member states. Thus the Court’s jurisdiction is limited to situations in which a crime occurred on the territory of a member state, or if the perpetrator of the crime is a national of a member state, the only two exceptions being where the Security Council, acting under Chapter VII of the UN Charter,

64 RomeStatute, supra note 41, art 12.
refers a mater to the Court, or where a non-party state voluntarily refers a situation to the Court.

It is, however, important not to over exaggerate the limited nature of the Court’s current jurisdiction. First, whatever significance its temporal restriction might have had in 2002 when the court commenced its work has largely dissipated, given that most of the crimes requiring international judicial intervention occurred after this date. Second, at least theoretically, the Security Council’s referral power means that even non-party states can be subjected to the jurisdiction of the Court. Finally, the criticism that the Court’s jurisdiction ratione materiae or subject-matter is too circumscribed and unreflective of global criminalization trend as evident in universal jurisdiction’s expansion to cover more human rights offenses is highly misguided since, as argued in the previous chapters, some of the crimes in respect of which some states and scholars assert universal jurisdiction remain contested. In other words, the criticism seems to exaggerate the number of international crimes over which there is consensus among states on either their customary international law or jus cogen status.

\[65\] Ibid, art. 13(b).
\[66\] Ibid, art. 12(3).
\[67\] It must be conceded that it gets more complicated in practice. Given that the UN Security Council operates on the basis of unanimity of votes of its five permanent members, what it means is that a member could veto any resolution that affects its interest or that of a key ally who is not a party to the ICC Statute. For instance, a resolution mandating the Court to investigate Israel for international crimes against Palestinians is sure to be vetoed by the United States any more that a similar resolution against China for its action against Tibet will be vetoed by China and Russia.
Having said that, it must be conceded that there is currently a gaping hole in the jurisdictional reach of the ICC that, in the absence of universal jurisdiction, could be exploited by some states, especially the powerful and their allies, to escape with impunity. As explained earlier, the court’s jurisdiction *ratione territori* and *ratione personae* is limited to only States’ Parties to its Statute, subject to two exceptions – of voluntary submission by a non-State Party or the Security Council referral. Since many states have refused to ratify the Statute, the implication is that, in the absence of universal jurisdiction, some of these states may never be prosecuted in the event that they commit an international crime. This is especially the case where a powerful state or any of its allies is involved, since any attempt by the Security Council to pass a referral resolution will certainly be deadlocked. Over the years, the political reality of having a sub-set of ICC non-Party States against whom the ICC can exercise jurisdiction while another sub-set – of powerful countries and their allies – are perpetually shielded from prosecution, among other issues, has always been a source of tension between the ICC and Africa.\(^6\)

Thus, since the vitality of universal jurisdiction is sustained by the legitimate concern that without it, certain human rights violations may fall through the cracks of the ICC and that, at least in theory, it is the best last hope for victims to seek justice, an effective centralized


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criminal court must be one that addresses this concern. To ensure that every state is brought within the jurisdiction of the ICC, and to eliminate the referral power of the Security Council, which has often been politicized, the proposed research, therefore, will have to deal with the question of how to enforce other incidences that constitute international crimes currently not covered by the ICC Statute.
Bibliography

JURISPRUDENCE


Bates v. Johnston, Ill F.2d 966, 967 (9th Cir. 1940).


Čelebići, Trial Chamber Judgement, Case No. IT-96-21-T, 26 November 1998.


Davis v. United States (1895) 160 U.S. 469.


Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985).


Filartiga v. Pena-Irala, 630 F2d 876, 890 (2d Cit. 1980).


Galić, Appeals Chamber Judgment, Case No. IT-98-29-A, 30 November 2006.


Hatch v. Baez, 14 N.Y. Sup. Ct. 596 at 599 (Sup. Ct. 1876).


Prosecutor v. Erdemović, Appeals Judgment, No. IT-96-22-A.

Prosecutor v. Furundzija, Case No. IT-95-17, Judgement (Dec. 10, 1998).


Rivard v. United States, 375 F.2d 882 (5th Cir. 1967).

Tadić Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995).


United States v. Smith, 680 F.2d 255 (1st Cir. 1982).


TREATIES AND RESOLUTIONS


Declaration regarding Germany by the United States of America and the United Kingdom of Great Britain and Northern Ireland, the Union of the Soviet Socialist Republics, and the Provisional Government of the French Republic, June 5, 1945, 60 Stat. 1649, 1650.


SECONDARY MATERIALS

BOOKS


Gennady, Denilenko. *Law-Making in the International Community* (Dordrecht: Martinus


Gourevitch, Philip. *We Wish to Inform you that Tomorrow we will be Killed with our Families* (New York: Farra, Straus and Giroux, 1999).


Lillich, Richard B. ed. *Humanitarian Intervention and the United Nations* (Charlottesville,


Röling, B. V. A. International Law in an Expanded World (Djambatan – Amsterdam, 1960).


Roth, Brad R. Governmental Illegitimacy in International Law (New York: Oxford University Press, 1999).


Ryngaert, Cedric. Jurisdiction in International Law (Oxford Scholarship online, 2009).


Great Powers and Outlaw States: Unequal Sovereigns in the International Legal

Snyder Fredrick E. & Surakiat Sathirathai, eds. Third World Attitudes towards International


Steiner Henry & Philip Alston, eds. International Human Rights in Context, 2d ed (New

Steinke, Ronen. The Politics of International Criminal Justice: German Perspectives from

Taylor, Telford. The Anatomy of the Nuremberg Trial: A Personal Memoir (New York:


Tomuschat, Christian. Obligation Arising for States without or Against their Will (Martinus

Triffterer, Otto. Commentary on the Rome Statute of the International Criminal Court, 2nd

Triggs, Gillian D. International Law: Contemporary Principles and Practices (LexisNexis
Butterworths, 2006).

Tunkin, G. I. Theory of International law (Cambridge, Mass: Harvard University Press,
1974).

Twaddle, Michael, ed. Imperialism and the State in the Third World (New York: British

Twagilimana, Aimable. HistoricalDictionary of Rwanda (United Kingdom: Scarecrow Press
Inc., 2007).

Verzijl, JHW. International Law in Historical Perspective, 10 vols (Leiden: AW Sijthoff,

Villiger, Mark E. Customary International Law and Treaties: A Study of their Interactions
and Interrelations with Special Consideration of the 1969 Vienna Conventions on the


JOURNAL ARTICLES


Al Attar, Mohsen & Rebekah Thompson. “How the Multi-Level Demcratisation of


_______ “C.G. Weeramantry at the International Court of Justice” (2001) 14 LJIL 829.


_______ “Time Present and Time Past: Globalization, International Financial Institutions,


________ “The History of Universal Jurisdiction and Its Place in International Law” in Stephen Macedo, Universal Jurisdiction: National Courts and the Prosecution of


Bell, Duncan. 'Empire and International Relations in Victorian Political Thought' (2006) 49:1 The Historical Journal 281.


________ “The Growing Support for Universal Jurisdiction in National Legislation” in


________ “Power and Visibility: Development and the Invention and Management of the


Fatouros, A. A. “International Law and the Third World” (1964) 50 Va L Rev 783.


Fidler, David P. “Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law” (2003) 2 Chinese JIL 29.


Freeman, Alwyn V. “Professor McDougal’s ‘Law and Minimum World Public Order” (1964) 58 Am J Int’l L 711


Fuller, Lon L. “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) Harv LR 630.


Gathii, James Thuo. “TWAIL: A Brief History of its origins, its Decentralized Network, and

________ “Assessing Claims of a New Doctrine of Pre-Emptive War under the Doctrine of Sources” (2005) 43 Osgoode Hall LJ 67.


461


Ikenberry, John G. “America’s Imperial Ambition” (2002) 81 Foreign Affairs 44.


462


Kunz, J. L. “La crise et les transformations du droit des gens” (1955) II Recueil des Cours 1.


Lissitzyn, Oliver J. “International Law in a Divided World” (1963) 34 Int’l Conciliation 3.


Mann, F. A. “The Doctrine of Jurisdiction in International Law” (1964) 111 Receuil des cours de l’académie de droit international 9.


_________ “The Bearded Bandit, the Outlaw Cop, and the Naked Emperor; Towards a North South (De)Construction of the Texts and Contexts of International Law’s (Dis)Engagement with Terrorism” (2005) 43 Osgoode Hall L J 105.


Riesenfeld, Stefan A. “JusDispositivum and JusCogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court” (1966) 60 Am J Int'l L 511.


Roberts, Anthea. “Comparative International Law? The Role Of National Courts In Creating And Enforcing International Law” (2011) 60 Int'l and Comp 57


Sands, Philippe. “After Pinochet: The Proper Relationship between National and


Sinha, S. Prakash. “Perspective of the Newly Independent States on the Binding Quality of International Law” (1965) 14 Int’l & Comp LQ 121.


Van Der Molen, G. H. J. “Alberico Gentili and the Universality of International Law” (1964) 13 Indian Y.B. Int’l Aff 33.


Williams, Marc. “Re-articulating the Third World coalition; the role of the environmental Agenda”, (1993) 14:1Third World Quarterly 28.


_________ “The Outlawry of War” (1925) 19 AJIL 76.

Yasuaki, Onuma “When Was the Law of International Society Born?: An Inquiry of the


ELECTRONIC SOURCES


Prosecutor v. Furundija, online: <http://www.un.org/icty/furundzija/trialc2/judgement/furtj981210e.pdf> Last viewed 09-08-2104.


Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events, CM 12048 (LXVII), May 2000, Online
Last viewed 12-08-2104.


Statute of the International Court of Justice, online: International Court of Justice, <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II> Last viewed 25 08-2104.


**NEWSPAPER PUBLICATIONS**


