

論 説

Universal Principle Reconsidered

Mari Takeuchi

Introduction

Universal principle allows a State to prosecute individuals for certain criminal offenses regardless of the *locus* of the crime, the nationality of the perpetrators, or the nationality of the victims. This has traditionally been regarded as established with regard to piracy. After the Second World War, various multilateral conventions have addressed the jurisdiction of states to prosecute offenders with which the prosecuting state has no direct linkage, in such areas as war crimes, hijacking, terrorism, apartheid, and torture⁽¹⁾.

Moreover, we have recently witnessed that some states established jurisdiction over offenses committed abroad by foreigner against foreigner, irrespective of conventional provisions, which have been observed as based on customary international law or as evidences of emerging customary rules⁽²⁾.

First, a state extends its jurisdiction over the crimes that the conventions do not encompass (the matter of the extent of offenses which are covered by universal jurisdiction). For example, although it has traditionally not been considered that serious violations of the laws and customs applicable in armed conflict not of an international character are subject to universal jurisdiction, some states have extended their jurisdiction to

(1) On a brief, but elaborated overview of these post-war conventions, see, L. Reydam, *Universal Jurisdiction : International and Municipal Legal Perspective* (2003), at 47-68.

(2) M. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' 23 *Human Rights Quarterly* (2001) 940. This is a revised version of the Report of the 69th conference of the ILA.

that offence alleging universal jurisdiction.

Secondly, a tribunal which is not made competent by the conventions exercises its jurisdiction based on universal jurisdiction (the matter of the extent of forum which is entitled to exercise universal jurisdiction). For example, although the 1948 Genocide Convention itself does not provide for the exercise of jurisdiction other than by tribunal of the state in the territory of which the act was committed or international tribunal, there have been practices in which the tribunal which was not mentioned in the Convention claims the exercise of jurisdiction over genocide. In addition, although in a few cases, some domestic courts even asserted a jurisdiction based on universal principle when offenders were not present in their territory (so-called universal jurisdiction *in absentia*).

However, the basis of customary international law is not as well established as the proponents claim it to be. Indeed, state practices have not been coherent so far. In fact, Belgium, which had set up the broadest universal jurisdiction in the Act of June 1993 as amended by the Act of 19 February 1999 (hereinafter the Act of 1993/99)⁽³⁾, modified its criminal code with respect to international humanitarian law on 5 August 2003⁽⁴⁾, in which it renounced universal principle. This new amendment allows Belgian courts to exercise jurisdiction over cases only where the victim is a national of Belgium or has resided in Belgium for at least three years. In addition, there is a procedural safeguard in which prosecution, including investigation, may only be initiated at the request of the attorney general who will consider the admissibility of the complaint. Belgium had already amended the Act of 1993/99 on the Act of April 23, 2003⁽⁵⁾, in

(3) The original texts in French and Dutch were published in the Belgian Official Journal : Moniteur belge, 5 August 1993, at 17751, and Monituer belge, 23 March 1999, at 9286. An English translation can be found in 38 *ILM* (1999), at 918-925. About actual practices under the Act 1993/99, see, T. Ongena & I. Van Daele, 'Universal Jurisdiction for International Core Crimes : Recent Developments in Belgium', 15 *Leiden Journal of International Law* (2002) 687.

(4) The original text in French and English translation can be found in, 42 *ILM* (2003) 1258.

(5) The original text in French and English translation can be found in, 42 *ILM* (2003) 749.

which it considerably narrowed the scope of universal jurisdiction. However, strong pressures from Israel and the United States continued to be piled on, which made the Belgian Government to introduce a new series of amendments.

Thus, the situation is still fluid. Then, how can we appraise the practices asserting universal jurisdiction irrespective of conventional provisions? Should they be regarded as evidences of emerging customary rule? Or, are they only abusive exercises of jurisdiction?

To address this question, we should put practices into the context. Given the constraint of space, this paper will only deal with the matter of the extent of forum. Chapter I will address the matter of universal jurisdiction *in absentia* which was raised by the actual application of the Act of 1993/99. In particular, I will review Arrest Warrant case before the International Court of Justice. Since this is the purest form of universal jurisdiction, focus should be on how it could — or could not — be justified. It will be revealed that such a broad concept of universality has not found a place in theory and practice. Chapter II will reveal that some nexus between a prosecuting state and an offence or some considerations with regard to relevant jurisdiction⁽⁶⁾ are required in actual exercise of jurisdiction. This will lead to the reconsideration of the basis for asserting universal jurisdiction.

I . Arguments surrounding Universal Jurisdiction *in absentia*

A. The Belgian Act of 1993/99

In 1993, Belgium enacted a law implementing the Geneva Conventions of 12 August 1949⁽⁷⁾ and their Additional Protocols I and II of 18 June 1977⁽⁸⁾. The Act lists twenty acts that constitute grave breaches of the Conventions and Additional Protocols, and declared them crimes under international law, which are made punishable in accordance with the Act.

(6) This paper uses the term 'relevant state' or 'relevant jurisdiction' to refer to a state or jurisdiction which has some linkage with the offense in question based on the established principles (territoriality, nationality, or protective), or which is referred as an entitled state to prosecute an offender in the multilateral conventions.

(7) 75 UNTS 3.

(8) 1125 UNTS 609.

This Act was amended by a law in 1999, in which genocide and crimes against humanity are added to the list of crimes under international law.

The Act has several original features. As to the definition of crime, one of the notable innovations of the Act of 1993 was the extension of its scope of application of 'grave breaches' to non-international armed conflicts as defined in Additional Protocol II. In fact, pursuant to Articles 49 (Geneva Convention I), 50 (II), 129 (III) and 146 (IV) and Article 85 (1) of Additional Protocol I, the term "grave breaches" is only applicable to international armed conflict. Thus, the Act criminalize acts which are not 'grave breaches' but are merely prohibited under the 1949 Geneva Conventions and Protocols.

As to the jurisdiction, the Act provides that Belgian courts shall deal with breaches provided for in the Act, irrespective of where such breaches have been committed, the nationality of the offender or the victim (Art 7). This recognition of universal jurisdiction over all the crimes under the Act goes beyond the obligation placed on by relevant conventions. While the four Geneva Conventions and the Additional Protocol I lay down the principle of *aut dedere aut judicare*, which oblige state parties either to prosecute or to extradite an accused found in its territory, the Additional Protocol II does not contain this principle. Moreover, Genocide Convention only provides jurisdiction on the basis of territoriality and jurisdiction by an international penal tribunal. Further, there is no specialized international convention on crimes against humanity which provides the basis of universal jurisdiction⁽⁹⁾.

The Act also contains several rules derogating from common penal and penal procedural rules, such as the inapplicability of any statute of limitations or amnesties, the exclusion of any ground of exoneration of responsibility, and the rejection of immunity attached to an official position. In addition, it was the drafter's will that the Act should also apply to acts of genocide and crimes against humanity committed before

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(9) Admittedly, the Rome Statute of International Criminal Court contains crimes against humanity as one of the core crimes (Art. 5). However, it should be noted that the Court may only exercise its jurisdiction over the act occurred in the territorial jurisdiction of a State Party, or the act committed by a national of a State Party (Art. 12 (2)). This does not provide universal jurisdiction.

its adoption because 'they were already crimes under customary and conventional international law⁽¹⁰⁾.'

Soon after the adoption of the Act of 1993, many complaints were filed in relation to the genocide and massacres which took place in Rwanda in 1994 during the armed conflict between government forces and the rebel army of the Front patriotique rwandais (FPR). This led to the first conviction, *Public Prosecutor v. Higaniro et al*⁽¹¹⁾, in which the Brussels assize court found the four defendants guilty of violations of the 1949 Geneva Conventions (common Art. 3) and Additional Protocol II (Art. 4 (2) (a)). This case, however, did not raise a question of universal jurisdiction *in absentia*, since all of the accused were found in Belgium. In *Aguilar Diaz et al. v Pinochet*⁽¹²⁾, the second case of universal jurisdiction, the Court of First Instance of Brussels faced with this question, since the accused was not in the territory of Belgium. The Court observed that there was now a rule of customary international law, and even *jus cogens*, recognizing universal jurisdiction and authorizing national authorities to investigate and prosecute, in all circumstances, persons suspected of crimes against humanity⁽¹³⁾. However, the formal extradition request addressed to the United Kingdom was not proceeded with by the UK authority⁽¹⁴⁾. Thus, it was the *Yerodia* case that brought universal jurisdiction *in absentia* into focus in the international law sphere.

B. Universal Jurisdiction *in absentia*

On 11 April 2000 an investigating judge of the Brussels tribunal de

(10) Justice Committee of the Senate, Doc. parl., senate, S. O. 1-749/3, at 18-19. It was stated, '(a) ny other interpretation would be contrary to the *ratio legis* of the present bill'.

(11) Cour d'Assises, verdict of 8 June 2001, available at <http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm>

(12) Juge d'instruction à Bruxelles, 6 November 1998, reproduced in *Revue de Droit Pénal et de Criminologie* (1999), at 278-291, with note by J. Burneo Labrin and H-D Bosly (at 291-300).

(13) *Ibid*, at 288. It should be noted that the magistrate reached this conclusion without referring any state practice.

(14) 'In re August Pinochet Ugarte : Introductory Note', 119 ILR (2002) 1. The United Kingdom received requests for extradition of Pinochet from Belgium, France, Spain and Switzerland, and only the Spanish request was proceeded with.

première instance issued an international arrest warrant *in absentia* against Mr. Abdulaye Yerodia Ndombasi, then an incumbent Minister for Foreign Affairs of the Democratic Republic of Congo, seeking his provisional detention pending a request for extradition to Belgium. In that arrest warrant, Mr. Yerodia was accused of having made various speeches inciting racial hatred during the month of August 1998, which were made punishable as a war crime and a crime against humanity under the Act of 1993/99⁽¹⁵⁾.

On 17 October 2000, Congo filed an Application with the International Court of Justice requesting that the Court annul Belgium's arrest warrant. In its Application, Congo relied on two separate grounds. It claimed that the universal jurisdiction of Belgium constituted a 'violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality...', and that non-recognition of the immunity of a Minister for Foreign Affairs in office under the Belgian Act constituted a violation of the principle of the diplomatic immunity. However, since Congo invoked only the latter ground in its submissions in the Memorial and at the stage of oral proceedings, the Court did not directly deal with the matter of universal jurisdiction⁽¹⁶⁾.

Nevertheless, the matter of universal jurisdiction was one of the central issues among the opinions of judges, and has also drawn many assessments by commentators. The crucial point was how to appraise the fact that Belgium tried to exercise its jurisdiction over an offence committed abroad by foreigners against foreigners when the perpetrator was not present in the territory of Belgium.

(15) About the factual background, see, Arrest Warrant of 11 April 2000 (The Republic of the Congo v. Belgium) ICJ, February 2002

(available at <<http://www.icj-cij.org/>>), Judgment, paras. 13–21.

(16) Arrest Warrant, Judgment, para. 46. The Court held that the arrest warrant issued against Yerodia, as well as its international circulation, constituted a breach of a legal obligation by Belgium towards the DRC in that it fails to respect the immunity from criminal jurisdiction and the inviolability which incumbent ministers for foreign affairs enjoy under international law. It also held that Belgium had to revoke the arrest warrant against Yerodia.

Here, we should bear in mind two given premises. First, it should be noted that there is no convention which explicitly allows a State to exercise universal jurisdiction *in absentia*. In general, the conventions which include the principle of *aut dedere aut judicare* are regarded embodying universal principle. This principle was firstly adopted by The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970⁽¹⁷⁾ and has been included in many multilateral conventions since then. The character of this principle can be depicted that they place an obligation to prosecute an offender on a State party in whose territory the offender was found, in addition to a State which has territorial or personal linkage with the offence. The Article 4 paragraph 2 of the Hague Convention provides :

Each Contracting State shall... take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention].

Thus, an offender would be denied refuge from all state parties, which ensure universal punishment of the offenses. On the other hand, none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. In other words, they are silent in the matter of universal jurisdiction *in absentia*.

Secondly, it should be pointed out the fact that state practices vary from one another, which makes it difficult to conclude that customary rule which permit the exercise of universal jurisdiction *in absentia* has established. In fact, while some legislation do not require that an accused is present in the territory⁽¹⁸⁾, others do⁽¹⁹⁾. Moreover, even if legislation does not expressly require the presence of an accused in the territory, it

(17) 860 UNTS 105.

(18) Art. 7 of the Act of 1993/99 of Belgium ; Art. 23.4 of the Judicial Power Organization Act (Ley Orgánica del Poder Judicial) of Spain.

(19) Art. 689-I of the Code of Criminal Procedure of France.

might be interpreted so. For example, the Dutch legislation implementing the 1984 Convention against torture does not include a specific provision requiring the presence of an accused. This raised a question of universal jurisdiction *in absentia* in *Wijngaarde et al. v Bouterse*⁽²⁰⁾. The Netherlands Supreme Court noted that the legislation implementing the Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch courts jurisdiction in respect of offences committed abroad if 'the accused was found in the Netherlands', and the same applied in the case of the legislation implementing Torture Convention. Thus, it held that prosecution in the Netherlands for acts of torture committed abroad was possible only 'if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example... if the accused was on Dutch territory at the time of his arrest⁽²¹⁾.' Thus, we cannot find coherent practices with *opinio juris* which shows that exercising of universal jurisdiction *in absentia* is *permitted* under international law.

Thus, neither the relevant conventions nor customary rules provide the ground to assert the universal jurisdiction *in absentia*. Then, how can we justify the exercise of such a jurisdiction in a given context without specific permissive rule? With this regard, the famous dictum of the *Lotus* case has attracted particular attention. In this case, the Permanent Court of Justice acknowledged that a State cannot exercise its jurisdiction outside its territory by virtue of a permissive rule derived from international law, and then stated :

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any

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 (20) District Court of Amsterdam, interlocutory order of 3 March 2000 and order of 20 November 2000. English translation of the order of 20 November can be found in, 3 *Yearbook of International Humanitarian Law* (2000) 548 ; Supreme Court of the Netherlands, judgment of 18 September 2001. Original Dutch text is available at <http://www.rechtspraak.nl/hoge_raad/>.

About the overview of this case, see, Raydams, *supra* n. 1, at 173-178.

(21) Supreme Court, *ibid.*, para. 8. 5, cited by President Guillaume. See, Arrest Warrant, Separate Opinion of President Guillaume, para. 12.

case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules ; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable⁽²²⁾.

Some argue that this means that a State has an absolute discretion as far as it exercises jurisdiction in its own territory⁽²³⁾. Others observe that international law has developed since that era to the effect that international law now imposes a certain restriction on the discretion of States⁽²⁴⁾. However, this dictum is not so extreme as is sometimes supposed to be. Indeed, the Court itself referred to 'the limits which international law places upon its jurisdiction' and which it 'should not overstep'⁽²⁵⁾. More

(22) Lotus case, *PCIJ Ser. A*, No. 10, at 19. So far, this has been the only case by international tribunals with regard to the matter of extraterritorial criminal jurisdiction.

(23) M. Koskenniemi, *From Apology to Utopia : The Structure of the International Legal Argument* (1989), at 221.

(24) F. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *RdC* (1964), 9 at 35. Further, Judges Higgins, Kooijmans and Buergenthal observe that the concept of universality is based on the demand that offenders should not go unpunished, which makes States asserting universal jurisdiction act as 'agents for the international community'. Therefore, '(t) his vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the "Lotus" case'. Arrest Warrant, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

(25) Lotus, *supra* n. 22, at 19.

succinctly, as Reydam's observes, 'extraterritorial jurisdiction would simply not be an issue⁽²⁶⁾' if States had absolute discretion.

Thus, the matter of extraterritorial jurisdiction should be considered in terms of limit placed upon international law even if it is neither prohibited nor permitted by a specific rule.

Then, how should we appraise a practice in a given context? With regard to this, there seems to have been two conflicting explanations⁽²⁷⁾; on the one hand, the account which deduces the right to exercise universal jurisdiction from the peremptory norm (the peremptory norm theory), on the other, the account which regards the exercise of jurisdiction as a manifestation of sovereignty and requires a consent — or at least inferred consent — of the relevant jurisdiction (the sovereignty theory).

C. Doctrines

(1) the Peremptory Norm Theory

In this theory, it is presupposed that the fundamental interest of the international community, the violation of which constitutes an international crime, that raises a universal accusation. Thus, while multilateral conventions can be seen as a specific manifestation of will among parties to oblige themselves to prosecute offenders, every other state has a *right* to exercise universal jurisdiction. According to this account, customary rules are not based on a state practice as such, but are deduced from the peremptory norm that is embodied in the multilateral conventions.

This account finds support of the principle of universal jurisdiction in the doctrine of *jus cogens* and obligation *erga omnes*, since all of them stem from the notion of fundamental interest in international community⁽²⁸⁾. Thus, a state acts on behalf of the international community in the exercise of universal jurisdiction, and accordingly no jurisdictional

(26) Reydam's, *supra* n. 1, at 15.

(27) I owe this distinction primarily to Schachter's observation. See, O. Schachter, 'International Law in Theory and Practice', 178 *RdC* (1982), 1 at 263.

(28) M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice', 42 *Virginia Journal of International Law* (2001), 81 at 104; K. Randall 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* (1988), 785 at 829-832.

connection or link between the crime and the forum state would be required. Therefore, the basis of jurisdiction is found solely in the heinous nature of the crime as Princeton Principle states :

For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction⁽²⁹⁾.

While Principle 1-2 provides that the accused must be present before any judicial body which tries her, the commentary on the principles points out that the language of the principle 'does not prevent a State from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present⁽³⁰⁾'. Thus, the issuance of the international arrest warrant *in absentia* can be justified in terms of universal jurisdiction.

However, this account can be criticized from several perspectives. First, it should be noted that we cannot designate an international community which has the power of incrimination. This being the case, to pretend an international community would only lead to encourage the arbitral decision of powerful States, purportedly acting as agent for an ill-defined 'international community⁽³¹⁾'.

Secondly, it should be pointed out that every state does not necessarily have the same standing with regard to a breach of the peremptory norm. Indeed, ILC established a category of interested states in addition to injured states which are entitled to invoke the responsibility of another

⁽²⁹⁾ *Princeton Principles on Universal Jurisdiction, Programme in Law and Public Affairs* (2001) ; See also, Bassiouni, *ibid.*, at 88.

⁽³⁰⁾ *Princeton Principles, ibid.*, at 44.

⁽³¹⁾ M. Henzelin, 'La compétence pénale universelle. Une question non résolue par l'arrêt Yerodia', 106 *RGDIP* (2002), 817 at 827-828. See also, Arrest Warrant, Separate Opinion of President Gillaume, para. 15.

state⁽³²⁾. On the other hand, it was suggested that, in the actual litigation, the nationality of claims rule in the sphere of diplomatic protection would be applied, which would amount to reject as inadmissible a claim presented to vindicate the interest of injured non-nationals⁽³³⁾. In other words, a state without any concrete nexus with the breach of the obligation does not have the same *locus standi* as a state with some nexus in terms of invocation of state responsibility. Then, why should every state have the same status in respect of prosecuting of an offender acting in violation of the fundamental norm? Shouldn't there be any distinction between the states with nexus and the states without it?

Curiously enough, even the proponent of peremptory norm theory seems to admit that exercising of universal jurisdiction *in absentia* is too broad and that balance should be required. In fact, Bassiouni observes that a solution is 'to recognize a state's right to enact such legislation, but not to recognize a state's power to seek to enforce such legislation beyond the state's territory, unless a nexus can be shown to exist with the enforcing state, such as the physical presence of the accused in that state⁽³⁴⁾.' Yet this seems to paralyze the logical coherency of the theory. Why should such a nexus be required when a state is acting 'on behalf of the international community'? In sum, this theory cannot retain its logical coherency facing with the actual condition of international society.

(2) The Sovereignty Theory

It has often been asserted that exercise of jurisdiction is a manifestation of sovereignty, and that either explicit or implicit consent of a relevant state is required when other states intend to exercise jurisdiction over the same offense. Thus, the multilateral conventions can be seen as agreements by the parties that they would not object to any state party prosecuting offenders under the treaty. In other words, the conventions

(32) Final Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/L.602/Rev.1 (26 July 2001), approved by the General Assembly in Resolution 56/83 (A/RES/56/83 (12 December 2001)).

(33) I. Scobbie, 'The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'', 13 *EJIL* (2002) 1201, at 1219.

(34) Bassiouni, *supra* n. 28, at 147.

imply 'advance waivers of jurisdictional claims among the parties⁽³⁵⁾'.

Here, the point is how to appraise the exercise of universal jurisdiction *in absentia* in light of the existing multilateral conventions. Some writers observe that it cannot be justified because there is no multilateral convention which permits the exercise of universal jurisdiction *in absentia*⁽³⁶⁾.

On the other hand, others claim that there is some room in the conventions to allow the exercise of universal jurisdiction *in absentia*. It should be noted that Judges and writers supporting this idea admit that a trial *in absentia* is not appropriate in light of the effectiveness of trial or the human rights of the accused⁽³⁷⁾. Indeed, treaties including the principle of *aut dedere aut judicare* cannot be seen to allow a trial *in absentia*. Under these treaties, universal principle relates to a State in whose territory an offender was found. The State is obliged to establish jurisdiction if it decided not to extradite the offender to the relevant States. In definition, the presence of an offender is envisaged for a trial. As Judges Higgins, Kooijmans and Burgenthal assert, 'there cannot be an obligation to extradite someone you choose not to try unless that person is within your reach⁽³⁸⁾.' Thus, they distinguish a trial from an investigation or search and argue that the latter is not excluded by treaties⁽³⁹⁾.

This matter will specifically arise in the context of extradition. If a State which is entitled to request an extradition is limited to the relevant State explicitly provided in the treaty, investigation by default would be denied indirectly. On the other hand, if the treaty does not exclude the

(35) Schachter, *supra* n. 27, at 263. According to this account, multilateral conventions do not affect the right or obligation of non-parties, nor relate directly to the process of the formation of customary international law.

(36) For example, President Gillaune asserts that 'universal jurisdiction *in absentia* as applied in the present case is unknown to international law'.

(37) D. Vandermeersch, 'La compétence universelle', in A. Cassese et M. Delmas-Marty, *Juridictions nationales et crimes internationaux* (2002) at 606. A. Winants, 'The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction', 16 *Leiden Journal of International Law* (2003) 491, at 505.

(38) Judges Higgins, Kooijmans and Burgenthul, *supra* n. 24, para. 57.

(39) Vandermeersch *supra* n. 37, at 606. In addition, Belgium alleged that investigation by default was not incompatible with international law.

third State not envisaged in the treaty to request an extradition, it would amount to admit investigation by default based on universality, since this request can be seen as the exercise of jurisdiction over acts committed abroad by foreigners, even if they are not found in the territory.

With regard to this point, Henzelin argues that the treaties do not limit the extent of requesting State. If a State is allowed to request an extradition of an offender, it can also request an arrest of the offender as a precondition⁽⁴⁰⁾. Thus, the issuing of an arrest warrant *in absentia* would find some room in the treaties⁽⁴¹⁾.

Admittedly, this case would not be unthinkable under the treaties including the principle of *aut dedere aut judicare*. Consider the case in which the third State filed a request of extradition to the State in which the accused is present. Facing with a request of extradition, the requested State is only required to consider if the conduct complained constitute a crime under the laws of both States (so-called the double criminality rule), if there are no other grounds for refusal⁽⁴²⁾. Because these treaties impose a State Party to establish jurisdiction over an offence committed abroad by foreigners against foreigners if he is found in its territory, there is always the case that both State Parties have legislation which makes that extraterritorial offence punishable. Thus, the requirement of double criminality would be fulfilled, which makes extradition effected between these States. In fact, when Spain requested the extradition of Pinochet to

(40) Henzelin *supra* n. 31, at 845. However, Henzelin himself admits that a requested State is not obliged to extradite an offender to a requesting State based solely on universal principle and that the territorial State might be preferred.

(41) Judges Higgins, Kooijmans and Burgenthul seem to be more cautious with regard to this matter. After acknowledging that the presence of the offender is envisaged under the conventions including the principle of *aut dedere aut prosequi*, they continue : 'National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario* so as to exclude a voluntary exercise of a universal jurisdiction'. Judges Higgins, Kooijmans and Burgenthul, *supra* n. 24, para. 57.

(42) See, Art. 2 and 3 of the United Nations Model Treaty on Extradition, A/RES/45/116 (14 December 1990).

the United Kingdom, the fact that Spain based its claim solely on universality did not prevent House of Lords from confirming that the demand of double criminality is fulfilled⁽⁴³⁾.

Even if this case can be thinkable, however, this does not provide a theoretical basis for exercising jurisdiction. Indeed, the fulfillment of double criminality rule merely confirms that the act in question is punishable both under domestic legal systems of requested and requesting states. It does not necessarily mean that the incrimination is permitted under international law. Moreover, we should bear in mind the existence of the relevant jurisdiction. Consider the case in which a State requested extradition based on universal jurisdiction and the extradition was taken place. Would this State validly assert its jurisdiction if the relevant States alleged that their jurisdiction should be preferred and that its exercising jurisdiction would constitute a violation of their sovereignty? Is it enough to assert that the treaties do not exclude for it to exercise jurisdiction?

In sum, this account tries to justify an investigation by default alleging that it can be distinguished from trial itself and that the treaties do not exclude it. However, it cannot justify the subsequent trial which is made possible by extradition of the offender, as far as it relies solely on the presumption that the treaties do not exclude it. Indeed, the exercise of universal jurisdiction *in absentia* can take place *ipso facto* where no relevant States protest against it. Yet it does not mean that it has a place in theory.

Bearing this in mind, Henzelin distinguishes the Geneva Conventions from the treaties which contain the *aut dedere aut prosequi* provisions, and asserts that the exercising of universal jurisdiction *in absentia* is deductively permitted in respect of the former. He emphasizes that Geneva Conventions established the system of *primo prosequi sucondo dedere*, in which prosecution would be preferred to extradition⁽⁴⁴⁾. The relevant provisions (I, art 49) stipulate :

(43) Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte Pinochet Ugarte* (No. 3), [2000] 1 AC 147.

(44) M. Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (2000), at 353.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Henzelin admits that Geneva Conventions do not mention any possibility for a State Party to prosecute an offender found in the foreign territory. In fact, the authoritative Pictet Commentary acknowledged :

As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecution with all speed⁽⁴⁵⁾.

According to Henzelin, however, the Conventions do not prevent a State from initiating investigation when an offender is not present in its territory. On the contrary, they oblige a State to do so. The Geneva Conventions provide under Article 1 that a State is obliged not only to respect but to *ensure* respect for the Convention, in which issuance of an international arrest warrant or filing a request of extradition are included. Moreover, the relevant States cannot allege the breach of the principle of non-interference, since they are equally obliged to ensure the respect as a Contracting Party.

The cautiousness of this assertion is to take account of the fact that there are other relevant jurisdictions. Applying this to the Arrest Warrant case, Henzelin emphasized that Congo had not prosecuted Mr. Yerodia nor had decided to request his extradition. In other words, Congo had acted in bad faith with regard to this matter, which deprives it from asserting its right to exercise jurisdiction. In this regard, Henzelin agrees with Judge van den Wyngaert, who argues that '(t) he Congo did not come

(45) J. Pictet (ed.), *Commentary to Geneva Convention I* (1952), at 411.

to the Court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith⁽⁴⁶⁾.'

Nevertheless, the question arises as to if the obligation to ensure respect for the Convention can be interpreted to the effect that it allows the exercise of universal jurisdiction *in absentia*. If this obligation covered issuance of international arrest or requesting of extradition of offenders based solely on universal jurisdiction, then, was each Contracting Party required to issue an arrest warrant against Mr. Yerodia ? Did all Contracting Party other than Belgium breach the obligation by not issuing an arrest warrant ? In sum, this cannot be seen as 'the ordinary meaning to be given to the terms of the treaty' regarded as general rule of interpretation by the Vienna Treaty.

In addition, it should not be overlooked that Geneva Convention itself requires a State to make out a *prima facie* case when it is handed over an offender for trial (I Art 49, para. 2). In other words, the Conventions require a Contracting Party to show a basis of exercising jurisdiction in requesting the extradition of an offender. To show a *prima facie* case, then, it would not be enough to assert that a State is under such a general obligation to ensure respect for the Convention.

In sum, we cannot find any basis of, or room for, the exercise of universal jurisdiction *in absentia* in multilateral convention. The point is not only to justify investigation by default as a precondition of exercising universal jurisdiction, but also universal jurisdiction as a whole. In other words, investigation by default can be established only when the subsequent exercising of jurisdiction is made out.

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Thus, neither the peremptory norm theory nor the sovereignty theory found persuasive accounts for universal jurisdiction *in absentia*.

In addition, we should not overestimate the fact that the exercise of universal jurisdiction *in absentia* would overburden the court systems of

(46) Arrest Warrant, Dissenting Opinion of Judge van den Wyngaert, para. 35, p. 19.

states. In fact, when it adopted universal jurisdiction over the crimes falling within the Statute of the International Tribunal of Former Yugoslavia, the Assemblée nationale in France seemed to refrain from introducing universal jurisdiction *in absentia* for fear of overburdening of its court system. During the parliamentary debate, the responsible Minister explained his opposition to the proposed amendment which removes the required presence, as follows :

Indeed, if this proposal is retained, many of the 4000 victims living in France would file a complaint for the most part with the Tribunal de Grande Instance of Paris. This would cause a considerable bottleneck which would finally have an effect opposite to the one sought, because certain exactions that could be sanctioned never would be because of this artificial overload... We are therefore faced with a practical problem⁽⁴⁷⁾.

In fact, so many complaints had been filed under the Act of 1993/99, which made Belgian courts overburdened. That was partly because of the particularity of the Belgian law of criminal procedure, in which victims can play a significant role⁽⁴⁸⁾. While victims are not entitled to bring prosecutions before the courts, they may initiate a criminal investigation. If the public prosecutor, in the exercise of his discretion, decides not to prosecute, or is still considering his position, the victims may, by making themselves a civil party (*constitution de partie civile*), seize an examining magistrate (*juge d'instruction*). This is fundamentally different from a mere complaint, since the latter does not have any procedural consequence, nor seize the court.

In order to mitigate this situation, Belgium promulgated an Act on April 23, 2003, which modified the Act 1993/99. This new Act included several significant modifications in terms of criminal procedure. While it allows Belgian courts to exercise jurisdiction over the offences committed

(47) *Journal Officiel de l'Assemblée nationale*, 20 décembre 1994, 2e, at 9446.

(48) C. Van den Wyngaert, 'Belgium', in C. Van den Wyngaert (ed.), *Criminal Procedure Systems in the European Community* (1993), 1, at 16-18.

abroad by non nationals, even if the offender is not found in Belgium (Art. 7 § 1 (1)), the jurisdiction is subjected to certain conditions. First, public prosecution can only be triggered by a request of the federal prosecutor if Belgium has no linkage with the offence (Art. 7 § 1 (2)). In addition, the interest of good administration of justice and international obligation of Belgium should be considered when the federal prosecutor requests a hearing (Art. 7 § 1 (3)). Moreover, even if the proceeding has been commenced in the above cases, it should be renounced either when the International Criminal Court decided to initiate proceedings (Art. 7 § 2 (2)) or when the court of one of other States which have a certain linkage decides to exercise its jurisdiction (Art. 7 § 3 (2)). In addition, a civil action is limited to the case that a plaintiff can claim in person that he/she was injured by the offenses (Art. 7 § 1 (6)).

However, a diplomatic row with the United States and Israel was not calmed down. Moreover, the United Kingdom and Spain made representation to protest against the Belgium's exercising jurisdiction. In June 2003, the Belgian parliament agreed to restrict the application of the law to cases which has a linkage with Belgium, which led to the eventual renouncement of universal jurisdiction by the Act of 5 August 2003.

II . Analysis of Recent Practices

While Belgium retreated from the frontline, some states have established legislation which provides the basis of jurisdiction over offences committed abroad by foreigners against foreigners, irrespective of treaty provisions. For example, although the 1948 Genocide Convention does not provide for the basis of jurisdiction other than by tribunal of the state in the territory of which the act was committed or international tribunal, there have been practices in which tribunals that are not mentioned in the Convention claims the exercise of jurisdiction over genocide. It should be pointed out, however, that these practices are not so broad as that of Belgium. In fact, domestic courts have taken into account of the existence of relevant jurisdiction. The question is, then, how these relevant jurisdictions are to be reconciled.

When several jurisdictions stand at the same time, the matter of concurrent jurisdiction arises. In the *Lotus* case, the Permanent Court

regarded the case as that of concurring jurisdiction. After acknowledging that the relevant offence for which Lieutenant Demons appeared to have been prosecuted was an act having its origin on board the *Lotus*, the French ship, whilst its effects were felt on board the *Boz-Kourt*, the Turkish vessel, the Court stated :

These two elements are, legally, entirely inseparable, so much so that their separation and to do so renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction⁽⁴⁹⁾.

The Court seems to be silent as to what should be taken into consideration in general in a case of concurrent jurisdiction. Yet it did not have much difficulty to reach the conclusion in this specific case. The Court emphasized the fact that offence produced its effects on the Turkish vessel that could be assimilated to Turkish territory, in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed by foreigners⁽⁵⁰⁾. In other words, the Court could rely on territorial principle which had been regarded primary, if not absolute, in respect of extraterritorial criminal jurisdiction⁽⁵¹⁾.

Here, the question is if a state where the offence occurred or any other relevant states should always be preferred. This is crucial when a state asserts the exercise of universal jurisdiction, since this is not so well established as other relevant jurisdiction and the basis of jurisdiction itself still needs to be founded especially when there is no conventional ground.

(49) *Lotus*, *supra* n. 22 at 45.

(50) *Ibid.*, at 23.

(51) Jennings, 'General Course on Principles of International Law', 121 *RdC* (1967), 323 at 518. See also, Mann, *supra* n. 24, at 33.

With this regards, the Eichmann case⁽⁵²⁾ deserves consideration. While the Supreme Court relied mainly on the heinous character of the crimes to confirm the basis of universal jurisdiction⁽⁵³⁾, it also discussed the alleged limitation upon the exercise of universal jurisdiction, namely, that the State which has apprehended the offender must first offer to extradite him to the State in which the offence was committed. In fact, the Counsel for the appellant had taken this view and submitted that so long as the State of Israel had not offered to extradite Eichmann to Germany — the forum *delicti commissi* of many of the crimes attributed to him — it had no right to try him.

In response to this assertion, the Supreme Court pointed out the fact that the application of the counsel to the Government of West Germany to demand the extradition of his client had already been refused. Therefore, an offer in this sense on the part of the Government of Israel could be of no practical use. However, the jurisdiction of West Germany is not dominant in the first place, as the Court states :

...the idea behind the above-mentioned limitations is not that the requirement to offer the offender to the State in which the offence was committed was designed to prevent the violation of its territorial sovereignty. Its basis is rather a purely practical one. Normally, the great majority of the witnesses and the greater part of the evidence are concentrated in that State and it is therefore the most convenient place (*forum conveniens*) for the conduct of the trial⁽⁵⁴⁾.

Thus, it held that it is the State of Israel — not the State of Germany — that must be regarded as the most convenient forum for the trial⁽⁵⁵⁾, due

(52) Supreme Court of Israel, judgment of 29 May 1962. English translation can be found in, 36 *ILR* (1968) 277.

(53) *Ibid.*, at 289-297.

(54) *Ibid.*, at 302.

(55) *Ibid.*, at 303. About the concept of *forum convenience*, see, H. Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', 9 *Cambridge Law Review* (1949), 330 at 348. Similarly, Baxter seems to have taken this principle into consideration when he argued about the locus to try a war crime. See, R. Baxter, 'Legal Basis of Jurisdiction over War Crimes', 28 *BYIL* (1951), 382 at 391.

to the fact that the majority of the witnesses were resident of Israel and that the vast mass of documents had been gathered and was preserved in Israel.

According to the doctrine of *forum conveniens*, if there is any other forum which is more convenient than the relevant jurisdiction, it should be preferred. However, we should bear in mind that Israel can be seen a Jewish State which is entitled to make a claim on behalf of Jews⁽⁵⁶⁾, which makes the assertion of *forum conveniens* much easier. Indeed, this case can be seen rather exceptional⁽⁵⁷⁾ or even the case of passive personality jurisdiction⁽⁵⁸⁾. In addition, this doctrine has not been followed by other jurisprudence. Rather, some nexus or at least consideration with regard to relevant jurisdictions seems to be required in actual cases. These considerations seem to cover two distinct conditions : special linkage and subsidiarity.

A. Consideration in Domestic Jurisprudence

(1) special linkage

In some domestic cases, special linkages between the forum State and the offense have been required in order to ensure that its exercising jurisdiction would not violate other sovereignty. It is based on the idea that jurisdiction is a manifestation of sovereignty. Thus, a State should indicate special interest if it extends its criminal jurisdiction over offenses committed abroad by foreigners.

For example, German courts have regarded that a legitimate link is required to exercise universal jurisdiction. With this regard, *Public Prosecutor v. Tadic* can be seen as a leading case. After admitting that German Penal law applies by virtue of StGB § 6 (1) to genocide committed

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⁽⁵⁶⁾ L. C. Green, 'The Eichmann Case', 23 *Modern Law Review* (1960) 507 at 514.

⁽⁵⁷⁾ D. W. Bowett, 'Jurisdiction : Changing Patters of Authority over Activities and Resources', 53 *BYIL* (1982), 1 at 12.

⁽⁵⁸⁾ Bassiouni, *supra* n. 28, at 137.

abroad independently from the law of the territorial State⁽⁵⁹⁾, the court continued :

...Prerequisites, however, are that international law does not forbid this and that there is a legitimate link (*ein legitimierender Anknüpfungspunkt*) in the concrete case ; only then is the application of German penal law to extraterritorial conduct by foreigners justified. Absent such a link the forum State violates the non-interference principle which requires States to respect the sovereignty of other States. The significance of the legal values protected by StGB § 6 or the general political interests of Germany alone do not justify the application of the universality principle⁽⁶⁰⁾.

In this case, what was regarded constituting a link was that the accused has resided voluntarily for several months in Germany, that he has established his center of interests there, and that he was arrested there. This jurisprudence has been followed by *Public Prosecutor v Jorgic*, in which the Federal Supreme Court in Düsseldorf found the linkage based on the fact that Jorgic had lived in Germany from 1969 to 1992, that his German wife and his daughter still live in Germany, and that he was arrested in Germany after having entered on his own free will⁽⁶¹⁾.

The strictness of linkage, however, seems to vary from case to case, and from court to court.

For example, the position taken by Spanish Supreme Court in Guatemala Genocide case on 25 February 2003⁽⁶²⁾ seems to be more restric-

(59) StGB § 6 provides as follows : German criminal law applies, irrespective of the law of the *locus delicti*, to the following acts committed abroad : (1) genocide (§ 220a) ;...; (9) acts that are to be prosecuted by the terms of an international treaty binding on the Federal Republic of Germany even if they are committed outside the country. However, The Code of Crimes against International Law (entered into force on 30 June 2002) repealed StGB § 6 (1). See below.

(60) Bundesgerichtshof Ermittlungsrichter, 13 February 1994, 5 *Neue Zeitschrift für Strafrecht* (1994) 232, at 233.

(61) Bundesgerichtshof, 30 April 1999, 8 *Neue Zeitschrift für Strafrecht* (1999) 396, at 396.

(62) Supreme Court of Spain, judgment of 25 February 2003. Original Spanish text and English translation can be found in, 42 *ILM* (2003) 686.

tive. In this case, the question of universal jurisdiction was raised as to the crime of genocide. While it mainly relied on the treaty provisions biding on Spain in terms of universal jurisdiction, the Supreme Court also considered the requirement of special linkage. It argued as follows :

On the other hand, an important part of the doctrine which certain national tribunals have tended to recognize is the relevance of a legitimizing link to national interest, within the framework of universal jurisdiction, forming the extension in accordance with the criteria of reasonableness and with respect to the principal of no intervention. In these cases the minimum relevance of national interest exists when the act with which the national interest connects reaches a meaning equivalent to that which is recognized by other acts which, according to the internal law and to treaties, gives rise to the application of the remaining criteria of extraterritorial criminal jurisdiction. The common interest is united to in order to avoid impunity for crimes against humanity with a concrete interest of the State in the protection of certain rights⁽⁶³⁾.

According to the Supreme Court, 'this link should be considered in direct relation to the crime used as a basis for finding jurisdiction and not for other crime'. Although this directness was required to the effect that the existence of a connection to the crime does not authorize the extension of jurisdiction to other different crimes, it can also be seen that the link should be related directly the crime. For example, the fact that an offender had resided voluntarily in the territory of the forum state would not be enough to confirm the direct relation, but at least that the residence has something to do with the crime would be required. Such a direct link was not found with regard to the crime of genocide. On the other hand, a link to national interest was found with regard to the crime of torture, based on the fact that Spaniards were victims of the crime. Thus, the Supreme Court based its decision solely on the passive personality principle, not on the universal principle.

(63) *Ibid.*, at 701.

(2) subsidiarity

According to this principle, a state can exercise universal jurisdiction only when the relevant States give up exercising their jurisdiction. In other words, if the relevant States are exercising jurisdiction, other States should refrain from exercising their jurisdiction. Carnegie describes this principle as follows :

Where this [subsidiarity principle] is applied, a State may only exercise a universal jurisdiction after the State entitled to exercise jurisdiction under one of the other heads of jurisdiction [territorial or nationality principle] has refused to accept the proffered extradition of the offender⁽⁶⁴⁾.

What Carnegie bears in mind here is the cases that the basis of jurisdiction other than the relevant jurisdictions is provided by conventions including the principle of *aut dedere aut prosequi* or by consent of the relevant states.

On the other hand, recent events seem to show a certain departure from this, especially because states have asserted the exercise of jurisdiction without specific entitlement by treaties, while making their jurisdiction subject to the subsidiary principle.

In this regard, cases concerning genocide provide good examples. For example, in the Pinochet case⁽⁶⁵⁾, the Criminal Division of the National Court of Spain acknowledged that the Genocide Convention does not preclude the existence of jurisdiction apart from those in the territory where the crime was committed or international tribunal. On the other hand, the Criminal Division admitted that its jurisdiction is subject to the principle of subsidiary, stating as follows :

...However, Article 6 of Genocide Convention imposes the principle of

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(64) A. R. Carnegie, 'Jurisdiction over Violation of the Laws and Customs of War' 39 *BYIL* (1963), 402 at 405.

(65) National Court, the Criminal Division, plenary session, orders of 4 and 5 November 1998. English translation can be found in, 119 *ILR* (2002) 331.

subsidiary upon action by jurisdiction other than those envisaged in that provision.... Thus, the courts of a State should abstain from exercising jurisdiction regarding events constituting genocide which are the subject of prosecution by the courts of the country in which they took place or by an international criminal court⁽⁶⁶⁾.

Similarly, Austrian Supreme Court found in *Public Prosecutor v Cvjetkovic* that it had jurisdiction over persons charged with genocide, given that there was not a functioning criminal justice system in the State where the crimes had been committed nor a functioning international criminal tribunal⁽⁶⁷⁾. In this case, the crucial element was that the Bosnian authority did not react to the notification of Austrian authority of the arrest of Cvjetkovic, due to the ongoing war. In addition, the International Tribunal for the former Yugoslavia did not take over the proceedings.

The recent legislation of Germany also calls for consideration. In June 2002, Germany enacted the Code of Crimes Against International Law (*Völkerstrafgesetzbuch* or VStGB⁽⁶⁸⁾), in which it brought its domestic law into line with the ICC Statute. In the explanatory memorandum of the Act⁽⁶⁹⁾, the government made it clear that offences under the Code do not require a special domestic link, which indicated a departure from the established jurisprudence by Federal Supreme Court. On the other hand, the code of penal procedure (*Strafprozessordnung* or StPO) seems to make its jurisdiction defer to that of the relevant States. StPO § 153 f stipulates as follows :

⁽⁶⁶⁾ *Ibid*, at 336. According to the Criminal Division, '(i)t would be contrary to the spirit of the Convention... to consider that this Article of the Convention limits the exercise of jurisdiction excluding any jurisdiction other than those envisaged by the provision in question'.

⁽⁶⁷⁾ Reydam, *supra* n. 1. at 99-100.

⁽⁶⁸⁾ Bundesgesetzblatt (BGBl.) Teil, I at 2254 ; translation in all five UN languages available at the website of the Max Plank Institute for Foreign and International Criminal Law. As to a general overview of this new Criminal Code, see, S. Wirth, 'Germany's New International Crimes Code : Bringing a Case to Court', 1 *Journal of International Criminal Justice* (2003) 151. See also, Reydam, *supra* n. 1, at 144-147.

⁽⁶⁹⁾ The explanatory memorandum of the government. A part of English translation is reproduced in, Reydam, *supra* n. 1, at 145.

- (1) In the cases referred to under § 153c subsection (1), number 1 and 2, the public prosecution may dispense (*kann absehen*) with prosecuting an offence punishable pursuant to VStGB §§ 6 to 14, if the accused is not residing in Germany and such residence is not to be anticipated.
- (2) In the case referred to under § 153c subsection (1), numbers 1 and 2, the public prosecution shall dispense (*soll absehen*) with prosecuting an offence punishable pursuant to VStGB §§ 6 to 14, if :
 - 1 . there is no suspicion of a German having committed such an offence,
 - 2 . such offence was not committed against a German
 - 3 . no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated, and
 - 4 . the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

While the abstention of prosecution is left to discretion of the prosecutor in the case that the accused is not residing in Germany, it should be a duty in the case that relevant States are prosecuting the offender. In other words, Germany may exercise a universal jurisdiction only when any other relevant States are not exercising their jurisdiction.

B . Analysis

As observed above, jurisprudence varies from one another, which makes it difficult to draw any decisive conclusion. However, the crucial issue is how these considerations function in an actual litigation in the international sphere.

As to special linkage doctrine, the linkage is required only to confirm the basis of jurisdiction in internal sphere by domestic court. If two or more states allege jurisdiction, it can be used to strengthen the legitimacy of exercising jurisdiction. For example, the fact that an offender has

established his center of interests in a state can be used to make its exercising jurisdiction over the offender prevail to that of the other state where he has been only for a while. Nevertheless, it does not indicate that the jurisdiction of the former state should prevail to that of any other states. Indeed, it might defer to the jurisdiction of the state where the offence was committed.

Moreover, this doctrine might make the basis of universal principle obscure. On the one hand, the stronger a linkage is required, the closer would the jurisdiction become to other principles such as passive personality. On the other hand, if a linkage is weak, other relevant jurisdiction would be preferred.

In contrast, the subsidiary principle seems to provide more adequate standard for deciding proper jurisdiction in an actual litigation : if dominant jurisdiction fails to prosecute offenders, then another stands. Here, the basis of jurisdiction can be found in a sense of responsibility shared among states. While relevant states are responsible for prosecuting offenders, other states may take over their responsibility when they fail to carry it out.

In this regard, the principle of complementarity provided in the Statute of International Criminal Court deserves attention. The Preamble and Article 1 of the Statute provide that the ICC 'shall be complementary to national jurisdiction'. Thus, if a national judicial system functions properly, The ICC shall not seize any cases. Article 17 (1) stipulates :

- 1 . Having regarded to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where :
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to genuinely to prosecute.

To put it in another way, the ICC may seize a case if the relevant State is unwilling or unable genuinely to carry out the investigation or prosecution. This can be equated with the principle of subsidiarity in general.

It could be argued that the principle of complementarity is applied to the relationship between the international tribunal and a State, and accordingly it should not be analogized with the principle governing the relationship between sovereign States. Indeed, concern would be raised as to if a State can judge the judicial capacity of other sovereignty⁽⁷⁰⁾.

Nevertheless, it should be recalled that the ICC was, in the first place, designed to give apparent primacy to national courts, with residual power to assess jurisdiction in a specific and limited circumstances⁽⁷¹⁾. Therefore, delegations at the Rome Conference were mindful to avoid the ICC to become an appellate body to review decisions of domestic courts⁽⁷²⁾. Thus, the relation between ICC and national courts can be seen as that between equal sovereigns. In fact, delegations had chosen as far objective expressions as possible so that the decision of admissibility would not constitute an intervention to national courts. For example, the concept of 'genuineness' was adopted instead of 'effectiveness', since the former was regarded more objective. Moreover, the chapeau of Article 17 (2) which obliges the Court in making its determination to have 'regard to the principle of due process recognized by international law' was added at the Rome Conference, based on the consideration that the Court must use objective criteria in assessing national procedures⁽⁷³⁾.

The situation is, however, still fluid. While there should be a sense of responsibility shared among states in order for the subsidiarity principle to be workable, the number of the practice is still limited. Nevertheless, we should bear in mind that it is the relevant jurisdictions - not other

(70) This concern has already been raised by the Spanish Supreme Court in its Guatemalan Genocide judgment. See, Supreme Court of Spain, *supra* n. 62, at 696.

(71) In contrast, ICTY and ICTR were given priority over national courts.

(72) J. T. Holmes, 'Complementarity : National Courts versus the ICC', in Antonio Cassese et al eds., *The Rome Statute of the International Criminal Court : A Commentary*, vol. 1 (2002), at 673.

(73) J. T. Holmes, 'The Principle of Complementarity', in Lee (ed.) *The International Criminal Court : The Making of the Rome Statute*, (1999), at 53-54.

jurisdictions — that should be primarily responsible. When this responsibility is established in international law, it would provide the stable basis for the universal principle.

Concluding Remarks

So much ink has been spilled out on the matter of universal jurisdiction. When this matter is argued in terms of customary international law, incoherency of practices has always been a stumbling block. Some emphasize the heinous character, which allegedly overwhelms the scarcity of practices. Others argue that the incoherency of practices prevents a customary rule from evolving.

As far as they dispute over whether a new rule which is applicable to every state has established, or at least is emerging, it would hardly bear any fruit. The important point is that there is a difference between relevant jurisdictions and others. As has been observed, the proponents of universal jurisdiction *in absentia* failed, because they did not take this point into consideration.

In addition, we should not overlook the major impetus behind the introduction of universal jurisdiction into a domestic legal system, when there is no treaty obligation. It is true that lawyers in Belgium were acting on the belief that they represented the international community. However, it should be noted that there was also a domestic necessity which prompted the Belgian legislator to adopt such a broad jurisdiction. Indeed, after the armed conflict in Rwanda in 1994, many Rwandans fled their countries and sought refuge in Belgium, among them victims but also alleged genocide participants who managed to escape after the final victory of the rebel force. This created a situation in which both victims and alleged perpetrators lived face to face in a small community in Belgium, which caused an intolerable situation for the victims⁽⁷⁴⁾. In fact, when an extension of the scope of the Act of 1993 was proposed in 1998, it was feared that Belgium could become a place of refuge for the perpetrators of the Rwandan genocide if it did not enact legislation that

(74) Winants, *supra* n. 37, at 503.

allow a court to exercise jurisdiction over non-nationals⁽⁷⁵⁾.

In this regard, what deserves attention is that, under the new amendment on 5 August 2003, Belgian courts may still exercise jurisdiction over an offence committed abroad by a foreigner when the victim has resided in its territory for more than three years. This linkage does not fall under the passive personality principle, since the latter requires a nationality linkage as a condition. Whether this case will lead to extend the scope of the passive personality principle or to develop the universal principle, however, remains to be seen.

(75) Justice Committee of the Senate, *supra* n. 10, at 2-3.