

STATES' CRIMINAL JURISDICTION UNDER INTERNATIONAL LAW: FOSTERING A COMMON AND BETTER UNDERSTANDING

Abstract

Over the past few years, the extent to which international law allows States to exercise their jurisdiction in criminal matters has been a subject of diplomatic tensions between States. The purpose of this paper is to shed some light, on the question as to what extent a State, powerful or weak, has a right under international law to extend its criminal jurisdiction to cover crimes committed in foreign States.

Keywords: *Universal jurisdiction, extraterritorial jurisdiction, territorial jurisdiction, international crimes, States' jurisdiction under international law.*

1. Introduction

Under international law, jurisdiction is the power of a State to regulate its affairs pursuant to its laws.¹ In criminal matters,² the term jurisdiction describes the power or authority of States to make (legislative jurisdiction), apply (judicial jurisdiction), and enforce (executive jurisdiction) penal laws.³ Over the past decade, however, the extent to which international law allows States to exercise their jurisdiction in criminal matters has been a subject of diplomatic tensions between States. Two notable incidents concerned the arrests of two Rwandan officials, Rose Kabuye in Germany in 2008 and General Kareenzi Karake in the United Kingdom in 2015, pursuant to arrest warrants issued by French and Spanish authorities, respectively. In both cases, the charges concerned crimes allegedly committed by the suspects not in France or Spain but in Rwanda against French and Spanish nationals. When the arrest warrants were issued, Rwandan Government reacted angrily calling the arrest warrants a violation of Rwanda's sovereignty,⁴ and an 'absolute arrogance and contempt'.⁵ Rwanda accused the two Western countries to have 'given themselves the right to extend their national jurisdiction to indict weaker nations [...] in total disregard of international justice and order' and has asked: 'where does this right come from'?⁶ The purpose of this paper is to attempt to shed some light on the question to what extent

* By **Evode KAYITANA, LLB (NUR), LLM (Unisa), LLD (NWU, Potchefstroom)**. The author is a lecturer in the School of Law, University of Rwanda. E-mail: ekayitana@yahoo.fr

¹R. Cryer *et al An Introduction to International Criminal Law and Procedure* 2nd ed (Cambridge University Press Cambridge 2010), at 43; I. Bantekas and S. Nash, *International Criminal Law* 2nd ed (Cavendish Publishing Limited London 2003), at 143; R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' 2004 *Journal of International Criminal Justice* 735-760, at 736; C.C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' 1996 *Law & Contemporary Problems* 153-172, at 163 and M.N. Shaw, *International Law* 5th ed (Cambridge University Press Cambridge 2003), at 572.

²Jurisdiction can also be civil when it refers to private and commercial laws. See O'Keefe, *supra* note 1, at 736.

³A. Colangelo, 'The Legal Limits of Universal Jurisdiction' 2005 *Virginia Journal of International Law* 1-51, at 9 and M. C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' 2001 *Virginia Journal of International Law* 81-162, at 89; J. Dugard, *International Law: A South African Perspective* 4th ed (Juta Cape Town 2011), at 146. See also C. F. Swanepoel, *The Emergence of a Modern International Criminal Justice Order* (LLD-thesis University of the Free State 2006), at 35: 'Jurisdiction of a state with reference to its sovereignty refers to that state's sovereign right to exercise legislative, executive, administrative and judicial authority within a particular territory'.

⁴Daily Nation 2008 'Kagame says Kabuye arrest violates sovereignty' <http://www.nation.co.ke/news/africa/1066-489606-7s3gyhz/index.html> [2 Feb 2018].

⁵The Guardian 2015 'UK court drops extradition case against Rwandan spy chief' <https://www.theguardian.com/uk-news/2015/aug/10/uk-court-drops-extradition-case-rwandan-spy-chief> [2 Feb 2018]

⁶B. L. Krings, 'The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?' 2012 *Goettingen Journal of International Law* 737-763, at 739.

a State has a right, under international law, to exert its criminal jurisdiction over crimes committed in foreign States.

2. Legislative jurisdiction in criminal matters

The notion

Legislative jurisdiction, sometimes called prescriptive jurisdiction, refers to the competence to enact and prescribe the ambit of national laws.⁷ In the criminal context, legislative jurisdiction relates to a State's authority under international law to assert the applicability of its criminal law to given conduct.⁸ Prescriptive jurisdiction is the most important part of the jurisdiction of a State in international law because both the jurisdiction to enforce (executive jurisdiction) and the jurisdiction to adjudicate (judicial jurisdiction) are dependent on jurisdiction to prescribe.⁹ In other words, a State has no authority to subject persons to its judicial process if that State has no law-making authority over those persons to begin with.¹⁰

The principle of territoriality

Primarily, legislative jurisdiction is territorial. In principle, a State may apply its prescriptive jurisdiction only to persons and things within its territory.¹¹ For example, a State may not prescribe that drivers must drive on the left hand side of the road in the territory of foreign States; such legislation plainly would be contrary to international law.¹²

Extraterritorial legislative jurisdiction

Exceptionally, international law also allows States to exercise legislative jurisdiction beyond national territories.¹³ This power is reflected in the concepts of extraterritorial and universal jurisdiction which will be discussed in detail later, in relation to judicial jurisdiction.¹⁴ In a nutshell, extraterritorial legislative jurisdiction refers to a State's competence to criminalise conduct occurring in foreign States, when there is a direct and substantial link between the conduct in question and the State criminalising it.¹⁵ For example, the Rwandan Penal Code provides that a 'Rwandan' citizen who commits a felony or a misdemeanour, outside Rwandan territory, may be prosecuted and tried by Rwandan courts in accordance with the Rwandan law if such an offence is punishable by Rwandan law.¹⁶

Universal legislative jurisdiction

Universal legislative jurisdiction, or universal jurisdiction to prescribe, is, in criminal matters, the competence of a State under international law to criminalise a certain conduct that takes place abroad when, at the time of the commission of the offence, there is no direct link between the prescribing State and the crime.¹⁷ For example, all States are free to enact laws that criminalise genocide wherever and

⁷Bantekas and Nash, *supra* note 1, at 143. See also Geneuss J 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction' 2009 *Journal of International Criminal Justice* 945-962, at 949.

⁸O'Keefe, *supra* note 1, at 736.

⁹Colangelo, *supra* note 3, at 10.

¹⁰Colangelo, *supra* note 3, at 10.

¹¹Colangelo, *supra* note 3, at 12.

¹²Colangelo, *supra* note 3, at 12.

¹³O'Keefe, *supra* note 1, at 740.

¹⁴See 3 hereunder.

¹⁵Colangelo, *supra* note 3, at 12.

¹⁶Art 13 Organic Law n° 01/2012 of 02/05/2012 Instituting the Penal Code (Official Gazette n° Special of 14 June 2012).

¹⁷O'Keefe, *supra* note 1, at 756.

by whoever it may be committed.¹⁸ An example of such laws may be found in article 16 of the Rwandan Penal Code which provides that any person, including a foreigner, found within the territory of the Republic of Rwanda after having, committed on the territory of a foreign State any of the listed crimes such as crimes of genocide, crime against humanity and war crimes, shall be prosecuted and tried by Rwandan Courts in accordance with Rwandan laws 'as if the crime had been committed in Rwanda'.¹⁹

3. Judicial jurisdiction in criminal matters

Definition

Judicial jurisdiction, also called jurisdiction to adjudicate or curial jurisdiction,²⁰ relates to the competence of courts to apply national laws.²¹ In the criminal context, judicial jurisdiction refers to a municipal court's competence to try a person or persons alleged to have committed an offence.²²

In international law, judicial jurisdiction is dependent on legislative jurisdiction. National courts cannot exercise judicial jurisdiction over conduct which has not been criminalised by the State's legislature in the first place.²³ Thus, where judicial jurisdiction is asserted, legislative jurisdiction is implied.²⁴

Jurisdictional bases

The criminal jurisdiction of a State's courts under international law is primarily territorial.²⁵ Only under exceptional conditions can national courts also assert extraterritorial jurisdiction and even, under more stringent and narrower conditions, universal jurisdiction.²⁶

Territorial jurisdiction

International law grants to States the right to exercise criminal jurisdiction over all acts that occur within its territory and over all persons responsible for such criminal acts, whatever their nationality.²⁷ This

¹⁸Colangelo, *supra* note 3, at 13.

¹⁹It must be mentioned, however, that the list of the crimes which fall under the universal jurisdiction of Rwandan criminal courts pursuant to article 16 of the Penal Code is too extensive to the extent that is not allowed by international law. These crimes include such crimes as illicit manufacturing and trafficking in arms; money laundering; cross-border theft of vehicles with the intent of selling them abroad; information and communication technology related offences; which clearly cannot be said to be committed 'against the international community as whole' or 'to shock the conscience of humanity' as international crimes are properly understood.

²⁰O'Keefe *supra* note 1, at 736

²¹Bantekas and Nash, *supra* note 1, at 143. See also Colangelo, *supra* note 3, at 10: '[a]djudicative jurisdiction is [the state's] authority to subject persons or things to its judicial process'.

²²O'Keefe, *supra* note 1, at 737.

²³M. Akehurst, 'Jurisdiction in International Law' 1973 *British Yearbook of International Law* 145-257, at 179 and O'Keefe, *supra* note 1, at 737.

²⁴Akehurst, *supra* note 23, at 179: 'In criminal law legislative jurisdiction and judicial jurisdiction are one and the same. States do not apply foreign criminal law; even in those few cases where criminality under the *lex loci* is made a condition precedent for the extraterritorial application of the criminal law of the forum, the accused is acquitted or convicted of an offence under the *lex fori*. If the court has jurisdiction, it applies its own law; if the *lex fori* applies, then the court has jurisdiction (apart from cases of immunity, statutes of limitation, etc.)'. See also O'Keefe, *supra* note 1, at 737.

²⁵*Bankovic v Belgium* (2002) 123 ILR 94 para 59. See also Schabas WA 'International Crimes' in D. Armstrong, (ed) *Routledge Handbook of International Law* (Routledge London 2011), at 274: "The exercise of jurisdiction over crimes is a facet of national sovereignty. Pursuant to principles of international law, as a general rule states have only exercised jurisdiction over crimes when they could demonstrate an appropriate link or interest. Normally, this consisted of a territorial connection, either because the crime was committed on the state's territory or because it had significant effects on that territory'.

²⁶*Bankovic v Belgium* (2002) 123 ILR 94 para 59.

²⁷Cryer *et al*, *supra* note 1, at 46. See also Swanepoel, *supra* note 3, at 264-265; I. Brownlie, *Principles of Public International Law* 7th ed (Oxford University Press Oxford 2008), at 301; W. Schabas, *An Introduction to the*

jurisdiction extends to a crime which was commenced within the State's territory but completed on the territory of another State (subjective territoriality),²⁸ or which was commenced on the territory of a foreign State but completed within its territory (objective territoriality).²⁹

An example of objective and subjective territoriality in international law would be where a rocket is fired from one State at a civilian object in another.³⁰ The State in which the rocket was fired would assert jurisdiction over the crime on the basis of subjective territoriality, while the State in which the rocket landed would have jurisdiction over it on the basis of objective territoriality.³¹

Extra-territorial jurisdiction

International law also permits States to exercise criminal jurisdiction over crimes committed on foreign soil where there is a 'direct and substantial connection between the State exercising jurisdiction and the matter in question'.³² The commonly accepted bases for extraterritorial criminal jurisdiction are the nationality principle and the protective principle.

Nationality

A. Active nationality

States are entitled under international law to legislate and adjudicate with respect to the conduct of their nationals abroad (known as active nationality or active personality).³³ In *Mharapara*³⁴, a trial of an ex-Zimbabwean diplomat on charges of theft from the Zimbabwean government committed while he was in the Zimbabwean diplomatic mission in Belgium, the court exercised jurisdiction on the ground of nationality, holding that:

a state has jurisdiction with respect to any crime committed outside its territory by a person or persons who is or they are its nationals at the time when the offence was committed [...].³⁵

Some States also extend their criminal jurisdiction over the activities of their permanent residents when they are abroad.³⁶ This is an extended form of the nationality principle.³⁷ This form of jurisdiction is

International Criminal Court 4th ed (Cambridge University Press Cambridge 2011), at 73; Joyner, *supra* note 1, at 164; M. Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' 2002 *Michigan Journal of International Law* 869-975, at 870; C. L. Blakesley, 'Extraterritorial Jurisdiction' in Bassiouni MC *International Criminal Law* (Transnational Publishers Dobbs Ferry 1986), at 5 and Council of the European Union 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (2009) http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf [15 Jan 2016], para 12.

²⁸Brownlie, *supra* note 27, at 301 and Dugard, *supra* note 3, at 149-150.

²⁹Dugard, *supra* note 3, at 149-150; Brownlie, *supra* note 27, at 301 and O'Keefe, *supra* note 1, at 739.

³⁰Cryer *et al*, *supra* note 1, at 47.

³¹Cryer *et al*, *supra* note 1, at 47.

³²Dugard, *supra* note 3, at 148.

³³Dugard, *supra* note 3, at 152. See also Swanepoel, *supra* note 3, at 264; Blakesley, *supra* note 27, at 5; Lee A S 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations' 1999 *Virginia Journal of International Law* 425 – 466, at 432; Council of the European Union, *supra* note 27, para 12 and Cryer *et al*, *supra* note 1, at 47. It is worth noting that in case of criminal participation, the nationality of each accused is considered separately; jurisdiction over an accused national does not carry with it jurisdiction over his alien accomplices. Akehurst, *supra* note 23, at 156.

³⁴1985 4 SA 42 (ZH).

³⁵1985 4 SA 47.

³⁶Du Toit E *et al* Commentary on the Criminal Procedure Act (Juta Cape Town 1987), at 16-13.

³⁷Brownlie, *supra* note 27, at 303 and Cryer *et al*, *supra* note 1, at 48.

also acceptable under international law since those who have chosen to establish their permanent residency in a particular State are clearly analogous to its citizens.³⁸

B. Passive nationality

Under the nationality heading, States are also permitted to exercise criminal jurisdiction over a person who commits an offence abroad against a national of that State (passive personality).³⁹ In *United States v Tunis* (n° 2),⁴⁰ a United States District Court invoked passive personality as a basis for exercising jurisdiction over a Lebanese national who hijacked a Jordanian aircraft with United States nationals on board. Likewise, a Japanese national was prosecuted by a Netherlands Court Martial for forcing a Dutch woman into prostitution in Batavia, Indonesia from 1943 to 1945.⁴¹

The protective principle

It is accepted under international law that every country is competent to take any measures compatible with the law of nations, in order to safeguard its national interests.⁴² A state may thus exercise jurisdiction over aliens who have committed acts abroad that are considered prejudicial to its safety and security;⁴³ such as counterfeiting of the national currency⁴⁴ and treason.⁴⁵ The rationale of the protective principle is that since other States will normally not be interested in protecting the security of the affected State, it is legitimate for the State in question to take appropriate measures, including by exercising its criminal jurisdiction, against the perpetrators of the offending acts.⁴⁶ Under the protective principle, a State may also assert jurisdiction over crimes that, although committed on foreign soil, create 'effects' upon the territory of the State.⁴⁷ Thus, a State may exercise jurisdiction on such crimes such as conspiracy to commit a crime which is perpetrated on the territory of that State, even if the conspiracy took place outside the territory of the State in question.⁴⁸

Universal jurisdiction

The notion

As pointed out earlier,⁴⁹ under the principle of territoriality, the primary methods of judicial enforcement of the provisions protecting human rights should be the domestic courts of the State where the crime occurred. However, since international crimes are often committed by State agents as part of State

³⁸For example, Section 4(3) of the South African *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* provides that: '[...] any person who commits a crime contemplated in subsection (I) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if- [...] (d) that person is not a South African citizen but is ordinarily resident in the Republic'.

³⁹Dugard, *supra* note 3, at 153; Brownlie, *supra* note 27, at 304; Du Toit *et al*, *supra* note 36, at 16-13 ; Blakesley, *supra* note 27, at 5 and Council of the European, *supra* note 27, para 12.

⁴⁰681 F Supp 896 (1988) 82 ILR 344.

⁴¹*Trial of Washio Awochi* Netherlands Temporary Court-Martial at Batavia (25 October 1946) 1997 LRTWC 122-125.

⁴²Bantekas and Nash, *supra* note 1, at 154; Du Toit *et a* , *supra* note 36, at 16-13 and Joyner, *supra* note 1, at 164.

⁴³Dugard, *supra* note 3, at 150 and Blakesley, *supra* note 27, at 5.

⁴⁴Council of the European Union, *supra* note 27, para 12.

⁴⁵Du Toit *et al*, *supra* note 36, at 16-13. See also *R v Neumann* 1949 3 SA 1238 (SCC).

⁴⁶Du Toit *et al*, *supra* note 36, at 16-13.

⁴⁷Schabas, *supra* note 27, at 82. Other crimes which may fall under this type of jurisdiction are the selling of a State's secrets, spying and the counterfeiting of its currency or official seal. Cryer *et al*, *supra* note 1, at 250.

⁴⁸Schabas, *supra* note 27, at 82.

⁴⁹See 3.3. above.

policy, this method of enforcement of human rights often fails.⁵⁰ In order to counter this ‘culture of impunity’, there are two other possible avenues where judicial enforcement of human rights norms may take place. First, such enforcement may take place in international courts, such as the ICC. However, enforcement of human rights norms by such courts is limited, *inter alia*, by the fact that an international court may not have the necessary means (in terms of financial and human resources) to prosecute the violators of the large-scale violations of human rights.⁵¹ For this reason, enforcement of international criminal law must resort to the second avenue: the domestic courts of other States.⁵² For a domestic court of a foreign State to serve as a forum for the enforcement of international criminal law, however, it must first be established whether such a State has jurisdiction, as a matter of international law, to subject the issue to adjudication in its courts. This question relates to the legal concept known as ‘universal jurisdiction’. In a nutshell, a court is said to have universal jurisdiction when it has jurisdiction over persons suspected of having committed certain grave crimes under international law, independent of where these crimes were committed and independent of the nationality of the victims or alleged perpetrators, and even if these crimes did not pose a direct threat to the prosecuting State’s security or particular interests.⁵³ The concept of universal jurisdiction is discussed in detail in the next point.

The concept of universal jurisdiction

Definition, rationale and examples of universal jurisdiction:

As stated above,⁵⁴ a state’s extraterritorial jurisdiction is limited to instances where there is a ‘direct and substantial connection between the State exercising jurisdiction and the matter in question’.⁵⁵ If a State would purport to exercise extraterritorial jurisdiction in the absence of any ‘direct and substantial connection’ such exercise of jurisdiction would be regarded as an infringement over other States’ sovereignty and those States would protest.⁵⁶ With regard to crimes which are regarded as ‘international crimes’, however, the jurisdictional limitation imposed by the principle of State sovereignty is lifted.⁵⁷

⁵⁰See also D. Akande and S. Shah ‘Immunities of State Officials, International Crimes and Foreign Domestic Courts’ 2011 *European Journal of International Law* 815-852, at 816 and Cassese A *International Criminal Law* 2nd ed (Oxford University Press Oxford 2008), at 307.

⁵¹Werle G *Principles of International Criminal Law* (Asser Press The Hague 2009), at 67. See also Coalition for the International Criminal Court Date Unknown ‘ICC Implementing Legislation’ http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf [5 Feb 2018].

⁵²Akande and Shah, *supra* note 50, at 816.

⁵³A. Poels, ‘Universal Jurisdiction in Absentia’ 2005 *Netherlands Quarterly of Human Rights* 65-84, at 67; Bassiouni, *supra* note 3, at 88; Joyner, *supra* note 1, at 165; Swanepoel, *supra* note 3, at 36; Meron 1995 *AJIL* 576; Colangelo, *supra* note 3, at 2; Philippe X ‘The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?’ 2006 *International Review of the Red Cross* 375-398, at 377; D. R. Hurwitz, ‘Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium’ in D. R. Hurwitz & M. L. Satterthwaite (eds) *Human Rights Advocacy Stories* (Thomson Reuters New York 2009), at 271; Yee S ‘Universal Jurisdiction: Concept, Logic, and Reality’ 2011 *Chinese Journal of International Law* 503-530, at 505; Macedo S *et al* ‘The Princeton Principles on Universal Jurisdiction’ (Princeton University Princeton 2001) http://lapa.princeton.edu/hosteddocs/unive_jur.pdf [2 Feb 2018], at 28 and Lee, *supra* note 33, at 433-434.

⁵⁴See 3.4 above.

⁵⁵Dugard, *supra* note 3, at 148.

⁵⁶Dugard, *supra* note 3, at 152.

⁵⁷Yee, *supra* note 53, at 505. In the *Eichman* case, the District Court of Jerusalem described universal jurisdiction as follows: ‘The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself (‘*delicta juris gentium*’). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal’. *Attorney General* of the Government

The fact that an offence is a crime under international law implies that such a crime is of common concern to all States, which gives them the right to bring perpetrators to justice, regardless of territory and the nationality of the perpetrator or the victim.⁵⁸ As Lee⁵⁹ says:

[U]nlike other bases for jurisdiction, which require some direct connection between the offense and the state exercising jurisdiction, the universality principle is predicated on the assumption that certain offenses are so egregious and universally condemned that all states have an interest in proscribing and punishing the offenses no matter where or by whom they occur.

The principle of universal jurisdiction is grounded in the assumption that there is a need to expand enforcement mechanisms needed to protect individuals against the most serious violations of human rights defined as crimes under international law; and that such expanded jurisdictional enforcement network will produce deterrence and prevention, and ultimately will enhance world order.⁶⁰ Thus, when a State's courts exercise universal jurisdiction, the State is not acting in its own name *uti singulus*, but in the name of the international community as a whole.⁶¹ However, while international law permits universal jurisdiction, it is the domestic law of States which confers jurisdiction to national courts. As correctly put by Gubbay JA in *S v Mharapara*⁶² in relation to extraterritorial jurisdiction:

[T]he permissibility under international law for a state to exercise jurisdiction is not a sufficient basis for the exercise of jurisdiction by a municipal court of that state. A municipal court must be satisfied in addition that the municipal law itself authorizes the trial of a national for an offence committed abroad which would be punishable if committed at home.

This argument applies with equal force with regard to universal jurisdiction. While international law may permit such jurisdiction, it is the national laws of States that actually authorize the trial of those cases before national courts.⁶³ It is in pursuance of the principle of universal jurisdiction, that a number of perpetrators of the 1994 Genocide against the Tutsis in Rwanda have been tried and convicted in Belgium,⁶⁴ pursuant to its Law of 16 June 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocol I and II of 8 June 1977,⁶⁵ which criminalised violations of those treaties without regard to the place where the crime was committed. This was the first time in history that a third party State convicted persons of war crimes not directly affecting the

of *Israel v Adolf Eichmann* District Court of Jerusalem Case N° 40/61 (11 December 1961) para 12. A copy of this judgment is accessible at <http://www.internationalcrimesdatabase.org/Case/192> [6 Feb 2018].

⁵⁸Bassiouni *International Criminal Law* 50; Dugard, *supra* note 3, at 154 and Yee, *supra* note 53, at 505. See also Bassiouni, *supra* note 3, at 88: 'As an *actio popularis*, universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing state'.

⁵⁹Lee, *supra* note 33, at 433-434

⁶⁰Bassiouni, *supra* note 3, at 97.

⁶¹Abi-Saab 2003 *J Int'l Crim Just* 600. See also Dugard, *supra* note 3, at 154.

⁶²1986 1 SA 556 (ZS).

⁶³A. A. Lamprecht, *Nullum Crimen Sine Lege (Iure) and Jurisdiction in the Adjudication of International Crimes in National Jurisdictions* (LLD-thesis UNISA 2010), at 259: '[n]ational courts would normally not exercise international criminal jurisdiction unless they have been empowered by the legislators of their respective states to do so'.

⁶⁴*Prosecutor v Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera Brussels* Cour d'Assises (8 June 2001). A copy of the judgement is accessible at [http://www.haguejusticeportal.net/Docs/NLP/Belgium/Ntezimana_arret_\(8-6-2001\).pdf](http://www.haguejusticeportal.net/Docs/NLP/Belgium/Ntezimana_arret_(8-6-2001).pdf) [Jan 2018].

⁶⁵Law of 16 June 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocol I and II of 8 June 1977 (Belgian Official Journal of 05 August 1993).

prosecuting State.⁶⁶ Furthermore, the trial was very significant in that the defendants were not former high-ranking government officials. Two of the defendants,⁶⁷ were ordinary Benedictines while the third⁶⁸ was a professor at the National University of Rwanda, and the fourth⁶⁹ was a businessman.⁷⁰ Other countries which exercised universal jurisdiction over perpetrators of the Rwandan genocide are Switzerland and Canada. In 1999, a Swiss military court tried and found Mr. Fulgence Niyonteze, a former mayor in Rwanda, guilty of war crimes.⁷¹ In Canada, in 2009, Desire Munyaneza, was convicted of genocide, crimes against humanity and war crimes committed in Rwanda and against Rwandan citizens.⁷²

Germany has also exercised universal jurisdiction in cases related to the conflict in the Former Yugoslavia. In 1997 Mr. Nikola Jorgic, a Bosnian Serb, was found guilty of genocide against Bosnian Muslims.⁷³ In 1999, a German court also found Mr Maksim Sokolovic, a Serbian, guilty of aiding and abetting the crime of genocide against the Muslim population in Osmaci in Bosnia and Herzegovina.⁷⁴ Again, in 1999, a German court found Mr Djurdj Kusljic, another Bosnian Serb and former chief of the police station in northern Bosnia, guilty of genocide and sentenced him to life imprisonment.⁷⁵

The crimes that are subject to universal jurisdiction:

While the existence of the notion of universal jurisdiction is not disputed, the question as to which crimes States have such jurisdiction is not easily answerable. In legal literature, it is often simply stated that States have universal jurisdiction over ‘international crimes’. But, what are these international crimes over which all States have universal jurisdiction? According to Dugard,⁷⁶ the crimes that are considered as affecting the international legal order as a whole and which, consequently, fall under the universal jurisdiction of all States, are genocide, war crimes, crimes against humanity, piracy,⁷⁷ slave-

⁶⁶Case Western Reserve School of Law 2003 <http://www.nesl.edu/userfiles/file/wcmemos/2003/harrah.pdf> [Jan 2018].

⁶⁷Sister Gertrude (Consolata Mukangano) and Sister Maria Kisito (Julienne Mukabutera).

⁶⁸Vincent Ntezimana.

⁶⁹Alphonse Higaniro.

⁷⁰Keller 2001 <http://www.asil.org/insigh72.cfm> [Jan 2018].

⁷¹*Prosecutor v Fulgence Niyonteze* Tribunal Militaire d’Appel Geneva Switzerland (26 May 2000). Accessed at http://www.trial-ch.org/fileadmin/user_upload/documents/APPEL_FN.pdf [30 Jan 2018].

⁷²*R v Munyaneza* Superior Court (Quebec) Canada Case N° 500-73-002500-052 (29 Octobre 2009). Accessed at http://www.google.rw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCgQFjAB&url=http%3A%2F%2Fwww.cci.j.ca%2Fprograms%2Fcases%2Fmunyaneza-judgment-en-2009-05-22.pdf&ei=3HktU_iBHKLA7AbmuoCQBg&usg=AFQjCNHK-MykXfEzINbZgsmHK-r2pRVBjQ&bvm=bv.62922401,d.Yms [30 Jan 2018].

⁷³*Prosecution v Nikola Jorgić* Federal Court of Justice Case N° 3 StR 215/98 (30 April 1999). A summary of the case as well as the link to the original judgement (in Germany) are available on the ICRC’s website at <http://www.icrc.org/ihl-nat.nsf/0/3DD61210D58D48C9C1256ACC003457D1> [20 Jan 2018].

⁷⁴*Prosecution v Maksim Sokolović* Higher Regional Court (Oberlandesgericht) of Dusseldorf Case N° 2 StE 6/97 (29 November 1999). A summary of the case as well as the link to the original judgement (in Germany) are available on the ICRC’s website at <http://www.icrc.org/ihl-nat.nsf/0/6FECEBA3886F31A2C1256A95004D6E14> [20 Jan 2018].

⁷⁵*Prosecution v Djurdj Kusljic* Bavarian Higher Regional Court Case No 6 St 1/99 (15 December 1999). A summary of the case as well as a link to the judgement (in Germany) are available at the ICRC’s website at <http://www.icrc.org/ihl-nat.nsf/0/89CE874FA05E14DBC1256ACC004E5E09> [20 Jan 2018].

⁷⁶Dugard, *supra* note 3, at 154.

⁷⁷In support of the view that piracy is an international crime subject to the universal jurisdiction of all States, see also P. Sands, ‘After Pinochet : the role of national courts’ in P. Sands (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press Cambridge 2003), at 87 and Z. Lulu, ‘Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law’ in M. Bergsmo and L. Yan (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel Opsahl Academic EPublisher 2012), at 40. Some commentators oppose this view. They hold the view that this crime is not an international crime in the

trading and torture.⁷⁸ Some commentators⁷⁹ also view the crime of aggression as falling under this category.

Universal jurisdiction: a 'right', not a 'duty'

The principle of universal jurisdiction entails only the authority to prosecute, not a duty to do so.⁸⁰ The duty to prosecute perpetrators of international crimes is a different concept. This duty, which is often expressed in its Latin form: *aut dedere aut judicare* (which literally translated means extradite or prosecute) means that those who commit crimes under international law may not be granted safe havens anywhere in the world, thus making prosecution or extradition mandatory.⁸¹ Thus, as a right, universal jurisdiction is merely permissive. Accordingly, a State may not be compelled to exercise universal jurisdiction if it does not wish to do so.⁸² However, in order to avoid impunity for international crimes, the State in question can be compelled to extradite the suspect to another State that is willing to prosecute.⁸³ It is on the basis of the principles of universal jurisdiction and *aut dedere aut judicare*⁸⁴

strict sense of the word and that, consequently, it is not subject to the universal jurisdiction of all States. The reason for this, they argue, is that piracy is not committed against the 'humanity' as a whole but against particular States. It is not on behalf of the international community as a whole that piracy is universally suppressed; it is rather 'on states' own behalf, or better yet, on each other's behalf', that piracy is suppressed (See Cassese, *supra* note 50, at 23-25. Lee Lee W 'International Crimes and Universal Jurisdiction' in May L & Hoskins Z (eds) *International Criminal Law and Philosophy* (Cambridge University Press Cambridge 2010), at 26). Against this argument, it may be said that since piracy is committed on the High Seas, which are not under the jurisdiction of a particular State, pirates threaten, not a particular State, but the whole world in general. They endanger international trade and commerce generally, not only for some States. See in this regard *France v Turkey The Case of the SS 'LOTUS'* Dissenting Opinion by Mr Moore PCIJ Series A N°7 (27 September 1927) 70: 'Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind-hostis humani generis-whom any nation may in the interest of all capture and punish'. See also Jessica CL 'Human Rights' (Peace Operations Training Institute 2012). Accessed (upon registration) at <http://www.peaceopstraining.org/courses/> [1 January 2013], at 227 and Kittichaisaree K 'Piracy: International Law & Policies' (Paper Presented at the AALCO Seminar at the UN Headquarters on 16 March 2011 <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Piracy-InternationalLawAndPolicies.pdf> [12 Jan 2017], at 1.

⁷⁸See also M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' 2001 *Military Law Review* 20-73, at 30 and M. Chengyuan 'The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China' in M. Bergsmo and L. Yan (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel Opsahl Academic EPublisher 2012), at 160.

⁷⁹Macedo *et al*, *supra* note 53, at 29; D. V. Hoover, 'Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court' (2011) http://scholarship.law.cornell.edu/lps_clacp/52/ [2 Feb 2018], at 23 and Cryer *et al*, *supra* note 1, at 7.

⁸⁰Werle, *supra* note 51, at 70 and Dugard, *supra* note 3, at 155.

⁸¹Zeidy, *supra* note 27, at 948 and Lamprecht, *supra* note 63, at 265-266

⁸²Council of the European Union, *supra* note 27, para 13: 'Under customary international law, these bases of jurisdiction are, like universal jurisdiction, merely permissive: a state is not obliged to assert a jurisdiction granted to it by custom'.

⁸³Lamprecht, *supra* note 63, at 266. See also Hurwitz, *supra* note 53, at 271-272: 'The principle of universal jurisdiction allows states to investigate and prosecute in their domestic courts certain grave violations of international law, namely genocide, torture, war crimes and crimes against humanity, that have occurred extraterritorially even when there is no link (nexus) with the perpetrator, victims or location of the crime. A related rule, *aut dedere aut judicare*, stems from the principle that states may not shield a person suspected of certain categories of crimes, and that they have an obligation to prosecute or facilitate the extradition of a perpetrator found within their territory to a country or tribunal willing or able to prosecute'.

⁸⁴The principle of *aut dedere aut judicare* is also codified in art 7(1) of the 1984 Torture Convention to which Senegal is party

that the ICJ in July 2012 ordered Senegal to prosecute or extradite to Belgium (which was willing to prosecute under the principle of universal jurisdiction) the former Chadian president Hissène Habré who was accused of crimes of torture committed when he was still president of Chad.⁸⁵

Delegated jurisdiction is not universal jurisdiction

States which have a substantial connection to a crime may, by way of bilateral or multilateral conventions, delegate their jurisdiction over such a crime to the States where the perpetrator of those crimes will be found.⁸⁶ With respect to war crimes, for example, the four Geneva Conventions of 1949 relating to the conduct of armed conflict provide for a kind of ‘delegated jurisdiction’⁸⁷ over the grave breaches provided therein. In articles 49, 50, 125 and 146 respectively, it is provided that each High Contracting Party is under the obligation to search for and prosecute before its own courts persons suspected to have committed war crimes, ‘regardless of their nationality’. However, although such jurisdiction is independent of any traditional jurisdictional link to the crime, the victim or the perpetrator, it would be incorrect to call it ‘universal jurisdiction’, because the power to exercise that jurisdiction is reserved only to the States that are party to the relevant Conventions.⁸⁸ In contrast to this limited jurisdiction under the Geneva Conventions, customary international law allows all States’ courts, party or not to the Geneva Conventions, to prosecute the perpetrators of war crimes regardless of any territorial or national links to the crime, making jurisdiction over these crimes truly ‘universal’.⁸⁹

Absolute versus conditional universal jurisdiction

Universal jurisdiction can be exercised in two ways: ‘absolute’ or ‘pure’ universal jurisdiction and ‘conditional’ universal jurisdiction.⁹⁰ Pure or absolute universal jurisdiction (also called universal jurisdiction *in absentia*)⁹¹ arises when a State’s court asserts jurisdiction over an international crime while the suspect is not present in the territory of the forum State.⁹² Conversely, conditional universal jurisdiction is exercised when the suspect is already in the State asserting jurisdiction.⁹³ However,

⁸⁵*Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* 2012 ICJ 422 (20 July 2012) para 121: ‘The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré’.

⁸⁶Poels, *supra* note 53, at 68.

⁸⁷Poels, *supra* note 53, at 68.

⁸⁸Colangelo ‘The Legal Limits of Universal Jurisdiction’ 2005 *Virginia Journal of International Law* 1-51, at 19 and Geneuss, *supra* note 7, at 953.

⁸⁹Colangelo, *supra* note 88, at 20.

⁹⁰Cryer *et al*, *supra* note 1, at 52.

⁹¹Cryer *et al*, *supra* note 1, at 52 and Philippe, *supra* note 53, at 380.

⁹²E. Kourula, ‘Universal Jurisdiction for Core International Crimes’ in Bergsmo and Yan (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel Opsahl Academic EPublisher 2012), at 137; Cryer *et al*, *supra* note 1, at 52 and Poels, *supra* note 53, at 72. An example of this type of universal jurisdiction may be found in section 8 of the New Zealand *International Crimes and International Criminal Court Act* of 2000, which provides as follows:

‘(1) Proceedings may be brought for an offense [...] : (c) against section 9 (genocide) or section 10 (crimes against humanity) or section 11 (war crimes) regardless of [...] (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offense occurred or at the time a decision was made to charge the person with an offense’.

⁹³Kourula, *supra* note 92, at 137 and Cryer *et al*, *supra* note 1, at 252. This type of universal jurisdiction is also known as ‘universal jurisdiction with presence’ Cryer *et al*, *supra* note 1, at 52. An example of this type of universal jurisdiction is found in section 3(c) of the South African Implementation Act 27 of 2002, which provides that a person who commits an international crime outside the territory of the Republic, is deemed to have

although many States tend to limit the universal jurisdiction of their courts to cases where a suspect is present on their territory, the distinction between pure and conditional universal jurisdiction is not based on any conceptual ground and can probably be explained by the concern that adopting pure universal jurisdiction 'may show a lack of international courtesy',⁹⁴ or as a matter of ensuring the right to a fair trial for the accused person,⁹⁵ rather than as a matter of international law.⁹⁶ Other reasons for the conditional judicial universal jurisdiction would appear to be practical. As Judge *ad hoc* Van den Wyngaert observed in the *Arrest Warrant* case,⁹⁷ referring to the requirement of the suspect in the territory of the forum State:

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 with the linkage with the national order...seems to be of a pragmatic than of a juridical nature.

Political considerations may also play a role in States choosing to limit the universal jurisdiction of their courts to situations where the suspect is already in the territory of the State exercising jurisdiction. This may be illustrated by reference to the 1999 Belgium law which gave universal jurisdiction to the Belgian courts over war crimes, genocide, and crimes against humanity.⁹⁸ Under this law, the presence of the suspect in Belgium was not required and immunities were declared not applicable in proceedings relating to that Act.⁹⁹ This law immediately proved to be politically controversial; complaints were swiftly laid against ex-US President George H W Bush, Vice-President Dick Cheney and General Colin Power for war crimes alleged to have been committed by them in the Gulf War in the 1991 Gulf War.¹⁰⁰ Subsequent to these claims, Belgium came under severe pressure from the United States to alter its legislation¹⁰¹ as a result of which Belgium revised its law in 2003 to limit its jurisdiction.¹⁰² Under the 2003 revised legislation,¹⁰³ Belgian courts have jurisdiction over genocide, crimes against humanity and war crimes committed abroad, only if the accused is Belgian or has primary residence in Belgian territory, if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes

committed that crime in the territory of the Republic if [...] 'that person, after the commission of the crime, is present in the territory of the Republic'.

⁹⁴*Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 3.

⁹⁵*Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Separate Opinion by judges Higgins, Kooijmans and Buergenthal 2002 ICJ 3 (14 February 2002) para 56: '[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 recognised under international law'.

⁹⁶Cryer *et al*, *supra* note 1, at 252. See also Philippe, *supra* note 53, at 380.

⁹⁷*Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 56.

⁹⁸Art 7(1) Law of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law of 10 February 1999 (Belgian Official Journal of 23 March 1999).

⁹⁹Art 5(3): 'The immunity attributed to the official capacity of a person, does not prevent the application of the present Act'. This approach to immunity was, however, challenged by the ICJ in the *Arrest Warrant* case and will be discussed in this study.

¹⁰⁰Cryer *et al*, *supra* note 1, at 257.

¹⁰¹Cryer *et al*, *supra* note 1, at 257.

¹⁰²See L. Reydam, 'Belgium Renegades on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' 2003 *Journal of International Criminal Justice* 679-689, at 679.

¹⁰³Law of 5 August 2003 Relating to Grave Breaches of International Humanitarian Law (Belgian Official Journal of 7 August 2003).

were committed, or if Belgium is obliged under international convention or customary law to exercise jurisdiction over the case.¹⁰⁴

4. Executive jurisdiction

Executive, or enforcement jurisdiction, refers to the ability of States to enforce laws and judicial decisions.¹⁰⁵ In the criminal context, executive jurisdiction refers to a State's authority under international law to enforce its criminal law through police and other executive action.¹⁰⁶ While jurisdiction to prescribe (legislative jurisdiction) can be extraterritorial and universal, enforcement jurisdiction is strictly territorial.¹⁰⁷ This means that it is not permissible for a State to exercise any form of extraterritorial police powers without the foreign State's consent.¹⁰⁸ For example, the police of one State may not investigate crimes or arrest suspects in the territory of another State without that other State's consent.¹⁰⁹ However, the territorial nature of enforcement jurisdiction does not entail that the exercise of police powers *in absentia*, that is, when the suspect is not on the territory of the State in question; is prohibited. For instance, international law does not prohibit the issuing of an arrest warrant for a suspect who is on the territory of a foreign State.¹¹⁰

A question of enforcement jurisdiction *in absentia* arose in the South African case of *Southern African Litigation Centre v National Director of Public Prosecutions*¹¹¹ concerning an application brought in terms of section 6 of the *Promotion of Administrative Justice Act* 3 of 2000 and the Implementation Act 27 of 2002, in relation to the allegations of serious violations of human rights (torture constituting crimes against humanity) committed in Zimbabwe in 2007. The application concerned the events alleged to have taken place in Harare, Zimbabwe, on 27 March 2007. It was alleged that on that day the Zimbabwean police, under orders from the ruling party, the Zanu-PF, raided the headquarters of the opposition Movement for Democratic Change ('MDC') and that during that raid, over one hundred people were arrested and taken into custody where they were continuously and severely tortured.¹¹² In response to these acts, the applicants (the Southern African Litigation Centre) compiled evidence relating to the said events and submitted it to the South African authorities for investigation.¹¹³ The respondents (South African authorities) argued that they lacked the power to investigate such crimes on

¹⁰⁴Article 6(1° *bis*), article 10(1° *bis*) and article 12 *bis* introduced by the Law of 2003 (Law of 5 August 2003 Relating to Grave Breaches of International Humanitarian Law (Belgian Official Journal of 7 August 2003) into the Belgian Code of Criminal Procedure. See also Redress-FIDH 'Universal Jurisdiction in the European Union: Country Studies' 4.

¹⁰⁵Bantekas and Nash, *supra* note 1, at 143.

¹⁰⁶O'Keefe, *supra* note 1, at 736.

¹⁰⁷O'Keefe, *supra* note 1, at 740.

¹⁰⁸Brownlie, *supra* note 27, at 309 and O'Keefe, *supra* note 1, at 740.

¹⁰⁹Poels, *supra* note 53, at 67-68: '[a] State cannot violate the sovereignty of another State, and thus overstep the limits dictated by international law, by exercising physical constraint on the latter's territory, without permission, by arresting or removing an individual by virtue of its own government agents'.¹⁰⁹ See L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press Oxford 2003), at 3: '[a] State cannot perform outside its territory acts auxiliary to the prosecution and trial of an offence (eg arrest of a suspect, collection of evidence, site inspection, or deposition of witnesses), unless explicitly authorized by the territorial State'.

¹¹⁰O'Keefe, *supra* note 1, at 740-741.

¹¹¹*Southern African Litigation Centre v National Director of Public Prosecutions* 2012 JDR 0822 (GNP).

¹¹²2012 JDR 0822 (GNP) 6.

¹¹³The docket was hand-delivered to the Priority Claims Litigation Unit (PCLU), being the entity responsible for the investigation and prosecution of crimes contemplated in the ICC Act, as part of the National Prosecuting Authority (the NPA). *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 JDR 0822 (GNP) 7.

the ground that section 4(3) does not provide universal jurisdiction *in absentia* (in the absence of suspects). Section 4(3) of the Implementation Act provides as follows:

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

[...]

c. that person, after the omission of the crime, is present in the territory of the Republic; [...]

The applicants disagreed on this interpretation of section 4(3) of the *Implementation Act* and sought a court order directing the respondents to reconsider their request to initiate an investigation into the alleged crimes. They believed that South African authorities were legally entitled to investigate the allegations in the absence of the suspects on South African territory.

The court agreed with the applicants that the respondents' argument was 'absurd', holding that such argument:

would mean that if a suspect was physically present in South Africa then an investigation could continue. If they then left, even for a short period, the jurisdiction would then be lost. If they then re-entered South Africa, an investigation would continue. I agree that this does amount to an absurdity.¹¹⁴

The court declared that section 4(3) of the Implementation Act was concerned with a trial, not an investigation and declared the decision to refuse to initiate investigations was unlawful and invalid,¹¹⁵ a view which was confirmed by the Supreme Court of Appeal.¹¹⁶

It is submitted that the court's decision was a correct one. The territorial character of enforcement jurisdiction does not prevent a State from investigating a case and subsequently requesting the extradition of a suspect from the territory of a foreign State in which he is present.¹¹⁷ The *Pinochet* case¹¹⁸ in England is a case in point: Spain investigated the allegations against General Pinochet without him being present on Spanish territory and requested the United Kingdom to extradite him to Spain for trial.¹¹⁹ The provisions of the Implementation Act that permit investigations of international crimes without a suspect being present on South African territory are therefore consistent with international law.

5. Conclusion

This article was concerned with the question as to what extent a State can, as a matter of international law, extend its jurisdiction over crimes committed in foreign States. It was demonstrated that international law allows States to exercise their legislative and judicial jurisdictions in criminal matters in three ways: territorial jurisdiction, extraterritorial jurisdiction and universal jurisdiction. It was found that extraterritorial jurisdiction is allowed only when there exists a direct link between the prosecuting State and the crime or the perpetrator of the crime committed abroad, while universal jurisdiction is

¹¹⁴2012 *JDR* 0822 (GNP) 91.

¹¹⁵2012 *JDR* 0822 (GNP) 93.

¹¹⁶*National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 2 SA 42 (SCA).

¹¹⁷O'Keefe, *supra* note 1, at 740-741.

¹¹⁸*R v Bow Street Stipendiary Magistrate*, ex parte Pinochet Ugarte [1998] 4 All ER 897.

¹¹⁹O'Keefe, *supra* note 1, at 752.

only allowed when the crime committed is accepted by international law as a crime ‘against the international community as a whole’, such as genocide, crimes against humanity and war crimes. It was noted, however, that the list of these (international) crimes is not yet clearly delineated. With regard to enforcement jurisdiction, it was argued that this type of jurisdiction is exclusively extraterritorial because a State may never send its enforcement agents to carry out any investigative or enforcement activity in another State without the consent of that State. It was found, however, that this does not prohibit a State from issuing international arrest warrants or conduct trials *in absentia* against suspects who are on the territory of a foreign State.

It is the hope of the present writer that this paper sheds some light on the questions surrounding the legality of the exercise by States of their criminal jurisdictions over crimes committed abroad. A better and common understanding will inevitably help to avoid the kind of diplomatic tensions witnessed in the near past and that it will thus contribute to more harmonic and peaceful coexistence between nations. It is true that extra-territorial and universal jurisdictions can be abused by powerful States to indict officials of weaker States. This, however, does not negate the right, as a matter of international law, for States to extend their jurisdictions to crimes committed in foreign States. For example, in the matter referred to in the introduction between Rwanda, France and Spain, it seems that since the later States were investigating the crimes (of murder) allegedly committed in Rwanda against their citizens, the real question is not whether France and Spain had a right to investigate and issue arrest warrants. The issue is only whether the investigations were genuine, not politically motivated. In the two cases, arrest warrants had been issued (and some warrants are still hanging) against around 40 senior Rwandan political and army officials. The Rwandan government saw this as an attempt by European-based networks to bring it down and the African Union offered political support to the Rwandan government in this saga.¹²⁰ But, this does not affect the right for Spain and France to investigate and issue the arrest warrants as a matter of international law. Whether extra-territorial and universal jurisdictions can be abused is one question, whether those types of jurisdiction are permitted as a matter of international law is a different one.

¹²⁰See Reuters 2015 ‘African Union calls on UK to release Rwanda's spy chief’ <https://af.reuters.com/article/africaTech/idAFL8N0ZC3XO20150626https://af.reuters.com/article/africaTech/idAFL8N0ZC3XO20150626> [6 Feb 2018]