

# Universal Jurisdiction

## Clarifying the Basic Concept

Roger O'Keefe\*

### Abstract

*Academic analysis of the Arrest Warrant case in the International Court of Justice has tended to focus to date on the Court's judgment on immunity. Comparatively little attention has been paid to the question of universal jurisdiction, as discussed in detail in most of the separate and dissenting opinions and declarations. The following article focuses less on the various judges' conclusions as to the international lawfulness of universal jurisdiction than on their treatment of the basic concept. The article argues that this treatment is open to question, reflecting, as it does, both a conceptual conflation of states' jurisdiction to prescribe their criminal law with the manner of that law's enforcement and an inattention to crucial temporal considerations. As well as fostering dubious terminology, these factors lead some judges to an unsatisfying conclusion regarding the permissibility of the enforcement in absentia of universal jurisdiction, and cause others to underestimate the degree of state practice in favour of universal jurisdiction over crimes under general international law.*

## 1. Introduction

The separate and dissenting opinions and declarations of the judges of the International Court of Justice (ICJ) in *Arrest Warrant*<sup>1</sup> invite discussion of what is meant by 'universal jurisdiction'. This article suggests that the respective judges' understanding of the concept is debatable, since underlying it is a tendency, when dealing with states' criminal jurisdiction, to elide prescription and enforcement, as

\* University Lecturer and Deputy Director, Lauterpacht Research Centre for International Law, University of Cambridge; Fellow, Magdalene College, Cambridge. The following article is a modified and updated version of a lecture given by the author at Merton College, Oxford on 24 October 2002 as part of the Oxford Public International Law Group/International Law Association (British Branch) lecture series.

1 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, available online at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (visited 5 May 2004). The case's discussion of jurisdiction is limited to the separate and dissenting opinions and declarations.

well as an inattention to the question of when the requisite prescriptive jurisdictional nexus must be present. A number of the resulting judicial statements – eagerly looked to as the first by the World Court on national criminal jurisdiction since the *Lotus* case,<sup>2</sup> over 70 years before – serve, it is argued, as questionable guides to one of international law’s more controversial topics. The various judgments promote regrettable terminology. Moreover, the elision and inattention cited above lead some judges to a contestable finding on the lawfulness of the enforcement *in absentia* of universal jurisdiction, and causes others to underestimate the degree of state practice that exists in support of universal jurisdiction over crimes under general international law.

This article first outlines the basic principles of public international law governing national criminal jurisdiction and then, in this light, highlights and comments on the treatment of jurisdictional issues, especially universal jurisdiction, in the separate and dissenting opinions and declarations in *Arrest Warrant*.

## 2. International Principles Governing National Criminal Jurisdiction

A state’s ‘jurisdiction’, in the present context, refers to its authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law. Jurisdiction can be civil or criminal. Only criminal jurisdiction will be discussed here and, as such, only the regulation of the conduct of persons will be considered.

Jurisdiction is not a unitary concept. On the contrary, both the longstanding practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or prescriptive jurisdiction – sometimes called ‘legislative’ jurisdiction – refers, in the criminal context, to a state’s authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling.<sup>3</sup> Jurisdiction to enforce or enforcement jurisdiction – sometimes called ‘executive’ jurisdiction – refers to a state’s authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state’s authority to criminalize given conduct, jurisdiction to enforce the authority, *inter alia*, to arrest and detain, to prosecute, try and sentence, and to punish

2 *The S. S. Lotus (France v Turkey)*, 1928 PCIJ Series A, No. 10.

3 Prescription by judicial ruling occurs most commonly when a court interprets the scope of a statutory offence in such a manner as to extend that scope. In addition, in some common-law countries, certain crimes and their jurisdictional scope are still the creatures of the judge-made law alone. See *infra* note 23 for more.

persons for the commission of acts so criminalized.<sup>4</sup> Universal jurisdiction, it should be stressed from the outset, is a species of jurisdiction to prescribe.

Separate reference is sometimes made, especially in the civil context, to ‘jurisdiction to adjudicate’,<sup>5</sup> or ‘judicial’<sup>6</sup> or ‘curial’<sup>7</sup> jurisdiction, referring specifically to a municipal court’s competence under international law to adjudicate certain matters. But, in the criminal context, the distinction is generally unnecessary. The application of a state’s criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct.<sup>8</sup> As a result, a state’s criminal courts have no greater authority under international law to adjudicate conduct by reference to that state’s criminal law<sup>9</sup> than has the legislature of the state to prohibit the conduct in the first place. Equally, the trial and, in the event, conviction and sentencing of an individual for conduct prohibited by a state’s criminal law is as much a means of executing or enforcing that law as is the police’s investigation, arrest, charging and prosecution of the individual under it. As such, a state’s criminal courts have no greater authority under international law to execute the state’s criminal law than have the police or other coercive organs and agents of that state: as will be seen below, neither can operate as of right in the territory of another state. In apparent recognition of the foregoing, the respective judges of the ICJ in *Arrest Warrant*, the Court and dissenting judges of the Permanent Court of International Justice (PCIJ) in the *Lotus* case before it, and the

- 4 See, similarly, P. Daillier and A. Pellet, *Droit International Public (Nguyen Quoc Dinh)* (6th edn, Paris: LGDJ, 1999), §§ 334 and 336, respectively, drawing a distinction between ‘compétence normative’ and ‘compétence d’exécution’, i.e. ‘une distinction entre l’édiction d’une réglementation (au sens large) . . . et son application’: ‘Par contraste avec la compétence normative, qui consiste en l’édiction de normes générales et impersonnelles ou décisions individuelles par les organes investis de la fonction législative ou réglementaire, la compétence d’exécution “s’étend généralement comme le pouvoir d’accomplir des actes matériels tels la détention, l’instruction ou le redressement de la violation d’une règle de droit”’.
- 5 See, e.g. *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §§ 401 and 421–433; Council of Europe, Recommendation R (97) 11 on the amended model plan for the classification of documents concerning state practice in the field of public international law, 12 June 1997, Appendix, Part Eight (II); O. Schachter, ‘International Law in Theory and Practice. General Course in Public International Law’, 178 *Hague Recueil (HR)* (1982–V) 9, at 244–249; Y. Dinstein, ‘The Universality Principle and War Crimes’, in M.N. Schmitt and L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (Newport, RI: Naval War College, 1998) vol. 17, at 30–32.
- 6 See, e.g. M. Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1972–1973) 145; B. Oxman, ‘Jurisdiction of States’, 3 *Encyclopedia of Public International Law* (1997) 55, at 55; A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case’, 13 *European Journal of International Law* (2002) 853, at 858.
- 7 See, e.g. R. Jennings and A. Watts (eds), *Oppenheim’s International Law. Volume I. Peace* (9th edn, Harlow: Longman, 1992), § 137.
- 8 See Akehurst, *supra* note 6, at 179: ‘In criminal law legislative jurisdiction and judicial jurisdiction are one and the same.’ See similarly Oxman, *supra* note 6, at 55; F. Berman, ‘Jurisdiction: The State’, in P. Capps, M. Evans and S. Konstadinidis (eds), *Asserting Jurisdiction. International and European Legal Perspectives* (Oxford; Portland OR: Hart, 2003) 3, at 5.
- 9 Note, in this regard, the seemingly universal practice whereby a state’s criminal courts – in contrast usually to its civil courts – apply the law of that state and no other.

bulk of the mainstream European academic literature<sup>10</sup> premise their respective treatments of national criminal jurisdiction on the simple binary distinction between what are, here, termed jurisdiction to prescribe and jurisdiction to enforce.

As specifically regards jurisdiction to prescribe, state practice reveals a number of accepted bases or ‘heads’ of jurisdiction,<sup>11</sup> pursuant to which, as a matter of general international law, states may<sup>12</sup> assert the applicability of their criminal law, each of these heads being thought to evidence a sufficient link between the impugned conduct and the interests of the prescribing state. The two heads of jurisdiction unquestionably

- 10 See, e.g. the approach adopted by F.A. Mann, although Mann (along with others) refers to ‘legislative’, rather than ‘prescriptive’ jurisdiction: see F.A. Mann, ‘The Doctrine of Jurisdiction in International Law’, 111 *HR* (1964–I) 1, reproduced in F.A. Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973) 1; and F.A. Mann, ‘The Doctrine of International Jurisdiction Revisited After 20 Years’, 186 *HR* (1984–II) 9, reproduced in F.A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990) 1. See, similarly, D.W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, 53 *British Yearbook of International Law* (1982) 1, at 1; V. Lowe, ‘Jurisdiction’, in M.D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) 329, at 332–333. Combacau and Sur, likewise, distinguish between ‘compétence normative’ or ‘compétence législative’, on the one hand, and ‘compétence opérationnelle’, on the other: see J. Combacau and S. Sur, *Droit International Public* (4th edn, Paris: Montchrestien, 1999), 342 and 351, respectively. Recall also, from *supra* note 4, Daillier and Pellet’s analogous distinction between ‘compétence normative’ and ‘compétence d’exécution’. A simple binary distinction between what are here called jurisdiction to prescribe and jurisdiction to enforce is also maintained by Kelsen: see H. Kelsen, *Principles of International Law* (2nd edn, New York: Holt, Rinehart and Winston, 1966) (revised and edited by R.W. Tucker), 307–310.
- 11 These heads are alternatives: a state need only point to one of them as the basis for its assertion of jurisdiction. In this regard, note that a state’s criminal jurisdiction to prescribe in relation to any given conduct is not necessarily exclusive. It is very commonly the case that two or more states enjoy concurrent jurisdiction – that is, prescriptive jurisdiction over the same conduct – each under a different head.
- 12 This is not the place to discuss the meaning and present status of the PCIJ’s famous dictum in *Lotus*, at 19, although cf. the rider added by the Court, *ibid.*, at 20, as well as *ibid.*, diss. op. Loder, at 34, and diss. op. Nyholm, at 60–61, along with the approach taken in Harvard Law School Research in International Law, ‘Jurisdiction with Respect to Crime’, 29 *American Journal of International Law Supp.* (1935) 435. See also, far more recently, *Arrest Warrant*, sep. op. Guillaume at § 14, sep. op. Higgins, Kooijmans and Buergenthal at §§ 50–51, and diss. op. Van den Wyngaert at § 51. In the final analysis, it arguably does not matter whether the so-called ‘*Lotus* presumption’, in general or in the specific context of criminal jurisdiction, is correct or accepted in principle, since, in practice, its application need not run counter to the observable situation whereby state assertions of prescriptive criminal jurisdiction are tolerated only if they fall under specific acceptable heads: all that is required is that, instead of characterizing the accepted heads of prescriptive jurisdiction as permissive rules set against a backdrop of a general prohibition, we think of them as pockets of residual presumptive permission in the interstices of specific prohibitions. The only difference – and this might not, in the event, be that great – is the burden of proof. As it is, the Court in *Lotus* summarized its position very generally, stating that ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty’: *Lotus*, at 19. This simple statement is unimpeachable and ‘[w]hatever the underlying conceptual approach, a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction’: Oxman, *supra* note 6, at 56. On a different note, it is worth stating that, as a matter of general international law (cf. certain treaty obligations), jurisdiction to prescribe is permissive or facultative, not mandatory. Whether or not a state actually asserts a jurisdiction allowed it by international law is a matter for that state.

available to states in respect of all offences are territoriality and, in relation to extraterritorial offences, nationality: that is, a state may criminalize conduct performed on its territory, as well as conduct performed abroad by one of its nationals. In addition, extraterritorial prescriptive jurisdiction over the conduct of non-nationals on the basis of so-called 'passive personality' – viz. where the victim of the offence is a national of the prescribing state<sup>13</sup> – now appears generally permissible.<sup>14</sup> Extraterritorial prescriptive jurisdiction over the conduct of non-nationals is also permitted, although only in relation to certain offences, under what is known as the 'protective' principle (or *compétence réelle*): that is, states may assert criminal jurisdiction over offences committed abroad by aliens where the offence is deemed to constitute a threat to some fundamental national interest.<sup>15</sup> The assertion of criminal jurisdiction over extraterritorial conduct by aliens on the basis of the 'effects' doctrine – viz. where the offence is deemed to exert some deleterious effect within the territory of the prescribing state – remains controversial, if apparently not objectionable in all cases.<sup>16</sup> Many states also assert prescriptive criminal jurisdiction over the extraterritorial conduct of non-nationals on a range of other bases thought to evidence a sufficient link with the prescribing state's interests, e.g. on the basis of the offender's residency in that state or his or her service in that state's armed forces. Such assertions have seemingly excited no adverse reaction. Finally, even if the range of such offences is contested, criminal jurisdiction over the extraterritorial conduct of non-nationals also attaches to certain

- 13 In the past, passive personality was sometimes subsumed terminologically into the protective principle: see, e.g. *Lotus*, diss. op. Finlay, at 55–58 and diss. op. Moore, at 91–92.
- 14 Such jurisdiction was disputed in the past: see, e.g. *Lotus*, diss. op. Loder, at 36, diss. op. Finlay, at 55–58, diss. op. Nyholm, at 62 and diss. op. Moore, at 91–93; see also Harvard Law School Research in International Law, *supra* note 12, at 445 and 579. The Court in *Lotus* reserved its opinion on the existence of the principle: see *Lotus*, at 22–23. But, as noted by Judges Higgins, Kooijmans and Buergenthal, in their joint separate opinion in *Arrest Warrant*, at § 47, '[p]assive personality jurisdiction, for so long regarded as controversial, is now reflected . . . in the legislation of various countries . . . and today meets with relatively little opposition, at least so far as a particular category of offences is concerned'. For his part, Judge Rezek asserts that a 'majority of countries' give effect to the principle: *Arrest Warrant*, sep. op. Rezek, at § 5. President Guillaume goes so far as to treat passive personality as part of 'the law as classically formulated': *Arrest Warrant*, sep. op. Guillaume, at § 4.
- 15 See, e.g. *Lotus*, at 20 and *ibid.*, diss. op. Loder at 35–36; *Arrest Warrant*, sep. op. Guillaume at § 4 and sep. op. Rezek at § 4. In the past, at least, this principle has been less a general rule than the basis on which a few, specific exercises of extraterritorial jurisdiction over non-nationals have been tolerated by states, e.g. the offence of counterfeiting currency or an inchoate conspiracy to assassinate the head of state.
- 16 The effects doctrine proper is to be distinguished from prescriptive jurisdiction on the basis of so-called 'objective' territoriality, out of which it seems to have grown: we speak of the former rather than the latter when no constituent element of the offence takes place within the territory of the prescribing state. The Court in *Lotus* was content simply to note the occasional assertion of such jurisdiction: see *Lotus*, at 23. In the event, extraterritorial prescriptive jurisdiction on the basis of the effects doctrine has proved uncontroversial in relation to certain offences, e.g. inchoate conspiracies to commit murder, to import prohibited drugs, etc. But, to cut a long story short, it has proved highly controversial in other areas, notably in the field of antitrust or competition law, even if today "[e]ffects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union' in this area: *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 47.

specific offences on the basis of universality – that is, in the absence of any other acceptable prescriptive jurisdictional nexus.<sup>17</sup>

While jurisdiction to prescribe can be extraterritorial, jurisdiction to enforce is, by way of contrast, strictly territorial. A state may not enforce its criminal law in the territory of another state without that state's consent.<sup>18</sup> The territorial character of jurisdiction to enforce is seen most clearly in the impermissibility, as of right, of extraterritorial police powers: the police of one state may not investigate crimes and arrest suspects in the territory of another state without that other state's consent.<sup>19</sup> It is also reflected in the judicial sphere: the criminal courts of one state may not, as of right, sit in the territory of another,<sup>20</sup> or subpoena witnesses or documents, or take sworn affidavit evidence abroad. The upshot of this is that a state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it. At the same time, general international law does not prohibit the issuance of an arrest warrant for a suspect or the trial of an accused *in*

17 See, e.g. *Arrest Warrant*, sep. op. Guillaume, at §§ 12 and 16 (piracy), sep. op. Koroma, at § 9 (at least piracy, war crimes and crimes against humanity, including the slave trade and genocide), sep. op. Higgins, Kooijmans and Buergenthal, at §§ 61–65 (at least piracy, war crimes and crimes against humanity), and diss. op. Van den Wyngaert, at § 59 (at least war crimes and crimes against humanity, including genocide).

18 See, e.g. *Lotus*, at 18–19; *Arrest Warrant*, sep. op. Guillaume, at § 4, sep. op. Higgins, Kooijmans and Buergenthal, at § 54, and diss. op. Van den Wyngaert, at § 49. General international law admits of only rare exceptions to the territoriality of criminal jurisdiction to enforce, all of them pertaining to armed conflict. First, military forces engaged in armed conflict in the territory of a foreign state are permitted to capture or otherwise take into custody and detain hostile combatants, as well as civilians accompanying regular armed forces, when such persons fall into their power in the course of hostilities. Secondly, a state in belligerent occupation of all or part of the territory of a hostile state is permitted to exercise certain extraterritorial powers of criminal (prescription and) enforcement over the occupied territory, in accordance with rules now codified in Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, Arts 64–77. Finally, an occupying power is permitted, under certain conditions, to resort to preventive detention, in accordance with Geneva IV, Art. 78.

19 Examples of consent to the extraterritorial exercise of police powers are Arts 40 and 41, providing for limited and conditional cross-border powers of police investigation and of 'hot pursuit', respectively, of the Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000, OJ 2000 L239, 0019–0062; see also the provisions typical of status of forces agreements (SOFAs), e.g. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, UKTS No. 3 (1955), Cmd 9363, Art. VII.

20 An example of consent to the extraterritorial sitting of a criminal court is the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish Trial in the Netherlands, 24 August 1998, UKTS No. 43 (1999). See also, more recently, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand concerning Trials under Pitcairn Law in New Zealand and Related Matters, 11 October 2002, Cmd 5745.

*absentia*, the legality of both being a question for the municipal law of each state.<sup>21</sup> Nor does the territorial character of criminal enforcement jurisdiction prevent the prescribing state from requesting the extradition of a suspect, accused or convict from the territory of a state in which he or she is present, or from requesting other police or judicial assistance from another state.

Jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other. The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and vice versa. For example, imagine that a criminal court in the state of Hernia tries and convicts a national of the state of Dyspepsia under a Hernian statute outlawing whistling in Dyspepsia, the accused having been arrested while on holiday in Hernia. Hernia is exercising an exorbitant prescriptive jurisdiction, but no rule of international law governing jurisdiction to enforce has been breached. Conversely, imagine that Dyspepsian police arrest, in Hernian territory, a Dyspepsian national, charged with murder in Dyspepsia. This constitutes an exorbitant exercise by Dyspepsia of jurisdiction to enforce, even if it enjoys jurisdiction under international law to criminalize the conduct in question.

At the same time, while *jurisdiction to prescribe* and *jurisdiction to enforce* are mutually distinct, the act of prescription and the act of enforcement are, in practice, intertwined. A state's assertion of the applicability of its criminal law to given conduct is actualized, as it were, when it is sought to be enforced in a given case. Nonetheless, the act of prescription can still be said to take place when the prohibition in question is promulgated, the conduct prohibited being, at that point, hypothetical (that is, paradigmatic murder, paradigmatic robbery and so on). It might well be that the question of when prescription occurs is distinct from the question of when state responsibility for the arrogation of exorbitant prescriptive jurisdiction can be said to be engaged, although the latter might, in turn, depend upon the way in which responsibility is invoked.<sup>22</sup> But, as far as prescription itself is concerned, this must be

21 See, e.g. *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 56. As regards the trial of the accused, the jurisdiction of the criminal courts in the common-law tradition is, as a matter of municipal law, generally *in personam*: with a few exceptions, the presence of the accused in the court is a precondition to his or her trial. By contrast, many civil-law states permit trial *in absentia* under certain conditions.

22 It would seem that, vis-à-vis an injured state within the meaning of Art. 42 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res. 56/83, 12 December 2001, responsibility arises only when prescriptive jurisdiction is exercised, i.e. when it is enforced, e.g. when the Dyspepsian national is arrested by the Hernian authorities on suspicion of having violated Hernian law by whistling in Dyspepsia. See also L. Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (Oxford, New York: Oxford University Press, 2003) 25. On the other hand, it might be the case that a so-called 'interested' state acting under Art. 48 of the ILC's Articles could invoke the responsibility of Hernia for its mere promulgation of the offensive law, and would be entitled to demand its repeal, even if it were never enforced. Such questions are beyond the scope of this article.

said to occur when jurisdiction is asserted, rather than exercised.<sup>23</sup> If this were not the case, then the prescription of the prohibition in question – in other words, the proscription of the relevant conduct – would take place after the commission of the prohibited conduct and, as such, would amount to *ex post facto* criminalization – a phenomenon abhorred by the world’s major legal traditions and contrary to international human-rights law.<sup>24</sup>

This last point helps to answer the question of when the relevant prescriptive jurisdictional nexus – be it territoriality, the nationality or residency of the offender, the nationality of the victim, or the offender’s service in the armed forces of the prescribing state – must exist in a given case; and the answer is that the nexus relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed. This is obvious in relation to territoriality. The assertion of prescriptive jurisdiction over an offence that takes place abroad cannot be founded on territoriality simply because the offender subsequently enters the territory of the prescribing state: regardless of how it is enforced, an assertion of prescriptive jurisdiction over conduct taking place outside the territory of the prescribing state is an assertion of extraterritorial jurisdiction, for which an alternative legal justification must be found. As Judge Loder noted in his dissenting opinion in *Lotus*, speaking specifically of jurisdiction to prescribe on the basis of territoriality:

... a law [cannot] extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and the *subsequent presence of the guilty person* cannot have the effect of *extending the jurisdiction of the State*.<sup>25</sup>

Similarly, in respect of nationality, the offender must be a national of the prescribing

23 The situation is more complex when a state’s assertion of the applicability of its criminal law to given conduct takes place by way of judicial ruling. As mentioned *supra* note 3, this can happen in one of two ways. In the vast majority of cases in both civilian and common-law systems, such a ruling will take the form of an expansive interpretation by the court of the ambiguous jurisdictional scope of a given statute. While the practical effect of such a ruling is that prescription occurs only at the moment of its exercise, the formal legal characterization of the situation is that the statute in question has always had the jurisdictional scope ascribed to it by the court; as such, prescription can still be said, at least in formal terms, to have occurred when the statute came into force. In some common-law countries, however, the jurisdictional scope of at least certain crimes is still the creation solely of the judge-made law, the upshot being that a judicial ruling can (leaving aside certain objections) extend the jurisdictional scope of a crime without reference to statute. Here, recourse must be had to the traditional common-law fiction that a judicial ruling merely ‘discovers’ what the common law has always been, the result being that, again at least formally, prescription takes place not at the moment of enforcement but when the common law is said, by historical fiction, to have emerged. In both instances, the reality is that serious questions of retroactivity arise: although the prohibition itself might have existed at the time of the accused’s conduct, the application of the prohibition to the accused might not have been ascertainable.

24 See Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, Art. 11(2); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 15(1); European Convention on Human Rights, 4 November 1950, ETS No. 5, Art. 7(1); American Convention on Human Rights, 22 November 1969, OASTS No. 36, Art. 9; African Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, Art. 7(2).

25 *Lotus*, diss. op. Loder, at 35 (original emphasis).



state at the moment at which he or she commits the offence. The same applies, *mutatis mutandis*, to prescriptive jurisdiction on the basis of residency, passive personality and service in the armed forces of the prescribing state.<sup>26</sup> The reason for this, as alluded to above, is the cardinal principle of the rule of law expressed in the maxim *nullum crimen nulla poena sine lege*. The exercise of prescriptive jurisdiction on the basis of a jurisdictional nexus established subsequent to the commission of the offence is a form of *ex post facto* criminalization and, therefore, repugnant, in that a substantive national criminal prohibition and its attendant punishment – and not merely a national procedural competence – become applicable to the accused only after the performance of the impugned conduct.<sup>27</sup>

This last point is worth emphasizing: the exercise by a state of prescriptive jurisdiction in reliance on a jurisdictional nexus not satisfied until after the commission of the ‘offence’ means that, at the moment of commission, the ‘offender’ is not prohibited by the law of that state from performing the relevant act; as such, his or her subsequent conviction and punishment for that act under the law of the state in question are violations of the principle of legality. This is especially significant in relation to prescriptive jurisdiction asserted on the basis of a nationality (or, equally, residency) acquired after the impugned act. True, a number of states provide for jurisdiction over certain strictly municipal offences<sup>28</sup> on the basis of nationality acquired by the offender subsequent to the commission of the offence.<sup>29</sup> But, this,

- 26 The question has less chance of arising in relation to the protective principle and the effects doctrine, where the requisite prescriptive jurisdictional nexus – respectively, the threat posed by the relevant conduct to a fundamental interest of the prescribing state and the effect of the relevant conduct within its territory – is, in practice, simply deemed to exist in relation to certain offences such as counterfeiting. But consider the situation where the prescribing state itself did not exist at the time of the commission of the offence; and query the statements in this regard in *Attorney-General of Israel v Eichmann*, 36 *International Law Reports (ILR)* 5, at 49–57, especially §§ 36–38 (1961, Dist. Ct Jerusalem) and 36 *ILR* 5, at 304 (1962, Sup. Ct Israel).
- 27 That said, it might be countered that the considerations of natural justice underpinning the principle of legality are less compelling in circumstances where individuals have the choice of whether to render themselves liable to punishment for past conduct by subsequently adopting a given nationality or residency, or by subsequently joining the armed forces of a given state. This rebuttal, however, is unsatisfactory when it comes to jurisdiction on the basis of passive personality in cases where the victim acquires the relevant nationality after the commission of the offence. In such cases, the offender is obviously denied fair warning.
- 28 It is crucial to note that different considerations apply to crimes under general international law, as specifically considered *infra*. In short, the principle of legality is not violated in cases of municipal retroactivity where the impugned conduct constituted an offence under international law at the time of its commission: see, e.g. Universal Declaration, Art. 11(2); ICCPR, Art. 15(1); ECHR, Art. 7(1), as consonant with customary international law. This is highly relevant to the exercise of universal jurisdiction over crimes under general international law, especially by means of subsequent nationality or subsequent residency jurisdiction, as also discussed *infra*.
- 29 See, e.g. Penal Code (France), Art. 113–6. See also the sources cited in Z. Deen-Racsmany, ‘The Nationality of the Offender and the Jurisdiction of the International Criminal Court’, 95 *American Journal of International Law (AJIL)* (2001) 606, at 614.

nonetheless, violates the prohibition on the retroactive application of criminal laws,<sup>30</sup> and cannot be said to be a valid exercise of nationality jurisdiction in the eyes of public international law,<sup>31</sup> even if it has elicited no great reaction from states who do not assert it. The lack of adverse response does not necessarily denote acquiescence. For one thing, while such provisions are on the books, it seems that they have only very rarely formed the basis of prosecutions; as such, there has been little opportunity for the occasioning of injury to other states,<sup>32</sup> and, hence, for protest. Moreover, there is no indication of the *opinio juris* accompanying the apparent silence, and the most likely explanation for it relates to the admissibility of claims under the law of diplomatic protection: the offender's change of nationality after the commission of the offence implicates the rule on the continuous nationality of claims; alternatively, the offender's later assumption of an additional nationality implicates questions of dual nationality. Whatever other subjective belief as might exist is just as likely political as legal.<sup>33</sup>

### 3. Clarifying Universal Jurisdiction

#### A. Basic Definition

It comes as something of a surprise that none of the judges in *Arrest Warrant* explicitly posits a definition of universal jurisdiction, despite the concept's centrality to the case. In fact, Judge ad hoc Van den Wyngaert suggests, in her dissenting opinion, that '[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law',<sup>34</sup> stating that '[m]any views exist as to its legal meaning'<sup>35</sup> and that 'uncertainties ... may exist concerning the definition [of the concept]'.<sup>36</sup>

In response to Judge ad hoc Van den Wyngaert, one might fairly question whether treaty or custom could be expected to provide such a definition, rather than just permissive or prohibitive rules regarding a phenomenon defined doctrinally. One might query, also, the genuineness or seriousness of the alleged debate over the meaning of universal jurisdiction. And, one might, with reason, point out that the absence of a customary or conventional definition and the supposed plurality of

30 See also L. Sarkar, 'The Proper Law of Crime in International Law', 11 *International and Comparative Law Quarterly (ICLQ)* (1962) 446, at 459. The question is floated but left open by Deen-Racsmany, *supra* note 29, at 614–615, especially note 61, although she does suggest *contra* that '[n]ationality either at the time of prosecution or at the time of the commission of the crime should be sufficient for jurisdiction' (*ibid.*, at 615).

31 Cf., *contra*, Harvard Law School Research in International Law, *supra* note 12, at 531–532, and the sources referred to therein, even if the authors concede that such jurisdiction is 'possibly a little difficult to justify theoretically' (*ibid.*, at 532).

32 Recall *supra* note 22.

33 See, e.g. *Lotus*, diss. op. Altamira, at 98.

34 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 44.

35 *Ibid.*, at § 45.

36 *Ibid.*, at § 46.

doctrinal definitions do not mean that no single soundest definition of universal jurisdiction cannot be given.

It would seem sufficiently well agreed that universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct. (It should again be stressed, in this light, that the term ‘universal jurisdiction’ is shorthand for ‘universal jurisdiction to prescribe’ or ‘universal prescriptive jurisdiction’ and that the point by reference to which one characterizes the head of prescriptive jurisdiction relied on in a given case is the moment of commission of the putative offence.) In positive and slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.<sup>37</sup> This positive definition is, needless to say, a mouthful, and universal jurisdiction is probably more usefully defined in opposition to what it is not. Indeed, Ascensio observes that universal jurisdiction ‘is usually defined negatively, as a ground of jurisdiction which does not require any link or *nexus* with the elected *forum*’.<sup>38</sup> As stated by de la Pradelle:

La compétence pénale d’une juridiction nationale est dite ‘universelle’ quand . . . un tribunal que ne désigne aucun des critères ordinairement retenus – ni la nationalité d’une victime ou d’un auteur présumé, ni la localisation d’un élément constitutif d’une infraction, ni l’atteinte portée aux intérêts fondamentaux de l’État – peut, cependant, connaître d’actes accomplis par des étrangers, à l’étranger ou dans un espace échappant à toute souveraineté.<sup>39</sup>

Similarly, Reydams states:

Negatively defined, [universal jurisdiction] means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.<sup>40</sup>

(By ‘nationality’, Reydams means both ‘the nationality of the perpetrator, and the nationality of the victim’.<sup>41</sup>) Meron, likewise, defines universal jurisdiction as existing when ‘states that have no territorial or nationality (active or passive) or “protective principle” links’ are permitted, by international law, ‘to prosecute those who commit

37 See, similarly, Reydams, *supra* note 22, at 5: ‘Positively defined, a State exercises universal jurisdiction when it seeks to punish conduct that is totally foreign, ie conduct by and against foreigners, outside its territory and its extensions, and not justified by the need to protect a narrow self-interest.’

38 H. Ascensio, ‘Are Spanish Courts Backing Down on Universality? The Supreme Tribunal’s Decision in *Guatemalan Generals*’, 1 *Journal of International Criminal Justice (JICJ)* (2003) 690, at 699. See also, in a similarly negative formulation, M. Henzlin, *Le principe de l’universalité en droit pénal international* (Basel/Geneva/Munich: Helbing and Lichtenhahn; Bruxelles: Bruylant, 2000) 1 and 29, § 72.

39 G. de la Pradelle, ‘La compétence universelle’, in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit International Pénal* (Paris: Pédone, 2000) 905, at § 1. See also B. Stern, ‘À Propos de la Compétence Universelle . . .’, in E. Yakpo and T. Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague: Kluwer, 1999) 735, at 737 (‘une compétence universelle . . . signifie que l’Etat a le droit d’exercer une compétence pour certains actes qui ne sont pas produits sur son territoire, et à l’égard desquels il ne serait pas normalement compétent’).

40 Reydams, *supra* note 22, at 5.

41 *Ibid.*

[offences]'.<sup>42</sup> Paragraph 404 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides an analogous definition.<sup>43</sup> Other definitions commonly offered are essentially identical, even if they often omit reference to less common heads of prescriptive jurisdiction, such as the protective principle and passive personality.<sup>44</sup> All conceive of universal jurisdiction as permitting a state to deem given conduct an offence against its law, 'regardless of any nexus the state may have with the offen[c]e, the offender, or the victim'.<sup>45</sup>

By way of aside, note that universal jurisdiction is often said to mean that 'any' state or 'every' state is permitted to criminalize the conduct in question.<sup>46</sup> While the gist of such statements is clear and obviously correct, the use of words like 'any' and 'every' can be unintentionally misleading, in so far as it might be mistaken to suggest that universal jurisdiction can never be grounded in treaty law, circumscribed as it is by the *pacta tertiis* principle. Such a misapprehension would seem to underpin Higgins' heterodox characterization (in a non-judicial capacity) of a certain provision common to many international criminal conventions and generally considered to mandate universal jurisdiction.<sup>47</sup> She is not, it must be said, alone. Cameron takes a similar line<sup>48</sup> and Cassese states:

[A]s rightly pointed out by R. Higgins, these treaties do not provide for universal jurisdiction proper, for only the contracting states are entitled to exercise extraterritorial jurisdiction over offenders on their territory. In addition, it may be contended that such jurisdiction does not extend to offences committed by nationals of states *not parties*, unless the crime (1) is

42 T. Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 568. See, similarly, Schachter, *supra* note 5, at 262.

43 See also comment (a) to § 404 of the *Restatement (Third)*, *supra* note 5.

44 See, e.g. L.C. Green, 'International Crimes and the Legal Process', 29 *ICLQ* (1980) 567, at 568, as endorsed by Brennan J. of the High Court of Australia in *Polyukhovich v Commonwealth of Australia* (1991) 91 *ILR* 1, at 40; G. Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?', 16 *Melbourne University Law Review* (1987) 382, at 389, as endorsed by Cory J. of the Supreme Court of Canada in *R. v Finta* (1994) 104 *ILR* 284, at 353; K.C. Randall, 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* (1988) 785, at 788; R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press, 1994) 57; Combacau and Sur, *supra* note 10, at 350; A. Cassese, *International Law* (Oxford: Oxford University Press, 2001) 261; W.A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) 60; G. Danilenko, 'ICC Statute and Third States', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume II* (Oxford: Oxford University Press, 2002) 1871, at 1878; G.P. Fletcher, 'Against Universal Jurisdiction', 1 *JICJ* (2003) 580, at 582.

45 S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn, Oxford: Oxford University Press, 2001) 161. See, similarly, Princeton Principles on Universal Jurisdiction, available online at <http://www.princeton.edu/~lapa/univ JUR.pdf>, Principle 1(1) (visited 18 May 2004).

46 See, e.g. Green, *supra* note 44, at 568; Bowett, *supra* note 10, at 11; Randall, *supra* note 44, at 788; Oxman, *supra* note 6, at 58; Dinstein, *supra* note 5, at 18; Combacau and Sur, *supra* note 10, at 350; Stern, *supra* note 39, at 735; Cassese, *supra* note 44, at 261; Schabas, *supra* note 44, at 60; Danilenko, *supra* note 44, at 1878; B. Conforti, *Diritto Internazionale* (6th edn, Naples: Editoriale Scientifica, 2002), § 24.2.

47 See Higgins, *supra* note 44, at 63–65, referring to some of the provisions cited *infra*, note 51.

48 See I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot: Dartmouth, 1994), 80.

indisputably prohibited by customary international law ... or (2) the national of the non-contracting state engages in prohibited conduct in the territory of a state party, or against nationals of that state.<sup>49</sup>

Cassese's substantive points are sound, but his (and the others') implicit definition of 'universal jurisdiction proper' is open to question. The jurisdiction mandated by the relevant treaty provision is, in fact, universal jurisdiction – that is, prescriptive jurisdiction in the absence of any other recognized jurisdictional nexus.

## B. 'Universal Jurisdiction In Absentia'

### 1. *President Guillaume, Judge Ranjeva and Judge Rezek in Arrest Warrant*

The relevant aspect of *Arrest Warrant* that is most open to question is several judges' treatment of what they call 'universal jurisdiction *in absentia*', which they posit as some sort of undisaggregated jurisdictional category. For example, President Guillaume – speaking of the jurisdictional provision common to many international criminal conventions, whereby each State Party is obliged to 'take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory ...',<sup>50</sup> without any requirement that the offence should take place on the territory of that state or that the alleged offender or victim should be one of its nationals – notes:

[N]one of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of

49 A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *JICJ* (2003) 589, at 594 (original emphasis, citation omitted). On the exercise of treaty-based universal jurisdiction over the nationals of non-party states, cf. *contra* M.P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', 35 *New England Law Review* (2001) 363.

50 *Arrest Warrant*, sep. op. Guillaume, at §§ 7–8. Provisions to this effect are found in Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970 ('Hague Convention'), 860 UNTS 1971, Art. 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft, 23 September 1971 ('Montreal Convention'), 974 UNTS 177, Art. 5(2); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 UNTS 167, Art. 3(2); Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 205, Art. 5(2); Convention on the Physical Protection of Nuclear Material, 3 March 1980, 1456 UNTS 124, Art. 8(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 112, Art. 5(2); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988 ('Rome Convention'), 1678 UNTS 221, Art. 6(4); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988 ('Rome Protocol'), 1678 UNTS 304, Art. 3(4); Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN Treaty Reg. No. 37789, Art. 9(2); Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363, Art. 10(4); Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Treaty Reg. No. 37517, Art. 6(4); Second Protocol to the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, reproduced in 38 *ILM* (1999) 769, Art. 16(1)(c); Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Treaty Reg. No. 38349, Art. 7(4); Convention against Transnational Organized Crime, 15 November 2000, UN Treaty Reg. No. 39574, Art. 15(4).

the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.<sup>51</sup>

Judge Ranjeva's use of the term and his reasoning are markedly similar.<sup>52</sup> What is more, both judges, along with Judge Rezek, talk consistently of so-called universal jurisdiction *in absentia* as if it were even less tolerable than universal jurisdiction *per se*.<sup>53</sup> President Guillaume, after observing that states 'may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory', concludes:

But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.<sup>54</sup>

Judge Ranjeva, noting by way of introduction that 'la présente déclaration portera-t-elle sur l'interprétation que la Belgique donne de la compétence universelle',<sup>55</sup> states:

5. La législation belge qui institue la compétence universelle *in absentia* pour les violations graves du droit international humanitaire a consacré l'interprétation la plus extensive de cette compétence . . . L'innovation de la loi belge réside dans la possibilité de l'exercice de la compétence universelle en l'absence de tout lien de la Belgique avec l'objet de l'infraction, la personne de l'auteur présumé de l'infraction ou enfin le territoire pertinent. Mais après les tragiques événements survenus en Yougoslavie et au Rwanda, plusieurs Etats ont invoqué la compétence universelle pour engager des poursuites contre des auteurs présumés de crimes de droit humanitaire; cependant, à la différence du cas de M. Yerodia Ndombasi, les personnes impliquées avaient auparavant fait l'objet d'une procédure ou d'un acte d'arrestation, c'est-à-dire qu'un lien de connexion territoriale existait au préalable.

6. En droit international, la même considération liée au lien de connexité *ratione loci* est également exigée pour l'exercice de la compétence universelle . . .

Judge Rezek declares:

L'activisme qui pourrait mener un Etat à rechercher hors de son territoire, par la voie d'une demande d'extradition ou d'un mandat d'arrêt international, une personne qui aurait été accusée de crimes définis en termes de droit des gens, mais *sans aucune circonstance de rattachement au for*, n'est aucunement autorisé par le droit international en son état actuel . . .<sup>56</sup>

He concludes:

51 *Arrest Warrant*, sep. op. Guillaume, at § 9; see also *ibid.*, at § 12.

52 See *Arrest Warrant*, dec. Ranjeva, at § 7.

53 As regards universal jurisdiction *per se*, President Guillaume states explicitly that it is not recognized by general international law except in relation to piracy: *Arrest Warrant*, sep. op. Guillaume, at § 16. Judge Ranjeva, while taking the view that 'universal jurisdiction *in absentia*' is impermissible (*Arrest Warrant*, dec. Ranjeva, at §§ 8–12), is silent on the status under general international law of universal jurisdiction over offenders subsequently present in the territory of the prescribing state. Judge Rezek rejects, as a matter of general international law, the attachment of universal jurisdiction to the war crimes and crimes against humanity at issue in the case before the Court, both in principle as well as when enforced *in absentia*: *Arrest Warrant*, sep. op. Rezek, at § 10.

54 *Arrest Warrant*, sep. op. Guillaume, at § 16. Reference by President Guillaume to 'universal jurisdiction *in absentia*' is also found *ibid.*, at §§ 13 and 17.

55 *Arrest Warrant*, dec. Ranjeva, at § 3.

56 *Arrest Warrant*, sep. op. Rezek, at § 6 (original emphasis).

[L]e for interne de la Belgique n'est pas compétent, dans les circonstances de l'espèce, pour l'action pénale, faute d'une base de compétence autre que le seul principe de la compétence universelle et faute, à l'appui de celui-ci, de la présence de la personne accusée sur le territoire belge, qu'il ne serait pas légitime de forcer à comparaître.<sup>57</sup>

For her part, Judge ad hoc Van den Wyngaert, while holding *contra* that 'universal jurisdiction *in absentia*' is not prohibited by conventional or customary international law,<sup>58</sup> also tends to treat it as a distinct head of jurisdiction, the lawfulness of which is to be proved in its own right;<sup>59</sup> but close reading suggests that this is probably just a function of misplaced emphasis.

It should be noted that the approach taken by President Guillaume and Judges Ranjeva and Rezek is not without resonance in the academic literature. Reydams uses the term 'universal jurisdiction *in absentia*',<sup>60</sup> and treats it as a form of jurisdiction whose lawfulness is to be considered in its own right – that is, as distinct from universal jurisdiction *per se*.<sup>61</sup> In a related vein are the various doctrinal writings summarized by Reydams,<sup>62</sup> where what the author terms the 'co-operative general universality principle' and the 'co-operative limited universality principle' are predicated on the presence of the offender, while the so-called 'unilateral limited universality principle' states that 'any State may unilaterally launch an investigation, even *in absentia*'.<sup>63</sup> Similarly, Cassese states that the principle of universality:

... has been upheld in two different versions. According to the most widespread version, only the State where the accused is in custody can prosecute him or her (so-called *forum deprehensionis*, or jurisdiction of the place where the accused is apprehended) ... Under a different version of the universality principle, a State may prosecute persons accused of international crimes regardless ... of whether or not the accused is in custody in the forum State.<sup>64</sup>

Elsewhere, he distinguishes between 'conditional' universal jurisdiction and 'absolute' universal jurisdiction.<sup>65</sup>

## 2. Discussion

The practice of states in this regard – sparse and ambivalent, to date – does not point conclusively to the general recognition of so-called universal jurisdiction *in absentia* as a distinct category of jurisdiction whose lawfulness is to be established in its own right. As such, the question can only be approached from first principles. In this light, the approach adopted by President Guillaume and Judges Ranjeva and Rezek is not logically compelling. It conflates a state's jurisdiction to prescribe its criminal law with the manner of that law's enforcement.

57 *Ibid.*, at § 10.

58 See *Arrest Warrant*, diss. op. Van den Wyngaert, at §§ 54–55 and 58.

59 See *ibid.*, at §§ 52–58.

60 See Reydams, *supra* note 22, at 55, 74, 88–89, 156, 177, 222, 224, 225 and 227.

61 See, e.g. *ibid.*, at 224.

62 See *ibid.*, at 29–42.

63 *Ibid.*, at 38 (original emphasis).

64 Cassese, *supra* note 44, at 261.

65 See A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 284–291.

As a manifestation of ‘jurisdiction’ in some wholly notional unitary sense, there can be no such thing as ‘universal jurisdiction *in absentia*’. Universal jurisdiction is a manifestation of jurisdiction to prescribe. Like all heads of jurisdiction to prescribe, it might be that it is exercised in a given case with the accused present in the court, consequent upon his or her arrest in the territory of the prosecuting state, pursuant to a warrant issued while he or she was present in that territory. Or, it might be exercised *in personam*, but consequent upon the accused’s arrest in and extradition from a foreign state, pursuant to a warrant issued while he or she was abroad or, equally, while he or she was in the territory of the prosecuting state, having since absconded. Alternatively, it might be that it is exercised without the accused present in the court, pursuant to an outstanding warrant, issued while he or she was abroad. Or, it might be exercised *in absentia* but pursuant to an outstanding warrant, issued while a subsequently absconding accused was present in the prosecuting state. The fact is that prescription is logically independent of enforcement. On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement *in absentia*, just as there is enforcement *in personam*.

In turn, since prescription is logically distinct from enforcement, the legality of the latter can in no way affect the legality of the former, at least as a matter of reason. Universal jurisdiction to prescribe is either lawful or it is not. The issuance of a warrant *in absentia* and trial *in absentia* is either lawful or it is not. And, as far as international law goes, these last two *are*, in fact, lawful, in a reflection of the position classically adopted by the civil-law tradition. As rightly noted by Judges Higgins, Kooijmans and Buergenthal:

... [s]ome jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.<sup>66</sup>

In short, as a matter of international law, if universal jurisdiction is permissible, then its exercise *in absentia* is logically permissible also. Whether it is desirable is, needless to say, a separate question.

Of course, logic and the *opinio juris* of states do not always go hand in hand, and it is always open to states to indicate unambiguously that the international lawfulness of universal jurisdiction does, in fact, depend upon the presence of the offender. But, ‘the great majority of the interested states’<sup>67</sup> have not done so, to date.

If the novel term ‘universal jurisdiction *in absentia*’ must be used at all, it can surely only be as shorthand (and potentially confusing shorthand, at that) for the combined manifestation in a given case of two distinct aspects of national criminal jurisdiction, namely the enforcement *in absentia* of universal prescriptive jurisdiction. If one is to talk, however, of ‘universal jurisdiction *in absentia*’, then one might as well talk also of

66 See *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 56.

67 *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands), *ICJ Reports* (1969) 3, at 229 (diss. op. Lachs).



territorial jurisdiction *in absentia*, nationality jurisdiction *in absentia*, passive personality jurisdiction *in absentia*, and so on. But no one does.

As for President Guillaume's more specific conclusion – based on the classic treaty undertaking by each state party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory ...' – that the exercise *in absentia* of universal jurisdiction 'is unknown to international conventional law'<sup>68</sup> (a view echoed by Judge Ranjeva<sup>69</sup>), this confuses what is mandatory with what is permissible, as pointed out by Judges Higgins, Kooijmans and Buergenthal.<sup>70</sup> It is clear that the territorial precondition to the exercise of the mandatory universal jurisdiction envisaged in such treaty provisions is designed to take account of the general unavailability of trial *in absentia* among states of the common-law tradition. A conventional *obligation* to provide for the exercise of universal jurisdiction *in absentia* would prevent these states from being able to ratify the conventions in question. In this light, the territorial precondition serves as a universally acceptable lowest common denominator, designed to encourage maximum participation in these treaties.<sup>71</sup> Moreover, as observed by Judge ad hoc Van den Wyngaert, most of the international criminal conventions which contain this provision also embody a provision to the effect that the convention 'does not exclude any criminal jurisdiction exercised in accordance with national law'.<sup>72</sup> It is also worth recalling that the mandatory universal jurisdiction provision in question is accompanied, in every single instance, by an *aut dedere aut judicare* provision;<sup>73</sup> and, as remarked by Judges Higgins, Kooijmans and Buergenthal:

... [t]here cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible

68 *Arrest Warrant*, sep. op. Guillaume, at § 9.

69 *Arrest Warrant*, dec. Ranjeva, at § 7.

70 *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 57.

71 See also Ascensio, *supra* note 38, at 700 (original emphasis): 'The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only a procedural condition for the exercise of universal jurisdiction, usually required for practical reasons. ... Some international conventions do mention it, in order to set up a minimum obligation for states to implement universal jurisdiction.'

72 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 61. See, in this regard, Hague Convention, Art. 4(3); Montreal Convention, Art. 5(3); Internationally Protected Persons Convention, Art. 3(3); Hostages Convention, Art. 5(3); Nuclear Material Convention, Art. 8(3); Torture Convention, Art. 5(3); Rome Convention, Art. 6(4); Rome Protocol, Art. 3(5); Illicit Trafficking Convention, Art. 4(3); Mercenaries Convention, Art. 9(3); UN and Associated Personnel Convention, Art. 10(5); Terrorist Bombings Convention, Art. 6(5); Second Hague Protocol, Art. 16(2); Financing of Terrorism Convention, Art. 7(6); Organized Crime Convention, Art. 15(6).

73 See Hague Convention, Art. 7; Montreal Convention, Art. 7; Internationally Protected Persons Convention, Art. 7; Hostages Convention, Art. 8(1); Nuclear Material Convention, Art. 10; Torture Convention, Art. 7(1) and (2); Rome Convention, Art. 10(1); Mercenaries Convention, Art. 12; UN and Associated Personnel Convention, Art. 14; Terrorist Bombings Convention, Art. 8; Second Hague Protocol, Art. 17(1); Financing of Terrorism Convention, Art. 10(1); Organised Crime Convention, Art. 16 (10).

realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario* so as to exclude a voluntary exercise of a universal jurisdiction.<sup>74</sup>

In addition, it is not clear how these treaty provisions could have a bearing either way on the position of ‘universal jurisdiction *in absentia*’ under *general* international law.

There is an intriguing postscript to all of this. In the version of *Arrest Warrant* originally made available on the ICJ website,<sup>75</sup> the dissenting opinion of Judge Rezek contained an additional paragraph (a paragraph 8) when compared with the version now available electronically. In this excised paragraph, Judge Rezek distinguishes the case before the Court from the request made by Spain ‘*in absentia*’, as it were, for the extradition by the United Kingdom of Senator Augusto Pinochet for crimes committed in Chile against Spanish nationals – a request that Judge Rezek considers internationally lawful. In a further conflation of jurisdiction to prescribe and jurisdiction to enforce, Judge Rezek concludes:

... et surtout ... la compétence de la justice espagnole avait pour fondement le principe de la nationalité passive, qui peut justifier – bien que ce ne soit pas le cas de la totalité, peut-être même pas d’une majorité d’Etats – l’engagement de l’action pénale *in absentia*, donnant lieu de ce chef à l’émission d’un mandat d’arrêt international et à la demande d’extradition.

The reason for the paragraph’s excision is a matter of surmise.

### C. ‘Classical’ Universal Jurisdiction, ‘True Universality’, Universal Jurisdiction ‘Properly So Called’, ‘Pure’ Universal Jurisdiction, etc.

#### 1. Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant*

Although recognizing that the legality of universal jurisdiction is unaffected by the method of its enforcement, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal is inconsistent in its use of the term ‘universal jurisdiction’ and seemingly unclear as to what it encompasses. This opacity, again, reflects a certain elision of prescription and enforcement, which is, in turn, a function of the judges’ inattention to the moment at which the requisite prescriptive jurisdictional nexus must be present.

The three judges observe at the outset:

As Mr Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction.<sup>76</sup>

They then ‘turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not

74 *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 57 (original emphasis).

75 Copy on file with author.

76 *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 6.

present in the State's territory',<sup>77</sup> and note, by way of preface, that, with the exception of the Belgian legislation in issue, 'national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences'.<sup>78</sup> The national legislation examined by Judges Higgins, Kooijmans and Buergenthal includes the Australian War Crimes Act 1945, as amended by the War Crimes (Amendment) Act 1988, which provides for the prosecution in Australia of war crimes committed during the Second World War by persons who, at the time of prosecution, are Australian citizens or residents; the United Kingdom's War Crimes Act 1991, which allows for the prosecution in the United Kingdom of certain war crimes committed in Europe during the Second World War by persons who, inter alia, have subsequently become nationals or residents of the United Kingdom; and the Criminal Code of Canada 1985, which establishes Canadian jurisdiction over offences in circumstances, inter alia, where 'at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada'.<sup>79</sup> Judges Higgins, Kooijmans and Buergenthal then conclude:

All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.<sup>80</sup>

Turning to national case law, the judges point to Dutch and German prosecutions:

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an 'extraterritorial jurisdiction' could be exercised over a non-national. However, in the *Hoge Raad*, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany) ...

Next, Judges Higgins, Kooijmans and Buergenthal survey the treaty law. They draw attention to the first 'grave breaches' provision, common to the four Geneva Conventions of 1949, and incorporated by reference into Additional Protocol I of 1977, which provides that 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed ... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts',<sup>81</sup> and they comment:

No territorial or nationality linkage is envisaged, suggesting a true universality principle ...

77 *Ibid.*, at § 19.

78 *Ibid.*, at § 20.

79 See *ibid.*

80 *Ibid.*, at § 21.

81 See *ibid.*, at § 28.

But a different interpretation is given in the authoritative Pictet Commentary . . . , which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to their own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?<sup>82</sup>

They also note the provision common to most international criminal conventions, discussed by President Guillaume and Judge Ranjeva, which requires each State Party to ‘take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory . . .’, or like formulation.<sup>83</sup> They state:

By the loose use of language [this] has come to be referred to as ‘universal jurisdiction’, though [it] is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.<sup>84</sup>

The judges make subsequent reference to ‘this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events)’<sup>85</sup> and to ‘the inaccurately termed “universal jurisdiction principle” in these treaties’.<sup>86</sup> Turning to academic writings, Judges Higgins, Kooijmans and Buergenthal refer to ‘[t]he assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not’.<sup>87</sup> Finally, summing up their findings, the judges declare:

That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.<sup>88</sup>

They even make passing reference to ‘universal criminal jurisdiction *in absentia*’.<sup>89</sup>

## 2. Discussion

The marked terminological inconsistency of Judge Higgins, Kooijmans and Buergenthal is frustrating, and leaves the reader scarcely able to tell whether reference to ‘universal jurisdiction’ at any given point is to universal prescriptive jurisdiction, as such, or to universal prescriptive jurisdiction enforced without the offender’s being present within the territory of the prescribing state. Perhaps even more to the point, the terminological distinctions drawn by the judges are less than sound. ‘Universal jurisdiction’, as emphasized already, is shorthand for universal jurisdiction *to prescribe*, and refers to the assertion of jurisdiction to prescribe in circumstances where

82 *Ibid.*, at § 31.

83 See *ibid.*, at §§ 33–41.

84 *Ibid.*, at § 41.

85 *Ibid.*, at § 42.

86 *Ibid.*, at § 44.

87 *Ibid.*

88 *Ibid.*, at § 45.

89 *Ibid.*, at § 49.

no other lawful head of prescriptive jurisdiction is applicable to the impugned conduct *at the time of its commission*. The term applies irrespective of whether this prescriptive jurisdiction is exercised *in personam* or *in absentia*: just as prescription and enforcement are logically and legally distinct, so too are they terminologically independent of each other. Judges Higgins, Kooijmans and Buergenthal's references to 'classical' universal jurisdiction, 'true universality', universal jurisdiction 'properly so called' and 'pure' universal jurisdiction, when what they are in fact referring to is universal prescriptive jurisdiction exercised *in absentia*, are misplaced. Indeed, universal jurisdiction 'properly so called' is universal prescriptive jurisdiction *tout court*.

Similarly, Judges Higgins, Kooijmans and Buergenthal characterize the common treaty provision obliging each State Party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory . . .' as a manifestation of 'the inaccurately termed "universal jurisdiction principle"' – also including under this rubric, by way of necessary implication, the Canadian Criminal Code's provision for jurisdiction in circumstances where 'at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada',<sup>90</sup> as well as the exercise by the Dutch courts of jurisdiction in circumstances where the only link to the Netherlands is the arrest of the accused in Dutch territory. Such exercises of criminal jurisdiction are, the judges assert, really examples of 'territorial jurisdiction over persons, albeit in relation to acts committed elsewhere' or, equally, of 'a territorial jurisdiction over persons for extraterritorial events'. This terminology is unhelpful and, with respect, a trifle silly.<sup>91</sup> In reality, these three exercises of jurisdiction are all manifestations of 'universal jurisdiction', viz. universal jurisdiction to prescribe: that is, at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction need link the prescribing state to the offender. All that is required is that the offender subsequently be present (or, in the Dutch case, be arrested) in the territory of the prescribing state – and this is a limitation strictly as to enforcement. As such, the three

90 Note that the provision in question, s. 7(3.71–3.77) of the Canadian Criminal Code, has been repealed by the subsequent Crimes Against Humanity and War Crimes Act 2000.

91 Consider also *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at §§ 53–54 (emphasis added):

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. *Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself?* An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. . . .

It might be observed that if, as a precondition to the assertion of universal jurisdiction, the presence of the accused were required at the time the offence was committed, it would not be an assertion of universal jurisdiction at all, but a straightforward assertion of jurisdiction to prescribe on the basis of territoriality.

examples all constitute exercises *in personam* of universal jurisdiction. To call them ‘territorial jurisdiction’ is to confuse the terminology of prescriptive jurisdiction with the separate concept of enforcement.

Similarly, Judges Higgins, Kooijmans and Buergenthal do not characterize as assertions of universal jurisdiction the Australian War Crimes Act (as amended) and the United Kingdom’s War Crimes Act, both of which grant the courts jurisdiction over persons accused of certain crimes committed during the Second World War where those persons have subsequently become nationals or residents of Australia and the United Kingdom, respectively. But both Acts do, in fact, represent assertions of universal jurisdiction in that, at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction need have existed. The criterion of subsequent nationality or subsequent residency is a criterion only as to the scope of permissible enforcement. In other words, these Acts are examples of universal jurisdiction, albeit enforced only as against perpetrators who, at the time of enforcement, are nationals or residents of the prescribing state. These Acts are not examples of prescriptive jurisdiction on the basis of nationality or residency. Indeed, the Australian government explicitly stated that it was providing for universal jurisdiction through the subsequent nationality and subsequent residency provisions of the War Crimes (Amendment) Act 1988 – a statement accepted in principle in the High Court of Australia.<sup>92</sup> Scholarly opinion has also characterized such provisions as manifestations of universal jurisdiction.<sup>93</sup>

In turn, neither the requirement of the offender’s subsequent presence in the territory of the prescribing state nor the limitation as to his or her subsequent nationality or subsequent residency undermines the cogency of the above legislative and judicial examples – where not pursuant to a treaty obligation – as state practice in favour of the permissibility under general law of universal jurisdiction to prescribe in relation to the offences in question. In each case, the state in question clearly considers it permissible to assert criminal jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, in circumstances where such offences are not deemed to constitute threats to the fundamental interests

92 For both the Australian government’s view and its acceptance, in principle, in the High Court, see *Polyukhovich v Commonwealth of Australia* (1991) 91 ILR 1, at 116, 118, 138 and 144 (Toohey J.), and – even if he held the legislation in question to have exceeded the bounds of international law – at 39 (Brennan J., dissenting).

93 As regards Australia’s War Crimes Act 1945, as amended by the War Crimes (Amendment) Act 1988, see J.M. Wagner, ‘US Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience’, 29 *Virginia Journal of International Law* (1989) 887, at 926; M.P. Scharf, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position’, 64 *Law and Contemporary Problems* (2001) 67, at 82, note 83, cited with apparent approval by Deen-Racsmany, *supra* note 29, at 614–615, note 54. See also Reydams, *supra* note 22, at 87; but cf. *ibid.*, at 91, where Reydams states contradictorily that ‘the proceedings against Polyukhovitch [sic.] were not an exercise of universal jurisdiction’ (original emphasis). As regards the UK’s War Crimes Act 1991, see A.T. Richardson, ‘War Crimes Act 1991’, 55 *Modern Law Review* (1992) 73, at 76, 77 and 78; Meron, *supra* note 42, at 573; Reydams, *supra* note 22, at 205.

of the prescribing state (nor even to give rise to effects within its territory). Indeed, it is no coincidence that, in each example, the jurisdiction in question was exercised or is provided for in respect of offences widely considered to give rise to universal jurisdiction under general international law – in the Dutch prosecution, in respect of a crime against humanity; in the Bavarian prosecution, genocide; and in the Australian, UK and Canadian legislation, customary war crimes.<sup>94</sup>

In each of these examples, the restriction on the enforceability of the offence would seem to be largely political. As Judge ad hoc Van den Wyngaert remarks, speaking specifically of the requirement of the offender's subsequent presence in the territory:

... [i]t may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international 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.<sup>95</sup>

The same political considerations could be seen equally to underpin the requirement of subsequent nationality or subsequent residency. Given the Pinochet experience in relation to its more expansive enforcement of universal jurisdiction over torture,<sup>96</sup> such considerations almost certainly helped motivate the United Kingdom, when enacting the International Criminal Court Act 2001, to restrict the enforcement of the offences of genocide, crimes against humanity and war crimes, when committed outside the United Kingdom by persons not, at that time, UK nationals, UK residents or persons subject to UK service jurisdiction, to the prosecution of those persons who

94 See also now s. 68, in combination with s. 51, of the International Criminal Court Act 2001 (UK), providing for jurisdiction in respect of genocide, crimes against humanity and war crimes over an accused 'who commits [the relevant] acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom', in the words of s. 68(1). See, also, to identical effect, s. 6 of the International Criminal Court (Scotland) Act 2001 (UK), in combination with s. 1(1). For the characterization of these provisions as manifestations of universal prescriptive jurisdiction, see R. Cryer, 'Implementation of the International Criminal Court Statute in England and Wales', 51 *ICLQ* (2002) 733, at 742; Reydams, *supra* note 22, at 206. For its part, however, the UK's Foreign and Commonwealth Office (FCO) made no reference to the international legal basis for the subsequent nationality and subsequent residency provisions of the International Criminal Court Act in the Explanatory Notes to the Act which it prepared: see *Explanatory Notes, International Criminal Court Act 2001, Chapter 17* (2001), at § 109; and the relevant government ministers did not characterize the Act as providing for universal jurisdiction: see 620 *HL Deb* (5s) 928–929 (Parliamentary Under-Secretary of State for the FCO), 620 *HL Deb* (5s) 999–1000 (Attorney-General) and 366 *HC Deb* (6s) 278 (Minister of State for the FCO). In the Scottish Parliament (which, under constitutional devolution arrangements with Westminster, enjoys competence to pass criminal laws), an amendment proposed by one of the smaller opposition parties, but defeated, sought to replace what was termed the 'partial universal jurisdiction' of the International Criminal Court (Scotland) Act – i.e. what was referred to as 'the residence test' – with so-called 'absolute universal jurisdiction', i.e. jurisdiction based merely on the subsequent presence of the offender in the territory: see Scottish Parliament Official Report, Thursday 13 September 2001, Session 1, col. 2418.

95 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 56 (original emphasis). See similarly Ratner and Abrams, *supra* note 45, at 185.

96 See Criminal Justice Act 1998 (UK), s. 134, at issue in *R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte* (No. 3) (1999) 119 *ILR* 135.

subsequently become resident in the United Kingdom.<sup>97</sup> Indeed, the point about international relations was made in the devolved Scottish Parliament during the passage of the analogous International Criminal Court (Scotland) Act 2001, where the spectre of ‘political repercussions for Scotland’ was raised.<sup>98</sup> Other compelling reasons for the restrictive enforcement of universal prescriptive jurisdiction would appear to be practical. As Judge ad hoc Van den Wyngaert again observes, referring once more specifically to the requirement of the offender’s subsequent presence in the territory:

... [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 ... The concern for a linkage with the national order ... seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an *opinio juris* ...<sup>99</sup>

The need to avoid overburdening the courts was one explicit motivation behind the subsequent nationality and subsequent residency restrictions in the United Kingdom’s War Crimes Act 1991;<sup>100</sup> and a similar desire not to become a ‘global prosecutor’,<sup>101</sup> along with reservations as to the practicability of evidence gathering,<sup>102</sup> were cited in debate in the Scottish Parliament over the jurisdictional provisions of the International Criminal Court (Scotland) Act. It should also be kept in mind when considering the requirement of the offender’s subsequent presence in the territory that municipal law might stipulate this as a precondition for the criminal courts’ exercise of jurisdiction. In sum, the circumscribed enforcement of universal prescriptive jurisdiction is not, without more, cogent evidence for an ambivalence on the part of states over the permissibility under general international law of the assertion of such jurisdiction *in limine*.

One important upshot of all this is that, when the assertion by states of so-called subsequent presence, subsequent nationality and subsequent residency jurisdiction over crimes under general international law is taken into account, there is more state practice to support the permissibility of universal jurisdiction over such offences than Judges Higgins, Kooijmans and Buergenthal – and, *a fortiori*, President Guillaume and

97 See *supra* note 94.

98 Scottish Parliament Official Report, *supra* note 94, col. 2423.

99 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 56 (original emphasis, citations omitted). Recall also Ascensio, *supra* note 38, at 700 (‘The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only a *procedural condition for the exercise of universal jurisdiction*, usually required for practical reasons.’). See, also, Ratner and Abrams, *supra* note 45, at 185; D. Turns, ‘Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States’, in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court. Legal and Policy Issues* (Oxford: Hart, 2004) 337, at 347–348.

100 See *HC Stand. Comm. 1989–1990*, Vol. I, Standing Committee A. War Crimes Bill. 29 March–3 April 1990, cols 45–46 (Minister of State for the Home Office).

101 Scottish Parliament Official Report, *supra* note 94, cols 2422 and 2424.

102 *Ibid.*, cols 2422, 2423, 2425 and 2427.



Judges Ranjeva and Rezek – credit.<sup>103</sup> This is potentially significant, given the latter three’s respective findings that general international law does not recognize universal jurisdiction over war crimes and crimes against humanity. Just how significant it is depends, of course, upon how many states assert subsequent presence, subsequent nationality and subsequent residency jurisdiction over such offences. This is something which calls for empirical research. The point to be made here is that these three manifestations of jurisdiction are rightly to be counted as exercises of universal jurisdiction to prescribe.

Finally, it should be added, *ex abundante cautela*, that because the above examples of subsequent nationality and subsequent residency jurisdiction are actually, and merely, exercises of national criminal jurisdiction on the basis of universality over crimes under general international law – and, critically, over crimes that existed under general international law at the moment of their commission – they do not in any way infringe the prohibition on *ex post facto* criminalization embodied in international human-rights law.<sup>104</sup> In accordance with the major international human-rights instruments, which are consonant to this extent with customary international law, the principle of legality is not violated in cases of municipal retroactivity if the impugned conduct constituted an offence under international law at the time of its commission.<sup>105</sup> In such cases, all that has happened is that a municipal procedural competence has later been extended to encompass conduct that was substantively criminal, under international law, when performed. At the same time, if a state’s municipal law defines such crimes in a manner that is broader than the international definition that prevailed at the time of their commission, then its exercise of subsequent nationality or subsequent residency jurisdiction in relation to them is, to the extent of the overbreadth, exorbitant in the eyes of international law.<sup>106</sup>

103 In this light, it should be noted that three prosecutions were initiated under the 1988 amendments to Australia’s War Crimes Act 1945 and two under the UK’s War Crimes Act 1991: see Reydams, *supra* note 22, at 87 and 205 respectively. None of these apparently drew protest from the state of nationality of the accused.

104 It is for this reason that Cassese, restricting his discussion to international crimes, is correct when he states that ‘nationality may be possessed at either moment’, viz. either ‘when the crime is perpetrated, or when criminal proceedings are instituted’: Cassese, *supra* note 65, at 282. The international criminality of the relevant war crimes at the time at which they were committed (i.e. during the Second World War) was the explicit justification, in the face of concern over offensive retroactivity, for the subsequent nationality and subsequent residency jurisdiction asserted by the War Crimes Act 1991 (UK): see *War Crimes. Report of the War Crimes Inquiry*, Cmd 744 (1989), §§ 6.41–6.44 and 9.27; 513 *HL Deb* (5s) 604 and 607 (Minister of State for the Home Department); 169 *HC Deb* (6s) 928 (Attorney-General); 519 *HL Deb* (5s) 1083 (Minister of State for the Home Department); 188 *HC Deb* (6s) 24 (Secretary of State for the Home Department).

105 See Universal Declaration, Art. 11(2); ICCPR, Art. 15(1); ECHR, Art. 7(1). By way of aside, it is interesting to note that none of these international guarantees requires that the relevant crime under international law must also, at the time of its commission, have been subject to universal jurisdiction on the part of states, and it is worth speculating whether the drafters simply considered the latter to be an inherent incident of the former. For a discussion of the relationship between the concept of a crime under international law and the concept of universal jurisdiction in the specific context of the prohibition on retroactive criminal laws, see *Polyukhovich*, *supra* note 92, at 120–121 (Toohey J.).

106 See, generally, *Polyukhovich*, *supra* note 92, at 41–51 (Brennan J., dissenting).

## 4. Conclusion

Governments, academics and students were looking to the ICJ's judgment in *Arrest Warrant* for a limpid elaboration of the international legal principles governing national criminal jurisdiction, in particular of universal jurisdiction. But the various judges ended up muddying the waters. It can only be hoped they take the second chance provided by *Certain Criminal Proceedings in France*<sup>107</sup> to clarify the law.<sup>108</sup>

107 *Certain Criminal Proceedings in France* (Republic of the Congo v. France), International Court of Justice, General List No. 129.

108 But cf., on a less optimistic concluding note, M. Henzelin, 'La Compétence Pénale Universelle. Une Question non Résolue par l'Arrêt Yerodia', 106 *Revue Générale de Droit International Public* (2002) 819, at 852: '[F]orce est d'admettre que les opinions [dans l'affaire du *Mandat d'arrêt du 11 avril 2000*] divergent du tout au tout, ce qui ne manque pas de faire craindre qu'un prochain litige soumis à la Cour internationale de Justice ne soit tranché que par la force des majorités, alors que les conséquences d'une décision, quelle qu'elle soit, ne sont pas faciles à prévoir (impunité ou chaos).'