CHAPTER 14

CONCLUSIONS: PROPOSED REFORMS

14.1 Introduction

The recent judgment of the International Court of Justice in the Case Concerning the Arrest Warrant of 11 April 2000 (the Congo v. Belgium), delivered on 14 February 2002, confirms the tendency of the Court to be seized and deal with topical issues confronting the international community. States, particularly developing countries, increasingly turn to the Court for the settlement of disputes that touch upon sensitive questions arising in their international dealings.

In this case the Congo claimed that Belgium, by issuing an arrest warrant against the then Congolese foreign minister for grave breaches of the Geneva Conventions of 1949 and for crimes against humanity allegedly perpetrated before he took office, breached international law. In particular, according to the Congo, Belgium violated the ‘principle that a state may not exercise its authority on the territory of another state’, the principle of sovereign equality of member states of the United Nations, as well as the diplomatic immunity of the Minister for Foreign Affairs of a sovereign state. Belgium contended, instead, that there had been no breach of international law, as the foreign minister concerned enjoyed immunity from prosecution while on official visits to Belgium; he was only liable for criminal prosecution during visits in a private capacity to Belgium.

Clearly, the question underlying this dispute belongs in the range of crucial issues facing the current international community: the tension between the need to safeguard major prerogatives of sovereign states and the demands of emerging universal values which may undermine those prerogatives. On the one hand, states cling to the notion that, when it comes to the exercise of criminal jurisdiction, it is up to the territorial or national state to prosecute and punish criminal offences. On the other hand, faced with the failure of territorial or national states to punish odious international crimes, there is a tendency to shift from territoriality or nationality: states other than the territorial or national state
claim the right to exercise extraterritorial criminal jurisdiction over those crimes. Similarly, international criminal tribunals or courts are set up, precisely to substitute for states unable or unwilling to prosecute and try alleged authors of international crimes.

The Court has handed down a judgment that is remarkable for its brevity: it is both concise and stringent. The Court has pronounced only upon the scope of immunities accruing to foreign ministers and ruled that Belgium violated international law, as those immunities cover all acts performed abroad by incumbent foreign ministers, designed as they are to ensure the effective performance of their functions on behalf of their respective states. According to the Court, a foreign minister enjoys immunities from foreign criminal jurisdiction and inviolability, whether the minister is on foreign territory on an official mission or in a private capacity, whether the acts are performed prior to assuming office or while in office, and whether the acts are performed in an official or private capacity. The Court has, however, excluded that the granting of such immunities could imply impunity in respect of any crime that a foreign minister may have committed. In an important passage of the judgment, amounting to an obiter dictum, the Court has envisaged four exceptions in this regard, none of which was present in the case at issue.

14.2 The Court’s Spelling Out of the Law on the Personal Immunities Accruing to Foreign Ministers

The judgment under discussion makes an important contribution to a clarification of the law of (what one ought to correctly term) personal immunities (including inviolability) of foreign ministers. This is an area where state practice and case law are lacking. To make its legal findings, the Court, therefore, did not have to establish the possible content of customary law. Rather, it logically inferred from the rationale behind the rules on personal immunities of senior state officials, such as heads of states or government or diplomatic agents, that such immunities must perforce prevent any prejudice to the ‘effective performance’ of

---

1731 See the Judgment, at para. 61; see infra.
their functions. They therefore bar any possible interference with the official activity of foreign ministers. It follows that an incumbent foreign minister is immune from jurisdiction, even when he is on a private visit or acts in a private capacity while holding office. Clearly, not only the arrest and prosecution of such a minister while on a private visit abroad, but also the mere issuance of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts as a foreign minister.

By and large, this conclusion is convincing, despite the powerful objections raised by Judge Al-Khasawneh in his important Dissenting Opinion. The Court must be commended for elucidating and spelling out an obscure issue of existing law. In so doing it has considerably expanded the protection afforded by international law to foreign ministers. It has thus given priority to the need for foreign relations to be conducted unimpaired.

In contrast, one ought to express misgivings on two issues. First, the Court's failure to rule, prior to tackling the question of immunity from jurisdiction, on whether states are authorized by international law to exercise extraterritorial criminal jurisdiction. Second, the Court's failure to distinguish between immunities inuring to state officials with respect to acts they perform in their official capacity (so-called functional or ratione materiae immunities) and immunities from which some categories of state officials benefit not only for their private life but also, more generally, for any act and transaction while in office (so-called personal immunities). This second flaw involves, as we shall see, legal consequences that prove extremely questionable.

14.3 The Court's Failure to Pronounce on Belgium's Assertion of Absolute Universal Jurisdiction

It would have been logical for the Court to first address the question of whether Belgium could legitimately invoke universal jurisdiction and then, in case of an affirmative answer to this question, decide upon the question of whether the

---

1732 See Dissenting Opinion, paras 1–2.
Congolese foreign minister was entitled to immunity from prosecution and punishment. That the Court should have proceeded in this manner has been cogently argued by a number of Judges in their Separate Opinions (President Guillaume, Judges Ranjева, Higgins, Kooijmans, Buergenthal, Rezek) as well as by Judge ad hoc van den Wyngaert in her Dissenting Opinion. It is therefore not necessary to dwell on the matter. Suffice it to point out that the Court has thus missed a golden opportunity to cast light on a difficult and topical legal issue.

Fortunately, some Judges deemed it necessary to discuss the point in their Separate Opinions; they have thus made a significant contribution to elucidating existing law. For instance, some of these Separate Opinions clarify terminology. President Guillaume distinguishes between universal jurisdiction (competence universelle) denoting jurisdiction over extraterritorial crimes by foreigners, based on the presence of the accused in the forum state, and universal jurisdiction by default (competence universelle par defaut), that is, jurisdiction asserted by a state without any link with the crime or the defendant, not even his presence on the territory, when that jurisdiction is first exercised (by initiating investigations, issuing an arrest warrant, etc.). Judges Higgins, Kooijmans and Buergenthal distinguish instead between ‘universal jurisdiction properly so called’, that is jurisdiction over crimes committed abroad by foreigners against foreigners, without the accused being in the territory of the forum state, and ‘territorial jurisdiction over persons for extraterritorial events’, that is jurisdiction over persons present in the forum state who have allegedly committed crimes abroad. Perhaps, in order to emphasize the ‘meta-national’ dimension of the jurisdiction, one should speak of ‘absolute universal jurisdiction’ (that is, jurisdiction over offences committed abroad by foreigners, the exercise of which is not made subordinate to the presence of the suspect or accused on the

---

1733 See President Guillaume’s Separate Opinion, paras 1–17; Judge Ranjева’s Opinion, paras 1–12; Judges Higgins, Kooijmans, Buergenthal’s Joint Separate Opinion, paras 2–18; Judge Rezek’s Opinion, paras 3–11; Ad hoc Judge van den Wyngaert, paras 4 and 7.
1734 See paras 5, 9.
1735 See paras 31–52.
territory), and ‘conditional universal jurisdiction’ (which is instead contingent upon the presence of the suspect in the forum state).

As to the question of whether either category of jurisdiction is authorized by international law, President Guillaume answers in the negative, holding the view that international law only authorizes, at customary level, universal jurisdiction by default for piracy, whereas treaties may, and indeed do, oblige contracting parties to exercise universal jurisdiction proper. Judge Rezek takes a similar view.

In contrast, Judges Higgins, Kooijmans and Buergenthal maintain that international customary law, in addition to authorizing ‘universal jurisdiction properly so called’ over piracy, does not prohibit such jurisdiction for other offences, subject to a set of conditions they carefully set out. The enunciation of these conditions whether or not one can fully subscribe to all of them indubitably constitutes a commendable contribution to the careful delineation of general legal principles on the question of universal jurisdiction. It seems correct to hold the view that universal jurisdiction properly so called (or,

1736 See paras 5–9, 12–13.
1737 See para. 6.
1738 These conditions are as follows: (i) the state intending to prosecute a person must first ‘offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned’; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (head of state, or diplomatic agent) in office; after he leaves office, it may be exercised over ‘private acts’ (see paras 59–60 and 79–85).

1739 Some of the conditions may however give rise to objection. For instance, one fails to see why, in the first of the five conditions set out by the three judges, it is required that ‘the national state of the prospective accused’ be ‘offered’ the opportunity to act upon the charges. Why should one leave aside the territorial state (normally the forum conveniens) or the state of which the victim is a national? In addition, why should one envisage that the state exercising universal jurisdiction should ‘offer’ to another state the chance to prosecute the suspect? To make such an offer would involve shifting the whole matter from the judiciary to foreign ministries and might imply making a bilateral agreement. It would be easier to require that the Court intending to exercise jurisdiction should first establish whether courts of the territorial or national state have (deliberately) failed to prosecute the suspect at issue; only then should a court proceed to assert universal jurisdiction.

It is submitted that also the fifth condition should be couched differently, to take account of the existence of the customary rule referred to in the text above, and which is intended to remove functional immunity in the case of international crimes.
according to the terminology I would prefer, absolute universal jurisdiction) is permitted by general international law, subject to the conditions set out by these three distinguished Judges regardless of whether or not, as a matter of legal policy, the upholding of absolute universal jurisdiction is considered inadvisable in current international relations or even likely to lead to the eventual substitution of ‘the tyranny of judges for that of governments’.

An issue on which most judges seem to agree and is perhaps in need of some clarification is the view that under customary law piracy constitutes the only case where states are undoubtedly authorized to exercise ‘universal jurisdiction properly so called’ (or absolute universal jurisdiction). With respect, it may be contended that in fact the exercise of ‘universal jurisdiction’ by states over pirates belongs to the category of ‘territorial jurisdiction over persons for extraterritorial events’ (or conditional universal jurisdiction); in other words, it is predicated on the presence of the accused on the territory of the forum state. States may try pirates only after apprehending them, hence only when the pirates are on their territory or at any rate under their physical control: this is a typical application of the well-known maxim ubi te invenero, ibi te judicabo. One of the reasons most likely motivating this legal regulation is that, at a time when piracy was rife and all states of the world were therefore eager to capture persons engaging in this crime, potentially innumerable ‘positive conflicts of jurisdiction’ were settled in this way. Indeed, if all states had been entitled to claim jurisdiction over pirates wherever they were, very many positive conflicts would have ensued. Instead, granting jurisdiction to the state apprehending the pirates neatly resolved the matter. Furthermore, had the universal jurisdiction over pirates been absolute (or ‘universal properly so called’), any state of the world could have issued arrest warrants against pirates. State practice, however, does not show any such trend,

---

1740 I, for one, have expressed doubts about the expediency of upholding ‘absolute universality’ rather than ‘conditional universality’, at least with regard to persons having the status of senior state officials, in my paper ‘Y a-t-il un conflit insurmontable entre souverainete des Etats et justice penale internationale?’, in A. Cassese and M. Delmas-Marty (eds), Crimes internationaux et jurisdictions internationales (2002), at 22–28.

and this, together with national legislation\(^{1742}\) and the restatement in the 1932 Harvard Law School Draft Convention and Comment\(^{1743}\) bears out the ‘conditional’ nature of such category of universal jurisdiction. True, under customary law, restated in Article 105 of the 1982 Convention on the Law of the Sea, ‘on the high seas, or in any other place outside the jurisdiction of any State’, every state may seize a pirate ship (or aircraft) and arrest the pirates. It would seem, however, that this action does not constitute an exercise of jurisdiction in the sense used by the various Judges in their Opinions, that is, judicial jurisdiction. It only constitutes an exceptionally authorized use of enforcement powers over private ships not belonging to the capturing state (executive jurisdiction). Jurisdiction, in the sense of exercise of judicial power by courts, will follow. It is the state that has the alleged pirates in its hands that will exercise jurisdiction: as Article 105 provides, ‘The courts of the State which carried out the seizure may decide upon the penalties to be imposed.’\(^{1744}\)

Probably, the twofold significance of the word ‘jurisdiction’ accounts for the questionable language one can find in some of the Separate Opinions. It is well known that ‘jurisdiction’ means, depending on the context, either effective authority or control by a state, or state officials, over persons or territory (executive jurisdiction), or exercise of judicial authority by courts of law (judicial jurisdiction). The two notions ought to be distinguished. It would seem that when speaking of piracy and stating that jurisdiction over pirates is ‘universal’ or

---

\(^{1742}\) See, e.g., Section 290 of the US Criminal Code of 4 March 1909 (35 Stat. 1088) (‘Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life’ (in 26 AJIL (1932) Suppl., at 899), Article 20(5) of the 1890 Penal Code of Colombia (‘National or foreigners who commit acts of piracy and are apprehended by the Colombinan authorities’ ‘shall be punished according to this Code’ (ibid, at 955), Article 2(2) of the 1916 Penal Code of Panama (ibid, at 997–998), Article 49 of the Penal Code of Venezuela, of 1926 (ibid, at 1013). However, most national laws do not specify whether the pirate must be in the custody of the prosecuting state, although the laws of Greece (ibid, at 973–974) and Brazil (ibid, at 908) seem to envisage a very broad jurisdiction, regardless of the presence of the pirate on the territory.

\(^{1743}\) Under Article 14(1) of the Harvard Law School Draft Convention, ‘A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.’ (26 AJIL (1932), Suppl., at 745). In the Comment on Article 14 the views of such writers as Halleck, Pradier-Fodere, Bluntschli, as well as the Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law are quoted in support of the Article (ibid, at 852-854).

\(^{1744}\) In the Comment on the ‘Draft Convention, with Comment’ prepared in 1935 by the ‘Research in International Law of the Harvard Law School’, it is stated that in the case of the crime of piracy ‘the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence’ (29 AJIL (1935), Supplement, at 564; see also 565).
‘universal properly so called’ the Judges in question referred wrongly to the second meaning.

14.4 Is Absolute Universal Jurisdiction Admissible?

Let us return to a major legal issue, namely the view set out by the three Judges referred to above, that absolute universal jurisdiction is legally admissible under international law. It seems appropriate to make a few points, which are all intended to bear out and fortify this view.

First, one should not be misled by the fact that in the case at issue and in other similarly striking cases, the person accused held a high position in government. Universal jurisdiction may also be, and indeed is, envisaged for cases involving lower-rank officers or state agents, or even civilians, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to understand why, if the national or territorial state fails to take proceedings, another state should not be entitled to prosecute and try them in the interest of the whole international community. As far as these persons are concerned, the initiation of criminal proceedings in their absence, the gathering of evidence and the issuance of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or heads of state. Hence the only way of bringing them to trial is to issue arrest warrants so that they are at some stage apprehended and handed over to the competent state.

Secondly, it is commonly admitted that under traditional international law states are allowed to act upon the so-called protective principle, that is, for the safeguard of national interests, and can thus prosecute foreigners who commit crimes abroad (for instance, counterfeiting of national currency). In other words, states are authorized to take proceedings with regard to extraterritorial acts whose link with the forum state exclusively lies in the infringement by these acts of a national interest of that state. If this is so, it would seem warranted to hold
that in the present world community, where universal values have emerged that are shared by all states and non-state entities, states should be similarly authorized to act upon such values. To put it differently, it would seem that any state is currently authorized to try foreigners who perpetrate abroad criminal offences which have no personal or territorial link with that state, but which attack and seriously infringe upon those universal values; in so doing, the state acts not to protect a national interest but with a view to safeguarding values of importance for the entire world community.

Thirdly, it is a fact that United States courts have for many years asserted universal jurisdiction by default, admittedly in civil proceedings, over serious violations of international law perpetrated by foreigners abroad. 1745 Although civil jurisdiction is less intrusive than criminal jurisdiction, when it is exercised over foreigners who possess official status (for instance, high-ranking state officials), it nevertheless amounts to interference with the internal organization of foreign states. Whether or not this trend of US courts is objectionable as a matter of policy, or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other states.

This implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, in case of serious and blatant breaches of universal values, national courts are authorized to take action, subject to fulfillment of some fundamental requirements, such as ensurance of a fair trial.

Fourthly, for the purpose of confirming that customary international law or general principles of international law do indeed authorize - subject to the conditions set out by the Judges at issue, or to similar conditions 1746 the exercise of absolute universal jurisdiction, one ought to also take into account some significant elements of state practice. I will briefly recall some of these elements.


1746 See my remarks in supra note 9.
Article 23(4) of the Spanish law of 1985 as amended in 1999 provided for absolute universal jurisdiction even in advance of the Belgian law. Furthermore, the relevant Spanish case law is worthy of mention (in addition to a judgment of the Constitutional Court, the decisions of the Audiencia Nacional in Pinochet, Scilingo and Fidel Castro should be recalled). In

1747 Under Article 23 para. 4 that Spanish jurisdiction also extends to 'facts committed by Spaniards or foreigners abroad and liable to be considered, under Spanish law, as one of the following crimes: (a) Genocide; (b) Terrorism ...(g) any other crime that, pursuant to international treaties or conventions, must be prosecuted in Spain'.

1748 See the judgment of 10 February 1997 (no. 1997/56). The ship of the accused (flying Panama’s flag) had been chased and seized on the high seas for drug trafficking; the accused had been prosecuted before Spanish courts for one of the crimes over which the Law of 1985 granted universal jurisdiction to those courts. In its lengthy decision, the Constitutional Court took the opportunity to state in an obiter dictum that Article 23 para. 4 of the 1985 Law, granting universal jurisdiction, was in keeping with the Constitution: the Spanish legislator had ‘conferred a universal scope (un alcance universal) on the Spanish jurisdiction over those crimes, corresponding to their gravity and to the need for international protection’ (Legal Ground 3 A).

1749 See, in particular, the Order (auto) of 5 November 1998 (no. 1998/22605). In this order the Spanish National High Court (Audiencia nacional) confirmed that national courts have jurisdiction over genocide and terrorism committed in Chile (see Legal Grounds nos 3 and 4; as for torture, where the Court held that Spanish jurisdiction was based on Article 23(4)(g), on the strength of the 1984 Torture Convention, see Legal Ground no. 7). It should be noted that the Court concluded that ‘Spain has jurisdiction to judge the acts (conocer de los hechos), based on the principle of universal prosecution of certain crimes… enshrined in our domestic law. It also has a legitimate interest (interes legítimo) in exercising that jurisdiction as more than fifty Spaniards were killed or made to disappear in Chile, victims of the repression reported in the orders’ (Legal Ground no. 9). In other words, as is apparent both from the words reported and the entire text of the decision, Spanish jurisdiction was not grounded on passive nationality; the presence of Spaniards among the victims of the alleged crimes only amounted to a ‘legitimate interest’ of Spain in the exercise of universal jurisdiction. This order was confirmed by the decision of the Audiencia Nacional of 24 September 1999 (no. 1999/28720). There, the Court reiterated that the Spanish Court had jurisdiction over the crimes attributed to Pinochet, namely genocide, terrorism and torture (Legal Grounds 1 and 10–12), and also stated that Pinochet could not invoke the immunities pertaining to heads of states, for he no longer held this status (Legal Ground no. 3). For the (Spanish) text of the order and the subsequent decision, see the Spanish case law on CD Rom, EL DERECHO, 2002, Constitutional decisions.

1750 See the Order (auto) of 4 November 1998 (no. 1998/22604), very similar in its tenor to that of 5 November referred to in supra note 17.

1751 See Order (auto) of 4 March 1999 (no. 1999/2723). The Audiencia Nacional held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent head of state, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to heads of states, ambassadors etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of ‘immunity from jurisdiction or execution provided for in rules of public international law’). See Legal Grounds nos. 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in Pinochet, because Pinochet was a former head of state, and hence no longer
particular, Fidel Castro bears underlining. This case was material to the matter submitted to the Court, for it dealt with charges laid against an incumbent head of state. The Spanish court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985. In addition, it is worth considering a recent German case, Sokolovic, where the Bundesgerichtshof ruled that when the jurisdiction of German courts is provided for in an international treaty, those courts are entitled to try genocide and other international crimes even absent any link between the crime, or the offender, or the victim, and Germany. Also worthy of note is that in the course of the drafting process of the Statute of the International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction over major international crimes.

1752 The German Criminal Code contains a provision (Section 6 para. 1), whereby ‘Regardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany: para. 1. Genocide’ (whereas Section 6 para. 9 refers to ‘Acts committed abroad which are made punishable by the terms of an international treaty binding in the Federal Republic of Germany’). While in the past courts tended to interpret Sections 6 paras 1 and 9 to the effect that in any case a link was required with Germany for German courts to exercise jurisdiction (see thereon Ambos and Wirth, ‘Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts’, in H. Fischer, C. Kress and S. Rolf Luder (eds), International and National Prosecution of Crimes under International Law (2001), 778), in Sokolovic the Federal Supreme Court held that a factual link was not required. The Court noted that in its decision of 29 November 1999 that the Court of Appeal (Oberlandesgericht Düsseldorf), following the traditional German case law, had held that a factual link was required by law (legitimierender Anknüpfungspunkt) for a German court to exercise jurisdiction over crimes committed abroad by foreigners (in the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia). The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: ‘The Court however inclines, in any case under Article 6 para. 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention’ (Judgment of 21 February 2001, 3 StR 372/00, still unreported, at 19–21 of the typescript in German).

1753 In a document submitted in 1998 to the Preparatory Committee drafting the Statute, Germany stated the following: ‘Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice.’ (UN Doc.A/AC.249/1998/DP.2, 23 March 1998).
international criminal law proposed by the German government and now pending before the German Bundesrat (Senate), namely the Entwurf eines Gesetzes zur Einführung des Volkerstrafgesetzbuches, provides that German law applies to all criminal offences against international law envisaged in the law (namely genocide, crimes against humanity, war crimes), even when the criminal conduct occurs abroad and does not show any link with Germany.1754

All of these elements of state practice, in addition to showing that states tend increasingly to resort to absolute universal jurisdiction for the purpose of safeguarding universal values, also point to the gradually increasing diffusion and acceptance of the notion that this form of jurisdiction is regarded as admissible under international law.

14.5 The Court’s Failure to Distinguish between Immunities Ratione Materiae (or Functional Immunities) and Immunities Ratione Personae (or Personal Immunities)

Let us move on to the second issue on which one can respectfully disagree with the Court, namely its failure to draw a distinction between two different categories of immunities from foreign jurisdiction: (i) those which a foreign minister, like any state official, enjoys for any official act (so-called functional, or ratione materiae, or organic immunities), and (ii) those which instead are intended to cover any act that some classes of state officials perform while in office (so-called personal or, with regard to diplomatic agents, diplomatic immunities).1755

1754 ‘Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Volkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist.’ (see Bundesrat, Drucksache 29/02, 18 January 2002, Gesetzentwurf der Bundesregierung, at 3; German text online at www.bmj.bund.de/images/10185.pdf). See the precisions made in the Commentary, at 29).

1755 Perhaps the Court hinted at this distinction in para. 60 of its judgment, when it stated that ‘Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibilities’. However, what the Court states both before and after these propositions would seem to disregard the fundamental importance of the distinction referred to above.
The first category is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state. The second category is predicated on the notion that any activity of a head of state or government, or diplomatic agent1756 or foreign minister must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act (ne impediatur legatio). This distinction, oddly denied by Belgium in its Counter-Memorial,1757 is made in the legal literature,1758 and is based on state practice. With regard to the first class of immunities, suffice it to refer to the famous McLeod incident and the Rainbow Warrior case1759 as well as some recent judicial decisions (one can mention the judgment rendered by the

---

1756 However, as is well known, international rules provide for exceptions to immunities of diplomatic agents for private acts (see Article 31 para. 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961).

1757 See Counter-Memorial of the Kingdom of Belgium, of 28 September 2001, at 33, para 3.5.141.


1759 For the McLeod case, see British and Foreign Papers, vol. 29, at 1139, as well as Jennings, ‘The Caroline and McLeod Cases’, 32 AJIL (1938), at 92–99; for the Rainbow Warrior case, see UN Reports of International Arbital Awards, XIX, at 213. See also the Governor Collot case, in J. B. Moore, A Digest of International Law, vol. II (1906), at 23–24.
Supreme Court of Israel in Eichmann\textsuperscript{1760} and that delivered by the ICTY Appeals Chamber in Blaskic (subpoena)\textsuperscript{1761}.

The distinction is relevant, for the first class of immunity (i) relates to substantive law, that is, it is a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country, if he breaches national or international law, this violation is not legally imputable to him but to his state; in other words, individual criminal or civil liability does not even arise); (ii) covers official acts of any de jure or de facto state agent; (iii) does not cease at the end of the discharge of official functions by the state agent (the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) is erga omnes, that is, may be invoked towards any other state.

In contrast, the second class of immunities (i) relates to procedural law, that is, it renders the state official immune from civil or criminal jurisdiction (it is a procedural defence); (ii) covers official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office; in other words, assures total inviolability; (iii) is intended to protect only some categories of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court) foreign ministers and possibly even other senior members of cabinet; (iv) comes to an end after cessation of the official functions of the state agent; (v) may not be erga omnes (in the case of diplomatic agents it is only applicable with regard to acts performed as between the receiving and the sending state, plus third states whose territory the diplomat may pass through while proceeding to take up, or to return to, his post, or when returning to his own country: so called jus transitus innoxii).

\textsuperscript{1760} Judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277–342, at 308–309.

\textsuperscript{1761} See \textit{Blaskic (subpoena)}, ICTY Appeals Chamber’s judgment of 29 October 1997, at paras 38 and 41. For other cases see in particular Bothe, \textit{ supra} note 26, at 248–253.
14.6 The Distinction between the Two Classes of Immunities and the Coming into Operation of the Rule Removing Functional Immunities for International Crimes

The above distinction is important. It allows us to realize that the two classes of immunity coexist and somewhat overlap as long as the foreign minister (or any state official who may also invoke personal or diplomatic immunities) is in office. While he is discharging his official functions, he always enjoys functional immunity, subject to one exception that we shall soon see, namely in the case of perpetration of international crimes. Nevertheless, even when one is faced with that exception, the foreign minister is inviolable and immune from prosecution on the strength of the international rules on personal immunities. This proposition is supported by some case law (for instance, Pinochet1762 and Fidel Castro,1763 which relate respectively to a former and an incumbent head of state), and is authoritatively borne out by the Court’s judgment under discussion. In contrast, as soon as the foreign minister leaves office, he may no longer enjoy personal immunities and, in addition, he becomes liable to prosecution for any international crime he may have perpetrated while in office. This is rendered possible by a customary international rule on international crimes that has evolved in the international community. The rule provides that, in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture (and I would add serious crimes of international, state-sponsored terrorism), such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may coexist state responsibility and individual criminal liability.

That such a rule has crystallized in the world community is evidenced by a whole range of elements: not only the provisions of the various treaties or other international instruments on international tribunals, but also international and national case law (see below). The Court has instead taken a rather ambiguous

---

1762 See references infra in note 39.
1763 See reference supra in note 21.
stand on the existence and purport of this rule. Addressing the Belgian contention that immunities accorded to incumbent foreign ministers do not protect them when they are suspected of international crimes, and the contrary submission of the Congo, the Court first excluded the existence of a specific customary rule lifting immunity from criminal jurisdiction for incumbent foreign ministers accused of those crimes; it then considered the provisions of the various international tribunals, whereby the official position of defendants does not free them from criminal responsibility; it concluded that 'rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals' only apply to such tribunals. No 'such an exception exists in customary international law in regard to national courts'.

Although the Court's proposition is very sweeping, the context of the Court's ruling would seem to indicate that the Court did not intend to deny the possible existence of a customary rule lifting functional immunities for state officials in the case of international crimes. In fact, it did not take any stand on such a customary rule. What it intended to state was that in any case such a rule, assuming it existed, did not remove that immunity for incumbent senior state officials.

If this is so, it is respectfully submitted that the Court's proposition is questionable. It seems warranted to argue that the customary rule at issue (on whose existence and purport I shall come back to below) has a broad scope and importance and does not distinguish between incumbent and former state officials. The treaty provisions that are at the origin of this customary rule point in this direction. Article 7 of the Charter of the Nuremberg International Military Tribunal and all the subsequent treaties or at any rate written stipulations providing in this regard clearly intended to remove the substantial defence based on the official status of the accused with regard both to incumbent and former

---

1764 Para. 58 of the judgment. It should be stressed that the clear wording of the Court’s holding (in the second paragraph of para. 58 of the judgment) excludes that such holding is only intended to apply to foreign ministers. In other words, it seems clear that the Court has ruled out the existence of a customary rule concerning any state official, not solely foreign ministers.
state agents. Actually, given the historical circumstances in which those provisions were adopted, it can be said that they were primarily intended to cover persons who were state officials when they committed the alleged crime, but no longer had such status when brought to trial.

Should one consequently conclude that under customary international law the lifting of functional immunities in case of international crimes, brought about by this rule, entails that an incumbent foreign minister may be brought to trial before a national court for such alleged crimes? The answer is no. However, this is so only because that minister is protected by the general rules on personal immunities, as long as he is in office of course. In this respect the Court may be right in pointing to a difference between the provisions of statutes of international tribunals and the customary rule (at least, the Court is right with regard to the practice of the ICTY\textsuperscript{1765} and the text of the ICC Statute\textsuperscript{1766}). Under customary law the rule we are discussing must be applied in conjunction with, and in the light of, customary rules on personal immunities, whereas the statutes of international criminal tribunals and courts (other than the ICC, where the text is clear) may perhaps be construed as removing, at treaty level, even personal immunities.

The above propositions are borne out by some recent cases, such as the decision mentioned above of the Spanish Audiencia nacional in Fidel Castro,\textsuperscript{1767} by the French Court of Cassation on 13 March 2001 in Ghadafi, or the decision of the House of Lords in Pinochet. In Fidel Castro, the Spanish court clearly stated that as long as the Cuban head of state was in office, no prosecution could be initiated against him, on account of his entitlement to enjoy personal immunities. In Ghadafi the French Court held that ‘la coutume internationale s’oppose a ce que les chefs d’Etats en exercice puissent, en l’absence de dispositions internationales contraires s’imposant aux parties concernées, faire

\textsuperscript{1765} See the indictment made by the chief Prosecutor against Milosevic when he was an incumbent head of state. The indictment was confirmed by a Judge and did not give rise to any objection from other states.

\textsuperscript{1766} See Articles 27 and 98 of the ICC Statute.

\textsuperscript{1767} See \textit{supra} note 21.
l’objet de poursuites devant les juridictions pénales d’un Etat étranger’. This view is absolutely compatible with the rule whereby state officials accused of international crimes may not plead as a defence, before national or international courts, their having acted in an official capacity. Indeed, as stated above, under customary international law this rule only becomes operational after the state official’s cessation of functions. The shield protecting state agents from criminal jurisdiction is only removed after that moment. The same holds true for Pinochet, where their Lordships held that he would have enjoyed immunities were he still in office as head of state, but that, having left office, he no longer enjoyed such (personal) immunities.

14.7 The Court’s Ruling on the Immunity of Former Foreign Ministers from Criminal Jurisdiction A The Questionable Resort to the Distinction between Private and Official Acts

The Court has admittedly recognized that personal or diplomatic immunities are only procedural in nature. Thus, it states in paragraph 60 of its judgment that ‘the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility’.

This proposition is indisputably sound and must be subscribed to. However, in the following paragraph of its judgment, in an important obiter dictum, the Court infers from that proposition (paragraph 61 starts with ‘Accordingly’) that the

---

1768 See text in 105 RGDIP (2001), at 474.

immunities enjoyed under international law by an incumbent foreign minister do not represent a bar to criminal prosecution in four different circumstances that, as it would seem from the text of the judgment, are given as an exhaustive enumeration: (i) when the national state institutes proceedings against its state official; (ii) when the national state (or the state for which the person acts as an agent) waives the immunities; (iii) when the person has ceased to discharge his official functions; at that stage 'provided that it has jurisdiction under international law, a court of one state may try a former Minister for Foreign Affairs of another state in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'; (iv) when an incumbent or former foreign minister may be subject to criminal proceedings before an international criminal court.

In this paper I shall concentrate on the third hypothesis (some of the Judges to the case set forth cogent misgivings on the first two in their Joint Separate Opinion, while the fourth hypothesis obviously becomes relevant when treaty law or binding international instruments such as Security Council resolutions taken under Chapter VII are at stake). One can raise two important objections to the Court’s holding concerning this third hypothesis.

First, the Court wrongly resorted, in the context of alleged international crimes, to the distinction between acts performed ‘in a private capacity’ and ‘official acts’, a distinction that, within this context, proves ambiguous and indeed untenable. Second, the Court failed to apply, or at least to refer to, the customary rule lifting functional immunities for international crimes allegedly committed by state agents, a rule that becomes operational as soon as the rules on personal immunities are no longer applicable (or in other words, as soon as state agents enjoying personal immunities are no longer in office).

1770 Curiously, in a Press Statement of 14 February 2002, President Guillaume, in summarizing the Court’s judgment, stated that the Court ‘also pointed out that immunity from jurisdiction and individual criminal responsibility are two separate concepts’ and went on to say ‘By way of example, the Court emphasized that Ministers for Foreign Affairs’ did not enjoy immunity in the cases mentioned by the Court (emphasis added).

1771 See Joint Separate Opinion, supra note 3, at para. 78.
Let me expound the first objection. For this purpose, it may prove helpful to envisage four different hypothetical cases: (i) a foreign minister orders, aids and abets or willingly participates in, genocide or crimes against humanity before assuming his official functions of foreign minister (for example, when he was a senior member of the military); (ii) a foreign minister orders or aids and abets or willingly participates in the commission of genocide or crimes against humanity while acting as foreign minister; (iii) a person steals goods or bribes state officials before becoming foreign minister; (iv) a foreign minister, while in office, kills his servant in a fit of rage.

Under the Court’s proposition, once the foreign minister has terminated his ministerial functions, he may be brought to trial before a foreign court having jurisdiction under international law for acts perpetrated prior to his taking office (cases sub (i) and (iii)); instead, if he engages in criminal offences while in office, he may be prosecuted and punished only if those acts are considered as being performed ‘in a private capacity’ (‘à titre privé’). If this is so, it would follow that he could only be prosecuted for the murder of his servant (case sub (iv)). What about international crimes? Can international crimes such as genocide or crimes against humanity be regarded as being committed ‘in a private capacity’?

It would seem warranted to infer from the holding of the Court that, as crimes are not normally committed ‘in a private capacity’, state agents do enjoy immunity for these crimes, even if they have terminated their official functions. That international crimes are not as a rule ‘private acts’ seems evident. These crimes are seldom perpetrated in such capacity. Admittedly, a civilian or a serviceman acting in a private capacity may indeed commit war crimes (think for instance of the rape or torture of an enemy civilian). It is however hardly imaginable that a foreign minister may perpetrate or participate in the perpetration of an international crime ‘in a private capacity’. Indeed, individuals commit such crimes by making use (or abuse) of their official status. It is primarily through the position and rank they occupy that they are in a position to order, instigate, or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions. In the case of torture
(not as a war crime or a crime against humanity), the ‘instigation or consent or acquiescence of a public official or other person acting in an official capacity’ is one of the objective requirements of the crime (see Article 1 of the 1984 Convention against Torture).

Hence, if one construes the legal propositions of the Court literally, it would follow that foreign ministers could never, or in any event rarely, be prosecuted for international crimes perpetrated while in office. However, a more radical question to be raised is as follows: why should one confine trials by foreign courts to acts performed ‘in a private capacity’? Which international rules would exclude official acts?

In fact, the distinction between ‘private’ and ‘official’ acts made by the Court with regard to international crimes that may have been committed by a foreign minister while in office, has a twofold origin. First, it is the transposition to the area of immunities of foreign ministers of the well-established distinction, applicable to diplomatic agents, between their private and their official acts (the latter being, pursuant to Article 39(2) of the Vienna Convention on diplomatic immunities, the ‘acts performed by such a person [i.e. a diplomatic agent] in the exercise of his functions as a member of the mission’). This distinction is designed to emphasize that, when his functions come to an end, the diplomatic agent stops enjoying personal immunities, whereas ‘with respect to acts performed . . . in the exercise of his functions as a member of the mission’.

1772 It seems less probable that the distinction under discussion is a transposition of, or grounded on, the old distinction between acts performed by states jure gestionis (that is, acts of a commercial nature), and acts done jure imperii. As is well known, this is a relatively outmoded distinction made in recent international law with regard to acts of states and aimed at establishing when a state enjoys immunity from the civil (not criminal) jurisdiction of foreign states. While this distinction makes sense with regard to privileges and immunities of foreign states, it does not hold water with regard to functional (or organic) immunity of state officials. Let me give an example: if a foreign minister signs abroad, on behalf of his state, a contract for the purchase of a building to house the state’s embassy, and then fails to pay, he may not be sued, for he is covered by functional and personal immunities (on account of the former he may not be sued even after leaving office), whereas the state may be (under the restrictive doctrine of state immunity). If, in contrast, the foreign minister, after participating in a cabinet decision for the expulsion of nationals of a particular country, contrary to treaty provisions, is sued before the courts of that country for compensation, he again is sheltered by functional and personal immunity; in addition, the state enjoys immunity from jurisdiction for the act was clearly done jure imperii, with the consequence that the matter may only be settled at a diplomatic or political level. As is clear from these examples, the distinction at issue may be germane to acts of states, but is irrelevant to acts performed by state officials.
mission, immunity shall continue to exist’. The distinction, however, in addition to being of rather complex application, only applies, even in relation to diplomatic agents, as long as the customary rule removing functional immunities of state agents in the case of international crimes does not come into operation. A fortiori the distinction evaporates as a result of that customary rule when what is at stake are the acts of foreign ministers that may amount to international crimes. Secondly, the distinction seems to derive from that between ‘official’ and ‘unofficial public acts’ made by some US courts in cases where actions for damage in tort had been brought against foreign states for acts of torture by state officials. This distinction manifestly aimed at arguing that, as torture could not be regarded as an official public act, the foreign state at issue could not claim state immunity from US jurisdiction. In other words, the distinction was a practical expedient for circumventing the strictures of the US Act on state immunities (the Foreign Sovereign Immunities Act of 1976, as amended in 1988). Although in this respect it was meritorious, it is however unsound and even preposterous from the strictly legal viewpoint.

The distinction under discussion, if applied to international crimes committed by senior state officials, could lead to the consequence that such crimes should be considered as ‘private acts’ in order that their authors be amenable to judicial process. The artificiality of this legal construct is evident. This would mean, for example, that the crimes for which Joachim von Ribbentrop (Reich Minister for Foreign Affairs from 1938 to 1945) was sentenced to death, namely crimes

---

1773 As Brownlie, supra note 28, points out (at 361), ‘The definition of official acts is by no means self-evident.’


1775 It should be noted that three Judges were aware of the possible consequences of the Court’s proposition. In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal mentioned the view that international crimes may not be regarded as ‘official acts’ ‘because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform’ (para. 85). It would however seem that they did not necessarily endorse such view.
against peace, war crimes and crimes against humanity, should be regarded as 'private acts'; 1776 or that the crime of having failed 'to secure observance of and prevent breaches of the laws of war', for which Mamoro Shigemitsu (Japanese Foreign Minister from 1943 to 1945) was sentenced to seven years' imprisonment, should be considered 'private acts'. 1777

B The Court's Failure to Refer to the Customary Rule Lifting Functional Immunities for State Officials Accused of International Crimes

Let me now move on to my second objection to the Court's decision. On the question of the amenability to trial of former state agents accused of committing international crimes while in office, the Court, instead of relying upon the questionable distinction between private and official acts, should clearly have adverted to the customary rule that removes functional immunity.

National case law proves that a customary rule with such content does in fact exist. Many cases where military officials were brought to trial before foreign courts demonstrate that state agents accused of war crimes, crimes against humanity or genocide may not invoke before national courts, as a valid defence, their official capacity (leaving aside cases where tribunals adjudicated on the strength of international treaties or Control Council Law no. 10, one can recall, for instance, Eichmann in Israel, 1778 Barbie in France, 1779 Kappler and Priebke in Italy, 1780 Rauter, Albrecht and Bouterse in the Netherlands, 1781 Kesserling

1776 For the charges against him see Trial of the Major War Criminals before the International Military Tribunal - Nuremberg 14 November 1945–1 October 1946, Nuremberg 1947, I, at 69; for the Judgment see ibid., at 285–288.

1777 For the judgment of the IMTFE concerning Shigemitsu, see B. V. A. Roling and C. F. Ruter (eds), The Tokyo Judgment vol. I (1977), at 457–458.

1778 See judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277–342.

1779 See the various judgments in 78 ILR, 125 et seq, and 100 ILR 331 et seq.

1780 For Kappler, see the Judgment delivered on 25 October 1952 by the Tribunal Supremo Militare, in 36 Rivista di diritto internazionale (1953) 193–199; as for Priebke see the decision of the Rome Military Court of Appeal of 7 March 1998, in L'Indice Penale (1999), 959 et seq.

1781 For Rauter see the decision of the Special Court of Cassation of 12 January 1949, in Annual Digest 1949, 526–548; for Albrecht see the judgment of the Special Court of Cassation of 11 April 1949 in
before a British Military Court sitting in Venice and von Lewinski (called von Manstein) before a British Military Court in Hamburg,1782 Pinochet in the UK,1783 Yamashita in the US,1784 Buhler before the Supreme National Tribunal of Poland,1785 Pinochet and Scilingo in Spain,1786 Miguel Cavallo in Mexico1787). True, most of these cases deal with military officers. However, it would be untenable to infer from that that the customary rule only applies to such persons. It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes. Besides, it is notable that the Supreme Court of Israel in Eichmann1788 and more recently various Trial Chambers of the ICTY have held that the provision of, respectively, Article 7 of the Charter of the IMT at Nuremberg and Article 7(2) of the Statute of the ICTY (both of which relate to any person accused of one of the crimes provided for in the respective Statutes) ‘reflect[s] a rule of customary international law’ (see Karadzic and others,1789 Furundzija,1790 and Slobodan Milosevic (decision on preliminary motions).1791 Furthermore, Lords Browne-Wilkinson, Hope of Craighead, Millett, and Phillips of Worth Matravers in their speeches for the House of Lords’ decision of 24 March

---

1782 See von Lewinski in Annual Digest 1949, 523–524; for Kesserling see Law Reports of Trials of War Criminals (1947), vol. 8, at 9 ff.
1783 See references in note 39.
1785 See Annual Digest 1948, at 682.
1786 See references in supra notes 20 and 21.
1787 See the decision of 12 January 2001 delivered by Judge Jesus Guadalupe Luna and authorizing the extradition of Ricardo Miguel Cavallo to Spain, text (in Spanish) on line in www.derechos.org/nizkor/arg/espana/mex.html.
1788 Supra note 30, at 311.
1791 ICTY, Trial Chamber III, Decision of 8 November 2001, at para. 28 and more generally paras 26–33.
1999 in Pinochet took the view, with regard to any senior state agent, that functional immunity cannot excuse international crimes.\footnote{1792}{See supra note 39, at 107–115 (Lord Browne-Wilkinson), 146–153 (Lord Hope of Craighead), 171-179 (Lord Millet) and 188–192 (Lord Phillips of Worth Matravers).}

In addition, important national Military Manuals, for instance those issued in 1956 in the United States and in 1958 in the United Kingdom, expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence.\footnote{1793}{See the US Department of the Army Field Manual, The Law of Land Warfare (July 1956). At para. 498 it states that: ‘Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: a. Crimes against peace; b. Crimes against humanity; c. War crimes. Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting “war crimes”.’ At para. 510 it is stated that: ‘The fact of a person who committed an act which constitutes a war crime acted as the head of a state or as a responsible government official does not relieve him from responsibility for his act.’ See also the British manual, The Law of War on Land (1958), at para. 632 (‘Heads of States and their ministers enjoy no immunity from prosecution and punishment for war crimes. Their liability is governed by the same principles as those governing the responsibility of State officials except that the defence of superior orders is never open to Heads of States and is rarely open to ministers’).}

One can also recall that on 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it ‘affirmed’ ‘the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal’. These principles include Principle III, as later formulated (in 1950) by the UN International Law Commission.\footnote{1794}{All of these Principles, Israel's Supreme Court noted in Eichmann, ‘have become part of the law of nations and must be regarded as having been rooted in it also in the past’.}

Furthermore, it seems significant that, at least with regard to one of the crimes at issue, genocide, the International Court of Justice implicitly admitted that under

\footnote{1795}{Supra note 30, at 311.}
customary law any official status does not relieve responsibility. In its Advisory Opinion on Reservations to the Convention on Genocide, the Court held that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’. Among these principles one cannot but include the principle underlying Article IV, whereby ‘Persons committing genocide …. shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.’ It is notable that the UN Secretary-General took the same view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the UN Security Council, and explicitly by a Trial Chamber of the ICTR in Akayesu and of the ICTY in Krstic.

A further element supporting the existence of a customary rule having a general purport can be found in the pleadings of the two states before the Court: the Congo and Belgium. In its Memoire of 15 May 2001, the Congo explicitly admitted the existence of a principle of international criminal law, whereby the official status of a state agent cannot exonerate him from individual responsibility for crimes committed while in office; the Congo also added that on this point there was no disagreement with Belgium.

Arguably, while each of these elements of practice, on its own, cannot be regarded as indicative of the crystallization of a customary rule, taken together they may be deemed to evidence the formation of such a rule (a rule, it should be added, on whose existence legal commentators seem to agree, although

---

1796 ICJ Reports (1951), at 24.
1799 Memoire, at 39, para. 60 (<< . . . la R.D.C. ne conteste pas qu’est un principe de droit international penal, notamment forge par les jurisprudences de Nuremberg et de Tokyo, la regle suivant laquelle la qualite officielle de l’accuse au moment des faits ne peut pas constituer une cause d’exoneration de sa responsabilite penale ou un motif de reduction de sa peine lorsqu’il est juge, que ce soit par une juridiction interne ou une juridiction internationale. Sur ce point, aucune divergence existe avec l’Etat belge.>>)
admittedly without producing compelling evidence concerning state or judicial practice, and which the Institut de droit international has recently restated, at least with regard to heads of state or government).

Let me emphasize that the logic behind this rule, which was forcefully set out as early as 1945 by Justice Robert H. Jackson in his Report to the US President on the works for the prosecution of major German war criminals, is in line with contemporary trends in international law. At present, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes. This is why ‘superior responsibility’ has acquired, since Yamashita (1946), such importance. To allow these state agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established or an international treaty is applicable, would mean to bow to and

---


1801 See the Resolution on ‘Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law’ adopted at the Session of Vancouver (August 2001). At Article 13(2) it is stated that, although a former head of state (or government) enjoys immunity in respect of acts performed in the exercise of official functions and related to the exercise thereof, he or she nevertheless may be prosecuted and tried ‘when the acts alleged constitute a crime under international law’.

1802 In his Report to the US President of 6 June 1945, Justice R. H. Jackson (who had been appointed by President Roosevelt as ‘Chief Counsel for the United States in prosecuting the principal Axis War Criminals’) illustrated as follows the first draft of Article 7 of the London Agreement (whereby ‘The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment’), contained in a US memorandum presented at San Francisco on 30 April 1945: ‘Nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still “under God and the law”’ (in Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London 1945, US Department of State, 1949, at 47).
indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights. These last values require that all those who gravely attack human dignity and fundamental rights be prosecuted and punished.

To ignore or play down the customary rule in question may lead to ensuring impunity for the perpetrators as well as denying compensation to the victims, given that in such cases, although the state on whose behalf the authors of crimes acted formally incurs responsibility, in practice it is not held accountable by anybody. Furthermore, as no one denies that soldiers and other military personnel may be brought to trial for war crimes (but also for crimes against humanity or genocide), one would come to the preposterous conclusion that lower-ranking state agents could be punished for such crimes, while those in power (heads of states or governments, senior members of cabinet, senior military commanders), who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, only on account of their seniority.

14.8 The Court’s Balancing of the Requirements of State Sovereignty with the Demands of International Justice

Finally, the Court’s judgment lends itself to some general considerations. The Court of course had to strike a balance between two conflicting requirements, which were lucidly expounded by Judges Higgins, Kooijmans and Buergenthal.1803 They are the requirements of smooth and unimpaired conduct of foreign relations, a traditional concern of sovereign states, on the one side, and the need to safeguard new community values, in particular the need to prosecute and punish the perpetrators of grave crimes seriously infringing fundamental rights of human beings, on the other side. In the event, the Court put greater weight on one scale of the balance and markedly favoured the former requirements. Absent any state practice or opinio juris seu necessitatis, it

1803 See Joint Separate Opinion, supra note 3 at paras 73–75.
logically deduced from the whole system of the law of international immunities that foreign ministers enjoy a broad range of immunities while in office. However, by ambiguously excluding that state agents could be brought to trial after leaving office for acts other than ‘private’ ones performed while in office, the Court has arguably left in the event the demands of international justice unheeded. One might be tempted to recall what another international court had the opportunity to state in general terms, admittedly in a different context: ‘It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.’

The holding of the Court is indeed striking, the more so because, it is submitted, the legal regulation that can be deduced from current international law manages to protect both sets of requirements in a balanced way. As stated above, as long as a foreign minister is in office, he enjoys full immunity from foreign jurisdiction and inviolability, for whatever act he may perform. However, once he leaves office, he may continue to be shielded from foreign criminal or civil jurisdiction for the acts he performed in his official capacity (under the rules on functional immunities), but not (i) for his private acts and transactions; in addition, (ii) he may no longer take shelter behind personal (or functional) immunities, with respect to international crimes such as genocide, crimes against humanity, war crimes, torture, and serious international acts of terrorism. If he is accused of such crimes, whether they were committed prior to his taking office or after he left office or while he was in office, he may legitimately be subject to foreign criminal jurisdiction.

Finally, one ought not to pass over in silence one major negative knock-on effect of the Court’s judgment. In future cases brought before the International Criminal Court involving states not parties to the Statute, the asserted lack of a customary rule lifting the functional immunity of state officials could be relied upon by such third states. Clearly, the relevant provisions of the Court’s Statute removing any immunity only apply to contracting states. Thus, for instance, if the accused is the national of a third state who, acting as a state official, has allegedly perpetrated

1804 ICTY, Appeals Chamber, Tadic’ (Interlocutory Appeal), judgment of 2 October 1995, at 32, para. 58.
international crimes on the territory of a state party to the Statute, the third state might argue that under customary international law that state official enjoys functional immunity, hence also immunity from the Court’s jurisdiction.

14.9 The Legal Limits of Universal Jurisdiction

Despite all the attention it receives from both its supporters and critics, universal jurisdiction remains one of the more confused doctrines of international law. Indeed, while commentary has focused largely and unevenly on policy and normative arguments either favoring or undercutting the desirability of its exercise, a straightforward legal analysis breaking down critical aspects of this extraordinary form of jurisdiction remains conspicuously missing. Yet universal jurisdiction’s increased practice by states calls out for such a clear descriptive understanding. The following Essay will engage this under-treated area. It will offer to explicate a basic, but overlooked, feature of the law of universal jurisdiction: If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions-contained in customary international law-of the universal crimes they adjudicate; otherwise, their exercise of universal jurisdiction contradicts the very international law upon which it purports to rely. The Essay will argue that this legal feature derives from the distinctively symbiotic nature of universal prescriptive jurisdiction (the power to apply law to certain persons or things) and universal adjudicative jurisdiction (the power to subject certain persons or things to judicial process). Unlike other bases of jurisdiction in international law, the prescriptive substance of universal jurisdiction authorizes and circumscribes universal adjudicative jurisdiction; in other words, it defines not only the universal crimes themselves, but also the judicial competence for all courts wishing to exercise universal jurisdiction.

The Essay will look to chart out some important implications of this thesis for the real-world practice of universal jurisdiction: It will evaluate how most easily to determine the customary definitions of universal crimes, to detect breaches of international law by courts that manipulate subjectively those definitions, and to enforce against such illicit manipulation. The Essay will contend that while some
definitional aspects invariably remain to be ironed out by state practice, the provisions of widely-ratified and longstanding international treaties provide generally the best record of the core customary definitions of universal crimes, and accordingly, supply not only a harmonized point of departure for courts wishing properly to exercise universal jurisdiction, but also a useful means for detecting breaches of international law by overzealous courts seeking only to exploit universal jurisdiction for purely political or sensationalist ends. The framework presented thus will address concerns that universal jurisdiction hazards unbridled abuse. As the Essay will argue, the law of universal jurisdiction does not; rather, it prescribes legal limits. And the Essay will conclude that in the end, these limits are enforced not by those states exercising universal jurisdiction, but instead by other jurisdictionally interested states—that is, most often by those states whose national citizens are the subject of foreign universal jurisdiction proceedings.

Unlike other bases of jurisdiction in international law, universal jurisdiction requires no territorial or national nexus to the alleged act or actors over which a state legitimately may claim legal authority. Universal jurisdiction instead is based entirely on the commission of certain “universal crimes.” At the present stage of development of international law, this category of crime is generally considered to include piracy, slavery, genocide, crimes against humanity, war crimes, torture, and “perhaps certain acts of terrorism.” It is no secret that the near future may envisage an increased rubric of universal crime that includes, interalia, human sex trafficking, nuclear arms smuggling, and perhaps other characteristically transnational offenses. A “universal jurisdiction”

1805 See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

1806 See id. § 404 cmt. a.

attaches to these crimes, so the argument goes, because they are universally condemned and all states have a shared interest in proscribing such crimes and prosecuting their perpetrators. Accordingly, every state has what is called prescriptive jurisdiction, or lawmaking authority, to proscribe universal crimes wherever they occur and whomever they involve, and adjudicative jurisdiction to subject the alleged universal criminal to its judicial process. Thus, if a State A national commits a universal crime against another State A national in State A, all states have jurisdiction to prosecute.

Universal jurisdiction has been the focus of much policy and normative debate: It has been hailed as a catalyst in the global struggle to bring to justice elusive international criminals like tyrants and terrorists, while on the other hand decried as a dangerously pliable tool for hostile states to damage international relations by initiating unfounded proceedings against each other's officials and citizens. Such expansive jurisdiction has in fact provoked sharp backlash from many circles— including former and current U.S. administrations. Yet in the face of some blows to its use, universal jurisdiction is, for the foreseeable future, here to stay. A number of states' courts have in the past year alone

---

1808 This Essay will not address directly the underlying rationale for universal jurisdiction or its extension to certain crimes, but will accept for present purposes its legal existence as well as the generally acknowledged list of crimes. The focus of the Essay instead will be on clearly marking out some important legal parameters that govern how courts must exercise such jurisdiction under international law.


1810 Id. § 401 (a).

1811 Id. § 401 (b).

1812 For a good primer on the debate, compare Henry A. Kissinger, The Pitfalls of Universal Jurisdiction, 80 FOREIGN AFF. 86 (2001), with Kenneth Roth, The Case for Universal Jurisdiction, 80 FOREIGN AFF. 150 (2001). For a progressive, normative restatement of how universal jurisdiction ought to be exercised so as to facilitate its purposes, see THE PRINCETON PRINCIPLES, supra note 3.

8. Due to pressure from other nations— principally the United States— Belgium restricted the application of its controversially expansive universal jurisdiction law to require, inter alia, more traditional links with Belgium, immunity for foreign governmental officials, and an increased role for the public prosecutor. See Steven R. Ratner, Editorial Comment, Belgium's War Crimes Statute: A Postmortem, 97 AM. J. INT'L L. 888, 891 (2003).

1813 See Ratner, supra note 9; Glenn Frankel, Belgian War Crimes Law Undone by Its Global Reach, WASH. POST, Sept. 30, 2003 at A01.
exercised this type of extraordinary jurisdiction, and the recent proliferation of domestic legislation providing for universal jurisdiction signals that the trend will only continue.

But despite the heated political controversy that surrounds it, and its increased use by states, a straightforward legal analysis interrogating some basic features of universal jurisdiction remains strangely lacking. This Essay will engage this under-treated area; it will not ask whether and under what circumstances universal jurisdiction might be a good idea, but rather will seek to discern the international law governing how courts must exercise universal jurisdiction when in fact they pursue such exercises, as well as the international legal consequences of improper exercises of universal jurisdiction. My argument therefore will be primarily a legal one, albeit with important policy implications that will contribute to the larger debate since it goes to the very heart of when and how universal jurisdiction can be exercised under international law. The argument will proceed as follows:

It is presently contrary to international law for one state to extend unilaterally its prescriptive jurisdiction into the territory of another state absent some territorial or national link to the matter over which the first state claims competence—for example, where the act has an impact within that state's territory, involves its

---


1815 See infra notes 82-86 (listing legislation implementing the Statute of the International Criminal Court and providing for universal jurisdiction).
nationals, or directly threatens its security. Thus State B cannot, without such a link, project its domestic laws onto State A and vice versa. Yet, as we have seen, the principle of universal jurisdiction grants all states-including our hypothetical State B-jurisdiction to prosecute universal crimes irrespective of where the crimes occur or which state's nationals are involved (either as perpetrators or victims). This immediately raises the important-but thus far neglected-legal question: What prescriptive jurisdiction prescribes universal crimes? In concrete terms, what prescriptive law must national courts apply when they exercise universal adjudicative jurisdiction?

The answer, this Essay will submit, is international prescriptive jurisdiction, and thus in substance, international law. In other words, while a state's national law may not extend unilaterally its prescriptive reach into the territory of another state, international law can, and does, just that with respect to the proscription on universal crime-only in cases of universal jurisdiction, the adjudication of this international legal prohibition occurs through the operation of national courts. Because the international prescriptive substance of universal crimes authorizes a given court's universal jurisdiction, courts must apply that substance-that is, the international legal definitions of the crimes-when they exercise universal jurisdiction, or else their jurisdictional claim contradicts the very international law upon which it purports to rely. The thesis from which I will build my argument therefore is simply that the exercise of universal adjudicative jurisdiction fundamentally depends upon the application of the legal substance of universal prescriptive jurisdiction, and that this prescriptive substance-the definitions of universal crimes derives from customary international law.

Part II will explain how this thesis brings to light and grounds itself in the uniqueness of universal jurisdiction among the jurisdictional bases generally accepted in international law. For unlike other bases, universal jurisdiction's prescriptive substance at the same time authorizes and circumscribes courts' adjudicative jurisdiction; it defines not only the universal crimes themselves, but

---

1816 See infra note 33, and accompanying text, listing bases of jurisdiction.
also the judicial competence for all courts wishing to exercise universal jurisdiction. And it is a prescriptive substance common to all states since it can arise only as a matter of customary law, universally binding on them all. My claim thus will place legal limits on the exercise of universal jurisdiction. It is not just the empowerment of states by international law to adjudicate certain matters under any prescriptive law they see fit. Instead, when national courts prosecute on a theory of universal jurisdiction they must apply the international legal definitions of the crimes they adjudicate, or else their jurisdiction conflicts with international law. Part II also will employ this thesis to re-but the claim that because courts typically need some form of domestic authorization to exercise their jurisdiction, universal jurisdiction depends not on international law but on national law.

The thesis raises a number of important questions for the practice of universal jurisdiction that need answering, namely: How are courts to go about determining the definitional substance of what might be dubbed “fuzzy” customary international law? Further, how can states evaluate whether a universal jurisdiction court departs from the customary definition of the crime, thus rendering its underlying jurisdiction contrary to international law? And finally, how can interested states—that is, states on whose territories the universal crimes occurred and/or whose nationals are the subject of universal jurisdiction proceedings-enforce against illegitimate definitional expansions of universal crimes by overzealous courts seeking only to exploit universal jurisdiction for political or sensationalist ends?

In response to these questions, Parts III and IV will offer a basic framework for evaluating the legality of universal jurisdiction exercises under this Essay’s thesis. In response to the first question—how to determine the customary definitions of universal crimes—Part III will look to the formation of customary law generally, and will maintain that as to universal crimes in particular, their core substantive elements are set forth quite explicitly in the various treaties and conventions prohibiting the crimes under positive international law. I will not argue that treaty law sets forth definitively the customary definitions of universal crimes, but rather the best evidence of what those definitions are. While the
contention that treaties may generate customary law is perhaps not entirely free from debate with respect to, for example, the formation of “instant custom” at the moment the treaty enters into force absent opportunity for subsequent international acceptance of or acquiescence in the rules contained therein, or the establishment of custom through only bilateral treaties, I need not go so far for my argument. The treaties proscribing the various universal crimes represent a relatively longstanding consensus not only as to the prohibition on those crimes, but also- necessarily-as to their substance. On this point, the Appendix to this Essay will critically survey the positive law relating to each of the universal crimes listed above and assay some of the more important definitional provisions which supply a harmonized prescriptive foundation for courts wishing to exercise universal jurisdiction.1817 My purpose in so doing is not to elaborate comprehensively all aspects of the definitions of universal crimes under customary law, but rather to provide courts and international lawyers with a useful point of departure in line with the analytical framework forwarded by this Essay. To be sure, although state practice and opinion juris (the two elements that make up customary law) continue to fill in, refine and modify aspects of these customary definitions, for present purposes courts have a clear and workable catalog of core definitions handy, in the form of treaty provisions and legislation transposing those provisions onto domestic law, with which to prosecute universal crimes. In fact, national legislation enabling universal jurisdiction characteristically draws from treaty law to define the relevant offense1818 and courts consequently use that substantive definition to prosecute universal crimes,1819 thus reinforcing custom in this respect. Next, because treaty provisions largely evidence the core definitions of universal crimes, we might respond to the second question-how to determine when universal jurisdiction courts deviate from the customary definitions of the crimes-by saying initially that there are “easy cases” and “hard cases.” Where a court claiming universal jurisdiction clearly departs from the subject crime’s core definition-as

1817 See Appendix, infra. As the Appendix bears out, the treaties themselves tend to avow either an explicit or implicit purpose to codify or create custom in their respective areas of international lawmaking.

1818 See infra notes 82-86.
1819 See infra text accompanying notes 104-16.
evidenced by the treaty-absent a showing that customary law has evolved to justify such a departure, the illegitimacy of its jurisdictional claim is easily identifiable. Especially subject to easy-case categorization are universal crimes with rule-based elements. A quick example here, and one that will be discussed in more detail below, is the Spanish Audiencia Nacional's illegitimate expansion of the victim classes in the definition of genocide to include political groups, which purported to justify the court's assertion of universal jurisdiction over former Chilean dictator Augusto Pinochet. Under this Essay's framework, had the case gone forward on these grounds, Chile—both the territorial and national state—would have had a powerful legal claim to reject Spanish jurisdiction since the definition the court employed was plainly exorbitant. But although treaties strongly evidence the core elements of universal crimes, there invariably will be aspects of the definitions that need to be ironed out further by state practice. Thus, objections to universal jurisdiction that are not based on a court's clear departure from the universal crime's core substantive definition—as evidenced by the treaty—might fall into the “hard case” category. Especially subject to hard-case classification are crimes that depend on the application of standards. Examples here might include whether a specific act constitutes a war crime under standards of target selection and proportionality contained in the Geneva Conventions and their Additional Protocols, or whether a particular interrogation technique constitutes torture under the Torture Convention's widely-accepted definition of the crime. The jurisprudence of

---

1820 See infra text accompanying notes 104-16.

1821 See infra text accompanying notes 104-06.

1822 Torture ended up being the relevant crime of extradition for Great Britain, though Pinochet ultimately was not extradited but sent back to Chile because he was determined medically unfit to stand trial. See Regina v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, [1999] No. 3, 2 W.L.R. 827, 833-36 (opinion of Lord Browne-Wilkinson), reprinted in part in THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 255, 268 (Reed Brody & Michael Ratner, eds., 2000) (hereinafter THE PINOCHET PAPERS).

1823 I have argued against the use of universal jurisdiction over war crimes generally for this reason. See Appendix E, infra; Colangelo, supra note 3, at 587-94 (observing that these standards afford courts too much latitude to allege war crimes against U.S. forces despite an unprecedented adherence to international humanitarian law in the NATO bombing in the former Yugoslavia and the 2003 invasion of Iraq).

international criminal tribunals and of national courts exercising universal jurisdiction-decisions which are not precedent on their own but nonetheless evidence state practice,\textsuperscript{1825} would be particularly helpful guides here. But in order to illustrate most simply its basic thesis, this Essay admittedly concerns itself more with the easy cases-though the hard cases undoubtedly supply fertile ground for further legal evaluation of universal jurisdiction assertions in line with the framework forwarded here. Indeed, and as Part IV indicates in its enforcement discussion, where territorial and national states-states that have a strong legal interest in a given universal jurisdiction assertion-object to the definition of the crime that purports to justify another state's universal jurisdiction claim, the resolution of that international legal clash will go far toward determining further the customary definition of the crime at issue.

Finally, Part IV will deal with the question of enforcement against a court's illegitimate definitional expansion of a universal crime upon which the court purports to base its jurisdiction. Part IV will explain that the international legal limits of universal jurisdiction are indeed enforceable against such courts, and that the enforcers are those states with concurrent jurisdiction over the alleged crimes-that is, states with territorial or national jurisdiction. As I will show, where jurisdictionally interested states reject an illegitimate universal jurisdiction claim stemming from an improper manipulation of the underlying crime's definition, international law considers the universal jurisdiction claim an enduring breach. In short, it is not the state exercising universal jurisdiction, but most often those states whose nationals are in the dock, that are the enforcers of the legal limits of universal jurisdiction.

\textsuperscript{1825} \textit{RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES} § 103 cmt. a, b (1987).
14.9.1 Universal Jurisdiction’s Prescriptive Adjudicative Symbiosis

Jurisdiction is the central concept in the interface between the nation state and international law; as such, it describes the power allocation both among individual states and between states and international law. A state's jurisdiction, or what some may call “sovereignty,” refers by and large to its authority to make, apply, and enforce law. More distinctly, a state's prescriptive jurisdiction is its authority to apply its law to certain persons or things, and its adjudicative jurisdiction is its authority to subject persons or things to its judicial process. Importantly, “[j]urisdiction to enforce or adjudicate is dependent on jurisdiction to prescribe.” Thus a state has no inherent authority to subject persons or things to its judicial process if that state has no lawmaking authority over those persons or things to begin with.

---

1826 Although notoriously opaque, the label “sovereignty” invokes the familiar definition of state power by implying the state's autonomous jurisdictional authority to create, implement, and enforce its own laws; in short, it provides a metric by which changes in a given power dynamic—such as that between the state and international law—may be measured. See Marcel Brus, Bridging the Gap between State Sovereignty and International Governance: The Authority of Law, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 7-10 (Gerard Kreijen, ed. Oxford 2004). See generally John H. Jackson, Sovereignty Modern: A New Approach To An Outdated Concept, 97 AM. J. INT'L L. 782, 786, 789-90 (2003). For a discussion of the evolution of the concept of sovereignty toward a human rights-based, popular sovereignty see W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT'L L. 866 (1990).

1827 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

1828 Id. § 401(b).


1830 States may, however, agree either formally or informally to delegate among themselves jurisdiction absent territorial or national prescriptive authority—but such an exercise of jurisdiction is only legitimate insofar as it stems from the delegation of jurisdiction by a state with territorial or national prescriptive authority. For example, there is a form of extraterritorial criminal jurisdiction exercised by some European states, in particular Germany, called the “vicarious administration of justice” or “representation” principle which allows for the application of municipal criminal law based only on the custody of a foreign defendant without other territorial or national links. This type of jurisdiction is, however, preconditioned upon “a request from another state to take over criminal proceedings, or either the refusal of an extradition request from another state and its willingness to prosecute or confirmation from another state that it will not request extradition.” Extra-territorial Criminal Jurisdiction, in COUNCIL OF EUROPE, EUROPEAN COMMITTEE ON CRIME PROBLEMS 14 (1990). Unlike universal jurisdiction, the representation principle conforms with the classical sovereignty model under which states have full prescriptive authority.
The international law of jurisdiction is a customary law. That is, it is not based on treaties or other positive agreements among states, but rather on state practice and opinion juris, or the state's belief or intent that it is acting with legal purpose (though by these two components, as I show in more detail below, treaties certainly may inform or evidence the customary law of jurisdiction). While all states may contribute to international custom since it embodies their collective "general practice accepted as law," custom is an external force on each individual state that makes up part of the international law-making collective. The legal construct of jurisdiction essentially comprises the package of "external rules that have defined [the nation] as a

regarding conduct within their territories. First, the principle requires some form of agreement or consent between the custodial prosecuting state and the territorial state. See id.

(T)he 'representation' principle differs from the principle of universality in that the decision to prosecute is not taken in isolation by the state claiming jurisdiction, but requires a certain understanding, if not agreement, by the other state which is more directly concerned, for instance the state where the offence has been committed.).

Hence, the territorial state permits the custodial state's application of prescriptive jurisdiction, which of course the territorial state has a sovereign prerogative to delegate. Also in this connection, the principle is decidedly subordinate to other principles of jurisdiction, which take priority. See Jurgen Meyer, The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction, 31 HARV. INT'L. L.J. 108, 116 (1990). Second, the substantive crime must be virtually indistinguishable as between the custodial and territorial states; the custodial state literally acts as a surrogate for the territorial state. See id. at 111

(T)he principle of the vicarious administration of justice... implies that it is insufficient to find an applicable norm of the place of conduct which is identical to the [custodial state's] norm; the particular conduct must also satisfy the elements of that norm. Moreover, the grounds of justification and excuse under the law of the place of conduct must be observed....);

see also COUNCIL OF EUROPE, supra at 14. In contrast, universal jurisdiction can be exercised irrespective of the permission and despite the prescriptive legislation of the territorial state.

1831 See e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (describing this component as "a sense of legal obligation"); Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1179 (describing this component as "accepted as law").

1832 See discussion infra note 46.

1833 Statute of the International Court of Justice, supra note 28, at art. 38.

1834 In a recent defense of customary law, George Norman and Joel Trachtman explain this phenomenon in the following manner: while custom is “endogenous to states as a group meaning that it is not a vertical structure produced outside or above the group of states—it has an independent, exogenous influence on the behavior of each individual state.” George Norman & Joel P. Trachtman, The Customary International Law Game, 99 AM. J. INT'L L. 541, 542 (2005).
Presently those rules circumscribe the prescriptive reach of states based principally on their authority over territory and national citizens. Traditional bases therefore hold that a state has jurisdiction over acts that occur— even in part— within its territory (subjective territoriality), may not occur but have an effect within its territory (objective territoriality), involve its national citizens (active and passive personality— based on perpetrator and victim respectively), and are directed against its security (protective principle).

Despite an observable allowance for concurrent jurisdiction by multiple states, e.g., a matter occurs (or has an effect) in the territory of one state but involves one or more nationals of another state, and even conflicts between states with concurrent jurisdiction, the jurisdictional construct provides a relatively practicable and objective measure of the authority of individual states vis-à-vis one another concerning a particular matter. Thus State B may apply its prescriptive jurisdiction to persons and things within its territory, and therefore may apply its jurisdiction to a State A national within State B borders. State B may even have a jurisdictional claim over a State B national who happens to be in State A. But absent some justifying territorial or national nexus (or agreement between the states), State B may not project unilaterally its domestic laws onto State A. For instance State B may not project unilaterally, say, its traffic codes, onto State A. That issue is squarely


(As a construct of international law, a nation is nothing more nor less than a bundle of entitlements, of which the most important ones define and secure its boundaries on a map, while others define its jurisdictional competency and the rights of its citizens when they travel outside its borders.)

1836 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); see also Anne-Marie Slaughter, Defining the Limit: Universal Jurisdiction and National Courts, in UNIVERSAL JURISDICTION 168, 172 (Stephen Macedo, ed., 2004) (noting that like territorial and national bases of jurisdiction, this protective principle is “defined in terms of [a state's] territorial integrity or the safety of its citizens.”).

1837 See, e.g., Case of S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30-31 (Sept. 7) (ruling on the collision of a French ship with a Turkish ship, and observing that [n]either the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.).

1838 See supra note 27.
within State A’s sovereign jurisdiction. It follows that State B’s courts cannot apply State B’s traffic code to a State A driver, driving only in State A, and with no other jurisdictional connection to State B since there exists no prescriptive jurisdiction upon which State B’s adjudicative jurisdiction may rely. It would be as if some British court applied the British rule that drivers must drive on the left side of the road to a U.S. citizen, driving only in the United States and with absolutely no connection to Britain. Such an application plainly would clash with international law.

Yet universal jurisdiction allows State B’s courts adjudicative authority with respect to an act that occurs entirely within State A’s borders, has no effect on the territory of State B, and involves only State A national citizens. If, as we have said, State B cannot extend its prescriptive jurisdiction into the territory of State A, universal jurisdiction begs the question of what prescriptive jurisdiction authorizes State B’s courts. In cases of universal jurisdiction that prescriptive jurisdiction is, as a legal matter, international-for as we have seen already, extraterritorial prescriptive jurisdiction of this sort cannot by law be national, e.g., State B may not apply unilaterally its municipal law concerning traffic codes to State A nationals acting with respect to other State A nationals in State A. Universal crimes are instead proscribed at the level of international law which, unlike national prescriptive jurisdiction, does extend into the territory of all states.

Universal jurisdiction is therefore quite unique among the bases of international jurisdiction in two discrete but related respects. First, its prescriptive and adjudicative faces are distinctively symbiotic: The prescriptive substance of universal crimes not only defines the crimes themselves, but also authorizes the adjudicative competence for all states engendered by the commission of those crimes. In other words, universal adjudicative jurisdiction depends upon the definitional substance of the crime as prescribed by universal prescriptive jurisdiction.

Indeed, it is difficult to imagine a scenario in which, even with a link to the conduct in question, one state’s prescriptive jurisdiction regarding traffic codes could justifiably extend into the territory of another state.
Second, the legal content of this prescriptive jurisdiction is moored in customary international law. By contrast, a state's jurisdiction over its territory or nationals—while certainly a matter of international law at the edges since it describes the state's authority vis-à-vis other states—is not, at the level of a state's domestic law, necessarily substantiated by the content of international law. International law merely sets the perimeters inside which states have sovereign lawmaking authority (to the extent that they do not legislatively act contrary to international law by endorsing universal crimes). It follows that states may grant their courts jurisdiction over any subject matter they please within these territorial and national prescriptive perimeters. The same cannot be said of universal jurisdiction—courts' subject matter jurisdiction is circumscribed by the prescriptive substance of the international law outlawing universal crimes. Hence if certain State A nationals put into action a program of extermination of other State A nationals based on the latter group's race or ethnic identity, courts in State B would have the authority, under international law, to prosecute the former group for the universal crime of genocide. But crucially, State B’s adjudicative jurisdiction would be contingent upon the customary definitional substance of the crime prosecuted, i.e., genocide. Put differently, absent territorial or national links or some other legitimating understanding between the states, State B could not prosecute the State A actors under its municipal code for a series of homicides; like our traffic code hypothetical, such an application would conflict with international law. In sum, a state’s universal adjudicative jurisdiction is empowered not by the state’s own domestic prescriptive authority-based on, for instance, its authority over national territory or citizens—but rather, by international law. Consequently, when states exercise universal jurisdiction they are legally constrained to adjudicate the prescriptive substance of the crime under international law.

1840 A question arises where the state, through government power, commits universal crimes on a grand scale. Such a state arguably has waived its jurisdiction under international law. For example, it has been suggested that “[a] State that massively violates the rights of an ethnic minority risks forfeiture of its rights to control a given part of its territory.” Brus, supra note 23, at 13.
The objection immediately will be made, however, that national courts typically have no authority to pull sua sponte from the sky principles of international law according to which they may then adjudicate a matter; instead they must rely upon some domestic law granting them jurisdiction. And thus, the very idea of international prescriptive jurisdiction depends entirely on domestic law. It follows, the argument goes, that (contrary to my stated position) the state court that asserts universal jurisdiction gets its authority not from international law but from that state's domestic legislation. References to what skeptics might sardonically label “so-called international law” may make for nice and popular dicta in the court's opinion, but as a matter of law they are utterly irrelevant.

This position misunderstands the international law of jurisdiction. The principle of universal jurisdiction empowers states in the first instance with the capacity to adjudicate certain matters where they otherwise would have no authority to do so. How the sovereign state then authorizes its own judicial bodies to adjudicate the matter is up to the state's domestic law (and thus courts are not randomly pulling from the sky international law). For instance, the domestic law of the state may indeed permit the court to draw directly from international law, or domestic law may incorporate or reflect international law, in which case the state would be using its domestic laws and procedures to adjudicate the substance of international law. But importantly, for cases of universal jurisdiction the substance

---

1841 These two approaches to international law by national legal systems are called monism and dualism respectively. Under the monist approach to international law

[1]he state's constitutional system must recognize the supremacy of international law. The national legislature is bound—constitutionally bound to respect international law in enacting legislation. The national executive is constitutionally required to take care that international law be faithfully executed, even in the face of inconsistent domestic law. The national judiciary must give effect to international law, notwithstanding inconsistent domestic law, even domestic law of a constitutional character.

Louis HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64 (Dordrecht 1995). Dualism, on the other hand, views international law as the law between sovereign states, a law that is separate and apart from domestic law. See IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 30 (1990). Thus, for international law to be part of a dualist state's domestic legal system, it must be implemented through domestic legislation. See MALCOLM N. SHAW, INTERNATIONAL LAW 107 (1991). Most states incorporate aspects of both approaches with regard to the domestic application of international law.
of the law must accord with the prescriptive jurisdiction that governs it—that is, it must be international.

14.9.2 The Customary Law of Universal Jurisdiction

If state courts’ universal adjudicative jurisdiction depends upon universal prescriptive jurisdiction as defined by international law, then our next question asks how to determine the content of this prescriptive jurisdiction, or the customary definitions of universal crimes. This Part contends that the answer lies in the provisions of the widely-ratified and relatively longstanding multilateral treaties proscribing universal crimes under positive international law. To frame my argument, I begin with two distinctions. The first elaborates upon the distinction between the more procedural law of universal adjudicative jurisdiction and the more substantive law of universal prescriptive jurisdiction. The second, to be clear about the customary character of universal jurisdiction, observes the difference between a treaty-based or “conventional” version of universal jurisdiction, which necessarily confines itself to the states party to the convention that generates such jurisdiction, and the customary law of universal jurisdiction, which extends to all states. I then explain how treaty provisions prescribing universal crimes provide a strong and easily-measurable record of customary law’s universal prescription as to those crimes—in other words, the prescriptive jurisdiction that governs state courts’ exercises of universal adjudicative jurisdiction.

A. Adjudicative Versus Prescriptive Universal Jurisdiction

Although universal adjudicative jurisdiction depends upon the substance of universal prescriptive jurisdiction (or conversely, the substance of universal prescriptive jurisdiction authorizes universal adjudicative jurisdiction), the customary rules of universal adjudicative and prescriptive jurisdiction are nonetheless distinct in their character and development. Universal adjudicative jurisdiction essentially outlines the procedural connection needed for courts to assert jurisdiction over the person(s) before it. For universal jurisdiction
purposes, this procedural element exceptionally requires no territorial or national
nexus to the accused criminal over which a court asserts judicial authority.1842

My focus here, however, is on universal prescriptive jurisdiction, which relates
more to the subject matter over which the court claims competence—that is, the
substance of universal crime itself. Due perhaps to a need for legal analysis
explaining an increased exercise in the last decade or so of jurisdiction by courts
having no territorial or national links to the defendants they seek to
prosecute,1843 commentary has concentrated unevenly on the unqualified, and
literally global ambit of universal adjudicative jurisdiction,1844 while important
aspects of the prescriptive scope and definition of universal crimes themselves
have been overlooked. To illustrate, piracy is commonly understood as a core
universal crime because throughout international legal history any state's courts
could prosecute the pirate absent territorial or national links to him or his piratical
acts, and more recently, such adjudicative procedure has been strongly
endorsed in conventional law.1845 But the question of what precisely “piracy” is
as a matter of customary law has garnered little attention1846—and yet, as we

1842 The conventional or positive law relating to this aspect of jurisdiction is found in treaty provisions
establishing states parties' jurisdiction to prosecute, i.e., the provisions determining whether states may
exercise jurisdiction over acts committed outside their territories, having no effect on their territories and
involving non-nationals. See, e.g., the Torture Convention's prosecute-or-extradite provisions set forth
infra, note 52.

1843 See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 1 (2003) (noting that “[m]ore cases of 'universal jurisdiction' have been reported in the past decade than throughout the whole history of modern international law.”).

1844 Commentary has tended to focus almost exclusively on the availability of universal jurisdiction for
courts-i.e., adjudicative jurisdiction, without discussing the substance of the crime itself-i.e., prescriptive
jurisdiction. See, e.g., THE PRINCETON PRINCIPLES, supra note 3, at 21-25 (listing various universal
crimes but not explaining how to define them and dealing largely with procedural issues such as due
process, extradition, evidence-gathering, immunities, statutes of limitations, amnesties, resolution of
competing jurisdictions, double jeopardy, and settlement of disputes between states with concurrent
jurisdictional claims). The author has found one article that discusses universal jurisdiction as a
prescriptive jurisdiction, but only to make the point that while a state's universal prescriptive jurisdiction is
extraterritorial, jurisdiction to enforce is territorial. See Roger O'Keefe, Universal Jurisdiction - Clarifying
the Basic Concept, 2 J. INT'L CRIM. JUST. 735 (2004) (dealing primarily with the ICJ opinion in the
Arrest Warrant case, and not discussing the nature of the prescriptive jurisdiction under the universality
principle, the main focus of this Essay).

1845 M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law, in
have seen, this customary definition determines the legal availability of a given court's universal subject matter jurisdiction. To take a more modern and contentious example, “terrorism” has been rejected by courts as a crime of universal jurisdiction. The reason for this rejection stems not from a void of state practice favoring far-reaching adjudicative jurisdiction over the perpetrators of this type of crime, but rather from the absence of a coherent customary definition of “terrorism.”

In the words of the United States Court of Appeals for the Second Circuit in the recent Yousef opinion:

Unusual those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now have fairly precise definitions and that have achieved universal condemnation, 'terrorism' is a term as loosely deployed as it is powerfully charged. No consensus has developed on how to properly define 'terrorism' generally...[Such] strenuous disagreement among States about what actions do or do not constitute terrorism... [means that] terrorism unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction.

Thus the answer to the question of how to determine the customary definitional content of universal crimes is of increasing legal and practical importance.

On my view, developed below, that the answer lies in the substantive definitions of treaties, the international crime at issue in Yousef, which involved planting and exploding a bomb on a civilian aircraft—not abstractly “terrorism”—clearly would be subject to universal jurisdiction. The relevant international instrument, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the

---

1846 For an historical account of the crime that highlights confusion about what set piracy apart from other actions on the high seas, see Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, 45 HARV. INT'L L.J. 183 (2004).

1847 United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).

1848 Id. at 87-89 (internal citation and quotation omitted).
Safety of Civil Aviation, not only evidences a custom of universal adjudicative jurisdiction by providing for extraterritorial and extra-national jurisdiction over alleged plane-bombers, it fills the prescriptive customary hole that so worried the Second Circuit by prescribing a definite international law articulation of the crime of plane-bombing. Thus while “terrorism” abstractly labeled may not be

1849 Article 5 of the Montreal Convention provides that:
Each Contracting State shall... take such measures as may be necessary to establish its jurisdiction over the offences [defined]. . . in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

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


A state's entrance into a treaty with other states and commitment to be bound thereby constitutes the maximal expression of state sovereignty and “assent” to the particular rules contained in that treaty; the state's implementing legislation pursuant to the treaty compounds this assent by demonstrating a “general usage and practice” designed to enforce those rules; and finally, “the [state's] judicial decisions recognize and enforce that law” in practice.

The Montreal Convention, which was put into effect in 1971, currently has 173 states parties, which means that in the last thirty years the vast majority of states in the world have agreed to bind themselves to and put into practice through domestic legislation and judicial enforcement the provisions of the treaty. [And while] the Montreal Convention “creates a basis for the assertion of jurisdiction that is moored in a process of formal law making and that is binding only on the States that accede to it,... it is precisely this process of formal lawmaking between sovereign states, their mutual assent to the rule agreed upon, and their affirmative adoption and implementation of this rule in domestic legislation and judicial decision making that constitutes evidence of the customary rule. What is important to keep in mind is that the treaty, the municipal legislation, and the judicial opinion are not themselves customary international law; rather they make up the absolute best evidence of what a state, the United States, and all other states party to the Montreal Convention consider to be a legally binding practice-and in this respect supply the most powerful evidence possible of customary international law there is. (internal citation omitted) (emphasis in original).

1850 Article 1 of the Montreal Convention defines the offense as:

unlawfully and intentionally... plac[ing] or caus[ing] to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight....

Montreal Convention, supra note 46, at art. 1
subject to universal jurisdiction because of its definitional uncertainty, certain clearly-defined acts of terrorism, like plane bombing, are.\textsuperscript{1851}

B. “Conventional” Versus Customary Universal Jurisdiction

But treaties and custom are of course essentially different types of law. And like all bases of jurisdiction in international law, “[u]niversal jurisdiction is a fundamentally customary, not treaty-based, law.”\textsuperscript{1852} So before we make the jump from treaty definitions to customary definitions, one more distinction should be made between what might be called treaty-based or “conventional” universal jurisdiction on the one hand, and customary universal jurisdiction on the other. So-called “conventional” universal jurisdiction is somewhat of an oxymoron, or at the least, a misnomer. Because such jurisdiction is rooted in treaty law, it provides neither in fact, nor in law, a truly “universal” jurisdiction.\textsuperscript{1853} It merely vests a comprehensive jurisdiction for states party to a convention inter se with respect to the prosecution of a crime that is the subject of the convention; states party may (and in some cases are obliged to) under the jurisdictional provisions of the convention--exercise their adjudicative jurisdiction absent territorial or national links to the offense that the convention prescriptively defines and outlaws. Though the convention's prescriptive mandate-i.e., the proscription on the crime ostensibly binds all states party all the time, conventions tend to limit procedurally the exercise of a state courts' adjudicative jurisdiction, absent territorial or national links to the crime, to instances where the alleged offender is afterwards present or “found” in that state party's territory and it does not extradite him to another state party.\textsuperscript{1854}

\textsuperscript{1851} Colangelo, supra note 3, at 594-603
\textsuperscript{1852} Id. at 567; see also Yousef 327 F.3d at 96 n.29
\textsuperscript{1853} See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND How WE USE IT 64 (1994) (explaining that treaty-based jurisdiction is never “universal jurisdiction stricto sensu” because such jurisdiction concerns only the states parties to the treaty).
\textsuperscript{1854} This provision is commonly referred to as a “prosecute-or-extradite” provision, or audiedere autjudicicare.
To illustrate, the Torture Convention prescriptively defines and bans the crime of torture for states party to the Convention. And through its prosecute-or-extradite provisions, the Convention provides for an equivalent of universal adjudicative jurisdiction over torture as among the states party. As a matter of positive law, however, both the Convention's prescriptive ban on torture and its grant of extraterritorial and extra-national adjudicative capacity to courts to prosecute torturers comprehend only the jurisdictions of those states party to the Convention. In other words, the Torture Convention does not, on its own, bind non parties.

By contrast, the customary basis of universal jurisdiction over torture, both in terms of its prescriptive ban on the crime and in terms of its adjudicative scope allowing all states' courts to prosecute the crime, extends beyond those states party to the Torture Convention to contemplate the jurisdiction of all states-making jurisdiction in fact, and in law, “universal.” So if State A and State B are parties to the Torture Convention, and State B asserts jurisdiction pursuant to the Convention over a State A national found in State B for torture committed in State A against other State A nationals, State B is not exercising universal

---

1855 Torture Convention, supra note 21, at 197; see also Appendix F, infra.

1856 Torture Convention, supra note 21, at 198. Article 5(2) of the convention provides that “[e]ach State Party shall...take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him....” And Article 7(1) provides:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in [the relevant provision] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Id. at 198.

Lori Damrosch has noted that “at a minimum all the prosecute-or-extradite crimes [like torture] are ones as to which there is an option to exercise jurisdiction without any link to the crime other than custody of the offender.” Lori F. Damrosch, Connecting the Threads in the Fabric of International Law, in UNIVERSAL JURISDICTION 91, supra note 33, at 94 (emphasis in original).

jurisdiction, but is simply discharging its treaty obligations. Similarly, in Yousef, while the Second Circuit found that it did not have universal jurisdiction as a matter of customary law, it did find jurisdiction under the Montreal Convention and its domestic implementing legislation with respect to acts committed by a Pakistani national, which killed and injured Japanese nationals on a Philippine flag airliner flying from the Philippines to Japan (there was no evidence that a U.S. citizen was even aboard the flight). Critically, in the Torture Convention hypothetical, and in Yousef, both the prosecuting and the territorial states were parties to the applicable conventions and the prosecuting states used the prescriptive definitions of the crimes contained in the conventions.

To place the jurisdictional competence of the prosecuting state in the torture hypothetical outside of that vested by the treaty, we would need to make either State A (the territorial state), or State B (the prosecuting state), or both, non-parties to the Convention. Plainly if either both State A and State B are non-parties, or just State B is a non-party, State B cannot pretend to assert jurisdiction based on a treaty to which it is not party, and which accordingly does not vest it with jurisdiction. But what about the scenario in which State B is a party to the Convention and State A is not? Can State B still prosecute a State A national for torture committed in State A against only State A nationals based on

---

1858 This was essentially the reasoning of Lord Browne-Wilkinson speaking for the English House of Lords in Pinochet III, where he concluded that Pinochet could be extradited to Spain under the Torture Convention since the states with the most obvious jurisdiction... do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction... Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation.

THE PINOCHET PAPERS, supra note 19. The Netherlands also recently convicted a torturer absent territorial or national links to his crimes which occurred in the former Zaire (now Democratic Republic of the Congo) based on the Dutch implementation of the Torture Convention's provisions. See 51 NETH. INT'L L. REV. 439, 444-49 (2004).

1859 Yousef 327 F.3d at 97, 108-10.

1860 Id. at 109 n.43.

1861 Id. at 110 (observing that the domestic implementing legislation “carefully tracks the text of the Montreal Convention”). As to the definition of the crime in particular, the Montreal Convention and 18 U.S.C. § 32(b)(3) define the crime in substantively identical terms, see infra note 69.
the positive law of the Torture Convention? The answer would seem to be no, and the reason is that the Torture Convention, by itself, does not extend its prescriptive jurisdiction outlawing torture into the territory of non parties, i.e., State A. And therefore, State B, acting pursuant only to the Convention, would have no positive prescriptive jurisdiction authorizing its adjudicative jurisdiction under the Convention.

The State B prosecution could, however, rely on the customary law of universal jurisdiction because its prescriptive jurisdiction does extend into the territory of all states to proscribe torture, and likewise vests all states with the adjudicative jurisdiction to prosecute the torturer. But State B's customary adjudicative jurisdiction would only be valid insofar as it accords with the governing customary prescriptive jurisdiction. And so we come back to the question of how to determine the prescriptive substance of universal crimes under customary law.

C. Treaties and the Prescriptive Substance of Universal Crimes

As we have seen, unlike treaties and other positive law instruments that affect only those states that have signed onto them through a formal international lawmaking process, customary law is universal in its application. Moreover, it is evidenced by and evolves organically in light of state practice conditioned by opinio juris. Such practice is manifest, for instance, in the state's entrance into a treaty. The idea that generalizable or “norm-creating” treaty provisions-like, for example, proscriptions on internationally agreed-upon crimes-generate customary law is not new and is, in the words of the International Court of Justice, “indeed one of the recognized methods by which new rules of customary

---

international law may be formed.” Although some might feel the need to temper the formation of custom through treaty by requiring a certain threshold number of states party to the treaty or the passage of a certain amount of time before its provisions could constitute custom, this Essay needs not go so far for its argument. Each of the treaties prohibiting universal crimes enjoys longstanding and widespread acceptance; indeed, and as the Appendix bears out, the treaties themselves even tend to avow either an explicit or implicit purpose to codify or create custom in their respective areas of international lawmaking. That treaties do so is, again, nothing new for international law. The Nuremberg Tribunal, for instance, applied to the accused Nazi war criminals before it, as a matter of customary law, the detailed provisions of the 1907 Hague Convention and the 1929 Geneva Convention on the Prisoners of War. The Tribunal, citing no state practice other than that of states agreeing upon the rules contained in, and entering into, these treaties, observed that the rules were “declaratory of the laws and customs of war.” As Anthony D’Amato points out, “[i]t strains credulity to suppose that state practice had become so detailed by 1939—particularly between 1929, the date of the Geneva Convention, and 1939!—that the conventions were merely ‘declaratory’ of such practice. Rather, the more reasonable interpretation is that the conventions ‘declared’ what the

---

1863 North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

1864 See generally Scott & Carr, supra note 59.

1865 See Appendix, infra. The express or implied avowal of generating custom, when buttressed by the history of actions and reactions of states in respect to these treaties, would seem to take care of Dr. Michael Akehurst’s concerns that opinio juris must accompany a treaty for its provisions to create custom; the ways in which he sees this criterion satisfied are a declaratory statement in the treaty or its preparatory materials to this effect, or by subsequent practice and opinion juris supporting the rule. Michael Akehurst, Custom as a Source of International Law, in THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1974-1975 1, 45, 49 (R.Y Jennings & Ian Brownlie eds., 1977).


1867 Id.
practice is by virtue of the fact that the signatories undertook to declare that practice operative under the conventions themselves.”

The argument from treaty law engages therefore not just the prohibition on the crime but also the articulation of its content. It goes beyond accepting that genocide is prohibited as a matter of international law because the Genocide Convention prohibits it—treaties are the source of most if not all international human rights norms in this regard to contend that the substantive definition of the crime is reflected in the treaty provisions and, in line with Part II of this Essay, that it is a definition to which courts must adhere in exercising universal jurisdiction. Again, I do not argue that the treaty provisions setting forth penal characteristics constitute themselves definitively the customary definitions of universal crimes; rather, these provisions make up strong evidence of what the customary definitions are. It follows too that definitions contained in legislation implementing domestically a state's treaty obligations or simply transposing onto domestic law the treaty's definitional provisions are particularly useful to courts since these domestic-law definitions reproduce, by their very nature, the substance of the conduct prohibited by the treaty. My model necessarily allows for some flexibility in the definitions of the crimes insofar as domestic legislation does not substantively alter the definition of the treaty provision it transforms into domestic law. Even apart from obvious differences that will

---

1868 D'AMATO, THE CONCEPT OF CUSTOM, supra note 59, at 123.


1870 Of course, if the implementing legislation does not reproduce faithfully the crime as set forth in the treaty, the state would be in violation of its treaty obligations, and consequently, the definitions in the implementing legislation would not reflect the customary definitions of the crime (as set forth in the treaty).

1871 An example of an improper substantive alteration of a treaty definition is Germany's former Criminal Code § 220a, which translated the definition of genocide contained in the 1948 Genocide Convention into German law. Under the Convention's provisions, the act of genocide is defined as “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” The translation in § 220a criminalizes “inflict[ing] on the group conditions apt to bring about its physical destruction in whole or in part.” Kai Ambos & Steffen Wirth, Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 769, 784-786 (Horst Fischer et al. eds., 2004) (emphasis in secondary source). Ambos and Wirth explain that the use of the word “apt” in the literal German translation “substantially changes the elements of the inflicting-destructive-conditions-[provision] of
result from translating the treaty provisions into different languages for purposes of domestic legislation, slight variations on the language are almost inevitable given the universal prescriptions of treaties as compared to the more state-specific prescriptions of domestic legislation.\textsuperscript{1872} Using positive international law as the starting point for determining the substance of universal crimes accommodates the modification of definitions through evolutions in customary law regarding the crimes while presently providing courts with harmonized and fairly precise definitions that safeguard, among other things, bedrock criminal law principles of legality, “namely, no crime without a law, no punishment without a law”\textsuperscript{1873} in the context of international criminal law.\textsuperscript{1874}

\begin{flushright}
\begin{tabular}{l}
\textsuperscript{1872} To take one example, the Montreal Convention, supra note 46, provides for the equivalent of universal jurisdiction over anyone who unlawfuly and intentionally:
\end{tabular}
\end{flushright}

places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.


places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft’s safety in flight.

\begin{flushright}
\begin{tabular}{l}
\textsuperscript{1873} Bassiouni, supra note 42, at 45.
\end{tabular}
\end{flushright}

\begin{flushright}
\begin{tabular}{l}
\textsuperscript{1874} The history and development of international criminal law has relied on less stringent legality requirements than what might be found under domestic law. See Jordan J. Paust, It’s No Defense: Nullum Crimen, International Crime and the Gingerbread Man, 60 ALB. L. REV. 657, 664-671 (1997); Alfred P. Rubin, Is International Criminal Law “Universal”? 2001 U. CHI. LEGAL F. 351, 357-363 (2001). Thus, so long as states do not expand the definitions of the crimes beyond their customary meanings, states may specify further the definitions of the crime as set forth in a treaty to comport with more stringent domestic legality requirements, as are typical in civil law, code-based systems. For instance, Germany’s Code of Crimes Against International Law transforms the ICC crimes into domestic legislation. “Each crime was, however, reformulated into language consistent with German legal terminology, and to ensure that [sic], as required by the German Constitution, the crimes were clearly defined at the time of the commission of the act.” Steffen Wirth, Germany’s New International Crimes Code: Bringing a Case to Court, 1 J. INT’L CRIM. JUST. 151, 153 (2003). The drafters of the ICC evidently were also concerned with specificity problems and therefore agreed to promulgate more specific “Elements of Crimes,” which are “non-binding guidelines for the Court, aids for application and interpretation designed to help judges and prosecutors as well as legal counsels appearing in cases before the Court.” Wiebke Ruckert & Georg Witschel, Genocide and Crimes Against Humanity in the Elements of Crimes, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW, supra note 68, at 61.
\end{tabular}
\end{flushright}
There is, however, a circularity problem. How can state practice change the customary definitions of universal crimes if states are legally constrained in their exercise of universal jurisdiction to use, as it were, the customary definitions “as they exist”? This circularity problem tends to afflict customary international law generally. The easy solution for our purposes would be for states to get together and simply change the definition of the crime through an amendment to the relevant treaty, or to create a new instrument relating to that crime. This process has taken place to some extent with respect to crimes spelled out in the statute for the newly-established International. Criminal Court and to a lesser degree (since they are not treaties, strictly speaking) in the statutes of various international tribunals created under the auspices of the United Nations. For example, the Charter of the International Military Tribunal under which the Nazis were prosecuted defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations....” Although acts such as torture, imprisonment, and rape could potentially fall into the “other inhumane acts” receptacle, they are not set forth explicitly in the Charter and courts using its definitional provisions therefore would be on more precarious ground prosecuting these crimes as universal crimes against humanity than in prosecuting a listed offense such as “extermination” or “enslavement.” Yet by the end of the last century, international law evolved such that the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the ICC Statute, do affirmatively list torture, imprisonment and rape as crimes against humanity, thus clarifying or perhaps adding to the customary definitions of crimes against humanity and, in any event, providing courts with firmer prosecutorial footing as to certain of these

1876 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.
crimes. Judicial opinions also may contribute to the development or clarification of the definitions under customary law. For example, although the Genocide Convention nowhere explicitly mentions rape in its list of acts that may qualify as genocide when “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,” international criminal tribunal judgments make clear that acts constituting genocide encompass acts of rape committed with the requisite mens rea.

But all these examples are of legal developments engineered by quintessentially international agreements or institutions. More difficult is the question of when and how national courts advance customary law in domestic proceedings that apply international law, including, naturally, exercises of universal jurisdiction. We can say, for instance, that if the consistent and widespread practice of states prosecuting the international crime of genocide deems intent to destroy a group based on its political self-identification to satisfy the mens rea component of the crime, the customary definition of genocide has expanded to include within its victim class political groups along with the national, ethnic and racial groups carved out by the Genocide Convention. But the first state to extend the definition in this way violates customary law by improperly asserting jurisdiction over a crime that-at that moment-prescriptively does not qualify as universal. Yet customary law’s recursive constitution may immediately reduce the illegality of that act if interested states say, the alleged universal criminal’s state of national citizenship and/or the state on whose territory the crime occurred-acquiesce in or approve of the universal jurisdictional assertion. And particularly if other states then prosecute genocide in a way that recognizes political groups as

---


1880 This especially would be the case in this example because including political groups in this victim classification was debated and rejected in the drafting of the Genocide Convention. For a history of the drafting debate on this issue see Beth Van Schaack, Note, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, 106 YALE L. J. 2259, 2262-2269 (1997).

1881 I discuss this point in more detail, see Part IV, infra.
victims, the first state's illegal act will have planted a customary "seed,"
the cultivation of which, by state practice, will have modified the customary definition of genocide. The possibility of custom evolving beyond treaty definitions was even expressly built into the ICC Statute.

Evolutions in custom likewise may alter and even expand the capacity of states to allow procedurally for universal adjudicative jurisdiction over the perpetrators of international crimes. For instance, while like the Torture Convention, a number of positive instruments dealing with universal crimes provide for extraterritorial and extra-national jurisdiction by state courts over alleged offenders (the conventional equivalent of universal adjudicative jurisdiction), the Genocide Convention does not. In fact, extraterritorial jurisdiction was explicitly rejected in the Convention's drafting. Thus to accept genocide as a universal crime, one must view custom as having expanded the adjudicative scope of jurisdiction as to genocide beyond that envisaged by the treaty to encompass the jurisdiction of all states, irrespective of the place of the crime.

But again, my focus here is on prescriptive jurisdiction, or the substance of the universal crime under international law. Because, as we have seen, treaties furnish neither definitive nor exhaustive definitions of universal crimes due to the organic nature of customary law, courts may not always be obliged to use the precise definitional language of the treaty when exercising universal jurisdiction, though it will often be the case that the treaty definition is the best-not to mention the most readily available-evidence of custom. In fact, the practice of universal jurisdiction evidences this latter point.


1883 Rome Statute of the International Criminal Court, art. 10, U.N. Doc. A/CONF. 183/9 (July 17, 1998) (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”). For a detailed analysis of Article 10, see Leila Nadya Sadat, Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute, 49 DEPAUL L. REV. 909 (2000).

1884 For a detailed and persuasive explanation of this point, see REYDAMS, supra note 41, at 48-53.
To begin with, states' domestic laws facilitating universal jurisdiction flow routinely from the criminalization of the conduct in question at the level of international conventional law. These domestic laws may, for instance, fulfill a state's obligations under a treaty and thus, either through specific implementing legislation (typical in common law countries) or general enabling clauses making the treaty provisions directly applicable (typical in civil law countries), translate into national law the international substance of the crime for courts to prosecute. Prevalent examples include domestic legislation regarding the Torture Convention, the Genocide Convention, and the Geneva Conventions.

For example, Austria's criminal code provision providing for universal jurisdiction states that extraterritorial, extra-national jurisdiction applies to “criminal offences, if Austria is under an obligation to prosecute them-even if committed abroad irrespective of the penal law of the State where they were committed.” Strafgesetzbuch [StGB] [Penal Code] §64(1)(6) (Austria), translated in REYDAMS, supra note 40, at 94. “The term ‘obligation’ in §64(1) sub§ 6 refers to a treaty obligation.” REYDAMS, supra note 40, at 97. Another example is Belgium's Code de procedure p~nale, titre preliminare, article 12 bis, which has a general enabling clause that reads: “The Belgian courts are competent to take cognizance of offences committed outside the territory of the Kingdom that are the object of an international convention binding on Belgium if the convention obliges in any way to submit the case to the competent authorities for the purpose of prosecution.” REYDAMS, supra note 40, at 105. Likewise, Denmark's Straffeloven [Stfl] § 8(1)(5) (Denmark), provides: “Acts committed outside the territory of the Danish State, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings.” REYDAMS, supra note 40, at 127. An enabling provision appears also in France's criminal code with respect to self-executing treaties. REYDAMS, supra note 40, at 132-33. Somewhat of a departure from this model, the German code, StGB, supra, § 6, “Offences Against Internationally Protected Interests or Rights” lists international crimes over which universal jurisdiction exists-all of which, except for one, are directly the subject of an international treaty-and provides a catch-all provision that provides jurisdiction over “acts that are to be prosecuted by the terms of an international treaty binding on the federal republic of Germany even if they are committed outside the country.” REYDAMS, supra note 40, at 142. Spain's Ley Orgnica del Poder Judicial, article 23.4 follows this model as well, listing offenses prohibited under conventional international law, and providing also for jurisdiction over “any other offence which Spain is obliged to prosecute under an international treaty or convention.” REYDAMS, supra note 40, at 183. The Netherlands' 2003 International Crimes Act, which amended the Wartime Offenses Act and implements in part the ICC Statute, likewise draws from treaty law to define the offenses over which it provides universal jurisdiction, namely, genocide, crimes against humanity, torture and grave breaches (and even non-grave breaches) of the Geneva Conventions and their Additional Protocol I. See International Crimes Act of 19 June 2003, English version available at http://www.icrc.org/ihl-nat.nsf/0/fb9070f8fc60e047c125da30032f0b0?OpenDocument.

See Australia's Crimes (Torture) Act, 1988, translated in REYDAMS supra note 40, at 89-90; Uitvoeringswet Folteringsverdrag [The Netherlands' Act Implementing the Torture Convention], id. at 167-69.

See Israel's Crime of Genocide (Prevention and Punishment) Law 1950, see REYDAMS, supra note 40, at 160; Switzerland's Code penal Suisse, title l2bis, Offences Against the Interests of the International Community, id. at 195.
and their Additional Protocol 1 - this latter legislation has, in a number of states, been substituted for by legislation implementing the newly established ICC. Some legislation expressly declares its purpose in this regard. The since-tamed Belgian War Crimes Act, under which Belgian courts have prosecuted a number of Rwandan war criminals for acts committed in Rwanda against Rwandans, had as its purpose "to define three categories of grave breaches of humanitarian law and to integrate them into the Belgian domestic legal order." In fact, "[t]o remain consistent with the definitions used in international law, the Act textually refers to the wording of the relevant provisions of the international conventions." And its definitional provisions even

1888 See Australia’s Geneva Conventions Act 1957, translated in REYDAMS supra note 40, at 87-88; Belgium's War Crimes Act, which goes beyond the conventional law to add conduct from Additional Protocol II (non-grave-breaches), and subsequently was amended to add genocide and crimes against humanity, id. at 106-107, but implementation of the law has been substantially restricted through amendment due to international pressure, see supra note 1; Canada's Geneva Conventions Act, REYDAMS supra note 40, at 120; the Netherlands' Crimes in Wartime Act, id at 167; Switzerland's Code penal militaire, articles 9(1) and 109(l) and Code penal Suisse, article 6bis, id. at 195-196.

1889 See Australia's International Criminal Court Act 2002, REYDAMS, supra note 40, at 88-89; Canada's Crimes Against Humanity and War Crimes Act which “incorporates the provisions of the ICC Statute into Canadian legislation,” id. at 122-124; Germany's Code of Crimes Against International Law, “which makes the core ICC crimes offences under domestic law,” id. at 144; the United Kingdom's International Criminal Court Act 2001, which limits universal jurisdiction to foreigners either resident when the offense was committed, or subsequently become resident and reside in the U.K. at the time proceedings are brought, id. at 206. See REYDAMS, supra note 40, at Part II: Universal Jurisdiction in Municipal Law (discussing the exercise of universal jurisdiction by fourteen states). For specific examples, see pg. 87-90 (Australia), 97 (Austria), 105-07 (Belgium), 120-24 (Canada), 127 (Denmark), 132-34 (France), 142-46 (Germany), 159 (Israel), 165-69 (the Netherlands), 183-84 (Spain), 193-96 (Switzerland), 204-06 (United Kingdom).

1890 See Ratner, supra note 9.

1891 See Luc Reydams, Belgium's First Application of Universal Jurisdiction: The Butare Four Case, 1 J. INT'L CRIM. JUST. 428 (2003). Some of these convictions are problematic under international law. For example, as Reydams points out:

Some of the war crimes of which one of the defendants, Higaniro, was convicted took place when there was no armed conflict at all in Rwanda. The two incendiary reports attributed to him dated from late 1993 and early 1994. Contrary to the prosecutor's assertion, there was no armed conflict in Rwanda between 4 August 1993 (date of the Arusha Peace Accords) and 6 April 1994. While sporadic violent incidents took place during this period they did not reach the threshold of application of the 1949 Geneva Conventions and Additional Protocol II.

Id. at 435.


1893 Id.
explicitly invoke the relevant conventions by name; for example, the Act sets forth the definition of genocide after stating that the crime is defined "[i]n accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948." 1894

As a result of this legislative translation of international law into national law, the practice of courts has been to use positive international law (as reflected in national law) to define the subject universal offense when exercising universal jurisdiction. To take one of the earliest and most well-known examples of universal jurisdiction, the definitions of "war crimes" and "crimes against humanity" contained in the Nazi and Nazi Collaborators (Punishment) Law under which the Israeli Supreme Court convicted Nazi war criminal Adolf Eichmann for acts which were leaving no doubt as to the universal basis of the jurisdiction committed before Israel was even a state, embodied the definitions of the respective crimes in the Nuremberg Charter. 1895 The Israeli Supreme Court

1894 Id. at art. 1, § 1. Although the Act formally adopts the prescriptive definitions of the crimes from conventional law, like the Netherlands' International Crimes Act it went beyond conventional law regarding the adjudicative availability of universal jurisdiction over "grave breaches" by including within this category acts that were not committed as part of an international conflict. Smis and Van der Borgh explain that contrary to the Geneva law, the Belgian Act does not make a distinction between international and non-international conflicts for the purposes of defining grave breaches. In fact, pursuant to [the Conventions], the term "grave breaches" is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts (Additional Protocol II) do not fall within the ambit of the [legislative] undertaking referred to in [connection with grave breaches]. However, considering the number of violations of international humanitarian law that are committed in non-international conflicts, the Belgian legislator found it wise to extend the application of "grave breaches" to violations of the laws of war committed during internal conflicts.

Id. at 920.

1895 The Nazi and Nazi Collaborators (Punishment) Law defines the crimes as "crime against humanity" means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.
justified its competence to judge Eichmann on the grounds that “international law [enforces itself] by authorizing the countries of the world to mete out punishment for the violation of its provisions, which is effected by putting these provisions into operation either directly or by virtue of municipal legislation which has adopted and integrated them.”

Quoting the Nuremberg Tribunal, the Court observed that “the Charter, with all the principles embodied in it-including that of individual responsibility-must be seen as ‘the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law.” The Charter had, in the words of the Court, “formed part of the customary law of nations.” Consequently, through the enactment of the law, the Israeli legislature “gave effect to international law and its objectives.”

The United States endorsed universal jurisdiction over these precise crimes-as defined under Israeli law-when it subsequently extradited another war criminal, John Demjanjuk, to Israel for prosecution in connection with crimes he had allegedly committed as a World War II concentration camp guard. Ruling the extradition legal under national and international law, the Court of Appeals for the Sixth Circuit examined the definitions of the crimes contained in the Israeli law

Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985) (quoting The Nazi and Nazi Collaborators (Punishment) Law). The Nuremberg Charter defines the crimes as:

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to salve labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds.... Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, arts. 6(b), 6(c), Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 280.

Judgment reproduced in English, 2 LEON FRIEDMAN, THE LAW OF WAR 1664 (Fred L. Israel & William Hansen eds., 1972).

Id. at 1666 (quoting I.M.T. (1947), vol. 1, 218).

Id. at 1667.

Id. at 1668.

Demjanjuk was later acquitted by the Israeli Supreme Court on these specific charges due to flaws in the documents identifying him as “Ivan the terrible,” the guard against which the charges were directed. Based on evidence that he was nonetheless a concentration camp guard, Demjanjuk's legal battles continue. For a summary see Nathan Gutman, Demjanjuk To Appeal US Decision To Deport Him, JERUSALEM POST, Dec. 30, 2005, at 5.
and held that Israel had universal jurisdiction over war crimes and crimes against humanity. More recently, France's Court of Cassation found jurisdiction over a Rwandan national for crimes committed in Rwanda during that country's civil war based on France's domestic legislation implementing the Torture Convention, and despite the fact that Rwanda was not party to the Convention. The Court held that French courts were competent to "judge persons who could be guilty, in a foreign country, of tortures," under the Torture Convention's definition of the crime, which is incorporated by reference into the French Penal Code through article 689-2 of the Penal Procedures Code. Furthermore, courts also use the decisions and judgments of international tribunals to inform their application of international law. For example, in convicting on universal jurisdiction grounds Adolfo Scilingo, an Argentine naval captain, for his involvement in "death flights" during Argentina's military rule from 1976-1983, Spain's Audiencia Nacional drew from the case law of the ICTY and the text of the ICC to specify, among other things, the elements of crimes against humanity under international law, the character of the civilian population against which the crimes must be directed, the generalized and systematic nature of the crimes, and issues of command responsibility.

---

1901 Demjanjuk v. Petrovsky, 776 F.2d 571, 582-583 (6th Cir. 1985).


1904 Article 689-2 reads:

Whoever, outside the territory of the Republic, commits acts qualified as a felony or delict, which constitute torture within the meaning of the first article of the convention against torture and other cruel, inhumane, or degrading penalties or treatment, adopted in New York on December 10, 1984, may be prosecuted and tried by French courts if he is found in France.


Where legislatures or courts depart from the treaties, however, they are obliged to undertake a rigorous and bonafide inquiry into the status of customary law to justify the definition they employ. But doesn't this divination of custom just bring us right back to the initial concern of courts subjectively defining universal crimes, leading to the legally unjustified harassment of high-profile individuals for purely political or sensationalist motives? These claims might stick if the real-world practice of courts exercising universal jurisdiction wantonly flouted the legal strictures imposed by universal jurisdiction's prescriptive limits. But in fact the reported cases of universal jurisdiction reveal that courts by and large apply faithfully and responsibly the international legal definitions of universal crimes as evidenced in positive international law. Where courts do not-and have no international legal argument to support their deviation-their violation of international law is readily apparent, and perhaps most importantly, interested states have a strong legal basis to reject such claims.

For instance, under this Essay's analysis, Spain's Audiencia Nacional defied international law when it upheld jurisdiction over former Chilean dictator Augusto Pinochet for genocide based on crimes allegedly committed against a “national group” by stretching this victim class designation beyond its customary definition to include “a national human group, a differentiated human group, characterized by some trait, and integrated into the larger collectivity.” Finding that the acts alleged constituted genocide since they were designed “to destroy a differentiated national group” of political opponents irrespective of their nationalities, i.e., “those who did not fit in [Pinochet's] project of national reorganization... [whether] Chileans or foreigners,” the court effectively (and none-too-subtly) amended the victim groups within the definition of genocide. The court's own conclusory reasoning bespeaks the lack of legal support for its

---

1906 For a comprehensive cataloging with summaries of exercises of universal jurisdiction in municipal courts, see REYDAMS, UNIVERSAL JURISDICTION, supra note 40, at 81-226.

1907 Quoting the English translation in THE PINOCHET PAPERS, supra note 19, at 103.

1908 Id. at 103-04.
position; genocide has been defined consistently since the 1948 Genocide Convention in the statutes of international courts and treaties to have as victim groups only a “national, ethnical, racial or religious group, as such.” In the words of the ICTR, “a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship.” The Audiencia's sprawling construction eviscerates the “as such” qualifier and defacto enlarges the class of victims to include potentially any group whatsoever—including, as in the case before it, political groups, which had been explicitly rejected as victims in the drafting of the Genocide Convention. In short, the ruling clashes with one of the more recognizable legal demarcations of the crime of genocide under international law.

In sum, and as the Audiencia's exaggerated ruling shows, positive law articulates not just the substance of universal crimes but also a clear benchmark against which illicit overreaching may be measured. Where such overreaching occurs, the rulings conflict with international law and the exercise of universal jurisdiction is illegitimate. Interested states therefore have a solid legal basis to oppose the

---

1909 Id. at 100. The court's argument relies principally on the former Spanish legislation in place when the acts allegedly were committed, under which the intent element of genocide encompassed intent to totally or partially destroy a “national ethnic, religious or social group,” id. At 27, 100 (emphasis added), and which was therefore in clear departure from Article 1 of the Genocide Convention which prescribed intent to destroy, in whole or in part, a “national, ethnical, racial or religious group, as such.” See Appendix C, infra.  

1910 See ICTY Statute, supra note 74, at art. 4; ICTR Statute, supra note 74, at art. 6; ICC Statute, supra note 74, at art. 6.  

1911 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Sept. 2, 1998). Notably, the jurisprudence of the ICTR has abandoned the notion expressed in the Tribunal’s first finding of genocide in Akayesu, at ¶ 516, that the victim class could include “any stable and permanent group”—a definition that would nonetheless still exclude the wholly political group found to be victims in the Audiencia's ruling. Subsequent rulings have determined that the victims of the Rwandan genocide, the Tutsi, were indeed an ethnic group within the meaning of the Statute. Prosecutor v. Musema, Case No. ICTR-96-13-A ¶ 934 (Jan. 27, 2000); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 95, 98 (May 21, 1999). For an explanation of why the Akayesu ruling extending the victim class to “stable and permanent groups” based on the travaux preparatoires of the Genocide Convention was wrong, and why the Tutsi constituted a protected class under the correct definition in any event, see William A. Schabas, The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 447, 450-456 (Horst Fischer et al. eds., 2001).  

1912 The “as such” language was added to “implicitly include” a specific motive. Schabas, supra note 108, at 458.  

1913 See discussion, supra note 77.
exercise of universal jurisdiction in such circumstances. For instance, had the charges concerning Pinochet's extradition from Great Britain—which had arrested the former dictator pursuant to Spain's request—relied on Spanish allegations of genocide (instead of torture, which ended up being the relevant crime of extradition), Chile would have been perfectly justified in protesting the legality of Spain's jurisdiction under international law on the grounds that the basis for jurisdiction—that is, genocide as defined by the Audiencia's ruling—was faulty. The idea of states successfully objecting to the legality of universal jurisdictional assertions is not farfetched: Congo successfully obtained a World Court ruling invalidating a Belgian claim of universal jurisdiction over Congo's then-Minister of Foreign Affairs on grounds of sovereign immunity, which resulted in Belgium's repeal of the arrest warrant. Indeed, Chile actively considered bringing the Pinochet case to the World Court based on its objections that Pinochet enjoyed immunity (the case was, for practical purposes, resolved when British Secretary of State Jack Straw allowed Pinochet to return to Chile on medical grounds). The legal argument presented here would have been another arrow in Chile's quiver of legal objections to Spanish jurisdiction, and quite a sharp one at that. And although it is certainly the most formal avenue, taking the case to the World Court is by no means the only option among the panoply of mechanisms by which states may express their legal objections and

1914 See THE PINOCHET PAPERS, supra note 19, at 268.


1917 See REYDAMS, supra note 40, at 116.

1918 See Goering, supra note 112; Ray Moseley, Chile Will Ask World Court to Intervene for Pinochet; Ex-Dictator Fighting Extradition to Spain, CHI. TRIB., Sept. 29, 1999, at 6.

1919 Statement of Secretary of State Jack Straw in the House of Commons, March 2, 2000, reproduced in THE PINOCHET PAPERS, supra note 19, at 481.
attempt to protect their legal rights or “entitlements” under international law,\textsuperscript{1920} entitlements such as jurisdictional authority over territory and nationals.

14.9.3 Evolving and Enforcing the Limits of Universal Jurisdiction

So far this Essay has argued that universal jurisdiction is a customary law which, like all customary law, may evolve by violations that gain acceptance and eventually come to reflect a new consensus of state practice and opinion juris. But it has also argued that the treaty-based definitions of universal crimes best evidence custom, and accordingly constrain the legitimate exercise of universal jurisdiction by courts. The tension in these arguments raises perhaps one last question worth addressing: How can we tell whether a violation of international law resulting from a court's expansion of the treaty definition of a universal crime (a) signals a possible shift in customary law, or (b) represents an enduring breach of that law? In other words, how are the legal limits of universal jurisdiction enforced?

Framed broadly, the question of violations blossoming into custom is endemic to all customary law,\textsuperscript{1921} but in this particular circumstance the proper legal analysis may not be too difficult to discern. The answer lies in the reactions of other jurisdictionally-interested-\textit{i.e.}, national and territorial-states. The protest and acquiescence of states to what amounts to an international legal claim by another state has long been held to be a constitutive element of custom.\textsuperscript{1922} And a claim of authority to prescribe and adjudicate foreign conduct by foreign nationals under a theory of universal jurisdiction is as clear an international legal claim as any. Particularly important to the customary calculus are the reactions of states that have a substantial legal interest in the claim at issue, that is, states

\textsuperscript{1920} D’Amato, Is International Law Really Law?, supra note 32, at 1304-07 (describing legal rights as “entitlements” and applying the terminology to international law); id. at 1310-1313 (explaining how countermeasures enforce international law).

\textsuperscript{1921} See supra text accompanying note 78.

\textsuperscript{1922} See Akehurst, supra note 62, at 38-42 (and cases cited therein).
whose legal rights or entitlements are directly implicated by the claim.\textsuperscript{1923} In comparison to other areas of international law where it may be hard to identify and measure the various interests of various states implicated by a given claim,\textsuperscript{1924} the universal jurisdiction scenario presents a relatively clear picture of the interested states and the degree of their interests. The legally interested states are those states that otherwise would have jurisdiction over the acts and persons involved; they are those states whose nationals are the subject of the universal jurisdiction claim and/or whose territories suffered the alleged conduct giving rise to universal jurisdiction.

Accordingly, where a court asserting universal jurisdiction expands the definition of the crime upon which it grounds its competence beyond the crime's customary definition—a definition evidenced largely by treaty law—the reactions of national and territorial states determine the customary status of the universal jurisdiction court's definitional expansion.\textsuperscript{1925} As we have seen, these states may take a number of measures to repudiate the legality of the universal jurisdiction state's claim; they may, for instance, officially protest,\textsuperscript{1926} take the case to the World

\textsuperscript{1923} Id. at 40

(If an act affects the interests of only one State, protest by that State will carry great weight... [and] the extent to which a State's interests are affected varies according to the nature of the act concerned. Failure to protest against an assertion in abstracto about the content of customary law is less significant than failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State.).

\textsuperscript{1924} See id.

\textsuperscript{1925} A non-interested state may try to insulate itself from the definitional expansion of a universal crime by invoking the persistent objector doctrine of international law, which holds that “a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987). However, “[h]istorically, such dissent and consequent exemption from a principle that became general customary law has been rare.” Id; see also Ted Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, 26 HARV. INT'L L.J. 457 (1985) (observing that while historically rarely invoked, the principle may play a more instrumental role in modern international lawmaking that occurs through institutional organs such as the United Nations).

\textsuperscript{1926} The contribution of protest alone unaccompanied by some tangible response as a constitutive element of custom is the subject of some controversy. See Akehurst, supra note 63, at 40-41 (disagreeing with D'Amato's view that unaccompanied protests are not enough to block a new rule); R.A. Mullerson, New Thinking by Soviet Scholars: Sources of International Law, 83 AM. J. INT'L L. 494, 506-07 (1989). In cases of universal jurisdiction, the protest will almost inevitably be accompanied by some form of response, whether it is a suit against the state asserting universal jurisdiction or simply a refusal to extradite.
Court and, naturally, if the universal jurisdiction is asserted in absentia, if the universal jurisdiction is asserted in absentia,\textsuperscript{1927} refuse to extradite the accused. To enforce the definitional limits of the crime under customary law therefore, states objecting to universal jurisdiction on the grounds set forth above would be well-advised to make explicit their rejection of the universal jurisdiction court's illegitimate definitional expansion upon which the court purports to base its competence.

Consequently, the potential for evolving-or not-the definitions of universal crimes by the process of customary law-violation-turned new custom rests not with the state asserting universal jurisdiction, but instead most often with the states whose nationals are in the dock. Where interested states object to the universal jurisdiction assertion by rejecting an illegitimate definitional expansion of the crime that purports to justify the universal jurisdiction court's competence, the court's violation represents an enduring breach of international law. In other words, the objection to jurisdiction effectively blocks a potential shift in customary law as to the definition of the crime. However, if interested states approve of or acquiesce in the court's definitional expansion of the crime, such approval or acquiescence may signal a possible customary shift regarding the definition of the crime in line with the definition adjudicated by the court. Hence if the Pinochet extradition had taken place, and if the Spanish courts had rested their jurisdiction on the universal crime of genocide using their exorbitant definition of the crime—which we know is exorbitant because we can measure it objectively against the treaty definition-Chile would determine, either by approval or rejection of Spanish jurisdiction based on this definition, the potential for a customary definitional expansion of genocide as contrived by the Spanish courts. It should be emphasized that even were Chile to approve of the exorbitant definition and the

\textsuperscript{1927} The status of universal jurisdiction in absentia is not yet clear under international law. See Colangelo, supra note 3, at 548-49

(Universal jurisdiction in absentia is presently caught in a customary twilight that will witness either the development or the dismissal of the practice depending on the actions and reactions of states in the next part of this century. State practice has not yet worn into the fabric of international law an affirmative custom of universal jurisdiction in absentia assertions. At the same time, however, an incipient trend supporting this type of assertion is emerging, and those who take a permissive view of international law might legitimately submit that custom does not explicitly prohibit universal jurisdiction in absentia.) (internal citations omitted).
resulting universal jurisdiction, Spain's jurisdiction would still conflict with international law; one territorial or national state's approval of or acquiescence in a definitional expansion would not be enough to change the customary definition of the crime, especially against the backdrop of a widely-ratified and longstanding treaty to the contrary.

CONCLUSION

The purpose of this Essay has been to explicate a basic but over looked legal feature of universal jurisdiction: If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions-as derived from customary law-of the universal crimes they adjudicate. The Essay further has attempted to explain the best way of going about determining what those definitions are, by looking to the provisions of widely-ratified and longstanding international treaties. An important implication of this conclusion addresses concerns that universal jurisdiction hazards unbridled abuse for purely political and sensationalist ends. As I hope to have shown, the international law in this area does not permit such abuse; rather, it prescribes legal limits of universal jurisdiction. These limits are enforced not by those states exercising universal jurisdiction, but principally by those states whose nationals are the subject of foreign universal jurisdiction proceedings. Indeed, should states come to recognize this Essay's thesis, the near future may very well see precisely this type of legal argument being made where universal jurisdiction claims are in dispute.

1928 A basic definition of the hard-to-pin-down threshold for determining the existence of customary law appears in the Restatement, which states that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (emphasis added). Whatever view one takes of how much practice achieves the threshold level of generality and consistency necessary to form customary law, one improper assertion of universal jurisdiction accepted as legitimate by an interested state and in the face of a treaty to the contrary would not meet that test.