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Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?

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UNIVERSAL JURISDICTION: A MEANS TO END IMPUNITY OR A THREAT TO FRIENDLY INTERNATIONAL RELATIONS?

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ABSTRACT

Ending impunity for perpetrators of serious international crimes such as genocide, crimes against humanity, and war crimes is considered important because convictions may achieve justice and deter future acts. A controversial tool for ending impunity is the exercise of universal jurisdiction by states. For its supporters, universal jurisdiction denies safe havens for perpetrators of heinous offenses and ensures that their crimes do not go unpunished due to a lack of will or means. In contrast, critics warn that universal jurisdiction threatens international relations, international justice, and the rights of the accused.

The recent resistance of the African Union to attempted prosecutions of nationals of A.U. member states on the basis of universal jurisdiction highlights the controversy surrounding the exercise of universal jurisdiction. Through an analysis of the African Union reaction, this Article examines and assesses the arguments in favor and against universal jurisdiction, and proposes how a proper balance may be struck between enforcement of international criminal law on the basis of universal jurisdiction and respect for state sovereignty.

This Article argues that, under international law, states have the right to exercise universal jurisdiction over certain international crimes. Rather than disregarding international justice, such prosecutions may achieve justice by imposing individual responsibility for serious international crimes. It is undeniable, however, that difficulties may accompany the exercise of universal jurisdiction. Although there may be few legal restrictions on its use, states should adopt a balanced approach that makes universal jurisdiction a useful tool for ending impunity while minimizing the risks associated with its exercise. Ultimately, an international agreement may be required to resolve the outstanding disagreement among states surrounding the doctrine; until then, states should implement universal jurisdiction legislation and exercise it with care.

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I. Introduction: Reconciling Accountability and State Sovereignty

"Never again." In response to the horrors of the holocaust during World War II, this declaration symbolizes the commitment that humanity should be protected from similar atrocities.[1] Despite the commitment, the vow was repeated after the 1994 Rwandan genocide, during which an estimated 800,000-1,000,000 Tutsi were killed.[2] Ending impunity for perpetrators of international crimes such as genocide, crimes against humanity, and war crimes is often considered integral to realizing this commitment because convictions may achieve justice and deter future acts. A controversial tool

1. *See, e.g.*, Jimmy Carter, President of the United States, Remarks of the President at the Presentation of the Final Report of the President's Commission on the Holocaust, *appended to* Comm'n on the Holocaust, Report to the President, Appendix G (Sept. 27, 1979), *available at* http://www.ushmm.org/research/library/faq/languages/en/06/01/commission/.

2. *Never Again*, Outreach Programme on the Rwanda Genocide and the United Nations, http://www.un.org/preventgenocide/rwanda/neveragain.shtml (last visited Dec. 20, 2011); *Rwandan Genocide*, World Without Genocide, http://worldwithoutgenocide.org/past-genocides/rwandan-genocide (last visited Dec. 20, 2011).

for ending impunity is the exercise of universal jurisdiction[3] by states.[4] For its supporters, universal jurisdiction denies safe havens for perpetrators of heinous offenses and ensures that their crimes do not go unpunished due to a lack of will or means.[5] In contrast, critics warn that universal jurisdiction threatens international relations, international justice, and the rights of the accused.[6] This debate highlights the difficulties of holding individuals criminally accountable in a historically state-centric system.[7] At the heart of this debate is a clash between principles of international law:[8] the foundational principle of sovereign equality and the right of states to be free from external interference in their internal affairs on one hand,[9] and the more recent principle of individual responsibility for international crimes on the other.[10]

This conflict is most apparent when a state attempts to hold another state's head of state or other high-ranking official accountable for international crimes. In such circumstances, sovereign

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3. "Exercise of universal jurisdiction" is used in this Article to describe the enforcement of a state's criminal law based on the universality principle. This Article focuses on universal jurisdiction in international criminal law, although some states provide for civil causes of action based on similar principles. *See, e.g.*, Alien Tort Claims Act, 28 U.S.C. § 1350 (2006). Regarding universal civil jurisdiction, see generally Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142 (2006).

4. For an illustration of the controversy, see the separate and dissenting opinions and declarations in Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 40–45, 50–52, 56–57 (Feb. 14) (separate opinion of President Guillaume, dissenting opinion of Judge Oda, and declaration of Judge Ranjeva).

5. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 788–89 (1988); Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 596, 599–600 (2003).

6. *See* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 90–91, 96 (2001); George P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580, 582–84 (2003).

7. Reflecting its state-centric tradition, international law is largely created through state consent. As such, the primary sources are custom, treaty, and the general principles of law recognized by states. Statute of the International Court of Justice art. 33(1), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179. While not binding *per se*, secondary sources (e.g., judicial decisions and academic opinions) may be useful for interpreting the law and identifying its general principles. *See id.*

8. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 292 (2003) [hereinafter CASSESE (2003)]. Reference is made here and elsewhere to the first edition because the section "Legal Grounds of Jurisdiction" was removed from the second edition, which shortened the discussion of the jurisdiction of national courts under international criminal law. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW ix (2d ed. 2008) [hereinafter CASSESE (2008)].

9. *See* U.N. Charter art. 2, paras. 1, 4, 7.

10. As will be discussed later in this Article, individual responsibility for international crimes has only been generally recognized since the late nineteenth century. *See, e.g.*, CASSESE (2008), *supra* note 8, at 4.

equality may be implicated when a state, through its representative, is brought under another state's jurisdiction. Since officials represent the state internationally, such prosecutions may be interpreted as actions against the state itself. Rwanda recently made this argument against the exercise of universal jurisdiction after arrest warrants were issued in France and Spain against some of its officials: "*Rwanda has been a victim* of the abuse of this principle [of universal jurisdiction] . . . by French and [Spanish] judges *against Rwanda*."[11] Similarly, the African Union has recently opposed the exercise of universal jurisdiction.[12] The resistance of the African Union to attempted prosecutions of nationals of A.U. member states highlights the potential difficulties that exercising universal jurisdiction may pose to international relations, and is illustrated by Rwandan President Kagame's stinging rebuke:

> [L]ately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply such that a judgment from less powerful nations indicts those from the more powerful?[13]

This Article will explore the issues raised in President Kagame's statement through an examination of the African Union reaction to the attempted exercise of universal jurisdiction by non-African Union states. The African Union response is important because an emerging "African practice" could affect the future development of universal jurisdiction under customary international law, while the growing view among African states that universal jurisdiction (and the International Criminal Court (ICC)) "are the new weapons of choice of former colonial powers targeting weaker African nations" could have a chilling effect on international criminal justice.[14] As the African Union reaction shows, states may view the exercise of universal jurisdiction against their nationals—and, in particular, their officials—as a threat to their sovereignty, while

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11. Rwanda, Report on Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction, at 2 (emphasis added), *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Rwanda.pdf.

12. *See, e.g.*, African Union (A.U.) Ass., *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, A.U. Doc. Assembly/AU/Dec.199(XI) (July 2008).

13. Paul Kagame, President of the Republic of Rwanda, Address at the Facing Tomorrow Conference (May 13, 2008), *available at* http://www.presidency.gov.rw/speeches/156-13th-may-2008.

14. Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 Crim. L.F. 1, 3–4 (2010).

states may also hold divergent views regarding the legality of universal jurisdiction and the crimes to which it applies.[15]

This Article begins by reviewing jurisdiction under international criminal law and the features of universal jurisdiction. Part III examines the recent African Union reaction to the exercise of universal jurisdiction by non-African Union states. Part IV outlines and assesses the arguments in favor and against universal jurisdiction, while Part V considers how a proper balance may be struck between enforcement of international criminal law through universal jurisdiction and respect for state sovereignty. Contrary to President Kagame's statement, this Article will assert that international law provides states with the right to exercise universal jurisdiction over certain international crimes. Rather than disregarding international justice, lawful prosecutions based on the universality principle may achieve justice by imposing individual responsibility for international crimes. It is undeniable, however, that difficulties may accompany the exercise of universal jurisdiction. As such, although there may be few legal restrictions on its use, states should adopt a balanced approach that makes universal jurisdiction a useful tool for ending impunity while minimizing the risks associated with its exercise. Ultimately, an international agreement may be required to resolve the outstanding disagreements surrounding the doctrine; until then, states should implement universal jurisdiction legislation and exercise it with care.

II. Universal Jurisdiction under International Criminal Law

A. *Jurisdictional Bases*

Jurisdiction has two forms: prescriptive jurisdiction and enforcement jurisdiction.[16] In the criminal law context, jurisdiction refers to the state's ability to criminalize conduct (prescriptive jurisdiction) and enforce its criminal law (enforcement jurisdiction). Enforcement jurisdiction is primarily territorial, as a state is only permitted to enforce its law (i.e., investigate, prosecute, and punish) within its own territory, unless it obtains another state's con-

15. U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction, Rep. of the Secretary-General*, 6–8, 28–32, U.N. Doc. A/65/181 (July 29, 2010) [hereinafter *Secretary-General's Report on Universal Jurisdiction*].

16. Another term often used is "adjudicative" jurisdiction, which refers to the authority for courts to adjudicate an issue and is a subcategory of enforcement jurisdiction. *See* Julia Geneuss, *Universal Jurisdiction Reloaded?: Fostering a Better Understanding of Universal Jurisdiction*, 7 J. Int'l Crim. Just. 945, 949 (2009).

sent to act in that state's territory.[17] Enforcement jurisdiction is tied to territory because the power derives from—and is confined by—state sovereignty:

> It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent.[18]

Although prescriptive jurisdiction and enforcement jurisdiction are distinct concepts, they are nonetheless linked because the lawful exercise of enforcement jurisdiction is predicated on valid prescriptive jurisdiction.[19] In other words, a state must have the authority to criminalize the conduct in question before enforcement can be lawful.

Under customary international law,[20] states may prescribe criminal laws on various bases.[21] The most common is the territoriality principle,[22] under which a state may criminalize conduct committed on its territory, regardless of whether the acts are committed by nationals or non-nationals. In light of the principle of state sovereignty, this jurisdictional basis is uncontroversial. In some circumstances, states may also have jurisdiction over extraterritorial acts.[23] International law supports extraterritorial prescriptive jurisdiction in a number of instances: the nationality (or active personality)

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17. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (1986); Inst. of Int'l Law, Krakow Resolution art. 3(b) (Aug. 26, 2005) [hereinafter Krakow Resolution]. *But see* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept,* 2 J. INT'L CRIM. JUST. 735, 740 n.18 (2004) (noting that exceptions to this rule exist during armed conflict).

18. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432 cmt. b; *see also* M. CHERIF BASSIOUNI, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 179 (3d ed. 2008).

19. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432(1)(a).

20. Customary international law binds all states equally (with the possible exceptions of persistent objectors and states located outside of a region where a regional customary rule exists), and arises when there is "evidence of a general practice accepted as law" established through consistent state practice, coupled with *opinio juris sive necessitatis*, namely, the belief that the law requires the practice. North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶¶ 73–81 (Feb. 20).

21. Council of the European Union, *AU-EU Expert Report on the Principle of Universal Jurisdiction*, ¶ 12, Doc. 8672/1/09/REV1 (Apr. 16, 2009) [hereinafter *A.U.-E.U. Report*].

22. *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. c.

23. An often cited—although controversial—case supporting extraterritorial prescriptive jurisdiction is S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7).

principle, which is based on the accused being a national of the state; the passive personality principle, under which jurisdiction is derived from the victim being a national of the state; and the protective principle,[24] which vests jurisdiction over extraterritorial acts committed by non-nationals when the state's vital interests are at risk.[25] The final basis for extraterritorial jurisdiction is the universality principle, according to which a state has jurisdiction based on the *nature* of the crime, even though the crime was committed outside of the state's territory by and against non-nationals, and the state's vital interests are not endangered.[26] As such, the universality principle vests states with prescriptive jurisdiction when the traditional bases of jurisdiction are absent.[27] There may be a tendency to conflate enforcement and prescriptive jurisdiction, but this distinction should be maintained.[28] Universal jurisdiction may be considered "shorthand" for "universal *prescriptive* jurisdiction."[29] For all jurisdictional bases, whether a state *should* extend its criminal law over certain activity will depend on a number of factors.[30]

The principles regarding jurisdiction "were established to foster cooperative relations by avoiding and resolving conflicting assertions of domestic penal authority."[31] These principles "rest on and

24. *A.U.-E.U. Report*, *supra* note 21, ¶ 12; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmts. e, f, g.

25. *A.U.-E.U. Report*, *supra* note 21, ¶ 12 (an example of a vital interest is currency counterfeiting); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f. Although controversial, states may also have prescriptive jurisdiction based on the "effects principle," which is related to the territoriality principle because it is "[j]urisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory . . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. d.

26. For various formulations of this definition, see *A.U.-E.U. Report*, *supra* note 21, ¶ 8; Belg., Observations by Belgium on the Scope and Application of the Principle of Universal Jurisdiction, ¶ 2 [hereinafter Observations by Belgium], *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf; PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, princ. 1(1), at 28 (2001) [hereinafter PRINCETON PRINCIPLES]. Not all scholars accept the principle of universal jurisdiction as being well-established in customary international law. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 44 (Feb. 14) (dissenting opinion of Judge Van Den Wyngaert) ("There is no generally accepted definition of universal jurisdiction in conventional or customary international law."). *But see* O'Keefe, *supra* note 17, at 744–46 (criticizing Judge Van Den Wyngaert's statement).

27. This is not to say that universal jurisdiction should be considered an exception to the other bases of jurisdiction. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 58 (1994) (arguing that universal jurisdiction should be considered its own jurisdictional principle, rather than an exception to a rule that states lack jurisdiction over extraterritorial acts committed by non-nationals).

28. *See* O'Keefe, *supra* note 17, at 736, 755–56.

29. *Id.* at 745.

30. *Id.* at 738 n.12.

31. Randall, *supra* note 5, at 786.

are the typical results of a balancing of sovereignty between States and prohibited interference with internal affairs" as they "indicate *either* a meaningful link . . . which describes an internationally legally permissible relation . . . between forum State and offence or offender, *or* further international legal criteria . . . which prevent an exercise of extraterritorial jurisdiction from infringing on another State's sovereignty."[32] Although conflicts between states may be avoided due to enforcement jurisdiction being territorial, this does not mean that there is a hierarchy among the bases of prescriptive jurisdiction.[33] Therefore, there may be instances when multiple states have concurrent prescriptive jurisdiction over an alleged crime. This situation is readily apparent when a state assumes jurisdiction on the basis of the universality principle, as all states—including the territorial state and the state(s) of the victim and perpetrator's nationality—may enjoy jurisdiction. With no obligation on states to accord priority to another state in these situations,[34] the potential for interstate disagreement arising in the context of enforcement is clear.

B. *The Scope of Universal Jurisdiction*

1. Recognizing Universal Jurisdiction

Although universal jurisdiction has been discussed frequently in recent years due to an increase in its use,[35] the concept is not novel.[36] It was recognized—in at least a rudimentary form—as early as the 1600s by commentators such as Grotius:

> The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries

32. Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives 23 (2003).

33. *See, e.g.*, *A.U.-E.U. Report*, *supra* note 21, ¶ 14.

34. *Id.*

35. *See* Reydams, *supra* note 32, at 1 ("More cases of 'universal jurisdiction' have been reported in the past decade [to 2003] than throughout the whole history of modern international law.").

36. *But see* Kissinger, *supra* note 6, at 87 ("The very concept of universal jurisdiction is of recent vintage. The sixth edition of *Black's Law Dictionary*, published in 1990, does not contain even an entry for the term. The closest analogous concept listed is *hostes humani generis* . . . . Until recently, the latter term has been applied to pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state."). Regarding the history of universal jurisdiction, see generally Reydams, *supra* note 32; Yana Shy Kraytman, *Universal Jurisdiction – Historical Roots and Modern Implications*, 2 BSIS J. Int'l Stud. 94 (2005); Randall, *supra* note 5.

> which do not directly affect them but excessively violate the law . . . of nations in regard to any persons whatsoever.[37]

Piracy is widely considered the original crime subject to universal jurisdiction; all states could prosecute piracy because pirates were an enemy of humankind (*hostis humani generis*) and piracy a crime against humankind.[38] Further supporting this right was the fact that, because piracy was largely committed on the high seas, it was outside the territorial jurisdiction of every state.[39] Accordingly, all states could prosecute piracy so it would not go unpunished for lack of a forum.[40]

The concept of a crime against all humankind provides the foundation for modern universal jurisdiction: if a crime transcends the interest of a single state, this supports vesting jurisdiction over the crime to all states.[41] The criminal trials following World War II are

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37. Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 190 (1945) (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 504 (Carnegie trans. 1925) (1612)).

38. *See, e.g.*, Randall, *supra* note 5, at 794–95. "A more accurate rationale for not limiting jurisdiction over pirates to their state of nationality relies on the fundamental nature of piratical offences. Piracy may comprise particularly heinous and wicked acts of violence or depredation, which are often committed indiscriminately against the vessels and nationals of numerous states." *Id.* at 794 (footnotes omitted). Further, piracy was "especially harmful to the world at a time when intercourse among states occurred primarily by way of the high seas, thus making piracy a concern of all states." *Id.* at 795; *see also* Cowles, *supra* note 37, at 190 (noting that "brigands 'do not belong to any state' . . . and . . . 'can be punished by any person whatsoever'" (quoting GROTIUS, *supra* note 37, at 504)).

39. *See* REYDAMS, *supra* note 32, at 57–58. The act could be deemed to occur on the territory of the flag state. *Id.* at 13.

40. *See, e.g.*, *id.* at 40 (noting that lack of a forum is frequently considered justification for universal jurisdiction); Cowles, *supra* note 37 at 192–94. Despite the establishment of the International Criminal Court (ICC), there arguably remains a need for states to exercise universal jurisdiction. *See* discussion *infra* Part IV.A (discussing the benefits of universal jurisdiction).

41. *See, e.g.*, CASSESE (2003), *supra* note 8, at 285 ("[T]he crimes over which . . . [universal] jurisdiction may be exercised are of such a gravity and magnitude that they warrant their universal prosecution and repression."); Cowles, *supra* note 37, at 217 ("[W]hile the State whose nationals were directly affected has a primary interest, all civilized States have a very real interest in the punishment of war crimes."); Randall, *supra* note 5, at 826 ("Because of the global concern with certain heinous offenses, the world community permits every state to define and punish those offenses."). Some commentators attribute universal jurisdiction with increased respect for individual rights. *See, e.g.*, Henry J. Steiner, *Three Cheers for Universal Jurisdiction – Or Is It Only Two?*, 5 THEORETICAL INQ. L. 199, 210–11 (2004). Although human rights and universal jurisdiction may be animated by a shared ethical universalism, they remain legally unrelated. Similarly, some commentators (and judges) link universal jurisdiction to obligations *erga omnes* (i.e., obligations owed *by states* to all *states*) and *jus cogens*, or peremptory norms of international law, from which no *state* may derogate. *See, e.g.*, Randall, *supra* note 5, at 830; BASSIOUNI, SOURCES, SUBJECTS, AND CONTENTS, *supra* note 18, at 173; R v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (H.L.) 165 (Lord Browne-Wilkinson); Prosecutor v. Furund_ija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int'l Crim. Trib. for the For-

often cited as the modern recognition of universal jurisdiction, despite the fact that the International Military Tribunal (IMT) did not refer to it explicitly.[42] The Charter of the International Military Tribunal gave the IMT the power to prosecute crimes that previously were not considered crimes at an international level, namely, crimes against peace, crimes against humanity, and war crimes.[43] Further, as U.N. Secretary-General Lie noted in 1949, in at best an *implicit* recognition of universal jurisdiction,[44] the IMT stated that

> [t]he Signatory Powers created this Tribunal, defined the law it is to administer, and made regulations for the proper conduct of the Trial. *In doing so, they have done together what any one of them might have done singly*; for it is not to be doubted that *any nation has the right to set up special courts to administer law.*[45]

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mer Yugoslavia Dec. 10, 1998). Despite this tendency, linking universal jurisdiction with obligations *erga omnes* and *jus cogens* norms is not supported by law, as the latter relate to state obligations and responsibility, whereas universal jurisdiction is tied to individual responsibility. *See* Randall, *supra* note 5, at 830.

42. *See, e.g.*, Randall, *supra* note 5, at 807–08.

43. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284. Although these international crimes may not have existed prior to World War II, the U.N. General Assembly's unanimous endorsement of the principles of international law recognized in the International Military Tribunal (IMT) Charter and the IMT Judgment may be considered recognition of such crimes. *See* G.A. Res. 95(I), U.N. Doc. A/RES/95(I) (Dec. 11, 1946). With the establishment of international criminal tribunals, the existence of international crimes is no longer controversial.

44. U.N. Secretary-General, *The Charter and Judgment of the Nürnburg Tribunal: History and Analysis*, 79–80, U.N. Doc. A/CN.4/5 (1949). In discussing the Court's application of universal jurisdiction, the Secretary-General wrote:

> [W]ith some hesitation, the following alternative interpretations [of the IMT's Judgment] may be offered. It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them . . . On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers creating the Tribunal had made use of a right belonging to any nation.

Id. at 80; George A. Finch, *The Nuremburg Tribunal and International Law*, 41 Am. J. Int'l L. 20, 23 (1947); Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 New Eng. L. Rev. 337, 342–45 (2001); Randall, *supra* note 5, at 806–07; Quincy Wright, *The Law of the Nuremburg Tribunal*, 41 Am. J. Int'l L. 38, 49–50 (1947).

45. International Military Tribunal (Nuremberg), Judgments and Sentences (Oct. 1, 1946), *reprinted in* 41 Am. J. Int'l L. 172, 216 (1947) (emphasis added). An alternative interpretation of this statement is that the Allied Powers had assumed Germany's powers and were simply exercising the power that Germany—and all other states—possessed to establish a court in which to prosecute crimes committed by its nationals or on its territory. *See* Wright, *supra* note 44, at 50.

Support for universal jurisdiction may also be found in a limited number of post-World War II state tribunal decisions.[46] In *In re Ohlendorf and Others* (Einsatzgruppen Trial), the U.S. Nuremburg Military Tribunal stressed that the defendants were accused "[n]ot [of] crimes against any specified country, but against humanity" and held that

> the inalienable and fundamental rights of common man need not lack for a court . . . . Humanity can assert itself by law. It has taken on the robe of authority . . . . [I]t is inconceivable . . . that the law of humanity should ever lack for a tribunal. Where law exists a court will rise. Thus, the court of humanity, if it may be so termed, will never adjourn.[47]

In 1950, Italy's Supreme Military Tribunal noted that the universal character of "crimes against the laws and customs of war" renders them a concern of all states:

> *These norms . . . have a universal character, not a territorial one. . .* The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be. . . [The crimes] *concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed . . . .*[48]

Higgins argues that *Attorney-General (Israel) v. Eichmann*[49] is a "classic example" of the exercise of universal jurisdiction,[50] as the

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46. For an overview of these cases, see Randall, *supra* note 5, at 807–10. In his article reviewing several key cases on this topic, Randall quotes the U.S. Military Tribunal at Nuremberg in *In re List* (1948), as stating that "[a]n international crime is . . . an act *universally recognized* as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances." *Id.* at 807 (emphasis in original). Randall also quotes the opinion of the U.S. Military Commission at Shanghai in *In re Eisentrager* (1947) as stating that "[t]he laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments . . . that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation." *Id.* at 809–10.

47. In re Ohlendorf and Others (Einsatzgruppen Trial) 15 I.L.R. 656, 663–65 (U.S. Mil. Trib. 1948).

48. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (quoting Case of General Wagener, *Rivista Penale* 753, 757 (Sup. Mil. Trib. of Italy 1950)).

49. Attorney-General of Israel v. Eichmann, 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961).

50. HIGGINS, *supra* note 27, at 59. *But see* BASSIOUNI, SOURCES, SUBJECTS, AND CONTENTS, *supra* note 18, at 161 (discussing passive personality jurisdiction—or jurisdiction based on the nationality of the victim—and citing *Eichmann* as an example of a case in which the court conflated universal jurisdiction with the extraterritorial reach of national jurisdiction). Bassiouni's criticism may overlook the fact that Israel did not exist when the crimes

Israeli District Court, relying in part on universal jurisdiction,[51] convicted Eichmann of organizing and managing mass deportations of Jews and others to concentration camps in German-occupied eastern Europe. In affirming the District Court's conviction, the Israeli Supreme Court recognized that a state exercising universal jurisdiction "acts merely as the organ and agent of the international community and metes out punishment to the offender for his breach of the prohibition imposed by the law of nations."[52] Cassese and Higgins separately note that the lack of protest against this invocation of universal jurisdiction is significant because it may signal state acceptance of the principle.[53]

Although decided under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, another case widely cited as an example of universal jurisdiction is *Pinochet (No. 3)*.[54] Hailed as "signal[ing] the birth of a new era for human rights,"[55] "a decision without precedent,"[56] and a "beginning for what can and should be justice without borders,"[57] it was ground-breaking because the majority of the U.K. House of Lords held that, under the Convention, a former head of state (Pinochet of Chile) could be extradited to a third state (Spain), for alleged torture committed in another state (Chile) against nationals and non-nationals of the third state while the accused held office.[58]

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occurred, so the Jewish victims were *not* Israeli nationals when the crimes against them were committed. The issue of *nullum crimen sine lege* may not arise despite the fact that Israel was not a state at the time of commission, provided that the crimes existed under international law (which is, in itself, a controversial proposition, but one that is supported by the IMT and post-war state tribunals). *See* O'Keefe, *supra* note 17, at 759 ("In such cases, all that has happened is that a municipal procedural competence has later been extended to encompass conduct that was substantively criminal, under international law, when performed."). The principle of *nullum crimen sine lege* will be infringed, however, if a state legislates beyond what international law prescribed at the time of the offense. *See* Polyukhovich v. Australia, [1991] HCA, 176 C.L.R. 501, 575–76 (Brennan, J., dissenting).

51. Eichmann, 36 I.L.R. at 26 ("These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself . . . .").

52. Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 300 (Sup. Ct. Israel 1962).

53. Cassese (2003), *supra* note 8, at 293; Higgins, *supra* note 27, at 59.

54. R v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 1 AC 147 (H.L.) (Lord Browne-Wilkinson).

55. Press Release, Amnesty Int'l, Pinochet Decision: The Birth of a New Era for Human Rights (Dec. 9, 1998).

56. Richard Falk, Achieving Human Rights 97 (2009) (quoting Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience 232 (1999)).

57. *Id.*

58. *See generally id.* at 97–120; Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 Eur. J. Int'l L. 237, 237–40 (1999).

Although not strictly a universal jurisdiction case, France's Court of Cassation recognized in *Fédération Nationale v. Barbie* that crimes concerning all states may transcend national interests "by reason of their nature, the crimes against humanity with which Klaus Barbie, who claims German nationality, is charged in France where those crimes were committed, do not simply fall within the scope of French municipal law but are subject of an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign."[59] In similar fashion, the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized in *Prosecutor v. Tadic (Jurisdiction)* that crimes "shock[ing] the conscience of mankind" transcend territorial jurisdiction:

> . . . [T]he crimes which the [ICTY] has been called upon to try *are really crimes which are universal in nature . . . and transcending the interest of any one State* The crimes with which the accused is charged form part of customary international law and *were never crimes within the exclusive jurisdiction of any individual State*[.][60]

Although an exhaustive discussion of case law is beyond the scope of this Article, decisions from numerous states, including Australia,[61] Belgium,[62] Canada,[63] Germany,[64] and the United States[65]

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59. Fédéracion Nationale des Déportés v. Barbie, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 20, 1985, 78 I.L.R. 124, 130 (Fr.).

60. Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion on Jurisdiction, ¶¶ 42, 44 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995). On appeal, the ICTY upheld this application of universal jurisdiction. *Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 57, 59 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("[T]he offences . . . do not affect the interests of one State alone but shock the conscience of mankind.").

61. *See* Polyukhovich v. Commonwealth, [1991] HCA, 176 C.L.R. 501 (Austl.).

62. Public Prosecutor v. Higaniro, Cour d'Assises [Cour. ass.] [Court of Assizes] Brussels, June 8, 2001 (Belg.), *available at* https://www.law.kuleuven.be/jura/art/40n1/rechtspraak.pdf.

63. R v. Munyaneza, [2009] Q.C.C.S. 2201 (Can. Que. Sup. Ct.).

64. Public Prosecutor v. Sokolovic, Bundegerichtshof [BGH] [Federal Court of Justice], Feb. 21, 2001, 3 StR 372/00, BGHSt 46 (Ger.).

65. United States v. Yunis, 681 F. Supp. 896, 900 (D.D.C. 1988) ("[J]urisdiction is conferred in any forum that obtains physical custody of the perpetrator of certain offenses considered particularly heinous and harmful to humanity."); In re Extradition of Demjanjuk, 612 F. Supp. 544, 556 (N.D. Ohio 1985) ("International law provides that certain offenses may be punished by any state because the offenders are 'common enemies of mankind and all nations have an equal interest in their apprehension and punishment.'"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) ("The premise of universal jurisdiction is that a state 'may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern' . . . even where no other recognized basis of jurisdiction is present."); Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (holding that it had civil jurisdiction over torture committed in Paraguay by and against Paraguayans because "the torturer has become—like the pirate and

have recognized or proceeded on the basis of universal jurisdiction (albeit with various conditions on its exercise consistent with municipal legislation).[66]

2. Crimes Subject to Universal Jurisdiction

Although universal jurisdiction is widely accepted in principle,[67] there remains a measure of debate regarding the crimes to which it applies. The crimes subject to universal jurisdiction are found under customary international law.[68] As such, they exist internationally regardless of whether a specific state has ratified a treaty to this effect or incorporated the crime into its domestic law.[69] As customary law, the crimes may also evolve with state practice.[70] Recognition of such evolution may be drawn from the 1986

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slave trader before him—*hostis humani generis*, an enemy of all mankind"); Randall, *supra* note 5, at 789.

66. For a discussion of most of these cases and various states' municipal universal jurisdiction legislation, see generally REYDAMS, *supra* note 32, pt. II (reviewing legislative and judicial application of universal jurisdiction in Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, the Netherlands, Senegal, Spain, Switzerland, the United Kingdom, and the United States); Randall, *supra* note 5.

67. *See, e.g.*, *A.U.-E.U. Report*, *supra* note 21, ¶ 23 (listing the scope of universal jurisdiction in several European Union member states); Louise Arbour, *Will the ICC Have an Impact on Universal Jurisdiction?*, 1 J. INT'L CRIM. JUST. 585, 587 (2003); REYDAMS, *supra* note 32, at 28.

68. *See A.U.-E.U. Report*, *supra* note 21, ¶ 9 ("States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 404, cmt. (a). International treaties are sometimes used to claim that a crime is subject to universal jurisdiction, because once there is near unanimous state agreement—and extensive and virtually uniform state practice by parties and non-parties—to this effect, it may achieve customary status. *See* Yunis, 681 F. Supp. at 900. However, codification may indicate that the crime does *not* exist under customary law if it evidences state belief that it is necessary to codify the crime because it does not exist customarily. *See* R.R. Baxter, *Treaties and Custom*, 129 Recueil des Cours 27, 64 (1970) ("[P]roof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence, the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.").

69. Customary international law is a separate source of international law from treaties. *See, e.g.*, Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. INT'L CRIM. JUST. 683, 683–85 (2009) (discussing the interplay between the customary international law on "grave breaches" and the Geneva Convention).

70. Since customary international law is established through state practice and *opinion juris*, the crimes to which universal jurisdiction applies may evolve with state practice. For further discussion on customary international law, see *supra* note 20 and accompanying text.

Restatement (Third) of the Law: The Foreign Relations Law of the United States, which asserts as follows:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the [traditional] bases of jurisdiction . . . is present.[71]

This statement contrasts with the 1965 Restatement (Second), which identified only piracy as subject to universal jurisdiction, while it noted that other crimes of "universal interest" existed that were not yet subject to the principle.[72]

Legal theorists generally agree that the crimes subject to universal jurisdiction include piracy, slavery, war crimes, genocide, crimes against humanity, apartheid, and torture.[73] Some theorists suggest that other crimes, most notably terrorism-related offences, are subject to universal jurisdiction; however, in light of the international community's continuing inability to define "terrorism," it is likely premature to support this conclusion.[74] States are not unanimous regarding the crimes to which universal jurisdiction does apply, as diverse views were expressed in recent submissions to the United Nations.[75] China, for example, submitted that universal jurisdiction only exists for piracy,[76] while Belarus and Iraq respectively claimed jurisdiction over ecocide[77] and sabotage of international

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71. Restatement (Third) of Foreign Relations Law § 404.

72. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183, 184 n.8 (2004).

73. *See* M. Cherif Bassiouni, 2 International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms 169–80 (3d ed. 2008) (discussing the basis for universal jurisdiction over these crimes); Arbour, *supra* note 67, at 587 (recognizing the applicability of universal jurisdiction to "international crimes such as piracy, war crimes and crimes against humanity, as well as genocide").

74. *See* Restatement (Third) of Foreign Relations Law § 404; *but see* United States v. Yousef, 327 F.3d 56, 103, 105 (2d Cir. 2003) (holding that "the indefinite category of 'terrorism' is not subject to universal jurisdiction" because, "[u]nlike 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.").

75. *See generally A.U.-E.U. Report*, *supra* note 21.

76. China, Information from and Observations by China on the Scope and Application of the Principle of Universal Jurisdiction, ¶ 3, *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf.

77. Belr., Information from the Republic of Belarus on the Scope and Application of the Principle of Universal Jurisdiction, at 2, *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belarus_E.pdf.

means of communication[78] on the basis of the universality principle. Given that the crimes subject to universal jurisdiction exist as customary law, the divergence of state opinion has lead some commentators to claim that there is no settled practice upon which to found universal jurisdiction.[79] Due to limited scope, this Article cannot examine this issue in detail and will therefore assume that the universality principle provides states with jurisdiction over crimes including piracy, genocide, crimes against humanity, war crimes, and torture.[80] Despite the general[81] (albeit not unanimous) acceptance of universal jurisdiction, its scope and proper application remain controversial.[82]

3. Relationship with *aut dedere aut judicare* and International Tribunals

Universal jurisdiction *permits* states to prescribe certain conduct as criminal; it does not oblige them to do so.[83] A conventional obligation exists for many crimes to which universal jurisdiction

78. Permanent Mission of the Republic of Iraq to the United Nations, Letter dated Apr. 23, 2010 from the Permanent Mission of the Republic of Iraq to the United Nations addressed to the Secretary-General, at 1, U.N. Doc. PRCL/2010/124 (Apr. 28, 2010).

79. *See, e.g.*, Bassiouni, Multilateral and Bilateral Enforcement Mechanisms, *supra* note 73, at 154 ("Universal jurisdiction is not as well established in . . . customary international law as its ardent proponents . . . profess it to be.").

80. This assumption may be uncontroversial given the number of states that have ratified the Rome Statute for the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], and incorporated universal jurisdiction provisions into municipal law over war crimes, crimes against humanity, and genocide. Regarding torture, see Prosecutor v. Furund_ija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) ("[O]ne of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.").

81. Higgins, *supra* note 27, at 56–57; Cowles *supra* note 37, at 218; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 51 (Feb. 14) (dissenting opinion of Judge Oda) (observing that, "[f]rom the base established by the Permanent Court's decision in 1927 in the '*Lotus*' case, the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc," but noting that it was appropriate for the Court to avoid this issue in the present case).

82. *See, e.g.*, Florian Jessberger, *Universal Jurisdiction*, *in* Oxford Companion to International Criminal Justice 555, 555 (Cassese ed., 2009) ("While it is beyond controversy that states, under international law, have the right to provide for and to exercise universal jurisdiction, it has been difficult to agree on the scope and preconditions of the universality principle.").

83. *But see* Observations by Belgium, *supra* note 26, at ¶ 11 ("[T]here are also customary obligations which require States to incorporate rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the international community as a whole, such as grave crimes under international humanitarian law."); Bassiouni, Multilateral and Bilateral Enforcement Mechanisms, *supra* note 73, at 158 n.34 ("International criminal law prescribes certain conduct which

applies, including war crimes,[84] torture,[85] and genocide.[86] Known as *aut dedere aut judicare*, states that are party to treaties embodying the obligation undertake to criminalize certain conduct and extradite to requesting states persons suspected of committing the crime at issue or prosecute them.[87] Although distinct from universal jurisdiction, the obligation remains relevant:

> The obligation *aut dedere aut judicare* is nonetheless relevant to the question of universal jurisdiction, since such a provision compels a state party to exercise the underlying universal jurisdiction that it is also obliged to provide for by the treaty. In short, a state party to one of the treaties in question is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extraditing.[88]

Further, treaties embodying the obligation may signal state acceptance of extending extraterritorial jurisdiction to acts unconnected to a state.[89] As Justices Higgins, Kooijmans, and Buergenthal note in their separate opinion in *Arrest Warrant*, this conventional duty "opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality."[90]

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states are bound to enforce"); Rome Statute, *supra* note 80, pmbl. ("[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.").

84. Namely, grave breaches of the laws and customs of war. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

85. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

86. Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

87. Rather than an obligation to prosecute, *aut dedere aut judicare* may be better described as an obligation to *enforce*, as this obligation may be satisfied by the state submitting the case to the proper authorities for investigation even when prosecution does not result. Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811, 816 (2009).

88. *A.U.-E.U. Report*, *supra* note 21, ¶ 11.

89. *See* Randall, *supra* note 5, at 789. Rather than undermining the universality principle, such treaties may be further evidence that the crimes are subject to universal jurisdiction. *See id.* at 815–19.

90. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 46 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). Regarding the treaty basis of many crimes to which universal jurisdiction applies, see generally REYDAMS, *supra* note 32, at 43–68 (examining how universal jurisdiction is advanced by multilateral conventions); BASSIOUNI, SOURCE, SUBJECTS, AND CONTENTS, *supra* note 18, at 164–72 (listing various crimes defined in international conventions).

Universal jurisdiction is also distinct from the jurisdiction of international tribunals, such as the *ad hoc* tribunals created by the U.N. Security Council (e.g., the ICTY and the International Criminal Tribunal for Rwanda (ICTR)) and the ICC, as the jurisdiction of these bodies arises from conventional consent.[91] With respect to *ad hoc* tribunals and cases referred by the Security Council to the ICC, consent flows from the binding nature of Security Council decisions on U.N. member states,[92] whereas the jurisdiction of the ICC for cases not referred to it by the Security Council derives from state consent through ratification of the Rome Statute establishing the ICC or by non-parties accepting the Court's jurisdiction.[93]

C. *Universal Jurisdiction: Absolute or Conditional?*

A number of commentators have identified different categories of universal jurisdiction: narrow or conditional in contrast to broad or absolute.[94] Cassese argues that, under "conditional universal jurisdiction," the presence of the accused is required to prosecute, whereas under "absolute universal jurisdiction," any state may prosecute regardless "even of *whether or not the accused is in custody or at any rate present in the forum State.*"[95]

The separate and dissenting opinions in *Arrest Warrant* imply a similar distinction,[96] as the justices of the International Court of Justice (ICJ) refer to the exercise of "classical . . . universal jurisdiction,"[97] the "true universality principle,"[98] "universal jurisdiction, properly so called,"[99] "pure universal jurisdiction,"[100] and "univer-

91. *See* Ademola Abass, *The International Criminal Court and Universal Jurisdiction*, 6 Int'l Crim. L. Rev. 349, 369–72 (2006).

92. *See* U.N. Charter art. 25.

93. *See* Rome Statute, *supra* note 80, arts. 12(1), 13.

94. *See, e.g.*, Reydams, *supra* note 32, at 28–42 (explaining the development of and difference between "general versus limited" universality and "co-operative versus unilateral" universality"); Cassese (2003), *supra* note 8 at 295–91 (describing the narrow and broad notions of universality); Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589, 595 (2003) (discussing the current state of both conditional and absolute universal jurisdiction in international law); Jalloh, *supra* note 14, at 7–9.

95. Cassese (2003), *supra* note 8, at 286.

96. *See* O'Keefe, *supra* note 17, at 735, 749, 755.

97. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 21 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

98. *Id.* ¶ 31.

99. *Id.* ¶ 45.

100. *Id.*

sal (criminal) jurisdiction *in absentia*."[101] While the use of such terms may suggest that different categories of universal jurisdiction—in particular universal jurisdiction *in absentia*—exist, O'Keefe argues that this approach "is not logically compelling" because it "conflates a state's jurisdiction to prescribe its criminal law with the manner of that law's enforcement."[102] As noted above, enforcement jurisdiction and prescriptive jurisdiction are legally distinct:[103] "On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement *in absentia*, just as there is enforcement *in personam*."[104] Determining whether it is unlawful to enforce international criminal law *in absentia* remains a matter of the municipal law of the enforcing state.[105] Trials *in absentia* are not unknown; a court in France, for example, recently convicted *in absentia* thirteen former Chilean officials who served under Pinochet for their role in the disappearance of four French citizens.[106]

Since universal jurisdiction is a subset of prescriptive jurisdiction, "absolute" and "conditional" universal jurisdiction and "universal jurisdiction *in absentia*," insofar as they imply the existence of different legal categories of jurisdiction, are misleading. Rather, the discussion of these concepts should be considered statements regarding how states *should* restrict their exercise of universal jurisdiction. The fact that many states have imposed such restrictions[107] should not be considered *opinio juris* that customary

101. *Id.* ¶¶ 49–59; *id.* ¶¶ 5, 11 (declaration of Judge Ranjeva).

102. O'Keefe, *supra* note 17, at 749.

103. Judge Van Den Wyngaert maintains the distinction. *See* Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 49 (dissenting opinion of Judge Van Den Wyngaert).

104. O'Keefe, *supra* note 17, at 750.

105. *Id.* at 740–41; Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 56 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

106. *Pinochet Officials Sentenced to Jail in France*, BBC NEWS (Dec. 17, 2010), http://www.bbc.co.uk/news/world-europe-12021397.

107. *See* BASSIOUNI, MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS, *supra* note 73, at 188–89 ("[N]ational state law and judicial practice has always required at least the presence of the accused in the territory of the enforcing state or whenever the victim or perpetrator is a national of the enforcing state."); *see also, e.g.*, CODE PÉNAL [C.PÉN] art. 136 (Belg.) (requiring Belgian nationality or residency of the accused or victim, or a treaty obligation); Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, art. 8 (Can.) (requiring the crime to bear some connection to a Canadian citizen, or requiring the physical presence of the accused); Codice penale [C.p.] art. 7 (It.) (requiring nationality or territorial connection); LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23 (B.O.E. 1985) (Spain) (requiring a link to Spanish interests or the commission of one of several enumerated crimes). *But see* Donovan & Roberts, *supra* note 3, at 143–44 ("The infrequent exercise of pure universal jurisdiction is easy to understand: if the traditional connections

international law only permits "conditional" universal jurisdiction.[108] This conclusion may be supported by the separate opinion of Justices Higgins, Kooijmans, and Buergenthal in *Arrest Warrant*:

> [N]ational legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. . . . National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction.[109]

In addition, as *ad hoc* Justice Van Den Wyngaert noted,

> [t]here may be good political or practical reasons for a State not to assert jurisdiction in the absence of the offender. It may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law. A *practical* consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system. . . . The concern for a linkage with the national order thus seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an opinio juris to the effect that this form of universal jurisdiction is contrary to international law."[110]

Despite the fact that many states impose restrictions on the exercise of universal jurisdiction (such as requiring the accused to be

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to the regulated conduct are absent, so, too, will be the traditional incentives to exercise jurisdiction.").

108. *See* O'Keefe, *supra* note 17, at 750 ("[I]t is always open to states to indicate unambiguously that the international lawfulness of universal jurisdiction . . . depend[s] upon the presence of the offender. But, 'the great majority of the interested states' have not done so, to date.").

109. Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 45 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal); *see also* ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 501 (2008) (discussing the position of the Netherlands that there is no duty to establish absolute jurisdiction and problems may be associated with its exercise, and that therefore, the Netherlands is justified in providing for conditional universal jurisdiction domestically); Ministry of Sec. & Justice, Neth., Executive Summary, Foundations for Jurisdiction with Regard to Offences Committed Abroad, at 4 (2010), *available at* http://english.wodc.nl/onderzoeksdatabase/vestiging-rechtsmacht.aspx?cp=45&cs=6796 (select "1662_Summary") ("[T]he principle of unlimited universal jurisdiction [should be 'unambiguously' applied] with regard to the most serious criminal acts, which are identified in international law.").

110. Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 56 (dissenting opinion of Judge Van Den Wyngaert); O'Keefe, *supra* note 17, at 757.

present in the state before it takes enforcement action), international law arguably does not require such restrictions.[111]

D. *Immunity of State Officials*

Although an in-depth discussion of immunities is beyond the scope of this Article,[112] there is uncertainty regarding the relationship of immunities and universal jurisdiction. Certain state officials have traditionally enjoyed[113] immunity from prosecution in foreign states for acts committed in their official capacity.[114] Given the nature of the acts involved, a normative argument exists that no one should be immune from prosecution for crimes such as genocide, crimes against humanity, war crimes, and torture—especially state officials in light of the greater moral culpability incurred by authorizing or directing the crimes.[115]

The ICJ considered state official immunity in *Arrest Warrant*, holding that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs," in addition to diplomatic and consular agents, enjoy immunity from civil and criminal prosecution[116] by foreign states

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111. *See* Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, *in* UNIVERSAL JURISDICTION 214, 236 (Stephen Macedo ed., 2004) (observing that requiring a link for the exercise of jurisdiction could be viewed as "universality plus," while respecting state sovereignty could bolster the jurisdictional claim and lead to further state acceptance of universal jurisdiction).

112. For such a discussion, see generally ROSEANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW (2008); U.N. Secretariat, *Immunity of State Officials from Foreign Criminal Jurisdiction*, U.N. Doc. A/CN.4/596 (Mar. 31, 2008) (explaining the legal issues arising in connection with the immunity given state officials and the impact on this immunity by the development of international criminal law).

113. U.N. Secretariat, *supra* note 112, at 39, 47, 162 (explaining that immunity of a state official is more precisely a procedural right of the state that it may waive).

114. *See* VAN ALEBEEK, *supra* note 112, at 105 (analyzing the relationship between state immunity and "functional immunity"—immunity granted to an individual prosecuted for a state act).

115. Antonio Cassese explains, as follows:

> [I]t is state officials . . . that commit international crimes . . . . They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes . . . . To allow these state agents go scot-free only because they acted in an official capacity . . . would mean to bow to traditional concerns of the international community (chiefly, respect for state sovereignty). In the present international community respect for human rights and the demand that justice be done whenever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for state sovereignty. The new thrust towards the protection of human dignity has shattered the shield that traditionally protected state agents.

CASSESE (2008), *supra* note 8, at 307–08.

116. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 45 (Feb. 14).

while they hold office,[117] such that issuing a warrant for the official's arrest would violate the issuing state's obligations to the official's state.[118] Once officials no longer hold office, they may be prosecuted for acts committed prior and subsequent to holding office and for private acts committed while they were in office.[119] It is unclear if officials would be able to claim successfully that genocide, crimes against humanity, war crimes, or torture are official acts and therefore enjoy immunity from foreign prosecution under the universality principle because they committed such crimes while in office.[120] Although *Pinochet No. 3* was widely heralded as precedent-setting for finding that a former head of state could be prosecuted for torture committed by the regime while he held office, that the case was decided according to the language of the Convention Against Torture,[121] and should not be understood

117. *See id.* ¶ 61.

118. *See id.* ¶ 70.

119. *Id.* ¶ 61.

120. Indeed, there is a robust view that immunity from prosecution for acts committed while in office is not limitless. *See, e.g.,* Kenya, Scope and Application of the Principle of Universal Jurisdiction, at 3, *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf ("Impunity cannot be allowed to thrive at the expense of fellow human beings . . . . State officials must realize that immunities granted to them are not for their personal benefit, but for the pursuit of State interests. These State interests must also be tempered with reasonability."); Lozano v. Italy, 1085 I.L.D.C. 2 (Cass. 2008) (It.) (holding that immunity is unavailable with respect to international crimes that violate *jus cogens* norms); R v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (H.L.) (Lord Browne-Wilkinson) (expressing the view that torture is not a state act); CASSESE (2008), *supra* note 8, at 307 n.9 (referencing the fact that both the Democratic Republic of the Congo and Belgium agreed in the *Arrest Warrant* case that "the official status of a state agent cannot exonerate him from individual responsibility for crimes committed while in office . . . ."). The resulting uncertainty as to the application of functional immunity for certain acts committed while in office may be causing former heads of state concern. *See, e.g.*, Ewen MacAskill & Afua Hirsch, *George Bush calls off trip to Switzerland*, GUARDIAN (Feb. 6, 2011), http://www.guardian.co.uk/law/2011/feb/06/george-bush-trip-to-switzerland (reporting that former US President George W. Bush had cancelled a planned trip to Switzerland amid threats from human rights groups to seek a warrant for his arrest for alleged torture on account of his approval of "waterboarding," or the simulated drowning, of detainees suspected of terrorism-related offences). With regard to whether a head of state may be immune from prosecution for acts of genocide, see G.A. Res. 91(I), U.N. Doc. A/RES/96(I) (Dec. 11, 1946) (suggesting that genocide may be an example of an act that is not entitled to immunity because "genocide is a crime under international law . . . for the commission of which principals and accomplices – whether private individuals [or] public officials or statesmen . . . are punishable . . . ."); Genocide Convention, *supra* note 86, art. 4 ("Persons committing genocide . . . shall be punished, regardless of whether they are . . . rulers, public officials or private individuals."). *But see* Re Sharon and Yaron, 127 I.L.R. 110, 123–24 (Cass. 2003) (Belg.) (arguing that heads of government enjoy immunity for genocide unless prosecuted before the territorial or an international court).

121. R v. Bow Street Metro. Stipendiary Magistrate, [2000] 1 AC 147 (H.L.) (explaining that the Convention Against Torture defines the crime of torture such that state offi-

as removing official immunity for serious international crimes *per se*.

Immunities may be unpalatable to those seeking justice; however, as noted in *Arrest Warrant*, current and former officials who enjoy immunity from foreign prosecution may be prosecuted by their own states, other states if the official's state waives immunity, and international tribunals.[122] Jalloh argues that, although "[t]he rejection of blanket immunities for government officials that commit crimes is certainly correct morally . . . immunities exist for a reason: they are necessary to ensure smooth conduct of international relations. Again, as unpopular as they may be within certain circles, we cannot live without them."[123] This argument may be less persuasive with respect to *former* officials, as it is difficult to see how upholding immunities for serious international crimes is integral to international relations once an official leaves office. With immunities available to persons who direct and authorize serious international crimes, the ability to end impunity through universal jurisdiction may be severely curtailed; it may be true that "immunity leads to *de facto* impunity."[124]

III. The African Union and Universal Jurisdiction

Although the "death" of universal jurisdiction was discussed following amendments restricting its use in Belgium,[125] recent developments illustrate that these discussions were premature. Since mid-2008 the African Union has taken a hard stance against the "abuse" of universal jurisdiction and, "more broadly, internationalized and even international justice."[126] This response exemplifies the potential negative effects that the exercise of universal jurisdiction may have on international relations and international criminal justice in general.

A. *The African Union's Reaction*

The indictment of nine Rwandan officials in France (including Kabuye, the presidential officer of protocol) and the issuance of

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cials must be involved and, since it imposes *aut dedere aut judicare*, immunity cannot be available for the Convention to be coherent).

122. Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 61.

123. Jalloh, *supra* note 14, at 49.

124. Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 34 (dissenting opinion of Judge Van Den Wyngaert); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 Eur. J. Int'l L. 903, 911 (2007).

125. *See, e.g.*, Cassese, *Is the Bell Tolling for Universality?*, *supra* note 94, at 589.

126. Jalloh, *supra* note 14, at 2.

forty arrest warrants for current or former Rwandan officials by a Spanish investigative judge sparked the African Union reaction.[127] "In Africa, the arrest warrants were perceived as part of a 'legal campaign' against African states" and violations of Rwandan sovereignty and territorial integrity.[128] In response, Rwanda attempted to initiate proceedings at the ICJ, asking the Court to find that France "has acted in breach of the obligation of each and every State to refrain from intervention in the affairs of other States," and "is under a duty to respect [Rwandan] sovereignty."[129] The case could not proceed because France refused the ICJ's jurisdiction.[130]

In July 2008, the A.U. Assembly of the Union noted that the "abuse" of universal jurisdiction could "endanger [i]nternational law, order and security" and declared that "[t]he political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States."[131] It warned that the prosecutions would have a "destabilizing effect" on "the political, social and economic development of States and their ability to conduct international relations," and instructed A.U. member states to not execute the warrants.[132] The Assembly further recommended that an international body with "competence to review and/or handle complaints or appeals arising out of abuse" of universal jurisdiction be established; called on U.N. members to impose a moratorium on executing the warrants until "all the legal and political issues have been exhaustively discussed"; and requested the A.U. chairperson to approach the European Union in order to facilitate discussions between the two bodies "with a view to finding a lasting solution to this problem and . . . to ensure that [the] warrants are withdrawn and are not executable in any country."[133]

As a result of African Union-European Union discussions, an expert panel considered universal jurisdiction and issued its report

127. *Id.* at 29–31 (discussing France's urging the U.N. Secretary-General to direct the ICTR to indict Rwandan president Paul Kagame, and recounting the Rwandan government's reaction).

128. Geneuss, *supra* note 16, at 946.

129. Jalloh, *supra* note 14, at 32.

130. *Id.*

131. African Union (A.U.) Ass., *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, ¶ 5(i)–(ii), A.U. Doc. Assembly/AU/Dec.199(XI) (July 2008).

132. *Id.* ¶ 5(iii)–(iv).

133. *Id.* ¶¶ 5(v), 7, 8.

in April 2009.[134] Although the report provides a useful examination of universal jurisdiction, insight into European and African state practice, and a range of recommendations, it did not alleviate the African Union's concerns; in July 2009 (and subsequently[135]), the Assembly reiterated its concerns regarding the "blatant abuse" of universal jurisdiction, expressed concern for the continuing indictments "against African leaders and personalities," and called for an immediate termination of the indictments.[136]

B. *Challenges and Benefits of the African Union Response*

The African Union raised three main arguments regarding the exercise of universal jurisdiction,[137] largely centered on the indictment of state officials. First is the view that E.U. states have unfairly targeted African leaders.[138] As the African Union-European Union Report notes, "[t]he African perception is that the majority of indictees are sitting officials of African states, and the indictments against such officials have profound implications for relations between African and European states."[139] However, Africans have not been the sole targets: eight European states have instituted or sought proceedings under universal jurisdiction against nationals of Afghanistan, Argentina, Bosnia-Herzegovina, the Central African Republic, Chile, China, Côte d'Ivoire, Cuba, Democratic Republic of the Congo, El Salvador, Equatorial Guinea, Iran, Iraq, Israel, Guatemala, Mauritania, Mexico, Morocco, Peru, Republic of the Congo, Rwanda, Suriname, Tunisia, the United States, Uzbekistan, and Zimbabwe.[140] As Jalloh concludes, "when viewed in the broader global context, the targeting of high-ranking personalities for indictment by certain European courts . . . appears not to be

134. *A.U.-E.U. Report*, *supra* note 21.

135. A.U. Ass., *Decision on the Abuse of the Principle of Universal Jurisdiction*, ¶¶ 2, 5–7, A.U. Doc. Assembly/AU/Dec.271(XIV) (Feb. 2010); A.U. Ass., *Decision on the Abuse of the Principle of Universal Jurisdiction*, ¶¶ 3–7, A.U. Doc. Assembly/AU/Dec.292(XV) (July 2010); *see also* A.U. Ass., *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, ¶ 4, A.U. Doc. Assembly/AU/Dec.213(XII) (Feb. 2009) (expressing "regret" regarding the arrest warrant for Kabuye, which "creat[ed] tension between the AU and the EU").

136. A.U. Ass., *Decision on the Abuse of the Principle of Universal Jurisdiction*, ¶ 4, A.U. Doc. Assembly/AU/Dec.243(XIII) (July 2009).

137. Jalloh, *supra* note 14 at 13–14.

138. *See id.* In many instances, these are former colonial states, which may partly explain the vehemence of the African Union reaction. *Id.* at 62.

139. *A.U.-E.U. Report*, *supra* note 21, ¶ 34.

140. *Id.* ¶ 26. The eight European states that have exercised universal jurisdiction are Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain, and the United Kingdom. *Id.*

unique to the continent of Africa."[141] Further, most of the universal jurisdiction cases in European courts against Africans have been instituted by private parties, almost all of them African (albeit often supported by non-African human rights organizations).[142]

Second is the concern that denying immunities violates the sovereign equality and territorial independence of states when their officials are brought under the jurisdiction of the indicting state; this "evokes memories of colonialism" for African states.[143] Such indictments may also impair the state's ability to conduct international relations, which would "severely constrain[ ] the capacity of African states to discharge the functions of statehood on the international plane."[144] In accordance with *Arrest Warrant*, there may be credence to the African Union's claims that indictments of current officials may be internationally unlawful; however, this would likely depend upon the office held and the accused's role representing the state.

Third is the related concern that indictments restrict the state's political and economic growth. There may be "considerable merit" to this argument, as an indicted leader may lose domestic legitimacy, which "politicizes universal jurisdiction because of the air of 'regime change' that it takes in the generally delicate governance environment of the post-colonial African state."[145]

Exacerbating the belief that Africans have been unfair targets of the enforcement of international criminal law is the pending prosecutions of Africans before the ICC, including an indictment for Sudanese President Al-Bashir for genocide. Although the ICC does not exercise universal jurisdiction, the indictments may contribute to the sense that Africans are disproportionately targeted by international criminal justice. A danger of this view is the possibility of undermining the legitimacy of prosecutions based on universal jurisdiction and the effectiveness of the ICC. As the Kenyan Energy Minister recently asserted in response to the ICC prosecutor proposing two cases against six Kenyans for possible crimes against humanity during post-election violence in Kenya in 2008,[146] "[i]t is only Africans from former colonies who are being tried at the ICC. No American or British will be tried at the ICC and we

141. Jalloh, *supra* note 14, at 16.
142. *See id.* at 22.
143. *A.U.-E.U. Report*, *supra* note 21, ¶ 37; *see also* Jalloh, *supra* note 14, at 29.
144. *A.U.-E.U. Report*, *supra* note 21, ¶ 38.
145. Jalloh, *supra* note 14, at 14.
146. Press Release, Int'l Criminal Court, Kenya's Post Election Violence: ICC Prosecutor Presents Case Against Six Individuals for Crimes Against Humanity (Dec. 15, 2010).

should not willingly allow ourselves to return to colonialism."[147] This statement may not be mere political rhetoric; shortly thereafter, the Kenyan legislature voted to withdraw from the Rome Statute.[148] The indictment of a number of sitting officials, including the Deputy Prime Minister and Finance Minister Kenyatta, is exacerbating the Kenyan situation.

The argument that Africans are being unfairly targeted by the ICC may be overstated. Only the Kenyan situation was brought at the behest of the prosecutor: three of the six situations before the ICC are state-referred, while the Security Council referred the remaining situations in Sudan[149] and Libya.[150] As ICC President Justice Song recently noted, "the subject matter of the ICC's trials in broad terms has thus far been determined by States themselves and not by the ICC."[151] Further, the Office of the Prosecutor is conducting preliminary examinations outside of Africa, including Afghanistan, Colombia, Côte d'Ivoire, Georgia, and the Palestinian Territories.[152]

Africans may be disproportionately subject to the exercise of universal jurisdiction for a number of reasons.[153] First, enforcement of international criminal law by foreign states under the universality principle may result from the fact that, in comparison with the states that are exercising universal jurisdiction, many African states have weaker judicial systems, with limited capacity, and a potential unwillingness to prosecute.[154] As Jalloh argues, "[t]his nuance does not appear to have been reflected in the [official] A.U. discussion over the issue."[155] Given increased attention on the enforcement of international criminal law, such prosecutions will likely continue until there is "a real willingness on the part of African

147. *Kenya MPs Vote to Leave ICC over Poll Violence Claims*, BBC NEWS (Dec. 23, 2010), http://www.bbc.co.uk/news/world-africa-12066667.

148. *See id.*

149. *See* Int'l Criminal Court, *Report of the International Criminal Court to the United Nations for 2009/10*, ¶ 18, U.N. Doc. A/65/313 (Aug. 19, 2010) [hereinafter *ICC Report*] (noting that the state-referred situations are Northern Uganda, Democratic Republic of the Congo, and the Central African Republic).

150. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (referring the situation in Libya to the ICC for investigation into possible crimes against humanity).

151. Sang-Hyun Song, President of the ICC, Remarks to the 19th Diplomatic Briefing (Nov. 3, 2010), *available at* http://www.icc-cpi.int/NR/rdonlyres/F67584DE-F045-45E2-9503-8F4D16B3DEAA/282635/RemarksPresidentEN2.pdf.

152. *ICC Report*, *supra* note 149, ¶ 66.

153. Jalloh, *supra* note 14, at 16–19.

154. *Id.* at 16.

155. *Id.* at 17.

states to prosecute the relevant crimes themselves."[156] Unfortunately, this willingness may have been lacking in the past.[157] Second, due to emigration, many African victims and witnesses may be available in outside states to bring complaints to foreign authorities under universal jurisdiction.[158] Third, and likely most important, is the increased number and changing nature of conflicts in Africa in relation to the rest of the world. With over thirty since 1970, the majority of recent conflicts have been in Africa, while

> [t]he changing nature of modern warfare and mass communications also exacerbates the likelihood that African situations will command greater investigative attention in foreign jurisdictions. Ruthless military dictatorships, famine, abject poverty, barbaric civil wars in which civilians were not just *fair* game but the *only* game, widespread human rights abuses, including the commission of serious international crimes, have all regrettably become enduring features on the continent.[159]

Increased international will to enforce international criminal law coupled with the fact that Africa has suffered through a disproportionate number of brutal internal conflicts may explain, to some extent, why Africans have been disproportionately subject to the exercise of universal jurisdiction.

There is credence to the claim that more powerful states are less likely to have their nationals and officials subject to extraterritorial prosecutions—and not solely because those states have the capacity to investigate and prosecute alleged international crimes internally. This reality is illustrated by Belgium's experience when a Belgian prosecutor sought to investigate Israeli Prime Minister Sharon for war crimes allegedly committed while he was Israel's defense minister in the 1980s.[160] Belgium held the E.U. presidency

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156. *A.U.-E.U. Report*, *supra* note 21, ¶ 44.

157. Jalloh, *supra* note 14, at 44–45. Jalloh suggests that the attempt to prosecute former Chadian President Habré may have suffered from little support from African states, and "[w]hen viewed in the context of the AU Assembly's recent opposition to universal jurisdiction, it should not be surprising that continental leaders would be perceived in Europe as having, at least temporarily, retreated from their strong anti-impunity stance–especially when it comes to one of their own." *Id.*; *see also* Stephen P. Marks, *The Hissène Habré Case: The Law and Politics of Universal Jurisdiction, in* UNIVERSAL JURISDICTION 131, 137–38 (Stephen Macedo ed., 2004) (noting that, after Habré had fled to Dakar, neither Senegal nor Chad sought his extradition to Chad for trial); Tanaz Moghadam, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré*, 39 COLUM. HUM. RTS. L. REV. 471, 473–74 (2008).

158. *See* Jalloh, *supra* note 14, at 18.

159. *Id.* at 19.

160. For a discussion of this incident, see David A. Tallman, *Universal Jurisdiction: Lessons from Belgium's Experience*, *in* ACCOUNTABILITY FOR ATROCITIES 375, 389–92 (Jane E. Stromseth ed., 2003).

when the investigations were proposed, and Israel indicated that it would make it difficult for Europe to broker Middle East peace negotiations successfully if Belgium proceeded.[161] Similarly, investigations in Spain regarding alleged torture by Americans in Guantanamo Bay led to "high-level political controversies between the concerned governments," while "diplomatic steps were immediately taken and the relevant indictments were quashed."[162] Since Belgium and Spain restricted their universal jurisdiction legislation following such controversies,[163] it is undeniable that the identity of the potential accused plays a role in determining whether and how universal jurisdiction is exercised, and the prospects for its use in the future.

As the African Union reaction has shown, hostility toward universal jurisdiction (and, generally, the enforcement of international criminal law) can have ramifications on the effort to end impunity. Given the territorial nature of enforcement jurisdiction, inter-state cooperation is often a prerequisite to achieving justice; without such cooperation, an accused located abroad may avoid prosecution (unless prosecuted *in absentia*). This is currently the case for President Al-Bashir, who remains at large and against whom some African states are refusing to execute the ICC arrest warrant pursuant to a decision of the A.U. Assembly.[164] Even with prosecutions *in absentia*, perpetrators will evade justice if a sentence cannot be executed. Ultimately, without international cooperation, ending impunity may remain an elusive goal.

The African Union response further illustrates the risk of deteriorating international relations when states exercise universal jurisdiction without the support of the more closely connected state(s). This risk is undeniably heightened when the suspect is a current or former high-ranking official. Rwanda, for example, supported Belgium's prosecution in 2001 of two Rwandan nuns for crimes

161. *Id.* at 391.

162. Jalloh, *supra* note 14, at 56.

163. *See id.* Belgium removed the ability for private parties to bring claims and introduced nationality or residency requirements, *see* CODE PÉNAL [C.PÉN] art. 136, while Spain introduced a minimum requirement of a link to Spanish interests, *see* LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23 (B.O.E. 1985).

164. A.U. Ass., *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, ¶ 10, A.U. Doc. Assembly/AU/Dec.245(XIII)Rev.1 (July 3, 2009). Not all African states share this political stance; South Africa, for instance, maintains that it would execute the warrant. *See South Africa Warns Sudan's Bashir to Stay Away from World Cup Event,* SUDAN TRIBUNE (May 27, 2010), http://www.sudantribune.com/South-Africa-warns-Sudan-s-Bashir,35214.

committed in Rwanda against Rwandans,[165] and cooperated with the conviction in Canada of a Rwandan for genocide, crimes against humanity, and war crimes in 2009.[166] In contrast, Rwanda has fiercely criticized the arrest warrants issued for its officials in 2008,[167] while a Belgian arrest warrant for the Democratic Republic of the Congo's minister for foreign affairs resulted in an international row culminating in *Arrest Warrant*.[168]

A positive effect of the African Union reaction is that it may act as a catalyst for the international community to address outstanding issues regarding the most effective means of exercising universal jurisdiction.[169] A tangible result of the dispute was the African Union-European Union Report, which provided a number of recommendations regarding the exercise of universal jurisdiction. Further, due to a Tanzanian request, universal jurisdiction was placed on the U.N. General Assembly agenda in 2009.[170] Pursuant to a General Assembly resolution, the Secretary-General requested member states to provide their views on the scope and application of universal jurisdiction.[171] Although only forty-four states reported,[172] this may be an important step toward formal discussions and possibly developing international rules for the exercise of universal jurisdiction. The United Nations continues to study the issue, as the General Assembly recently established a working group "to undertake a thorough discussion of the scope and application of universal jurisdiction," which will hear submissions by member states and observers.[173] There may also be some merit to the African Union's calls for establishing a body with jurisdiction to consider inter-state disputes arising from the exercise of universal

165. *Introduction* to UNIVERSAL JURISDICTION 1, 3 (Stephen Macedo ed., 2004) (commenting that Rwandan officials "applauded the verdict in Belgium," and quoting the Rwandan justice minister as stating, "[i]t is highly positive that Belgium, a foreign country, pursues and punishes crimes against humanity committed in Rwanda . . . . Other countries should follow this example"); *see also* Luc Reydams, *Belgium's First Application of Universal Jurisdiction: the* Butare Four *Case*, 1 J. INT'L CRIM. JUST. 428, 434 (2003).

166. *See* R v. Munyaneza, [2009] Q.C.C.S. 2201, ¶ 15 (Can. Que. Sup. Ct.). The proceedings included a rogatory commission in Rwanda before which 14 witnesses testified. *Id.*

167. *See* Jalloh, *supra* note 14, at 36.

168. *See id.* at 34; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3 (Feb. 14).

169. *See* Jalloh, *supra* note 14, at 65.

170. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: UN GENERAL ASSEMBLY SHOULD SUPPORT THIS ESSENTIAL INTERNATIONAL JUSTICE TOOL 5 (2011).

171. G.A. Res. 64/117, ¶ 1, U.N. Doc. A/RES/64/117 (Dec. 16, 2009).

172. *Secretary-General's Report on Universal Jurisdiction*, *supra* note 15, at 3.

173. G.A. Res. 65/33, ¶ 2, U.N. Doc. A/RES/65/33 (Dec. 6, 2010).

jurisdiction,[174] as such a body could assist with dispute resolution and avoid situations where states are unable to pursue claims at the ICJ when the respondent state refuses to accept the Court's jurisdiction.[175]

IV. Promises and Perils of Universal Jurisdiction

From Kenneth Roth, the executive director of Human Rights Watch,[176] to Henry Kissinger, the former U.S. Secretary of State,[177] there are vocal advocates on both sides of the universal jurisdiction debate. The African Union reaction highlights that, although the debate has been long-standing, universal jurisdiction is of continuing importance and resolving disagreements regarding its proper exercise may become increasingly pressing.

A. *The Perceived Benefits of Universal Jurisdiction*

Leading international non-governmental organizations, such as Amnesty International and Human Rights Watch, are ardent advocates of universal jurisdiction.[178] These organizations, and many commentators, argue that universal jurisdiction is an important tool for ending impunity, as perpetrators of serious international crimes may avoid prosecution due to the shield provided by state sovereignty and the lack of international will to prosecute. As Macedo argues,

> universal jurisdiction appears as a potent weapon: it would cast all the world's courts as a net to catch alleged perpetrators of serious crimes under international law. It holds the promise of a system of global accountability—justice without borders—administered by the competent courts of all nations on behalf of humankind.[179]

Through universal jurisdiction, safe havens may be denied for perpetrators of serious international crimes because they cannot evade justice by crossing an international border. In addition to ending

174. Jalloh, *supra* note 14, at 64.

175. Consider, for example, that Rwanda was unable to pursue a claim against France at the International Court of Justice for this reason. *Id.* at 32.

176. *See generally* Kenneth Roth, *The Case for Universal Jurisdiction*, 80 Foreign Aff. 150 (2001).

177. *See generally* Kissinger, *supra* note 6.

178. *See, e.g.*, Amnesty International, Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction 7, 33–34 (2009); Amnesty International, *supra* note 170, at 5; *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, Hum. Rts. Watch, http://www.hrw.org/legacy/campaigns/chile98/precedent.htm (last visited Dec. 20, 2011).

179. Macedo, *supra* note 165, at 4.

impunity and denying safe havens, advocates highlight that universal jurisdiction can provide a competent forum when one would otherwise be lacking, increase the possibility of domestic prosecutions, and achieve justice when the international community is unwilling to act.[180]

According to Steiner, universal jurisdiction is particularly useful for bringing perpetrators to justice when other more closely connected states (i.e., the territorial and national states) "will not or cannot prosecute" and, in such instances it proves "essential to bringing gross violators to justice."[181] Given the nature of armed conflicts, particularly internal civil conflict, the territorial state may be an impossible or ineffective forum for prosecution of international crimes committed during the conflict. Such states may remain unwilling or unable to prosecute for long periods of time due to a number of factors, including the presence of socially and politically powerful persons responsible for the violations, on-going unrest, and a potentially fragile justice system.[182] By vesting outside states with jurisdiction, it may be possible to overcome domestic inability or unwillingness to prosecute.

An indirect benefit of universal jurisdiction is encouraging more closely connected states to take their own steps to prosecute alleged offenders. As Orentlicher argues, "the existence or looming prospect of international tribunals, along with the credible threat of prosecutions based on universal jurisdiction, have revitalized national processes of reckoning in countries afflicted by mass atrocity."[183] This effect occurred in Chile, as proceedings against Pinochet in Spain arguably fostered in Chilean society a sense that Pinochet and his officials could be prosecuted domestically, notwithstanding the lifetime immunity that Pinochet purportedly enjoyed due to his appointment as a senator.[184] Should the exercise of universal jurisdiction have such an effect, the ability to achieve justice would be greatly enhanced, as domestic prosecutions may, for practical reasons, be more effective than extraterrito-

180. *See* AMNESTY INTERNATIONAL, ENDING IMPUNITY, *supra* note 178, at 14–15.

181. Steiner, *supra* note 41, at 201.

182. *Id.* at 223 (citing the DRC and Cambodia as examples of these factors).

183. Orentlicher, *supra* note 111, at 228.

184. *See id.* (The proceedings had a "catalytic effect in Chile. Many Chileans who believed they had pressed the question of accountability as far as the political environment could bear were inspired to reconsider their calculation . . . . Chilean officials who had previously accepted Pinochet's untouchability pledged that Chilean courts would dispense justice . . . . In effect, the proceedings outside Chile helped blunt the power of General Pinochet's threat to unleash destabilizing force if his amnesty were ever challenged.") (footnotes omitted).

rial prosecutions and could contribute to a greater sense of justice within the affected community.[185]

Universal jurisdiction may also enhance the ability of victims to seek justice, as their complaints to outside states may provide the basis for prosecutions. In instances where the territorial state may be unwilling or unable to prosecute the alleged perpetrator, universal jurisdiction may be the only recourse available for victims to seek prosecution. Using *Pinochet No. 3* as an example, the attempted exercise of universal jurisdiction by Spain allowed victims to seek justice despite the fact that Pinochet enjoyed immunity from prosecution in Chile. Orentlicher argues this result was fair because the "[s]urvivors of Pinochet's torture chambers and mothers of the disappeared did not make a deal with Pinochet, nor did they accept the bargain struck by politicians."[186]

Universal jurisdiction may play an important role in achieving justice by providing an enforcement mechanism when the international community is unwilling or unable to prosecute. While some argue that universal jurisdiction is not necessary in light of the establishment of the ICC[187] and *ad hoc* international criminal tribunals, this Article contends that there remains a need for states to exercise universal jurisdiction in order to bring perpetrators of international crimes to justice. Although *ad hoc* tribunals have played a role in enforcing international criminal law, achieving a consensus among the permanent members of the U.N. Security Council to establish tribunals is not an easy task.[188] Further, while the ICC may become an integral tool to achieving justice, it will not be a panacea.[189] The Court is likely to deal with only the most

185. *See id.* at 228–29.

186. *Id.* at 229.

187. *See, e.g.*, REYDAMS, *supra* note 32, at 40 ("As first conceived, this notion of the universality principle was a substitute for a non-existing international criminal court . . . . Now that the ICC has been established, it would seem illogical to hold on to it and attribute similar, if not broader, powers to a single State than to a treaty-based court.").

188. *See infra* note 228.

189. *See, e.g.*, Macedo *supra* note 165, at 5 (observing that the existence of the ICC "might seem to obviate the need for universal jurisdiction, but the opposite is true. The jurisdiction of the ICC is complementary to national courts . . . . [P]rosecutions in international courts 'will never be sufficient to achieve justice.' For the foreseeable future, international courts . . . face daunting challenges with very limited resources. The resources of the ICC will always be limited.") (footnotes omitted); *A.U.-E.U. Report*, *supra* note 21, ¶ 28 ("[T]emporal, geographical, personal and subject-matter limitations on the jurisdiction of international criminal courts and tribunals mean that universal jurisdiction remains a vital element in the fight against impunity.").

serious offenders, it does not enjoy universal membership,[190] and its jurisdiction only reaches back to July 2002.[191] Furthermore, international tribunals also face limited resources; therefore, domestic prosecutions may still have an important role to play in bringing perpetrators to justice, as has occurred to some extent with the ICTY and ICTR.[192] Vesting international tribunals with the sole responsibility for prosecuting crimes to which universal jurisdiction applies when the territorial or national states are unwilling or unable to prosecute risks effective impunity for minor individuals who, in contrast to high-ranking officials, may be better suited to prosecution through universal jurisdiction.[193] Accordingly, notwithstanding the potential for international prosecutions, domestic prosecutions based on the universality principle may prove integral to achieving the goal of ending impunity for serious international crimes.

B. *The Perceived Risks of Universal Jurisdiction*

Arguments against universal jurisdiction range from practical considerations regarding the ability to properly conduct such trials to an ensuing "tyranny of judges"[194] and widespread politically motivated prosecutions with negative implications for international relations. As Bassiouni cautions,

> [u]nbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions

190. There are currently 114 states parties to the Rome Statute. *The States Parties to the Rome Statute*, Int'l Crim. Ct., http://www.icc-cpi.int/Menus/ASP/states¶arties/ (last visited Dec. 20, 2011). Unless a non-party accepts its jurisdiction or the Security Council refers a situation, the Court only has jurisdiction if: (i) the alleged conduct occurred on the territory of a State party; or (ii) the accused is a national of a State party. *See* Rome Statute, *supra* note 80, arts. 12(2), 13.

191. *See* Rome Statute, *supra* note 80, art. 126; *Rome Statute*, Int'l Crim. Ct., http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm (last visited Dec. 20, 2011) (noting that the Rome Statute entered into force on July 1, 2002).

192. *See, e.g.*, Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*, 20 Crim. L.F. 1, 4–5 (2009). Eight International Criminal Tribunal for the former Yugoslavia (ICTY) cases have been transferred to Bosnia and Herzegovina, Croatia, and Serbia, *id.*, while two International Criminal Tribunal for Rwanda (ICTR) cases have been transferred to France, *id.*, which is proceeding under universal jurisdiction pursuant to the International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, r. 11*bis*(A)(iii), U.N. Doc. ITR/3/Rev.19 (Oct. 1, 2009).

193. *See* Kissinger, *supra* note 6, at 92.

194. *Id.* at 86.

> between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory.[195]

Further, Steiner argues that controversial prosecutions could undermine the principle: "If universal jurisdiction courts are seen as 'taking sides,' as advancing one or another deeply contested view about highly politicized and ideologically divisive conflicts, they risk being viewed as fully part of political conflict and power rather than as means of strengthening the rule of law."[196] Kissinger underscores that universal jurisdiction could be abused for political purposes,[197] noting that, "[i]t would be ironic if a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice."[198] Although commentators raise many arguments against universal jurisdiction, the most compelling may be its risk to international relations.

A major concern with the exercise of universal jurisdiction is the possibility of creating tensions among states,[199] which has come to fruition in the African Union context. Cassese favors constraining the use of universal jurisdiction due to its risk of hindering international relations, particularly when the alleged perpetrator is a high-ranking state official.[200] He argues that *in absentia* prosecutions based on universal jurisdiction (which he terms "absolute universal jurisdiction") may be suitable only for minor defendants:

> Universal jurisdiction may be envisaged for cases involving *low-ranking* military officers or other junior State agents, or even *civilians*, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to see why, if the national or territorial State fails to take proceedings, another State should not be entitled to prosecute and try them in the interests of the whole international community. With regard to these persons, the initiation of criminal proceedings in their absence, the gathering of evidence, and the issue of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or

195. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82 (2004).

196. Steiner, *supra* note 41, at 232.

197. Kissinger, *supra* note 6, at 88.

198. *Id.* at 92.

199. *See, e.g.*, David Stewart, *Some Perspectives on Universal Jurisdiction*, 102 AM. SOC. INT'L L. PROC. 404, 406 (2008).

200. CASSESE (2003), *supra* note 8, at 292–93.

> Heads of State or military leaders. Hence the only way to bring them to trial is to issue arrest warrants so that at some stage they are apprehended and handed over to the competent State.[201]

For Cassese, the risk of political disputes arising from prosecuting state officials militates against the exercise of universal jurisdiction for such persons.[202]

Like the Belgian arrest warrant leading to the dispute underlying *Arrest Warrant*, the African Union reaction is an example of an attempted prosecution of state officials sparking an international dispute. A further example, discussed above, is Belgium's experience when a prosecutor sought to investigate Sharon,[203] which, as Tallman argues, illustrates that, "when a single nation attempts to exercise universal jurisdiction over a world leader or other high-profile individual in a controversial case, the resulting political friction can have serious domestic and international consequences."[204] Similarly, Cassese notes with respect to *Arrest Warrant* that, "a case pertaining to the criminal responsibility of individuals became the subject of an interstate dispute. . . . [T]he case was moved from an inter-individual level to that of State-to-State relations. This is contrary to the very logic of international criminal justice."[205] Morris echoes this concern, which she views as arising from analogizing modern crimes subject to universal jurisdiction with piracy; where acts of piracy were usually for private gain, modern crimes subject to universal jurisdiction are often committed or accepted by state officials.[206] As such, "[u]niversal jurisdiction over war crimes and crimes against humanity . . . can become a source and an instrument of interstate conflict, in a way that universal jurisdiction over piracy was designed to avoid."[207]

Numerous commentators express concern for the rights of the accused when states exercise universal jurisdiction. Fletcher, for example, contends that "universal jurisdiction is both unwise and unjust" because it threatens the rights of the accused.[208] He argues

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201. *Id.* at 291.

202. *Id.* at 289. Compared with Cassese's statement regarding the rationale behind prosecuting state officials, *supra* note 115, this approach could result in safe havens for officials who, due to their likely role ordering or acquiescing to serious international crimes, are arguably more responsible for atrocities.

203. Tallman, *supra* note 160, at 391.

204. *Id.*

205. Cassese (2003), *supra* note 8, at 290.

206. Morris, *supra* note 44, at 345.

207. *Id.*

208. Fletcher, *supra* note 6, at 580. For an opposing view, see Abi-Saab, *supra* note 5, at 597–99.

that, "[v]ictims clamour not for fair trials for the accused but primarily for justice for themselves and others who have suffered like them. Anything short of perfect justice is called *impunidad*."[209] Fletcher identifies double jeopardy as a key risk, because an accused may face prosecution in one state even though another state's courts have already ruled on the same act.[210] As Randall concedes, "expanded exercises of domestic jurisdiction over foreign defendants for extraterritorial acts raise difficult issues concerning the rights of the accused."[211]

Such risks, however, may be overstated and do not provide sufficient justification for rejecting universal jurisdiction outright. In particular, it is unclear how extraterritorial prosecutions based on universal jurisdiction pose an inherently greater risk to individual rights than prosecutions based on other grounds where extradition is sought. To put it simply, all individuals facing extradition and trial risk having their rights violated. States could take steps to ensure—to the greatest extent possible—that these rights are respected, which could include, for example, requiring guarantees to this effect prior to extradition. Critics often argue that arrest warrants and summonses to appear violate the accuseds' right of presumed innocence.[212] However, this is not a compelling argument against universal jurisdiction because, if accepted, everyone subject to such instruments would have this right violated regardless of the jurisdictional basis being relied upon for prosecution. Ultimately, one may also question what incentive a state and its prosecutorial and judicial systems would have for permitting abuses of process under the guise of universal jurisdiction. In light of the potential that it would lead to diplomatic rows and potential state responsibility for breaches of international law, there may be little incentive for states to blatantly and systematically disregard the rights of the accused.

Evidentiary problems may pose a significant hurdle to the exercise of universal jurisdiction because it necessarily entails prosecuting crimes that occurred outside the state in which the alleged crime was committed. As such, practical considerations may arise regarding the ability to conduct trials when much of the evidence and witnesses are likely to be abroad. In such instances, the territorial state's cooperation may be necessary to substantiate the

209. Fletcher, *supra* note 6, at 581.
210. *Id.* at 582.
211. Randall, *supra* note 5, at 840.
212. *See, e.g.*, Fletcher, *supra* note 6, at 580.

charges against the suspect; however, if that state is unwilling to prosecute, it may also be unwilling to assist with the investigation.[213] As the African Union-European Union Expert Panel confirms, "[p]rospective evidentiary problems are a major reason why few prosecutors in EU Member States have initiated proceedings on the basis of universal jurisdiction to date."[214] Similar evidentiary problems will exist with any exercise of extraterritorial jurisdiction. Although this is a key issue for investigative and judicial authorities to overcome for the successful exercise of universal jurisdiction, it does not militate against its use in principle.

Numerous other criticisms of universal jurisdiction exist. Cassese, for example, argues that it "may prompt victims of atrocities to engage in so-called forum shopping"[215] in order to bring a claim in a jurisdiction in which it would be more likely to secure a conviction. Provided that any resulting trial is justifiable and fair, however, it is unclear how problematic forum shopping should be. Competing priorities among states may also arise when more than one state seeks to exercise universal jurisdiction over the same acts. Accordingly, "the risk of inconsistent rulings [may] be great and no one would know how to establish priorities between competing courts."[216] While completing priorities will always exist when the universality principle is exercised, if multiple states genuinely desire to bring a perpetrator to justice, they should resolve this issue amicably. Steiner argues that a further risk is that states could impose inconsistent laws if the definition of crimes varies between states.[217] This risk is tempered by the requirement that the municipal definition of a crime must be consistent with the definition under international law when the act was committed.[218] Another often-cited risk of states exercising universal jurisdiction is that courts empowered to hear universal jurisdiction cases could infringe the principle of separation of powers because, due to "the number of diplomatically and politically high-profile cases which would be brought before the courts, the judge would eventually become entangled in roles normally played by the political authorities."[219] This risk may also be overstated, as courts are often

213. *See* CASSESE (2003), *supra* note 8, at 291.

214. *A.U.-E.U. Report*, *supra* note 21, ¶ 25.

215. CASSESE (2003), *supra* note 8, at 289.

216. *Id.* at 290.

217. Steiner, *supra* note 41, at 219–20.

218. *See* O'Keefe, *supra* note 17, at 759.

219. CASSESE (2003), *supra* note 8, at 290.

required to consider politically sensitive cases.[220] As Tallman rightly envisages, difficulties may arise when domestic amnesties are granted,[221] because such amnesties would not prevent other states from prosecuting international crimes.[222]

Myriad arguments may be raised against the exercise of universal jurisdiction. This Article argues that these criticisms—individually and collectively—do not justify states abandoning universal jurisdiction. Many of the risks could be minimized by states adopting reasonable restrictions on their recourse to universal jurisdiction as a basis for prosecution.

V. Balancing Enforcement and Sovereignty

A. *Universal Jurisdiction as a Means to an End*

Universal jurisdiction has not ended impunity for serious international crimes as its proponents have hoped; conversely, the international community has not witnessed widespread judicial tyranny. The exercise of universal jurisdiction can give rise to problems, which may be avoided, to some extent, by controlling its use. When considering how states should exercise universal jurisdiction, one should keep in mind the goal underpinning the doctrine[223]—accountability—while ensuring that enforcement action is legitimate. As Bassiouni warns,

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220. This concern may be linked to U.S. principles regarding justiciability of "political questions" and "acts of state." *See generally* Deborah Azar, *Simplifying the Prophecy of Justiciability in Cases Concerning Foreign Affairs: A Political Act of State Question*, 9 Rich. J. Global L. & Bus. 471 (2010).

221. *See* Tallman, *supra* note 160, at 400–02. In South Africa, for example, as part of the attempt to address human rights violations that occurred under apartheid, individuals were granted amnesties if they made full disclosure of certain acts associated with a political objective to the Truth and Reconciliation Commission. *See* Promotion of National Unity and Reconciliation Act 34 of 1995 § 20(1) (S. Afr.).

222. *See, e.g.*, Prosecutor v. Kallon & Kamara, Case Nos. SCSL-2004-15, SCSL-2004-26, Jurisdiction, ¶ 67 (Special Ct. for Sierra Leone Mar. 13, 2004). Stating as follows:

> Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a state in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.

Id. (footnotes omitted); *see also* Peru, The Scope and Application of the Principle of Universal Jurisdiction, ¶ (d) (May 18, 2010), *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Peru_E.pdf. ("[A]mnesties granted by a State for crimes subject to universal jurisdiction are not binding on other States.").

223. *See* Bassiouni, Multilateral and Bilateral Enforcement Mechanisms, *supra* note 73, at 163 (identifying two rationales for universal jurisdiction: the "idealistic" and the "pragmatic and policy-oriented," with the common features that (i) there are shared values

> universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of the international legal processes. If that were the case, it would produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and work denial of justice. In addition, there is the danger that universal jurisdiction may be perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations.[224]

Given such dangers, a balance should be struck between the goals of ending impunity and denying safe havens on one hand[225] and respecting the rights of the accused, state sovereignty, and maintaining friendly relations on the other.

As Kissinger contends, "a universal standard of justice should not be based on the proposition that a just end warrants unjust means, or that political fashion trumps fair judicial procedures."[226] To achieve this aim, he proposed a procedure for prosecuting war crimes, genocide, and crimes against humanity focused on the U.N. Security Council by: (i) creating a special Security Council subcommittee to report when systematic violations appear to deserve prosecution; (ii) establishing *ad hoc* tribunals when a legitimate trial in the territorial state is unlikely; and (iii) defining rules and procedures for prosecutions, according to which the accused "should be entitled to due process safeguards accorded in common jurisdictions."[227] Although this proposal could make universal jurisdiction less controversial because the Security Council would provide a measure of legitimacy, its fundamental weakness is that prosecutions would be subject to the approval (or at least the acquiescence) of the permanent members of the Security Coun-

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and interests within the international community; (ii) there is a need to expand enforcement mechanisms in order to protect these shared values and interests; and (iii) expanded enforcement will lead to "deterrence, prevention and retribution, and ultimately will enhance world order, justice, and peace outcomes"); Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399, 401–02 (2001).

224. Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 195, at 154–55.

225. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 46 (Feb. 14) (dissenting opinion of Judge Van Den Wyngaert) ("[Universal jurisdiction's] *raison d'être* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries."); R v. Bow Street Metro. Stipendiary Magistrate, [2000] 1 A.C. 147 (H.L.) 198 (Lord Browne-Wilkinson) ("[T]he objective [of the Convention Against Torture] was to ensure a general jurisdiction so that the torturer was not safe wherever he went.").

226. Kissinger, *supra* note 6, at 92.

227. *Id.* at 95–96.

cil.[228] Further, this procedure may be duplicative in light of the existence ICC and the U.N. Security Council's past practice of establishing *ad hoc* tribunals. Rather than institutionalizing universal jurisdiction, states should, as a matter of policy, impose reasonable restrictions on its use.

B. *Reasonable Restrictions on the Exercise of Universal Jurisdiction*

An important restriction on the exercise of universal jurisdiction is limiting who can bring charges or have an arrest warrant issued under the principle. Allowing private parties to initiate prosecutions may risk a greater number of politically motivated cases and an over-burdening of court systems with cases that they may be ill equipped to handle. Requiring the approval of the attorney general (or similar office) or a special prosecutor to initiate proceedings or issue an arrest warrant may be a reasonable restriction.[229] To maintain legitimacy, it is imperative for such decision-makers to act impartially and independently. Further, to ensure non-arbitrary decisions, the authority determining whether to prosecute on the basis of the universality principle should be required to consider a number of factors, including the presence of the accused; availability of evidence; severity of the crime; situation in the territorial state (i.e., whether it is willing and able to prosecute); availability of a more closely-connected forum state; and prosecutorial resources.[230] Such restrictions are prudent and reasonable. Although private parties would be unable to initiate proceedings directly, they would remain able to file complaints with the proper authorities, who would determine if proceedings are warranted. The United Kingdom is currently introducing the requirement of approval by the Director of Public Prosecutions of arrest warrants in universal jurisdiction cases following the controversy that arose

228. Permanent members effectively wield a veto over such non-procedural decisions of the Security Council because the U.N. Charter requires the affirmative vote of the Security Council's permanent members (China, France, Russia, the United Kingdom, and the United States) on non-procedural decisions. *See* U.N. Charter art. 27, para. 3. In practice, acquiescence by the permanent members of such decisions is acceptable, as their abstention from voting is not treated as an exercise of this veto power. *See* Constantin A. Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the United Nations*, 61 Am. J. Int'l L. 737, 751–52 (1967).

229. Many states have this type of restriction in municipal legislation vesting their justice system with the ability to prosecute crimes based on universal jurisdiction. There may be questions regarding the permissibility of such restrictions under treaties that require states to take decisions to prosecute in the same manner as other serious crimes under municipal law. *See, e.g.*, Convention Against Torture, *supra* note 85, art. 7(2).

230. *See* Broomhall, *supra* note 223, at 415–18.

when a warrant was issued for Israel's former Foreign Minister Livni through a private prosecution.[231] Supporting this change, Justice Secretary Clarke noted that, "[i]t is important . . . that universal jurisdiction cases should be proceeded with . . . only on the basis of solid evidence that is likely to lead to a successful prosecution – otherwise there is a risk of damaging our ability to help in conflict resolution or to pursue a coherent foreign policy."[232] States should also implement measures to increase the ability of their justice systems to handle universal jurisdiction cases, including providing appropriate training for investigators, prosecutors, and judges, and possibly establishing specialized courts to deal with such cases.[233]

As the African Union reaction illustrates, the identity of the accused may play a key role in how states react to the exercise of universal jurisdiction. Accordingly, the suspect's identity should lead to a careful consideration of whether proceedings should be initiated on the basis of universal jurisdiction. As *Arrest Warrant* indicates, unless the state waives immunity, incumbent high-ranking state officials would be immune from foreign prosecution based on the universality principle, while even former state officials may enjoy immunity for official acts committed while in office; therefore, prosecutions of such persons should be postponed until they no longer hold office. Further, states seeking to exercise universal jurisdiction over an official should consider issuing summonses to appear to avoid any stigma arguably associated with arrest warrants[234] and forestall claims that the action infringes the sovereign independence and equality of the official's state. Given the probability that indicting current and former state officials may be problematic, it may also be prudent for states to consider—in appropriate circumstances—leaving such indictments to international tribunals. As Tallman argues,

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231. Other controversial attempts to secure arrest warrants in the United Kingdom include Kissinger, Livni, and Chinese Trade Minister Xilai. *See New Rules on Universal Jurisdiction*, U.K. Ministry of Justice (July 22, 2010), http://www.justice.gov.uk/news/newsrelease220710b.htm.

232. *Id.*

233. *A.U.-E.U. Report*, *supra* note 21, ¶ R11; *see also, e.g.*, *About the Canadian War Crimes Program*, Canadian Dep't of Justice, http://www.justice.gc.ca/warcrimes-crimesdeguerre/aboutus-aproposdenous-eng.asp (last visited Dec. 20, 2011) (stating that the purpose of the Program "is to support Canada's policy to deny safe haven to suspected perpetrators of war crimes, crimes against humanity or genocide, and to contribute to the domestic and international fight against impunity").

234. *A.U.-E.U. Report*, *supra* note 21, ¶ R10.

> high profile individuals and politically sensitive cases should ideally be tried before international tribunals, such as the ICC, in order to avoid political fallout that may have the unintended consequences of causing nations . . . to scale back their ambitious efforts to expand the reach of international legal order.[235]

With the weight of the international community behind them, such proceedings may be vested with increased legitimacy and the ability to indict persons who may otherwise enjoy immunity.[236]

For universal jurisdiction to be considered legitimate, it is imperative that the rights of the accused be respected. States exercising universal jurisdiction should ensure that they respect accepted norms of due process, and that proceedings are brought and conducted fairly and impartially. Similarly, states should abide by their human rights obligations and refuse to extradite a suspect where there is a risk of an unfair trial; cruel, degrading or inhuman punishment;[237] or the imposition of the death penalty.[238] In order to respect the rights of the accused, before acceding to an extradition request states should require: (i) a *prima facie* case to be made out[239] and (ii) guarantees that the requesting state will respect the accused's fundamental rights. A corollary benefit of such an approach may be minimizing the risk of politically motivated prosecutions.

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235. Tallman, *supra* note 160, at 392.

236. Rome Statute, *supra* note 80, art. 27(2) ("Immunities . . . which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."). Recent developments may call into question the ICC's efficacy in this regard. For instance, recall the Kenyan legislature's decision to withdraw from the ICC in response to ICC naming six Kenyans suspected of crimes within the Court's jurisdiction during post-election violence, *Kenya MPs Vote to Leave ICC over Poll Violence Claims, supra* note 147, and the African Union's decision that it will not execute the arrest warrant the ICC has issued against Sudan's President Al-Bashir, A.U. Doc. Assembly/AU/Dec.245(XIII)Rev.1, *supra* note 164, ¶ 10.

237. *See, e.g.*, Convention Against Torture, *supra* note 85, art. 3(1); Suresh v. Canada, [2002] 1 S.C.R. 3, 45 (Can.); Chahal v. United Kingdom, 23 Eur. Ct. H. R. 1832, 1855 (1997).

238. *See, e.g.*, Macedo, *supra* note 165, at 7. The ICTY and ICTR must consider similar issues before transferring cases to national courts. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, *Rules of Procedure and Evidence*, r. 11*bis*(B), U.N. Doc. IT/32/Rev. 45 (Dec. 8, 2010); ICTR *Rules of Procedure and Evidence*, *supra* note 192, r. 11*bis*(C).

239. In some instances, such as the issuance of a European Union arrest warrant, extradition between parties is streamlined such that neither a *prima facie* case nor executive approval would be required. *See* Council Framework Decision 2002/584/JHA, pmbl., art. 1, 2002 O.J. (L 190); J.R. Spencer, *Fair Trials and the European Arrest Warrant*, 69 Cambridge L.J. 225, 226–27 (2010).

An important factor in ensuring that the goals underlying universal jurisdiction are achieved in a manner that minimizes international disputes is for the principle to operate, as a matter of policy, as a subsidiary or default jurisdiction.[240] Although no formal rule prevents states from exercising jurisdiction in the face of concurrent jurisdictional claims, the appropriate authorities should carefully consider whether it is necessary to proceed under universal jurisdiction. To be necessary, more closely connected states and international tribunals should be unwilling or unable genuinely to prosecute.[241] As Jessberger argues, "universal jurisdiction should be understood as a fall-back mechanism activated only if no primary jurisdiction is willing and able genuinely to prosecute the crime."[242] This situation occurred in *Public Prosecutor v. Saric*, as Denmark successfully prosecuted a Bosnian refugee claimant under municipal legislation for crimes corresponding to grave breaches of the 1949 Geneva Conventions after the ICTY declined to take over the proceedings and cooperation with the territorial state failed.[243] As nothing renders internationalized prosecution inherently superior to domestic, universal jurisdiction can be

240. Arbour, *supra* note 67, at 585; Cassese, *Is the Bell Tolling for Universality?*, *supra* note 94, at 595 (supporting a requirement for states with better jurisdictional bases to fail or refuse to act before states could exercise universal jurisdiction at 589); Austl., Views on the Scope and Application of the Principle of Universal Jurisdiction, at 2, *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Australia.pdf ("Universal jurisdiction . . . ensures that, where a serious crime of international concern has been committed, and other States which have jurisdiction are unwilling or unable to act, and where international courts and tribunals lack the jurisdictional or practical means of prosecuting the perpetrators of grave crimes, then another State may take up the action on behalf of the international community."); Center for Constitutional Rights v. Rumsfeld, Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 10, 2005, 45 I.L.M. 119, 120–21 (recognizing that the United States was "the primarily competent jurisdiction for the criminal prosecution as the home state of the accused" and that "there are no indications that the [U.S.] authorities and the courts of the United States of America are refraining, or would refrain, from [imposing] penal measures").

241. *See, e.g.*, Krakow Resolution, *supra* note 17, art. 3(c). To avoid impunity, the state must have an impartial judiciary. *See* Orentlicher, *supra* note 111, at 235 ("[T]here is a heightened risk of impunity if, say, prosecution of a notorious dictator were left to national courts subservient to his authority.").

242. Jessberger, *supra* note 82, at 557; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 59 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) (stating that it should be noted "that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities"); *see also A.U.-E.U. Report*, *supra* note 21, ¶ R9 (recommending that the territorial state should have primary jurisdiction as a matter of policy).

243. Reydams, *supra* note 32, at 128–29 ("[O]ne can say that Denmark stepped in 'in default of any other State, to prevent, in the interest of humanity, an outrageous impunity.'").

treated as a subsidiary jurisdiction.[244] There may also be benefits to domestic prosecution: "By averting or dispelling a culture of impunity, in-country justice provides the surest guarantee that human rights will be respected in the future. Also prosecutions undertaken by the state that bears principal responsibility for atrocious crimes help repay the nation's moral and political debts to victims."[245]

In order for universal jurisdiction to operate successfully as a subsidiary jurisdiction, the more closely connected state must be willing and able to investigate and, where warranted, prosecute. In assessing this ability, states should consider factors similar to those that the ICC must consider when determining if states parties to the Court are willing and able genuinely to act. These factors consider whether the state is able to investigate properly and undertake proceedings; proceedings are being (or will be) undertaken to shield the accused from liability; there has been an unjustifiable delay inconsistent with the intent to bring the accused to justice; and the proceedings are being (or will be) conducted impartially and independently and consistent with the intent to bring the accused to justice.[246]

Even if restrictions such as those recommended above are adopted, states should remain willing to prosecute where it is warranted. When states receive information regarding alleged serious international crimes, they should investigate the claim to the extent possible and seek cooperation from other states where necessary. States should also share information with more closely connected states so that they may act. Where a state obtains sufficient evidence to support prosecution, and where the more closely connected state proves unwilling or unable to act, the state should proceed based on universal jurisdiction. A positive effect of such willingness may be spurring a more closely connected state to act, thereby ending impunity and denying safe havens to perpetrators. Even if universal jurisdiction operates as a subsidiary jurisdiction, it is apparent that the risk of political disputes as a result of the exercise of universal jurisdiction will remain as long as the more closely connected state is reluctant to act. In such instances, the inability

244. Rome Statute, *supra* note 80, pmbl., arts. 1, 17 (implicitly recognizing that the ICC's jurisdiction is complementary to national jurisdictions).

245. Orentlicher, *supra* note 111, at 233–34; *see also* Tallman, *supra* note 160, at 402 ("[T]hose most immediately affected by atrocities . . . have the greatest interest in seeing justice done and achieving it themselves.").

246. Rome Statute, *supra* note 80, arts. 17(2)–(3).

to overcome non-cooperation will remain a fundamental problem, which could be fatal to ending impunity.

VI. Conclusion: Making Universal Jurisdiction a Useful Tool

This Article has demonstrated that, in contrast to Rwandan President Kagame's assertion noted above, the right of states to exercise universal jurisdiction over certain serious international crimes is generally accepted under customary international law. Debate persists regarding its proper exercise and, as the African Union reaction illustrates, the exercise of universal jurisdiction has the potential to create friction between states. States may have valid grounds to complain that the principles of sovereign equality and non-interference are infringed when universal jurisdiction is exercised over certain incumbent state officials. The interference with these principles is less clear with respect to former officials and may be lacking when the suspect does not represent the state internationally.

International rules or standards could dispel much of the debate and assist with avoiding or resolving international disputes that arise from the exercise of universal jurisdiction. As Steiner warns, "absent some consensus over [universal jurisdiction's] appropriate use and some form of regulation by hard or soft law, bitter conflict and the use of one or another measure of economic and political pressure will become frequent if not commonplace, particularly when powerful states object to the trial of their own citizens."[247] As such, "[t]he goal ought to be to seek a broad consensus over uses and abuses and to attempt to persuade states to observe the suggested boundary line between the two."[248] Although such broad consensus may not soon occur, a positive result of the African Union protests may be building momentum to work toward an international agreement on the proper scope and application of universal jurisdiction. Accordingly, states should engage with the issue—which is made increasingly possible due to the activities at the United Nations—to address the African Union and critics' concerns regarding universal jurisdiction. By taking advantage of this opportunity, states can ensure that universal jurisdiction becomes a

247. Steiner, *supra* note 41, at 202.

248. *Id.*

useful tool in the fight against impunity and achieve justice for international crimes.[249]

In the meantime, states can address the issue domestically. Where they have sufficient capacity, states should enact legislation authorizing their courts to prosecute international crimes such as genocide, crimes against humanity, war crimes,[250] and torture based on universal jurisdiction.[251] Additionally, states should provide their authorities with legislative or regulatory guidelines regarding when and how such jurisdiction may be exercised. Several sets of proposed guidelines and principles exist regarding universal jurisdiction, which may provide guidance to both the international community and states when drafting an international agreement and municipal legislation.[252] Reasonable restrictions may include: controlling who may initiate proceedings or have an arrest warrant or summons issued; ensuring respect for the rights of suspects (both those before domestic courts and those for whom extradition is sought); issuing summonses to appear rather than arrest warrants; delaying indictment of certain state officials until they no longer hold office and/or deferring prosecutions of current and former officials to international tribunals; and relying on the principle as subsidiary jurisdiction. States should also adopt measures to provide their authorities with the expertise and resources necessary to investigate and prosecute properly cases brought under universal jurisdiction.

In the Rwandan context, French and Spanish courts must respect immunity from prosecution where it exists under international law. Where it does not, proceedings should continue if there is a risk of impunity for serious international crimes. In light

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249. As with any codification exercise, there is a possibility that states could agree to restrictions limiting the exercise of universal jurisdiction in a manner that makes ending impunity more difficult and complicates how the principle would apply customarily.

250. Many states that have ratified the Rome Statute have already done so. For instance, Spain's Organic Law of the Judiciary empowers Spanish courts to try cases of genocide and war crimes, even if the acts occurred outside of Spain. *See* LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23(4) (B.O.E. 1985) (Spain).

251. This may not be appropriate in some states due to a lack of legal capacity and resources. Accordingly, building the capacity of states to prosecute serious international crimes remains an important aspect of achieving justice, and the efforts of bodies such the U.N. Rule of Law Coordination and Resource Group may be crucial to combating impunity.

252. *See* PRINCETON PRINCIPLES, *supra* note 26; *A.U.-E.U. Report*, *supra* note 21; Krakow Resolution, *supra* note 17; Amnesty Int'l, *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, IOR 53/001/99 (Apr. 30, 1999); Int'l Law Ass'n., London Conference, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, 20–22 (2000).

of the unwillingness of Rwanda to cooperate with the proceedings, it is questionable whether proceedings (and the execution of a sentence, should a conviction be rendered *in absentia*) will be possible. Ultimately, inter-state cooperation will remain invaluable to ending impunity and denying safe havens for persons suspected of committing serious international crimes, which militates in favor of the balanced approach advocated in this Article. Although some people may view the African Union's hostility to the recent exercise of universal jurisdiction as a setback in the struggle against impunity, states should use this opportunity to make universal jurisdiction a useful tool of international criminal justice. Where prosecution of persons suspected of committing serious international crimes is not possible due to a lack of will or means, the international community must be willing to act—collectively or singly—to ensure that heinous crimes that shock the conscience of humankind do not go unpunished.